BEFORE THE MADURAI BENGH OF MADRAS HIGH COURT
RESERVED ON : 12.04.2022
PRONOUNCED ON : 19.04.2022
CORAM
THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN
Crl.O.P.(MD)No.1759 of 2021
and
Crl.M.P(MD)No.854 of 2021

S.P.Sivalingam ... Petitioner

Vs.

1.The State represented by,
The Inspector of Police,
City Crime Branch,
Trichy City.
(Crime No.40 of 2018). ... 1st Respondent/Complainant

2.B.Sivakumar ...2nd Respondent/Defacto complainant

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records relating to the complaint in C.C.No.825 of 2020 on the file of the learned Judicial Magistrate No.IV, Trichy West in Crime No.40 of 2018 on the file of the first respondent and quash the same.

For Petitioner	:	Mr.Ajmal Khan Senior Counsel for Ms.AL.Ganthimathi
For R - 1	:	Mr.B.Thanga Aravindh Government Advocate (Crl. Side)
For R - 2	:	Mr.Vijayamoorthy Vellaichamy for Mr.K.Sivabalan

ORDER

This Criminal Original Petition has been filed to quash the proceedings in C.C.No.825 of 2020 on the file of the learned Judicial Magistrate No.IV, Trichy West in Crime No.40 of 2018 on the file of the first respondent as against the petitioner.

2.The petitioner is the sole accused. On the complaint lodged by the second respondent, the first respondent registered the F.I.R in Crime No.40 of 2018 for the offences under Sections 420, 406 and 506(i) of I.P.C.

3.The case of the prosecution is that the petitioner had landed property situated in Plot No.64 in North side in S.Nos.54/2, 54/3 to an extent of 1676 Sq.fts and in very same survey numbers in very same plot number in Southern side to an extent of 1665 Sq.fts totalling 3341 Sq.fts. The petitioner approached the defacto complainant/2nd respondent through one Kathirvel for constructing apartment having 8 houses in 4 floors and having 2 houses each in a floor with a condition that all the expenses related to the constructions would borne by the second respondent and he has to construct the apartments having car parking facilities and other amenities. The petitioner and the second respondent had entered into a joint venture agreement on 21.03.2014. In the said agreement, the profit would be shared as 51% to the petitioner and 49% to the second respondent. On the very same day, the petitioner received Rs.10,00,000/- as advance from the second respondent and it is agreeable by the petitioner that he would return the said advance amount, after the construction is over. But so far the amount was not returned to the second respondent.

4.The petitioner further received Rs.5,00,000/- from the second respondent by saying that he would get the planning permission from the Trichy City Corporation for construction in the name of the second respondent. Thereafter, the petitioner had given a building plan to the second respondent. The second respondent had started to erect the apartment in the name of Sivalaya Apartments from May, 2014. After three months, the second respondent approached the petitioner for the approved building plan permission in order to get the NOC from the Ramalinga Nagar Housing Board Co-operative Society. At that time, the petitioner had given the building plan approval which obtained earlier prior to the joint venture agreement (05.01.2013). In the said building plan permission it has been stated that the construction of building should be completed within 12.12.2015. Originally, in the joint venture agreement, the duration for the completion of apartments in 18 months. At this juncture, on November, 2014 the electricity connection was disconnected by the TNEB Authorities by saying that the connection was not obtained under the proper category, which was intimated to the petitioner, for which the petitioner replied that he would bear the expenses for getting the electricity connections in future. Hence, the petitioner obtained the electricity connection by paying Rs.12,000/-. He again started the work only on January, 2015.

5.The second respondent started the constructions work and he had finished 75% of the constructions work. It is agreed that the second respondent can enter into an agreement with the proposed purchaser and the petitioner ought to have registered the sale deeds in favour of the proposed purchaser. Likewise, one S.Sivakumar and one Helen entered into an agreement with the second respondent for the plots in the said apartments. When the second respondent approached the petitioner for registering the sale deeds, the petitioner threatened the second respondent by saying that he would give only Rs.10,00,000/-.

