IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.03.2021

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.R.C.No.70 of 2015
and
M.P.No.1 of 2015

Namasivayam
S/o.Sambasivam ... Petitioner/Accused

Vs.

The Inspector of Police
F-1, Police Station
Chindadripet, Chennai-2 ...Respondent / Complainant

Prayer :- Criminal Revision Petition filed under Section 397 read with 401 Cr.P.C., seeking to call for the records in M.P.No.99 of 2008 in C.C.No.750 of 2006 on the file of the XIV Metropolitan Magistrate Court, Egmore, and set aside the same.

For Petitioner : Mr.V.K.Sathiamurthy

For Respondent : Mr.T.Shunmuga Rajeshwaran
Government Advocate (Crl. Side)

ORDER

The Revision has been filed seeking to call for the records in M.P.No.99 of 2008 in C.C.No.750 of 2006 dated 15.12.2008 on the file of the XIV Metropolitan Magistrate Court, Egmore, Chennai, dismissing the petition for discharging and to set set aside the same.

2. The brief facts of the case is that the defacto complainant Sivaganga Manohar had filed a private complaint under Section 200 Cr.P.C. against the petitioner for the offence under Section 406, 420 and 506(i) IPC and that the learned Magistrate had referred the case under Section 156(3) Cr.P.C. to the respondent police for investigation based on which, the case was registered in Crime No.2967 of 2005 by the respondent police for offence under Sections 420, 406 and 506(i) IPC. The respondent after completion of investigation had filed the final

report and the case was taken up in C.C.No.750 of 2006. The respondent have cited LW.1 to LW.8 as witnesses including the official witnesses.

3. The facts of the final report is that the defacto complainant Sivaganga, is the wife of Thiru.Manohar, Advocate. The petitioner/accused had approached the defacto complainant and her husband and had given his willingness to construct their house and agreed to proceed with the defacto complainant's house construction work at the rate of Rs.490/- per sq.ft. for the plinth area of 786.25 sq.ft. and he had also agreed to complete the construction work within the time as per specification given by him following which, he had received a part payment on 01.05.2003, whereas he started the construction work only on 05.09.2003, after a period of four months as he had diverted the amount of the defacto complainant for doing some other work. Thereafter, on various dates the petitioner had received amounts from the defacto complainant for doing the construction work and in total, he had received a sum of Rs.3,64,500/-. Thereafter, on 20.02.2005, the petitioner/accused without completing the construction work, had handed over the keys to the defacto complainant. However, the defacto complainant had completed the house warming ceremony on 21.02.2005. Thereafter, when the defacto complainant had enquired about the work done by the petitioner/accused, he did not give any proper reply. Therefore, the defacto complainant had assessed the value of the construction work left incomplete through an Engineer and it was assessed as Rs.1,40,000/-. Thereafter, the defacto complainant had completed the incomplete work by engaging Carpenter, Mason and Painter and they had also done 2nd coating of painting and constructed the compound wall and thereby, the defacto complainant incurred a further expense of Rs.1,40,000/-. The petitioner/accused had received a sum of Rs.3,64,500/- for doing construction from the defacto complainant. However, he did not complete the work and thereby, the petitioner/accused has cheated the defacto complainant and committed criminal breach of trust. Further, on 18.09.2005, the petitioner/accused had called the defacto complainant and had threatened her over phone stating that he has got a group of henchmen behind him and that he will do away with them. The respondent had filed the final report against the petitioner/accused for offence under Sections 406, 420 and 506 (ii) IPC. Other than the statements of eight list witnesses in the final report no other documentary material was filed.

4. The petitioner/accused had filed the petition in M.P.No.99 of 2008 under Section 239 Cr.P.C. seeking to discharge him on the ground that the charge against him was groundless. The trial Court by order dated 15.12.2008 had dismissed the petition against which, the present revision has been filed.

