IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

CRL.O.P.NO.3357 OF 2017
AND
CRL.M.P.Nos.9041 and 2437 of 2017

1. Renuka Bhojani
2. Mr.Jagdish Bhojani
   Power of Attorney holder of
   Mrs.Renuka Bhojani

.. Petitioners

~Vs~

1. Mr.T.Narendran
   Power of Attorney holder of
   Thiru R.Kumaravelu, Managing Partner
   M/s.Aquasub Engineering
   Thudiyur Post, Coimbatore 641 034.

2. State rep. By Public Prosecutor
   Coimbatore.

.. Respondents

Prayer: Petition filed under Section 482 of Cr.P.C.to call for the records pertaining to the order dated 15.12.2016 passed in Crl.R.P.No.13 of 2016 on the file of the V Additional District and Sessions Judge, Coimbatore, setting aside the order dated 02.04.2016 passed in CMP No.4922 of 2015 on the file of the Judicial Magistrate-1, Coimbatore, quash the same.

For Petitioner	:	Mr.B.Kumar Senior Counsel for Mr.M.R.Sivakumar
For Respondents	:	Mr.P.S.Raman, Senior Counsel for Mr.K.S.Karthick Raja [for R1]
		Mr.K.Vinoth Kumar Government Advocate (Crl. Side) [for R2]

O R D E R

This Petition has been filed to set aside the order passed by the learned 5th Additional District and Sessions Judge, Coimbatore, in reversing the order of the learned Judicial Magistrate-1, Coimbatore, dismissing the Private Complaint under Section 203 Cr.P.C.

2. The brief facts leading to file this Petition is as follows:

2.a. A private complaint was filed by the defacto complainant / 1st Respondent herein that the complainant is one of the leading manufacturers of agricultural monoblocks, open-well submersibles and various other types of motors and pumps with the brand name "texmo". For their business they were in need of huge quantities of copper profiles and had been outsourcing for converting copper into copper profiles. The accused had been doing the job work for about 20 years to the complainant, that the complainant would give copper and the accused and the accused after conversion would give the copper profiles. The complainant conduct periodical stock audit of the material lying with their job workers. On 5.9.2013 while taking stock audit in the presence of the accused, it was found that copper weighing 29,975 Kgs. amounting to Rs.1,54,07,150/- was not available and the accused had misappropriated the same by diverting to his other customers with intention to cheat and defraud the complaint. The accused promised to replace the entire deficit of copper. In further stok audit it was found that the copper weighing 37,765 kgs valued at Rs.1,92,41,750/- was shortage. As the accused promised to replace the shortage, the complainant did not suspect, the accused had convinced the complainant to provide necessary collateral security for the loan to be availed with Indian Overseas Bank. The complainant had given the property and personal deposit as security for the loan. After availing the loan of Rs.8.75 Crore the accused had diverted the funs towards their personal use and caused the account to become Non Performing Asset. The bank has proceeded against the complaintnt. Despite the criminal complaint lodged before the police no action has been taken. Hence it is the contention that the accused had dishonestly converting the copper entrusted to them for their own use and dishonestly misappropriated the copper and intentionally to deceive the complaint and committed breach of trust. Hence committed the offences under Section 420 and 409 of IPC.

2.b. Originally, after the police investigation the matter has been referred as "Mistake of Fact". Thereafter, Petition has been filed before the learned Magistrate for direction to the police to investigate the complaint under Section 156 (3) Cr.P.C.and file final report. However, the learned Magistrate treated the petition as private complaint, folowed the procedure under Setion 200 and 202 Cr.P.C. After considering the statement of witnesses dismissed the complaint holding that no criminal offence is made out, it is purely civil matter. Challenging the same revision has been filed. Learned 5th Additional District and Sessions Judge, Coimbatore, however, set aside the order of the learned Magistrate and found from the sworn statement of the complainant and other witnesses, that there is a prima facie materials to show that there was a deficit of copper to the tune of 29975 Kgs.and the same was acknowledged by the accused and held that there is a material for committing breach of trust and cheating. As against the above order the present petition has been filed.