6.After lodging the complaint, the Engineer has given the estimate that he had spent Rs.92,34,055/- for the construction of building and further the second respondent had spent further expenses to the tune of Rs.37,30,449/- for the same building and further Rs.10,00,000/- which was given during the agreement was also not paid by the petitioner, hence totally the expenses comes around Rs.1,44,54,504/-. The second respondent filed a Writ Petition before this Court in W.P(MD)No.4144 of 2018 for valuing the disputed property and pursuant to the direction issued by the Chief Engineer, P.W.D., Chennai, the P.W.D Engineer also made the estimate that the expenses would comes around Rs.90,40,372/-.

7.On 09.03.2017 at about 10.00 a.m., the second respondent along with other witnesses went to the petitioner's home in order to settle the issues between themselves, but the petitioner criminally intimidated the second respondent, hence, he preferred a complaint before the Uraiyur Police Station, due to in action on the part of the Woraiyur Police Station, the learned Judicial Magistrate No.IV, Trichy under Section 161(3) of Cr.P.C, the complaint given by the second respondent was forwarded in Crime No.1025 of 2017 under Sections 420, 406 and 506(i) of IPC and pursuant to the direction issued by the superior officials, on 06.10.2018 again the case was transferred to the file of the first respondent in Crime No.40 of 2018 for the offences under Sections 420, 406 and 506(i) of IPC.

8.The learned Senior Counsel appearing for the petitioner would submit that the entire dispute lodged by the second respondent is purely civil in nature and the entire charge is nothing but has given criminal colour. Even assuming that the allegations are true, it does not specify the necessary ingredients to attract the offences, as alleged by the prosecution. The petitioner and the second respondent had entered into a joint venture agreement dated 21.03.2014. The petitioner is the owner of the subject property, in which the petitioner is entitled to have 51% of share and the second respondent is entitled to have 49% of share. As per Clause 21 of the joint venture agreement, if there is any dispute with regard to joint venture agreement, the same may be resolved by the Arbitrator. Therefore, the present charge cannot be sustained as against the petitioner since all the entire allegations are business transaction. As per the joint venture agreement, the second respondent was supposed to complete the project by 29.09.2015. However, on that date only 20% of the work was completed by the second respondent. Due to which, several communications and negotiations happened between the petitioner and the second respondent. All of which failed since both sides were unable to agree on a solution as the second respondent contrary to the claim of Rs.1,45,00,000/- in this criminal proceeding was maliciously demanding huge amounts of money ranging to Rs.2,50,00,000/- from the petitioner for the incomplete and poor construction work. Therefore, the petitioner had terminated the joint venture agreement as early as on 27.11.2015 itself. Even then, the second respondent had unauthorisedly and hastily proceeded with the construction of the building without any valid agreement. In order to avoid the civil liability, the second respondent in fact filed so many caveats before the civil Courts and the same have been renewed continuously. After a period of two years from the date of the dispute, the second respondent lodged the present complaint as if the petitioner has committed the offences under Sections 406 and 420 of I.P.C. No charge under Section 406 of I.P.C can be made out as against the petitioner for the reasons that there is absolutely no entrustment of property to the petitioner herein nor has the defacto complainant given dominion of his property to the petitioner. In fact, the petitioner handed over the subject property to the second respondent who has in turn put up construction on the said property and had everything in his possession. When there is no entrustment, there can be no misappropriation, dishonest use or disposal of any property. Likewise, no charge under Section 420 of I.P.C is made out as against the petitioner since the very same incident cannot give rise to a charge for the offences under Sections 406 and 420 of I.P.C parallely as the same would be contradictory in the eye of law.

