IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Crl.O.P.No.26254 of 2017
and
Crl.M.P.No.15122 of 2017

Pinku @ Dharmendra Bafna . . . Petitioner

Versus

1. The Inspector of Police,
   Crime Branch - CID,
   Chennai-600 002.

2. Krishna Lal . . . Respondents

[2nd respondent impleaded as per order of this Court dated 28.01.2019 in Crl.M.P.No.1285/2018 in Crl.O.P.No.26254 of 2017]

PRAYER : Criminal Original Petition filed under Section 482 r/w 483 of Cr.P.C., to set aside the order dated 22.08.2017 in Crl.R.C.No.36 of 2015, passed by the I Additional City Civil Court, Chennai against Crl.M.P.No.5063 of 2014 and discharge the petitioner from the case pending trial in C.C.No.734 of 2011 on the file of the learned XI Metropolitan Magistrate, Chennai.

For Petitioner: Mr.P.Wilson
Senior Counsel for
M/s.Surana and Surana

For Respondents: Mr.R.Kishore Kumar
Government Advocate (Crl.Side) for R1

: Mr.K.P.Anantha Krishna for R2

O R D E R

(This case has been heard through video conference)

This Criminal Original Petition has been filed to set aside the order dated 22.08.2017 in Crl.R.C.No.36 of 2015 passed by the I Additional Judge, City Civil Court, Chennai against Crl.M.P.No.5083 of 2014 and discharge the petitioner from the case pending trial in C.C.No.734 of 2011 before the learned XI Metropolitan Magistrate, Chennai.

2. The crux of the allegation in the final report filed against the petitioner and the other accused, who were arrayed as A1 and A2 is that the respondent/de facto complainant has invested a sum of Rs.4.65 Crores through the petitioner at the instigation of A1 between 06.10.2005 and 17.11.2005 towards gold and silver on-line trading. The invested amount and profits derived were not returned to the de facto complainant and the said amount has been misappropriated by the accused persons. The final report was proceeded as against both the accused/A1 and A2, since they have conspired together and committed the offence under Sections 406, 420 and 120-B IPC. Challenging the final report, the accused filed the petitions in Crl.O.P.No.51 of 2010 and Crl.O.P.No.780 of 2010 before this Court to quash the final report in C.C.No.13970 of 2007. This Court by an order dated 04.04.2013 dismissed the quash petition as against the petitioner herein/A2, however, allowed the petition filed by A1. While dismissing the petition in Crl.O.P.No.780 of 2010 filed by this petitioner, this Court has observed that a prima facie case exists against the petitioner/A2. Challenging the said order, the petitioner/A2 filed an appeal before the Hon'ble Apex Court in Special Leave Petition in S.L.A(Crl.) No.7403 of 2013 and the same was dismissed vide order dated 01.05.2014. While dismissing the appeal, the Apex Court has observed that if the petitioner files an application for discharge, it may be considered expeditiously, independently and without being influenced by the observation made by the High Court in the impugned order dated 04.04.2013.

3.It is also relevant to note that not satisfied with the final report, the de facto complainant sought for further investigation before the trial Court in Crl.M.P.No.11979 of 2007, which was allowed by the trial Court. Challenging the said order, the petitioner filed Crl.R.C.No.245 of 2008 before this Court. This Court, by its order dated 13.03.2003, set aside the order of the trial Court. The said order of this Court was affirmed by the Hon'ble Apex Court by dismissing S.L.P.Crl.A.No.1283 of 2009 reported in 2009 (7) SCC 685 preferred by the de facto complainant.

4.Hence, the final report proceeded on the basis of the original complaint. After dismissal of S.L.P to Appeal(Crl.) No.7403 of 2013 filed against the order of the High Court declining to quash the proceedings against the present petitioner, a discharge petition has been filed before the trial Court. The trial Court by its order dated 27.04.2015 in Crl.M.P.No.5063 of 2014 has dismissed the discharge petition holding that there are prima facie materials available on record collected by the prosecution side against the petitioner. Aggrieved over the same, a Criminal Revision Petition was filed before the I Additional City Civil Court, Chennai in Crl.R.C.No.36 of 2015. The Revisional Court has also confirmed the order of the learned Judicial Magistrate holding that there is no infirmity or illegality in the order of the trial Court and that there are sufficient materials to proceed against the petitioner. Challenging the above order, the present petition has been filed under Section 482 Cr.P.C, as the second revision is barred under law.

