BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 09.01.2020
CORAM:
THE HONOURABLE MR. JUSTICE M.NIRMAL KUMAR

Crl.O.P.(MD).No.14266 of 2015
and
M.P.(MD).Nos.1 & 2 of 2015

Subaitha Beevi @ Subaitha ..Petitioner / Accused No.1

Vs.

1. The State represenated by
The Inspector of Police,
District Crime Branch,
Nagercoil, Kanyakumari District. ...Respondent / Complainant

2. Babu Hussian ...Respondent / De facto Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Criminal Procedure Code, to call for the records relating to the proceedings in C.C.No.174 of 2014, on the file of the Judicial Magistrate No.I, Nagercoil and quash the same insofar as the petitioner is concerned.

For Petitioner : Mr.T.Antony Arul Raj

For R-1 : Mr.K.Suyambulinga Bharathi
Government Advocate (Criminal side)

For R-2 : Mr.S.Palanivelayutham

O R D E R

This Criminal Original Petition has been filed to quash the proceedings against the petitioner in C.C.No.174 of 2014, before the learned Judicial Magistrate No.I, Nagercoil.

2. The petitioner herein is arrayed as Accused No.1 in C.C.No.174 of 2014, for the offences under Sections 120 (b), 406, 420 and 506 (i) I.P.C. The petitioner along with two other persons viz., Valarmathi and Kumar, the agents of the petitioner / Accused No.1 are arrayed as Accused Nos.2 and 3.

3. The case of the prosecution is that the Accused Nos.1 and 2 belong to Thituvillai, Kanyakumari District and Accused No.3 belongs to Nagercoil, Kanyakumari District. The Accused Nos.1 to 3 are known to each other and Accused Nos.2 and 3 are agents of

Accused No.1. The second respondent / *de facto* complainant is running a Jewellery shop in the name and style of Shaba Jewellery at Meenakshipuram, Nagercoil. During the period from 17.10.2011 to 01.11.2011, series of transactions have taken place and the jewelleries were handed over to the accused. Some spot payments were made, some without payment and thereafter, to the tune of Rs.2,98,66,834/- have been misappropriated by the accused and thereby, cheated the *de facto* complainant. When the second respondent / *de facto* complainant made a request for repayment of the amount, the accused threatened them with dire consequences. Hence, a case came to be registered before the first respondent Police and on completion of investigation, a charge sheet came to be filed. The petitioner has filed this petition to quash the proceedings in C.C.No.174 of 2014, initiated against her.

4. The contention of the petitioner is that earlier to this complaint, the second respondent / *de facto* complainant had lodged a complaint before the Inspector of Police, Kottar Police Station and after conducting enquiry, it came to be closed on 16.12.2011. Thereafter, a second complaint was given to the Superintendent of Police, Kanyakumari District and the same was forwarded to the Inspector of Police, Nesamani Nagar Police Station, Nagercoil and it was also closed on 18.03.2012. Again, a third complaint was given to the Kottar Police Station and the same came to be closed on 25.03.2012. The present complaint / fourth complaint was given to the Kottar Police Station. Since huge amounts were involved in the present complaint, it was forwarded to the District Crime Branch and the Inspector of Police registered a case in Crime No.28 of 2012 on 14.05.2012. He would submit that in the fourth complaint, there is no mention about the earlier complaints lodged and closed. He would submit that in this case, it is an admitted case of the second respondent / *de facto* complainant that over a period, the sale of jewellery had been taken place between the second respondent / *de facto* complainant and the accused. Hence, after the sale, it cannot be said that, it is the case of misappropriation. He would further submit that there have been series of business transactions and they had been carrying on the business and as such, in this case, the offence of cheating would not attract. The affidavit now being produced by the prosecution in this case has not been mentioned in the earlier three complaints and the case of the second respondent / *de facto* complainant is that the sale consideration has not been paid and the Police could not be used as a collecting agent for recovery of the balance sale consideration. He would further submit that the petitioner had not given any undertaking and hence, no criminal complaint, in view of no entrustment, under Section 406 I.P.C., would not attract and in view of the admitted case of the *de facto* complainant, it is series of transactions and due to failure of collection of subsequent amounts, the cheating would not get attracted. Hence, he prays before this Court to quash the criminal proceedings initiated against the petitioner herein.

