

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CrI.O.P.No.17540 of 2019 and
CrI.MP.Nos.8860 & 11137 of 2019

1.Kishore Kumar

S/o. John Rajakumar
Managing Trustee,
St. Johns Rajakumar Education
& Research Trust,
No.33, Rajiv Gandhi Salai,
Villa No.64, Navalur,
Chennai - 600 103.

2.Caroline Kishore

W/o. Kishore Kumar
Trustee,
St. Johns Rajakumar Education
& Research Trust,
No.33, Rajiv Gandhi Salai,
Villa No.64, Navalur,
Chennai - 600 103.

... Petitioners

Vs.

1.The Inspector of Police,
Central Crime Branch - I,
EDF-III, Greater Chennai Police,
Veperi, Chennai.
Crime No.112 of 2019)

2. Ranga Babu.K.

... Respondents

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records in Crime No.112 of 2019 pending on the file of the first respondent and quash the same.

For Petitioners : Mr.R.C.Paul Kanakaraj
For Respondents

For R1 : Mr.M.Mohamed Riyaz
Additional Public Prosecutor.

For R2 : Mr.ARL.Sundaresan
Senior Advocate.

O R D E R

This petition has been filed to quash the FIR in Crime No.112 of 2019 pending on the file of the first respondent, registered for the offences under Sections 406 & 420 of I.P.C., as against the petitioners.

2. Totally there are two accused and the petitioners are arrayed as A1 & A2. The allegations as against the petitioners are that the first petitioner is the Managing Trustee of St.Johns Rajakumar Education & Research Trust and the second petitioner is the wife of the first petitioner. The second respondent/ defacto complainant was introduced to the first accused by one Jayakrishna for the purpose of construction work in the year 2014. The construction work of Auditorium for their school was assigned to the second respondent herein and also they allotted renovation work in the school. During the completion of the project another construction work was assigned to the defacto complainant by entering into a Memorandum of agreement dated 07.12.2006, in which approximate cost of construction is fixed as Rs.45 crores. On the date of agreement an advance amount of Rs.50 lakhs has been paid. Further alleged that a portion of construction was completed and handed over the building to the petitioners along with bills to the tune of Rs.31,10,74,414/-. At several stages, part of the amount paid by the petitioners and for the balance amount, the first petitioner issued a cheque for Rs.11,39,38,813/-. When the said cheque was presented for collection, it was returned for the reason "Account blocked". Therefore, the statutory notice was issued under Section 138 of Negotiable Instruments Act (hereinafter referred to as NI Act) on 18.12.2018 to the first petitioner and the lodged the present complaint by the second respondent.

3. The learned counsel appearing for the petitioners submitted that no offence is attracted as against the petitioners since the entire transactions are business transaction and there is absolutely no ingredients to attract the offence under Sections 406 and 420 of IPC. As per the memorandum of agreement entered between the petitioners and the defacto complainant, there was an arbitration clause and as per the clause any dispute, both the parties have to appoint an Arbitrator to resolve the issue. In fact the second respondent also initiated proceedings under Section 138 of Negotiable Instruments Act in C.C.No.664 of 2019 and the same is pending on the file of the learned Metropolitan Magistrate (Fast Track Court No.3), Saidapet, Chennai. Even according to the defacto complainant, there is a balance payment payable by the petitioners to the second respondent. He further vehemently contended that on perusal of complaint, that there is absolutely no intention of the petitioners to cheat the second respondent as such, no offence is made out as against the petitioners and sought for quashment of the FIR in Crime No.112 of 2019 on the file of the first respondent. In support of his contention, he also relied upon the judgment of the Hon'ble Supreme Court of India and of this Court as follows :-

i. CrI.O.P.No.16109 of 2010 dated 15.10.2014 - Jayaprakash Vs. The State rep by the Inspector of Police and anr.

ii. CrI.O.P.No.20776 of 2014 dated 27.10.2014 - K.Jayakumar Vs. The State rep by the Inspector of Police and anr.

iii. 2019 AIR (SC) 1538 - Satishchandra Ratanlal Shah Vs. State of Gujarat and anr.