5.The learned Senior Counsel appearing for the petitioner submitted that merely, because the second revision is not permissible under law, the petition under Section 482 Cr.P.C. is very well maintainable and the Court can exercise its jurisdiction. In support of his contention, the learned Senior Counsel relied on the judgment of the Hon'ble Apex Court in Dhariwal, Tobacco Products Limited and Others Vs. State of Maharashtra and Another reported in (2009) 2 SCC 370, wherein, the Apex Court has stated that even the second revision is dismissed before the High Court and it is barred under Section 397(2) Cr.P.C, the inherent power of the Court has been held to be available. The main contention of the learned Senior Counsel appearing for the petitioner is that this Court has quashed the proceedings as against A1, against whom similar allegations were made to attract the offence under Sections 420 and 406 IPC, on the reason that there are no materials available on the prosecution side. The very statement of the de facto complainant recorded under Section 161 Cr.P.C and the statements of other witnesses show that the amount was invested only in the trade by the de facto complainant and he has invested the same in the multi option trade and purchased the gold. In such trade, he gained profits and the present complaint has been preferred only towards part of the transaction which went into loss. A suit has also been filed for recovery of money. Therefore, his contention is that when the amount was invested and handed over for the business purpose, at no stretch of imagination such entrustment would constitute an offence of criminal breach of trust. Similarly, there is no deception on the part of the accused to invest the amount in the business of trade. The materials collected by the prosecution itself indicate that the offence has not been made out. He has also submitted that the charge under Sections 406 and 420 IPC are mutually exclusive. Hence, he submitted that the Court below has not considered the facts properly and simply dismissed the revision petition. Therefore, he has submitted that the Court while exercising powers under Section 482 Cr.P.C, could look into the materials and discharge the accused. In support of his submissions, he has also placed reliance on the following judgments:

1.State of Madhya Pradesh Vs. S.B.Johari and Others reported in (2000) 2 Supreme Court Cases 57.

2.J.Duraimunusamy Vs. State of Madras reported in MANU/TN/1320/2011.

3.Amish Devgan Vs. Union of India and Others reported in (2021) 1 Supreme Court Cases 1.

6. The learned counsel appearing for the 2nd respondent submitted that similar arguments have been made in the quash petition which reached its finality. Therefore, under the pretext of the revision, the same ground is being urged before this Court, which is impermissible.

7.In any event, his contention is that for framing the charges what is required is not a proof beyond reasonable doubts, but mere suspicion is enough to proceed against the charges. Hence, the learned counsel for the 2nd respondent submitted that as the Court has already negatived similar sets of allegations and dismissed the quash petition, the same cannot be urged once again on the ground that the revision can be challenged under Section 482 Cr.P.C. He further submitted that both the Courts below found prima facie materials to proceed against the accused. His further contention is that the documents unearthed during investigation has also been subjected to forensic expert examination. The signature of the accused was also found tallied wherein, he has shown profits in the books maintained by him. Therefore, he has to explain how he has invested, what amount he has received as profits and whether such amounts have been given to the accused or not. Hence, this petition is not maintainable and hence, the same is liable to be dismissed.

8. In support of his contention, the learned counsel also relied upon the judgments of the Hon'ble Apex Court in the case of Anil Rishi Vs. Gurbaksh Singh reported in (2006) 5 SCC 558 and the case of State of Himachal Pradesh Vs. Karanvir reported in (2006) 5 SCC 381.

9.Though the present petition has been filed under Section 482 Cr.P.C., to invoke the inherent powers of this Court, the order under challenge in this petition is only the order passed by both the Courts below in refusing to discharge the petitioner from the offence. Therefore, this Court can exercise its inherent powers under Section 482 Cr.P.C, to prevent the abuse of process of law. When the order in revision was sought to be challenged under Section 482 Cr.P.C., the Court cannot go beyond the provisions relating to discharge of the accused.