5. The learned Counsel for the petitioner/accused would submit that a case of alleged breach of agreement simpliciter has been attempted to be converted as a case of criminal breach of trust and cheating. He would submit that even taking into consideration the statements recorded from the witnesses to be true, no case of cheating or criminal breach of trust or criminal intimidation can be made out against the petitioner. The petitioner finding that the police report and the documents sent with Section 173 Cr.P.C. do not make out the charge against the petitioner and also finding that the entire allegations are groundless, had filed a petition in M.P.No.99 of 2008 in C.C.No.750 of 2006 under Section 239 Cr.P.C. seeking to discharge from the proceedings, whereas the trial Judge without properly appreciating the materials on record and analyzing the statements of the witnesses, had dismissed the application by order dated 15.12.2008. He would submit that LW.1 has stated that the petitioner/accused is known to his wife from childhood and on the request made by them, he had agreed to construct the house at the rate of Rs.490/- per Sq.ft. for the plinth area of 786.25 Sq.ft. and there was no written contract. As per the oral agreement, they entrusted the work to him and that the petitioner/accused had received part amount on 01.05.2003, however, the work was started only on 05.09.2003 and nothing had been stated that when and how the amounts were given and no documentary evidence has been produced by the defacto complainant to show that the amounts were paid to the petitioner/accused. Further, an allegation of temporary criminal breach of trust has been made against the petitioner/accused and admittedly only after the petitioner had completed the construction, the keys were received by the defacto complainant. He would further submit that the defacto complainant/wife of LW-1, T.K.Natesan, and L.Jayakumar have given stereo typed statements as that of LW.1. LW.5 is a Civil Engineer from whom the respondent is stated to have taken a report, however he is not a witness to the transaction or the alleged oral agreement stated to have been made between LW.1 and the petitioner/accused and he is also not a witness to the alleged payments made by LW.1 to the petitioner/accused. LW.6 and LW.7 are Mahazar witnesses and LW.8 is the Investigating Officer. He would further submit that an attempt has been made by the defacto complainant to convert a civil dispute into a criminal dispute and a false allegation has been made as if, the petitioner/accused had intimidated the defacto complainant over phone. Even as per the statement of LW.2, she is stated to have been threatened by the petitioner over phone during a telephonic conversation. He would submit that without admitting to the offence, even taking into consideration the averments to be true for an offence under Section 506(ii) IPC, which is rather an important offence punishable with imprisonment which may extend to seven years, the threat should be a real one and

not just a mere word. In this case no complaint has been made by the defacto complainant to the respondent police in respect of such alleged threat and nothing has been stated by the defacto complainant or by the witnesses that due to the threat, she expressed any fear for her life and she sought for any protection. Therefore the offence under Section 506(ii) is also not made out. Further, though the defacto complainant had stated that she was threatened by the petitioner/accused on 18.09.2005 through telephone, no independent complaint has been given and other than a vague and baseless averment, nothing had been stated as if, she experienced fear for her life. He would further submit that when the ingredients of offence under Section 420 and the ingredients of offence under Section 406 and 506 (i) IPC are not made out and when there being no prima facie case, the charge against the petitioner/accused is groundless and thereby, the trial Court ought to have discharged the petitioner/accused. In support of his contention, he would rely on the following Judgments.