4.Per contra, the learned Senior Counsel appearing for the second respondent submitted that there are specific allegations as against the petitioners to attract the offences under Sections 406 and 420 of IPC. Even the case pending for the offence under Section 138 of NI Act, it is not impediment for taking action for the offences under Sections 406 and 420 of IPC. As per the agreement, after completion of project, the petitioners ought to have been settled the amount. Admittedly, the entire construction project have been completed and even then the petitioners did not settle the balance amount to the tune of Rs.11,39,38,813/-. In fact, the petitioners issued cheque for the said amount and the same was returned dishonored. Therefore their intention is very clear even at the inception of the agreement only to cheat the second respondent. Further it is only FIR and it has to be investigated in depth and it cannot be quashed on its threshold, since the offences under Section 406 and 420 of IPC are clearly attracted as against the petitioners to investigate further. In support of his contention, he relied upon the following reported judgments:-

i. (2006) 6 SCC 736 - Indian Oil Corpn Vs. NEPC India Ltd and ors.

ii. CrI.A.688 of 2005 dated 20.10.2010 - Iridium India Telecom Ltd., Vs. Motorola Incorporated & ors.

iii. (2012) 7 SCC 621 - Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and anr.

iv. (2012) 10 SCC 155 - State of Madhya Pradesh Vs. Surendra Kori

v. 2019 SCC OnLine Sc 182 - Sau.Kamal Shivaji Pokarnekar Vs. The State of Maharashtra and ors.

vi. 2019 SCC OnLine SC 948 - Chilakamarthi Venkateswarlu and anr Vs. State of Andhra Pradesh and anr.

vii. CrI.A.Nos. 1573-1575 of 2019 dt. 17.10.2019 - Dr.Lakshman Vs.The State of Karnataka & ors.

5. Heard Mr.R.C.Paul Kanakaraj, learned counsel appearing for the petitioners, Mr.ARL.Sundaresan, learned counsel appearing for the second respondent and Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the first respondent police.

6. This petition has been filed to quash the FIR registered in Crime No.112 of 2019, for the offences under Sections 406 and 420 of IPC. The petitioners are arrayed as A1 and A2. The case of the prosecution is that the first petitioner is the Managing Trustee of St.Johns Rajakumar Education & Research Trust and the second petitioner is the wife of the first petitioner. The second respondent/ defacto complainant was introduced to the first accused by one Jayakrishna for the purpose of construction in the year 2014. The construction work of Auditorium for their school was assigned to the second respondent herein and also they allotted renovation work in the school. During the completion of project another construction work was assigned to the defacto complainant by entering into a Memorandum of agreement dated 07.12.2006, in which approximate cost of construction is fixed as Rs.45 crores. On the date of agreement an advance amount of Rs.50 lakhs has been paid. Further alleged that a portion of construction was completed and handed over the building to the petitioners along with bills to the tune of Rs.31,10,74,414/-. At several stages, part of the amount paid by the petitioners and for the balance amount, the first petitioner issued a cheque for Rs.11,39,38,813/-. When the said cheque was presented for collection, it was returned for the reason "Account blocked". Hence the second respondent lodged this present complaint.

7. Though there is arbitration clause to resolve the dispute between the second respondent and the petitioners, on perusal of complaint the prima facie case has been made out for the offences under Sections 406 and 420 of IPC, against the petitioners as such it cannot be resolved before the Arbitrator. When the person committed crime, it cannot be resolved through Arbitrator, though it is registered for the compoundable offences. It is relevant to extract the illustration to attract the offence under Section 415 of IPC as follows :-

"g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats;"

Therefore, the offence are made out as against the petitioners for further investigation.

8. The learned counsel appearing for the petitioners vehemently contented that once the second respondent/defacto complainant initiated proceedings under Section 138 of NI Act for the very same occurrence, the proceeding for the offences under Section 406 and 420 of IPC would not arise. In support his contention, he relied the order dated 15.10.2014 passed by this Court in CrI.O.P.No.16109 of 2010 in the case of Jayaprakash Vs. The State rep by the Inspector of Police and

anr. as follows :-

"10. Turning to Section 420 IPC, it requires three basic elements prima facie, namely, deception, inducement by means of fraud or dishonesty. The averments in the FIR do not satisfy any of these requirements. Though it is stated in the complaint that the shares were transferred in the name of the petitioner on the promise that Rs.60 lakhs would be paid by the petitioner to the second respondent 8 in consideration, in the reply notice sent, the second respondent has asserted that he still continues to hold 3,350 shares. Whether the shares were really transferred and whether money is due or not from the petitioner are all matters to be gone into only by the appropriate civil forum. Thus, I hold that the allegations in the FIR do not reflect any of the ingredients of Section 415 IPC., so as to allow the petition. In my considered opinion, it is a clear abuse of process of Court. An attempt has been made to convert a simple civil dispute into a criminal case. Therefore, as has been held by the Honourable Supreme Court in the State of Haryana and Others vs. Bhajanlal and Others (1992 SCC (1) Suppl (1) 335), the FIR deserves to be quashed."