3. Learned Senior Counsel Mr.B. Kumar appearing for the Petitioner submitted that there was a business transaction between the parties for more than two decades and the petitioner were suppliers of the copper profiles. Originally, the complaint given to the Commissioner of Police, Coimbatore on 11.8.2014 was closed as mistake of fact. The above complaint was given on the basis of the alleged stock said to have been taken on 05.09.2013. It is his submission that absolutely there is no materials to show that the accused committed cheating or the alleged misappropriation. Even in the entire sworn statement no materials available on record to proceed for the alleged misappropriation or cheating. Learned V Additional District and Sessions Court without even marking the documents appears to have considered the documents which is impermissible. His contention is that merely because the accused borrowed loan from the bank where the defacto complainant stood as personal guarantor, it cannot be said that there was a intention to cheat. The borrowal of loan or recovery of money from the guarantor are different transaction, same cannot be clothed with the present complaint to give a colour of criminal case. It is his contention that the defacto complainant has given a letter to the Inspector of Police that there was agreement reached with them. The letter was also not disputed in their counter. In the letter dated 26.12.2014, The defacto complainant himself admitted the settlement. There after filed private complaint which is nothing but abuse of process of law. Even the private complaint and witness statements do not show any materials to proceed against the accused. It is his further contention that the private complaint is off-suit of the criminal proceedings initiated by the Petitioner against the accused in respect of the immovable property. It is his further contention that there was suppression of fact by the defacto complainant as to the criminal complaint lodged against them and pending and also the

letter given before the police. Those facts have been suppressed only in order to gain advantage. Therefore, submitted that the entire private complaint has to be quashed and the order of the court below passed in Revision is also to be set aside.

4. Whereas the learned Senior Counsel Mr.P.S. Raman appearing for the 1st Respondent/defacto complainant submitted that the defacto complainant procured copper and entrusted the same to the accused for profiling. In the year 2013-14, around 36.70 Tonnes of Copper was supplied by the defacto complainant. In the stock audit it is found that 37,765 Kg.of copper valued at Rs.1,92,41,750/- was missing and no supplied by the accused. Further it is his contention that the accused also promised to do the needful provided the defacto complainant to extend some facilities. Accordingly, the defacto complainant stood as guarantor for the accused. Based on that the accused has availed Rs.6 Crores from the bank instead of using for supply of copper, converted the money for personal use. Hence, it is his contention that when the court below applied its mind and considered the statement including the allegations in the complaint, the court cannot quash the proceedings. It is his further contention that the letter said to have given to the Inspector of Police itself is disputed and it is his contention that such letter was originally given to the bank in a loan transaction for reaching a settlement. The same has been taken advantage by the complainant and handed over to the police station and obtained RTI copy to show as if the defacto complainant given such complaint. It is his further contention that there was no suppression of material facts in the complaint. Merely because the defacto complainant purchased the property from one of the accused, it cannot be said that itself suppression of material facts. Hence, submitted that when the V Additional District and Sessions Court applied its mind and found that there is misappropriation and cheating which requires trial.

5. Perused the Materials.

6. Originally, FIR filed by the police as closed as Mistake of Fact. Thereafter, private complaint was filed. As indicated, the crux of the allegation is that there was a business dealing more than 20 years and the accused job is copper profiling and supply it and the defacto complainant entrusted the copper for profiling to the accused. In the year 2013, it is found that 37765 Kg of copper was shortage. Therefore, it is the contention of the defacto complainant that there was a criminal breach of trust. Similarly the accused requested the complainant to stand as guarantor. After receiving

the bank amount of Rs.6 crores, the accused left the same as non performing asset, bank proceeded against the defacto complainant. Thereby the accused has committed the offence of cheating.

7. It is relevant to note that the police complaint earlier was closed. Thereafter, private complaint was mainly filed for seeking direction under Section 156(3) Cr..C. However, the learned Magistrate treated the petition as private complaint and examined witnesses by the following the procedure under Section 200 Cr.P.C.and finally dismissed the complaint holding that no criminal offence is made out and held that it was only business contract. Even there is breach of contract, it is not criminal breach of trust and it is only a civil breach of contact and similarly non payment of loan is not an offence. Now the learned 5th Additional District and Sessions Court set aside the order mainly on the ground that the statement of the witnesses show that there was a deficit of copper which was also acknowledged by the Respondent. That apart the loan availed by the Petitioner is also misused with no sign of repaying the loan and made the defacto complaint to pay the amount.