5. The learned counsel appearing for the petitioner in order to substantiate his submissions relied upon the judgment of the Hon'ble Supreme Court in the case of ***Vesa Holdings Private Limited and another Vs. State of Kerala and others*** reported in ***(2015) 8 SCC 293***. The relevant portion of the judgement is extracted hereunder:

> *"8. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code, 1860 can be said to have been made out."*

5.(1). He would further rely upon the judgment of the Hon'ble Supreme court in the case of ***State of Gujarat Vs. Jaswantlal Nathalal*** reported in ***AIR 1968 Supreme Court 700 (V 55 C 140)***. The relevant portion of the judgment is extracted hereunder:

> *"8.The term "entrusted" found in Section 405 I.P.C. governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter- see Velji Raghavji Patel Vs. State of Maharastra, 1964-2 SCR 429 = (AIR 1965 SC 1433). Before there can be any entrustment there must be a trust meaning thereby an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. But that does not mean that such an entrustment need conform to all the technicalities of the law of trustee Jaswantrai Manilal Vs. State of Bombay, 1956 SCR 483 at PP. 498-500 = (AIR 1956 SC 575 at pp. 582-583). The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that properly is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount*

to an entrustment. It is true that the Government had sold the cement in question to BSS solely for the purpose of being used in connection with the construction work referred to earlier. But that circumstance does not make the transaction in question anything other than a sale. After delivery of the cement, the government had neither any right nor dominion over it. If the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust."

5.(2). He placed reliance of the judgment of this Court in the case of ***Rakesh P.Sheth and others Vs. State represenated by the Inspector of Police, CCB, Vepery, Chennai-600 007*** and other reported in ***2018 (1) MWN (Cr.) 147.*** The relevant portion of the judgment is extracted hereunder:

"24.In the light of the aforesaid Judgments, it can only be held that whenever there are sufficient materials to indicate that a complaint manifestly discloses a civil dispute, the inherent powers of this Court under Section 482 Cr.P.C., can be invoked. Likewise, when the complaint prima facie discloses that the transaction is for recovery of money due on a commercial transaction, the police cannot be transformed into a collection agent by spicing a criminal colour to the complaint."

5.(3). He placed reliance of the order of this Court in the case of ***Kironkumar Lulla and others Vs. State represented by the Inspector of Police, E.O.W. II, Chennai-2 and others*** in ***Crl.O.P.No.10765 of 2004.*** The relevant portion of the order is extracted hereunder:

"16. The aforesaid statements of L.W.1 and L.W.2 reveal that during the course of the commercial transaction between the petitioners and the de facto complainant, the de facto complainant had supplied fabrics and the petitioners were making certain payments and ultimately a huge amount was due from the petitioners to the de facto complainant. Whether the above said failure on the part of the petitioners to pay the amounts towards the purchases of fabrics in the course of commercial transaction will amount to cheating or criminal breach of trust has to be considered in the light of the law laid down by the Apex Court in the various decisions relied upon by the learned counsel for the petitioners."

