



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.03.2022
PRONOUNCED ON : 26.05.2022

CORAM :

THE HON'BLE MR.JUSTICE G.CHANDRASEKHARAN

CRL.O.P.NO.8517 OF 2015
AND
CRL.M.P.NOS.1 & 3 OF 2015

1.M.Singamuthu

2.S.Sundarambal

3.S.Dinesh Kumar

...Petitioners

Vs.

A. Gurusamy

...Respondent

PRAYER : Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records and to quash the complaint in M.P.No.1853 of 2008 on the file of the Metropolitan Magistrate No.23, Saidapet.

For Petitioners : Mr.Sesubalan Raja

For Respondent : Mr.S.Baskaran

O R D E R

This petition is filed to call for the records and quash the complaint in M.P.No.1853 of 2008 on the file of XXIII Metropolitan Magistrate, Saidapet, Chennai.

2. The respondent filed a private complaint against the petitioners under Section 200 Cr.P.C., for the offences under Sections 403, 406, 420, 423, 506 r/w 34 and 109 IPC. Petitioners are the accused 1 to 3 in the complaint.

3. The allegations made against the petitioners, in brief are that:

3(i).Respondent/complainant borrowed a sum of Rs.3.25 lakhs from the first accused/first petitioner on various occasions. In 1994, the divorced wife of the respondent created some domestic problems. First accused demanded repayment of money on 25.05.1995, respondent executed an agreement to sell the



WEB COPY

property viz., plot No.AP 214, 9th Street, K.K.Nagar, Chennai, for Rs.4.75 lakhs. The loan of Rs.3.25 lakhs was treated as advance. First accused undertook to discharge the mortgage loan to Tamilnadu Housing Board from the balance sale consideration of Rs.1.50 lakhs. Though, the divorced wife of respondent was in possession of the property, it was stated in the sale agreement that possession was handed over to the first accused. On the instructions of first accused, respondent executed a Power of Attorney Deed in favour of his wife, the second accused on 25.05.1995. This Power of Attorney Deed was given as a security to the loan of Rs.3.25 lakhs, given by the first accused. There was an understanding that Power of Attorney Deed would be acted upon only if respondent's divorced wife created any problem. Respondent's divorced wife filed O.S.No.4123 of 1995 against the respondent and first accused for permanent injunction to protect her possession. First accused filed O.S.No.4320 of 1995, for mandatory injunction against respondent's divorced wife to deliver the possession of the property. That suit was decreed and delivery was taken in E.P.No.568 of 2005. The mortgage loan was not repaid by the first accused as per the undertaking given in the sale agreement. First accused agreed to pay the market price if the respondent discharges the mortgage. Respondent paid the entire balance to his employer on 20.09.2006 and registered the discharge receipt on 04.10.2006. The first and second accused started behaving differently and therefore, respondent cancelled the Power of Attorney Deed in favour of the second accused on 25.01.2007. Respondent surprised to know that even on 20.12.2006, second accused executed a sale deed in favour of her son, the third accused for Rs.11 lakhs. There is no mention about sale agreement in the sale deed nor the consideration paid by the first accused. After the sale in favour of the third accused, second accused has not rendered accounts. The sale in favour of the third accused is null and void. Therefore, he filed a suit in C.S.No.403/2007, seeking declaration that the sale deed dated 20.12.2006 is null and void and for recovery of possession and damage. The original documents are with the respondent. Accused threatened the respondent on 19.01.2007 of dire consequences if the original documents are not delivered to them. The act of the accused in collusion with each other with an intention to cheat the respondent of his property by committing criminal breach of trust, by executing a sale deed in favour of the third accused and without accounting for the sale are liable to be punished for the offences under Sections 403, 406, 420, 423, 506(ii) IPC.

4. After filing this complaint, the learned Judicial Magistrate on going through the complaint, sworn statement of the complainant / respondent found that there are no material to proceed against the petitioners under the penal provisions of



Indian Penal Code and thus, dismissed the petition under Section 203 Cr.P.C. Respondent filed CrI.R.C.No.380 of 2009 against the order passed in M.P.No.1853 of 2008 on 08.04.2008. This Court on going through the entire factual background, materials placed found that the impugned order passed by the learned XXIII Metropolitan Magistrate, is liable to be set aside and accordingly, set aside.