10.The main contention of the learned Senior Counsel Mr.P.Wilson is that the very statement of the accused itself shows that there was no deception on the part of the accused and the amount has been invested in the trade, involving buying and selling of gold. Further, his sworn statements also show that there are profits derived by him and the nature of the business is a fluctuating one and loss also can occur. In such a view of the matter, merely because the amount that was invested has not been returned due to the loss in the business, such action cannot be construed as an offence of cheating or entrustment. It is relevant to note that while disposing the quash petition filed on the earlier occasion before this Court, the contention was not only confined to the final report but also to the other materials like civil suit and the petition filed for further investigation etc. After considering the entire materials, this Court allowed the petition in favour of the first accused finding that there exists prima facie materials against the second accused namely, the petitioner herein and the matter has reached its finality as referred supra.

11.It is to be noted that for discharging the accused from the offence what is required to be seen that whether the materials collected by the prosecution is sufficient to proceed against the accused and if there are no materials available to proceed further, then the discharge is automatic. It is also well settled that to consider the discharge petition, the Court is bound to look into the materials collected by the prosecution agency alone. Even if the Court finds suspicion from the available materials, the Court can very well decline to discharge the accused at final stage and proceed with the matter.

12.Mere framing of the charges against the accused is not lead to the inference that the accused has committed the offence. Whether it is a mere business transaction or such loss occurred in the business transaction would attract any offence of cheating or not has to be seen only in the trial. Whether the intention to cheat or deceive is present from the beginning or not is a matter of evidence. The statement of the de facto complainant indicates that he had invested the amount only at the inducement of good profits shown by the accused. Therefore, he has invested the money. It is relevant to note that whether such inducement amounts to deception or not has to be seen by the trial Court, after appreciating the evidence. This Court has already declined the relief of quashing the final report as against the petitioner herein. At this stage this Court, once again cannot conduct a roving enquiry merely because the dispute appears to be Civil in nature. The same is not a ground to discharge the petitioner particularly when the orders of the Court is already starring at the petitioner herein/A2. At the same time it is the duty of the trial Court to appreciate the evidence to find out whether the investment made in the business is for gaining profits or not. Similarly, the trial Court also taken note of the fact that the charges under Sections 406 and 420 IPC are mutually exclusive. In this regard, it is useful to rely upon the judgment of the Hon'ble Apex Court in the case of B.Suresh Yadev V.Sharifa Bee and Another reported in (2007) 13 SCC 107, wherein the Court taking note of the fact that for constituting the offence under Sections 406 and 420 IPC the main element is trust, in which the de facto complainant reposes on the accused, whereas for the offence of cheating, it is not necessary to prove the existence of trust on the part of the victim and the accused. The main element required is an intention to deceive from the inception. Therefore, while framing the charges the Court has to consider whether Sections 406 and 420 IPC mutually exclusive or not. There are several judgments to the effect that the Civil dispute cannot be given a color of criminal case. Admittedly, there is no dispute over the above proposition of law.

13.In the given case, while dealing with this petition under Section 482 Cr.P.C., for discharge of the accused, which is in the nature of a revision, as already indicated, what is required to be seen is only the prima facie materials and not the proof which constitutes an offence. On perusal of the statements of the de facto complainant wherein, he has stated about the inducement made by the petitioner for such investment, whether such statement would attract offence under 420 IPC or not has to be seen only on the basis of evidence before the trial Court. Therefore, considering the prima facie materials, particularly the other documents where the entries said to have been made by the de facto complainant showing profits, this Court while exercising power under Section 482 Cr.P.C, is of the view that as Courts below have found prima facie materials to proceed further with the case, cannot re-appreciate the entire materials.

14.In such view of the matter, I do not find any merits in this petition. The learned Magistrate, while appreciating the evidence, has to consider the overall evidence and also the materials placed before it as per Section 3 of Evidence Act, 1872. The world matter does not confine only to the evidence, but also to take within its fold presumption or inferences etc., to arrive at the conclusion as to whether particular fact is proved or not.

15.Accordingly, this Criminal Original Petition is disposed of. Consequently, connected Criminal Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

ms/psa

To

1. The I Additional City Civil Court,
   Chennai.

2. The XI Metropolitan Magistrate,
   Chennai.

3. The The Inspector of Police,
   Crime Branch - CID,
   Chennai-600 002.

4. The Public Prosecutor,
   High Court, Madras-600104.

+2ccs to M/s.Surana & Surana, Advocate, S.R.No.6354

+1cc to Mr.K.P.Anantha Krishnan, Advocate, S.R.No.6942

Crl.O.P.No.26254 of 2017
and
Crl.M.P.No.15122 of 2017

PM(CO)
SU(10/03/2022)