8. No doubt when the petition has been filed under Section 156(3) Cr.P.C., the Magistrate has two options. Either to refer the complaint to police for investigation without taking cognizance or to take cognizance by following the procedures under Sections 200 and 202 Cr.P.C. After recording the statement of witnesses if the Magistrate finds that there is no case made out, he would dismiss the complaint under Section 203 Cr.P.C. In the event he finds that there is a prima facie materials, issue of process arising under Section 202 Cr.P.C. Whereas in the given case, the Magistrate has considered the statement of the witnesses and found that no criminal offence is made out. On perusal of the entire sworn statement of the witnesses, though the date of supply and what was the extent of the quantity of supply was stated, the fact that they have spoken about the supply of copper to the petitioners and having received the copper, having undertaken to do the job work to convert as a copper profiling, the Petitioners have not supplied the copper profile in tune with the copper actually supplied. From the statements it can be seen that there was entrustment of the copper from the very beginning and the job was undertaken from the very inception. Whether such entrustment amounts to criminal breach of trust or not or there is any conversion or the accused has dishonestly misappropriated or converted the property to their own use or dishonestly used or disposed of the property has to be seen only in the evidence. But when the sworn statement indicate the entrustment of the copper regularly for conversion and resupply and the supply has not been made and

there was misappropriation, whether such breach of contract was regret of any dishonest intention to attract the penal offence has to be seen only in the trial Court, not at this stage. Though the 5th Additional District and Sessions Court also found that there is a prima facie materials to proceed against the accused under Section 420 IPC, on perusal of the entire statement, this Court is of the view that to attract the offence under Section 420 Ipc there is no material available on record. The statement of witnesses do not show that there was deception played by the accused from the very inception. The only allegation is made that the loan amount has not been repaid, whereas in the defacto complainant stood as a guarantor and they have paid the amount.

9. It is relevant to note that sworn statement do not show that the accused dishonestly induced or deceived the defacto complainant to stand as a guarantor. Such being the position, merely because the defacto complainant stood as guarantor in a separate bank transaction, which was defaulted by the borrower. Such conduct do not constitute a criminal offence so as to attract the offence under Section 420 IPC. The only grievance appears to be with the defacto complainant is for the action taken against them by the bank officials under SARFAESI Act for which they have also paid some amount. When the surety has paid the amount, he has his right to recover the amount paid from the principal debtor is very much there under law. Such being the position, the offence under Section 420 IPC will not be attracted in this case.

10. Further, sworn statement also show that properties were purchased by the defacto complainant from the accused. Such being the position, the offence under Section 420 IPC, certainly will not be attracted in this case. However, taking note of the allegation of entrustment of copper, learned trial Court has to find whether there is any dishonest act on the part of the accused to misappropriate the property so as to attract the offence of criminal breach of trust. It is also stated by the learned Senior Counsel for the Petitioner that the complaint is off-suit of the earlier complaint filed against the defacto complainant, which is also taken cognizance by the lower court. These facts also can be gone into trial. Trial Court take note of the previous complaint and prosecution lodged against the defacto complainant by accused while appreciating the facts.

11. Accordingly, the Criminal Original Petition is partly allowed. The Order of the learned 5th Additional District and Sessions Court, Coimbatore, holding that there is a prima facie materials for the offence under Section 420 of IPC is set aside. However, remaining order as to the prima facie finding with

regard to criminal breach of trust, under section 409 of IPC is upheld. Learned trial Magistrate shall issue process only for the offence of criminal breach of trust and taking note of the nature of the allegations and the nature of the breach in the business transaction, the personal appearance of the accused are dispensed with, except for receiving copies and answering the charges and examining under Section 313 Cr.P.C.and any other day that may be fixed by the trial Court. The registry is directed to return all the original documents of lower court forthwith.

12. In the result, the Criminal Original Petition is partly allowed. Taking cognizance for the offence under Section 420 of IPC is set aside and prima facie finding with regard to criminal breach of trust, under Section 409 of IPC is upheld. Consequently connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

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To

1. The V Additional District and Sessions Judge,
   Coimbatore.

2. The Judicial Magistrate – I,
   Coimbatore.

3. -do- through The Chief Judicial Magistrate,
   Coimbatore.

4. The Public Prosecutor,
   Coimbatore.

5. The Public Prosecutor,
   High Court, Madras.

+1cc to M/s.M.R.Sivakumar, Advocate, S.R.No.6982

Crl.O.P.No.3357 of 2017
and Crl.M.P.Nos.9041 and 2437 of 2017

PL(CO)
RLP(17/02/2022)