9.Per contra, the learned counsel appearing for the second respondent would submit that the second respondent is doing construction business. The petitioner was introduced by his friend and he requested the defacto complainant to build a apartment having 8 flats in his land admeasuring 3341 square feet by way of joint venture by giving four flats in favour of the second respondent as a builder, the second respondent has to bear the whole construction costs and the remaining four flats are allotted in favour of the petitioner. Accordingly, on 21.03.2014, they entered into joint venture agreement. Thereby, the second respondent paid a sum of Rs.10,00,000/- as refundable deposit. In fact, the petitioner showed the plan which was not attested by the Government officials. The second respondent paid a sum of Rs.5,00,000/- for building plan approval charges. However, the second respondent noted that the building plan was issued prior to the joint venture agreement namely on 05.01.2013 and it was lapsed on 12.12.2015 itself. Therefore, the second respondent should have completed the construction work on or before 12.12.2015. It was assured that it would be extended for further period of 18 months. Accordingly, the second respondent started construction work and in November, 2014, the Tamil Nadu Electricity Board inspected the construction spot and disconnected the electricity connection for the reason that the connection was given for the wrong tariff. Therefore, the second respondent was not able to continue the work. Further, the petitioner had assured to allot four plots and agreed to register the sale deed in favour of the persons who were pointed out by the second respondent herein. Accordingly, the second respondent received advance to sell the flats and also made arrangements to register flats in their favour. However, the petitioner stopped the construction and as such, the petitioner committed offences and all the charges are clearly attracted as against the petitioner and the grounds raised by the petitioner cannot be looked into in the quash petition.

10.Heard the learned counsel appearing for the petitioner, the learned Government Advocate (Criminal Side) appearing for the first respondent and the learned counsel appearing for the second respondent and perused the materials available on record.

11.Admittedly, the petitioner and the second respondent have entered into a joint venture agreement, dated 21.03.2014 and accordingly, the profit would be shared as 51% to the petitioner and 49% to the second respondent. On the very same day, the petitioner received a sum of Rs.10,00,000/- as an advance from the second respondent and it was agreed by the petitioner that he would return the amount, after the completion of the construction work. The second respondent had started to erect the apartment in the name of Sivalaya Apartments in the month of May, 2014. After three months, the second respondent approached the petitioner for the approved building plan permission in order to get the NOC from the Ramalinga Nagar Housing Board Co-operative Society. It was obtained prior to the joint venture agreement and accordingly, the construction should be completed on or before 12.12.2015. In the month of November, 2014, electricity service connection was disconnected by the Tamil Nadu Electricity Board authorities for the reason that the connection was not obtained under the proper category. After completion of construction to the level of 75% as agreed by the petitioner, he has to register the agreement with the proposed purchaser and ought to have registered the sale deed in favour of the proposed purchaser. However, the petitioner failed to execute any agreement or sale deed in favour of the proposed purchasers. Therefore, the second respondent lodged the complaint.

12.In the joint venture agreement, dated 21.03.2014, clause No.21 reads as follows:-

> “21.இந்த ஒப்பந்தத்தை நிறைவேற்றி முடிப்பதிலும், இந்த ஒப்பந்தத்தில் கண்டுள்ள சில வாசகங்கள் தவறாக அர்த்தம் கொள்ளப்பட்டு அதன் காரணமாக நாம் இரண்டு பார்ட்டிகளுக்கும் கருத்து வேற்றுமை ஏற்பட்டால் நாம் இரண்டு பார்ட்டிகளுக்கும் வேண்டியப்பட்ட மத்தியஸ்தர்களை கொண்டு பேசித்தீர்த்துக் கொள்ள நாம் இரண்டு பார்ட்டிகளும் இதன் மூலம் ஒப்புக்கொள்கிறோம்.”

Accordingly, there is an arbitration clause for any dispute between the petitioner and the second respondent with regard to construction.

13.On a perusal of the entire complaint, the dispute between the petitioner and the second respondent related to completion of construction and execution of sale deed. Admittedly, the entire construction has not been completed and due to various issues, the petitioner terminated the joint venture agreement entered between them. All the allegations are related to business transaction in respect of construction of apartments as per the joint venture agreement dated 21.03.2014. However, on the complaint lodged by the second respondent, now the first respondent completed the investigation and filed a final report and the same has been taken cognizance in C.C.No.825 of 2020for the offences under Section 406, 420, 294(b) and 506(i) of I.P.C as against the petitioner.