6. The learned counsel appearing for the second respondent / *de facto* complainant would submit that the probability or improbability of the case, which is on factual aspect, has to be established only during the trial. In this complaint, it has been clearly mentioned about the entrustment of jewels to the petitioner and also the corresponding bills which have been given for the jewels are produced. Though it is a business transaction, the petitioner after getting the jewels, had sold the jewels, received the money and thereafter, converted the same to her own use and by not paying any amount to the *de facto* complainant, would clearly show that this is a case of misappropriation. Further to gain the confidence of the second respondent / *de facto* complainant, payments were made regularly and thereafter, lured the second respondent to entrust further jewels to the petitioner and thereby, the petitioner had converted the same for her own use, misappropriated and cheated the second respondent / *de facto* complainant. The petitioner had given an undertaking by way of an affidavit, further, she signed in the receipts acknowledging receipt of jewels. The petitioner has admitted her signatures as could be seen from page No.4 of the petition, wherein, it is alleged that the second respondent / *de facto* complainant had forcibly obtained the signatures in vouchers, blank papers and blank stamp papers from the petitioner, for which, she had lodged a complaint before the Bhoothapandi Police Station, Kanyakumari District and a case in Crime No.11 of 2014, came to be registered for an offence under Section 420 I.P.C., which is still pending investigation. Further, submitted that there is only a thin line of difference between the civil transaction and the criminal transaction. The conduct of the petitioner on the manner in which the petitioner gives an explanation for the signatures found in the affidavit clearly proves the culpability and the criminal intention of the petitioner. He would further submit that a complaint has been lodged only for cheating and for misappropriation committed by the petitioner, complaint is not for recovery. The first respondent Police registered the complaint, conducted investigation, collected documents, sent the documents for forensic study and filed a charge sheet against the petitioner and other accused. The points raised by the petitioner are to be decided only during the trial and hence, he sought for dismissal of the petition.

7. The learned Government Advocate (Criminal side) appearing for the first respondent submitted that on receipt of complaint from the second respondent / *de facto* complainant, a case came to be registered and on completion of investigation, L.W.1 to L.W.16 have been examined, cited and several documents have been listed along with the charge sheet. Some of the documents have been sent for Forensic Department as well as the Handwriting Expert opinion, the Fingerprint Expert report has been obtained in this case. He would further submit that in this case L.W.1 is the *de facto* complainant. L.W.2 and L.W.3 are the salesman, who handed over the jewels to the petitioner, L.W.7 is the witness for the threat given by the petitioner. L.W.8 is the witness to the documents. L.W.9 is the Document Writer. L.W.10 has spoken about the execution of documents. L.W.11 is the Notary Public Advocate has spoken about the signatures found in the documents. L.W.12 is the Officer attached to the Forensic Department. L.W.13 is the Fingerprint Expert He would further submit that the petitioner along with accused Nos.2 and 3, who are the agents of the petitioner had committed the offence and some of the witnesses have given 164 statement against the petitioner. The registration of Crime No.11 of 2014 is only an after thought and the crime committed is of the year 2011 and the complaint lodged by the petitioner is in the year 2014. Thus, after a detailed enquiry, a charge sheet came to be filed. He would further submit that the points raised by the learned counsel appearing for the petitioner are disputed points and it has to be decided only during the trial. He further submitted that the next hearing date before the trial Court is 13.01.2020 and due to the pendency of this Criminal Original Petition, the trial could not be proceeded. Hence, he prays this Court to dismiss this petition.

8. This Court has carefully considered the submissions made on either side and the entire oral and documentary evidence.

9. Considering the rival submissions made on either side and on perusal of the materials, it is seen that the points raised by the petitioner which are factual in nature and it has to be decided only during the trial. The petitioner admits his signatures and disputes the contents of the documents. Further, there are forensic and scientific evidence confirming to the case of the prosecution. It is seen that there are enough materials to proceed against the petitioner. The petitioner's contention is that the offence under Sections 406 and 420 I.P.C., would not get attracted, cannot be countenanced on the facts and circumstances of the case. Hence, this Court is not inclined to quash this petition.

10. In the result, the Criminal Original Petition stands dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To
1. The Judicial Magistrate No.I,
   Nagercoil.

2. The Inspector of Police,
   District Crime Branch,
   Nagercoil, Kanyakumari District.

3. The Additional Public Prosecutor,
   Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.PALANI VELAYUTHAM, Advocate (SR-1736[F] dated 13/01/2020)

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09.01.2020

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