1. Dalip Kaur and others Vs. Jagnar Singh and Another reported in 2009 14SCC 696

2. All Cargo Movers (India) Private Limited and others vs. Dhanesh Badarmal Jain and Another reported in 2007 14SCC 776

3. Thermax Limited and Others Vs. K.M.Johny and Others reported in 2011 13SCC 412

4. Noble Mohandass Vs. State reported in 1989 Crl.L.J. 669

6. The learned Government Advocate (Crl. Side) would submit that the petitioner and the defacto complainant are childhood friends. The petitioner/accused had induced the defacto complainant on the promise of constructing her house at the rate of Rs.490/- per sq.ft. for the plinth area of 786.25 Sq.ft and based on the assurance given by the petitioner/accused, the defacto complainant had parted with an amount of Rs.3,64,500/- on various dates. However the petitioner had not completed the construction within the time promised by him and delayed the construction and thereafter, he handed over the keys to the defacto complainant without completing the entire work. Thereafter, the defacto complainant had assessed the value of construction work left incomplete and it was assessed as Rs.1,40,000/- and thereby, the petitioner has cheated the defacto complainant by not completing the work. Further, the petitioner had called the defacto complainant over phone, and criminally intimidated her stating that he has got a group of henchmen behind him and he would do away the defacto complainant and his family.

7. Heard the learned Counsels and carefully perused the materials on record.

8. Now referring to the Judgments relied on by the petitioner. In Dalip Kaur and others Vs. Jagnar Singh and Another reported in 2009 14SCC 696 it has been been held that ;

> "to make out the ingredients of cheating, fraudulent and dishonest intention must exist from the very inception when the promise or representation was made. Non compliance with the terms of contract held does not constitute cheating or criminal breach of trust".

In All Cargo Movers (India) Private Limited and others vs. Dhanesh Badarmal Jain and Others reported in 2007 14SCC 776 it has been held that;

> "Beach of contract simpliciter does not constitute an offence and the allegations in the criminal complaint must disclose the necessary ingredients therefore and that the criminal proceedings should not been encouraged when it is found to be mala fide or otherwise an abuse of the process of the Court".

In Thermax Limited and Others Vs. K.M.Johny and Others reported in 2011 13SCC 412 it has been held that;

> "For initiation of proceedings under Section 156 (3), the complaint must disclose essential ingredients of offences alleged. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceedings. Essential ingredient for offence under Section 420 namely dishonest intention has to be from the very inception of the contract".

In Noble Mohandass Vs. State reported in 1989 Crl.L.J. 669, it has been held that;

> "the threat should be a real one not just a mere word, when a person uttering it does exactly mean what he says and when the person at whom threat is launched does not feel threatened actually.

9. Now analyzing the materials on records and the facts of the case in consonance with the above Judgments referred by the petitioner/accused, the facts remain that it is the case of the defacto complainant that the petitioner/accused offered to construct a house with a plinth area of 786.25 sq.ft. at the rate of Rs.490/- per sq.ft. and received a total sum of Rs.3,64,500/- on various dates and without completing the

construction, had handed over the key and later when questioned, had threatened the defacto complainant.

10. As pointed out by the Counsel for the petitioner/accused, it is a case of breach of contract simpliciter and no fraudulent or dishonest intention is stated to have existed from the very inception when the agreement was made. Further the threat is alleged to have been made over phone and no complaint had been made to the police and the person to whom the threat has been launched, had not stated that she felt the threatened actually. Though at the stage of considering the question of framing the charges under Section 227 of the code, the trial Judge should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if, he was conducting a trial, he has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out. In this case on hand, in the opinion of this Court, taking into consideration the material in entirely, no prima facie case is made out against the petitioner/accused. The trial Court without properly analysing the materials on record had dismissed the petition for discharge thereby, making the impugned order illegal.

11. In the result, this Criminal Rivision case stands allowed. Consequently, connected Miscellaneous Petition is closed. The order dated 15.12.2008 passed by the learned XIV Metropolitan Magistrate Court, Egmore, Chennai, in M.P.No.99 of 2008 in C.C.No.750 of 2006 is set aside and the petitioner stands discharged from the charges leveled against him in C.C.No.750 of 2006.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1. The XIV Metropolitan Magistrate Court,
   Egmore, Chennai

2. The Inspector of Police
   F-1, Police Station
   Chindadripet, Chennai-2

3. The Public Prosecutor
   High Court of Madras.

+2cc to Mr.C.Rajan, Advocate, S.R.No.18669

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and
M.P.No.1 of 2015

LN(CO)
CB(08/07/2021)