9. He further relied upon the order dated 27.10.2014 passed by this Court in Crl.O.P.No.20776 of 2014 in the case of K.Jayakumar Vs. The State rep by the Inspector of Police and anr., as follows :-

"17.....If failure to pay dues in any business transaction henceforth be treated as an offence falling within Section 415 of I.P.C., then every business transaction, where there is failure to pay the amount can be brought under the purview of the said provision. But that is not possible in law, because as I have already pointed out, to make out an offence of 'cheating', the deception, inducement either dishonestly or fraudulently are essential. Since nothing of that sort is found in this case, I hold that the registration of this case is clearly an abuse of process of law."

10. He also relied upon the judgment reported in 2019 AIR (SC) 1538 in the case of Satishchandra Ratanlal Shah Vs. State of Gujarat and anr., which reads as follows :-

"14. Now coming to the charge under Section 415 punishable under Section 420 of IPC. In the context of contracts, the distinction between mere breach of contract and cheating would depend upon the fraudulent inducement and mens rea. (See Hridaya Ranjan Prasad Verma v. State of Bihar, (2000) 4 SCC 168). In the case before us, admittedly the appellant was trapped in economic crisis and therefore, he had approached the respondent no. 2 to ameliorate the situation of crisis. Further, in order to recover the aforesaid amount, the respondent no. 2 had instituted a summary civil suit seeking recovery of the loan amount which is still pending adjudication. The mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. Even if all the facts in the complaint and material are taken on their face value, no such dishonest representation or inducement could be found or inferred.

15. Moreover, this Court in a number of cases has usually cautioned against criminalizing civil disputes, such as breach of contractual obligations [refer to Gian Singh v. State of Punjab, (2012) 10 SCC 303]. The legislature intended to criminalize only those breaches which are accompanied by fraudulent, dishonest or deceptive inducements, which resulted in involuntary and inefficient transfers, under Section 415 of IPC.

16. However, the High Court appears to have been carried away by the moral element involved in the breach of promise and made certain observations. Being a policy consideration, such suggestions need to be restricted. The aforementioned observations of the High

Court were not only unnecessary for the adjudication of this matter, but the same could have been understood as casting some kind of aspersions on the accused."

In the above judgments, this Court as well as the Hon'ble Supreme Court of India held that to attract the offence under Section 420 of IPC, three basic elements have to be fulfilled. The first one is deception played by the accused and not stopping with that, the person so deceived should have been induced either fraudulently or dishonestly to act on such deception, the person should have parted away his property or should have done anything which he would not have done otherwise.

11. In the case on hand, there are so many allegations are made as against the petitioners in the FIR. According to the second respondent after finishing the assignment, the petitioners refused to pay the bills. In fact, they issued cheque and the same was returned dishonest as 'Account closed' and the second respondent also initiated proceedings under Section 138 of NI Act as against the petitioners. Therefore, the facts are completely different and the judgments cited by the learned counsel appearing for the petitioners are not helpful to the case of the petitioners herein.

12. The learned Senior Counsel appearing for the second respondent contended that the defence raised by the petitioners may be available or facts/aspects when established during the trial may lead to acquittal, are not grounds for quashing the complaint at the threshold. With regard to while pending the proceeding initiated under Section 138 of NI Act, whether the complaint registered under Sections 406 & 420 of IPC, can be maintainable or not, the learned Senior Counsel appearing for the second respondent relied upon the judgment reported in (2012) 7 SCC 621 in the case of Sangeetaben Mahendrabhai Patel Vs. State of Gujarat and anr, as follows :-

"35. Learned counsel for the appellant has further placed reliance on the judgment in G. Sagar Suri & Anr. v. State of U.P. & Ors., (2000) 2 SCC 636, wherein during the pendency of the proceedings under Section 138 N.I. Act, prosecution under Sections 406/420 IPC had been launched. This Court quashed the criminal proceedings under Sections 406/420 IPC, observing that it would amount to abuse of process of law. In fact, the issue as to whether the ingredients of both the offences were same, had neither been raised nor decided. Therefore, the ratio of that judgment does not have application on

the facts of this case.

36. Same remained the position so far as the judgment in Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Anr., (2011) 2 SCC 703, is concerned. It has been held therein that once the conviction under Section 138 of N.I. Act has been recorded, the question of trying a same person under Section 420 IPC or any other provision of IPC or any other statute is not permissible being hit by Article 20(2) of the Constitution and Section 300(1) Cr.P.C.

37. Admittedly, the appellant had been tried earlier for the offences punishable under the provisions of Section 138 N.I. Act and the case is sub judice before the High Court. In the instant case, he is involved under Sections 406/420 read with Section 114 IPC. In the prosecution under Section 138 N.I. Act, the mens rea i.e. fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved. However, in the case under IPC involved herein, the issue of mens rea may be relevant. The offence punishable under Section 420 IPC is a serious one as the sentence of 7 years can be imposed.