It is observed in paragraphs 22 and 23 as follows:-

"22. It is the further case of the complainant that he cleared the mortgage by paying his own money and the first accused is the witness to the said document. Therefore, it is the case of the complainant that if the first accused wanted to exercise his right under the agreement and utilised the power granted in favour of the wife/second accused, he could have very well done such an exercise even at that point of time. Therefore, it is stated that after the mortgage was cleared, accused 1 and 2 have created a fraudulent transaction transferring it to their own son, who was a teenager. Thus, considering all these facts, it cannot be stated that the matter is purely of civil nature.

23. It is indisputably true that the matter relates to a property, but the case pleaded by the complainant is that it flows out of other criminal allegations, which is stated to be prima facie made out. Though an observation is made out by the Court below that criminal allegation prima facie is not made out as against the accused is an incorrect finding, mere pendency of the civil suit is not a bar for entertaining a criminal complaint. When an accused is alleged to have committed a criminal offence and in such an event, both the proceedings are separate and independent and one cannot abate and defeat other as referred to in the case of Rashida Kamaluddin Syed and another Vs. Shaikh Saheblal Mardan."

Thereafter, this petition is filed to call for the records and quash the complaint in M.P.No.1853 of 2008.

5. Learned counsel for the petitioners submitted that the sale deed in favour of the third accused was executed by the second accused in pursuance of the Power of Attorney Deed executed in their favour on 25.05.1995 by the respondent. The suit filed by the respondent challenging the sale in C.S.No.403 of 2007 (O.S.No.11336 of 2010) was dismissed, confirming the validity of the Power of Attorney Deed in favour of the second accused and the sale deed executed by her in favour of the third accused. When the Power of Attorney Deed and the sale deed aforesaid had been validated by a competent civil Court, prosecution of criminal case is nothing but an abuse of process



of law. Therefore, he prayed for quashing the proceedings initiated against the petitioners.

5(i).He relied on the judgment reported in CDJ 2014 SC 404 in Rashmi Jain Vs. State of U.P. & Another, for the proposition that when a criminal proceeding is manifestly attended with mala fide or where proceeding is maliciously instituted with an ulterior motive for wrecking vengeance on the accused and with a view to spite him due to private and personal grudge and that allegations in the complaint do not constitute a cognizable offence and it is so absolute and inherently improbable, the prosecution is liable to be quashed.

5(ii).The judgment reported in CDJ 2012 SC 675 in Manharibhai Muljibhai Kakadia & Another Vs. Shaileshbhai Mohanbhai Patel & Others, is relied for the proposition as to the right of the accused to be heard under Section 401(2) of the Code. It is observed in this judgment that:

"54. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 - although it is at preliminary stage- nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get right of hearing before revisional court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could



WEB COPY

happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage."

6. In response, the learned counsel for the respondent submitted that there is no denial of the fact that the respondent executed the sale agreement dated 25.01.1995 in favour of the first accused and the Power of Attorney Deed dated 25.05.1995 in favour of the second accused. The sale agreement was executed in connection with borrowing of loan or for settling the loan. Power of Attorney Deed was executed to face the impending proceedings expected to be initiated by his divorced wife. However, it was agreed that the first accused would pay the market price. Instead of paying market price for the property, second accused executed a sale deed in favour of her son, third accused. The sale deed was executed only on 20.12.2006 nearly after 11 years after the execution of sale agreement and General Power of Attorney Deed in favour of the accused 1 and 2 respectively. For all these years, first accused had not enforced the sale agreement. Though possession was with the divorced wife of the respondent, it was mentioned in the sale agreement that possession was handed over to the first accused. The fact that matter is that it is not true. The Power of Attorney Deed shows that second accused should give proper accounts to the respondent. Second accused has not given any account to the respondent. She played fraud in connivance with the other accused and executed a sale deed in favour of her son. A agent cannot legally buy the property of the principal. Fraudulent act of the accused with an intention to cheat from the inception of the execution of sale agreement and Power of Attorney Deed are evident from the factual background and conduct of the parties. Therefore, learned counsel for the respondent prayed for dismissal of this petition.