38. In the case under N.I. Act, there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In the case under N.I. Act, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under N.I. Act can only be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary.

39. There may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provisions."

The Hon'ble Supreme Court of India held that in the prosecution under Section 138 of the NI Act, the mens rea ie., fraudulent or dishonest intention is not required to be proved. However, in the case under IPC involved herein the issue of mens rea is involved as intention of mens rea is an offence and sentence of 7 years can be imposed. Therefore, the complaint registered under Sections 406 & 420 of IPC is very much sustainable, when the proceedings pending for the very same transactions under Section 138 of NI Act.

13. In this regard, it is relevant to rely upon the judgment of the Hon'ble Supreme Court of India passed in CrI.A.No.255 of 2019 dated 12.02.2019 in the case of Sau. Kamal Shivaji Pokarnekhar vs. the State of Maharashtra & ors., as follows:-

"4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

5. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to

interfere.

.....
9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted."

14. It is seen from the First Information Report that there are specific allegations as against the petitioners to attract the offences, which has to be investigated in depth. Further the FIR is not an encyclopedia and it need not contain all facts and it cannot be quashed in the threshold. This Court finds that the FIR discloses prima facie commission of cognizable offence and as such this Court cannot interfere with the investigation. The investigating machinery has to step in to investigate, grab and unearth the crime in accordance with the procedures prescribed in the Code.

15. In view of the above discussion, this Court is not inclined to quash the First Information Report. Accordingly, this Criminal Original Petition stands dismissed. However, considering the crime is of the year 2019, the first respondent is directed to complete the investigation in Crime No.112 of 2019 and file a final report within a period of three months from the date of receipt of copy of this Order, before the jurisdiction Magistrate, if not already filed. Consequently, connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar

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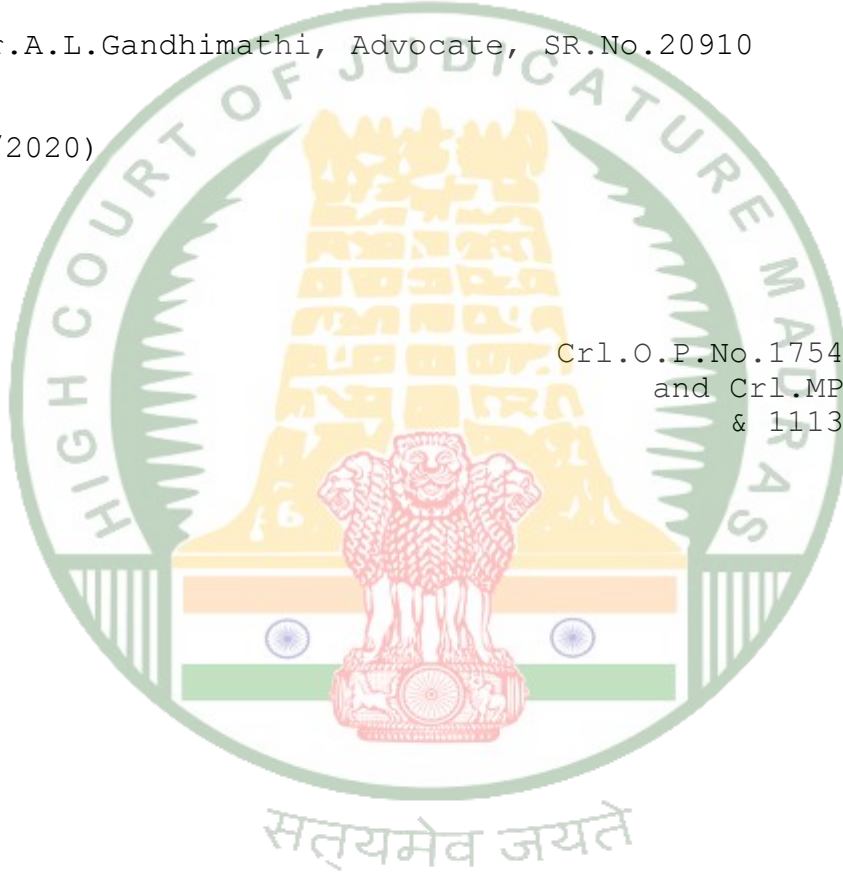
To

1.The Inspector of Police,
Central Crime Branch - I,
EDF-III, Greater Chennai Police,
Veperi, Chennai.

2.The Public Prosecutor,
High Court of Madras,
Chennai.

+1cc to Mr.A.L.Gandhimathi, Advocate, SR.No.20910

BS(CO)
rli(21/05/2020)



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and CrI.MP.Nos.8860
& 11137 of 2019

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