7. Considered the rival submission and perused the records.

8. As narrated above, it is seen from the order of this Court in Crl.R.C.No.380 of 2009 that this Court on going through the dismissal order passed by the learned XXIII Metropolitan Magistrate, Saidapet, Chennai in M.P.No.1853 of 2008, and on analyzing the factual background and legal possession, finally set aside the order of dismissal and directed the trial Court to issue notice to respondents/accused and proceed in accordance with law. Meaning thereby, the case had to be taken cognizance against the petitioners/accused and be proceeded with. It appears that against the order passed in Crl.R.C.No.380 of 2009



petitioners have not preferred any proceedings before the Hon'ble Supreme Court. Thus, the order in Crl.R.C.No.380 of 2009 has become final. The result is that after the order passed in M.P.No.1853 of 2008 was set aside and the trial Court was directed to proceed against the petitioners, petitioners have filed this petition to call for the records and to quash the complaint in M.P.No.1853 of 2008. This, in the considered view of this Court, is not correct and in accordance with law.

9. Learned counsel for the petitioners submitted that petitioners are entitled to challenge the issue of summons/notice after the issuance of process. There is no second opinion that petitioners are entitled to challenge the issuance of process after taking cognizance. However, in the case before hand, petitioners were represented in Crl.R.C.No.380 of 2009 by counsel and the order was passed directing the trial Court to issue notice against the petitioners to proceed further in accordance with law, only after hearing the counsel appearing for the petitioners. Therefore, it is not open to the petitioners to again file a petition to quash the proceedings in M.P.No.1853 of 2008.

10. On merits of the case, from the factual background set out above, this Court finds that the respondent has filed appeal against the judgment in O.S.No.11336 of 2010 in A.S.No.372 of 2015 and this appeal is pending before this Court. The judgment in O.S.No.11336 of 2010 is not final yet. The copy of the deposition of first accused is placed for the the perusal of this Court. It is seen from the evidence that respondent had paid the balance loan amount to the housing unit, whereas in a sale agreement, first accused had undertaken to pay the balance loan amount of Rs.1.50 lakhs. He admitted that he has not sent any notice to the respondent for enforcing the sale agreement nor he filed a suit for that purpose. It is also admitted by him that after receiving Rs.11 lakhs, second accused had not given any amount to the respondent. It is also his evidence that second accused has not received any consideration as mentioned in Ex.A12-sale deed. This evidence of first accused shows that the accused 1 to 3 have collected and connived among ourselves and executed Ex.A12-sale deed in favour of the third accused by the second accused.

11. The fact that a sale deed came to be executed nearly 11 years after the execution of sale agreement and Power of Attorney Deed on 25.05.1995 makes it clear that there are material to show that, the sale deed in favour of third accused had not been executed in normal and usual course of execution of sale deed. There is something more than what meet the eyes that we can gather from the sale agreement and General Power of Attorney Deed. Parties are at dispute in projecting their cases.



The disputed facts cannot be investigated in proceeding under Section 482 of Cr.P.C. However, there are materials available to presume that accused had not acted in accordance with law and created a sale deed in favour of the third accused with an intention to deprive the respondent of his valuable property. On merits, also this Court finds that this petition cannot be entertained. The proceedings must be permitted to go further before XXIII Metropolitan Magistrate, for it to reach its logical conclusion.

12. In this view of the matter, this petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-VII)

// True Copy //

Sub Assistant Registrar

AT

To

The XXIII Metropolitan Magistrate,
Saidapet, Chennai.

CRL.O.P.No.8517 of 2015 and
Crl.M.P.Nos.1 & 3 of 2015

AK-II (CO)
RVM(23/06/2022)