14.Though the matter has been referred before the Mediation and Conciliation Centre attached to this Court for amicable settlement between the parties, the parties have failed to settle the issues. Further, though the joint venture agreement was terminated, the possession of the property is still with the second respondent. Now, it has to be seen that whether the prosecution bring the charges to home or not.

15.Admittedly, the petitioner obtained planning permission and entered into a joint venture agreement to construct the building in the subject property with the second respondent. As per the agreement, the second respondent paid a sum of Rs.10,00,000/- to the petitioner and started construction. While construction was under progress, there was issues between them in respect of the period of planning permission and the electricity service connection. Thereafter, the petitioner refused to execute any agreement for sale / sale deed in favour of the proposed purchasers of the second respondent due to various reasons. Therefore, all the issues are related to construction of apartments and as per the joint venture agreement, there is a specific clause to solve the issues before the arbitrator. The distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. Applying this dictum laid down by the Honourable Supreme Court of India held in catena of cases, to the present case where the key ingredient of having a dishonest or fraudulent intent under Sections 405, 419 and 420 is not made out.

16.Further, the Honourable Supreme Court of India in the case of ***M/s. Indian Oil Corporation Vs. NEPC India Limited and others [(2006) 6 SCC 736]***, held that the civil liability cannot be converted into criminal liability and held as under "while on this issue, it is necessary to take notice of a growing tendency in business circle to convert purely civil dispute in criminal case. This is obviously on account of prevalent impression that civil law remedies are time consuming and do not adequately protect the interest of lender/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claim which do not involve any criminal offence by applying pressure through criminal prosecution should be deprecated and discouraged".

17.In order to ascertain the veracity and contentions made by the parties herein, it is imperative to examine whether the relevant ingredients of offences in which the petitioner herein was facing with are *prima facie* made out. The relevant provisions of Sections 405, 406 and 420 of I.P.C read as follows:-

> "405. Criminal breach of trust—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".
>
> [Explanation [1].—A person, being an employer [of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]
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> [Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

406. Punishment for criminal breach of trust— Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property— Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

18.It is also relevant to rely upon the land mark Judgment of the Honourable Supreme Court of India in the case of ***State of Haryana and others Vs. Bhajanlal and others*** reported in ***1992 Supp (1) SCC 335***, in which, the Honourable Supreme Court of India has laid down the following categories of instances wherein inherent powers can be exercised in order to secure the ends of justice as follows:-

"*(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;*

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a

just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

Applying the above dictum to the present case, it can be concluded that the present case falls within the ambit of first, third and fifth category of the seven categories enlisted in the above said Judgment. It is nothing but there has been attempt to stretch the contours of a civil dispute and thereby essentially impart a criminal colour to it.

19.To attract the provision under Section 294(b) of I.P.C is concerned, the essential ingredient is an obscene act must have been done in a public place or the act or song or ballad or words were obscene and the acts were done by the accused causing annoyance to others. Here in this case, where the alleged occurrence taken place had not caused annoyance to others. In this regard, it is relevant to extract the provision under Section 294(b) of IPC, which reads as under:

"*294. Obscene acts and songs —Whoever, to the annoyance of others—*
(a) does any obscene act in any public place, or
(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

Admittedly, Section 294(b) of I.P.C is not attracted as against the petitioner.

20.It is relevant to rely upon the judgment of this Court reported in ***1996(1) CTC 470*** in the case of ***K.Jeyaramanuju Vs. Janakaraj & anr.,*** which held as follows :-

"To prove the offence under Section 294 of IPC mere utterance of obscence words are not

sufficient but there must be a further proof to establish that it was to the annoyance of others, which is lacking in the case."

The above judgment is squarely applicable to the present case and the allegations are frivolous in nature and the petitioner need not go for ordeal of trial.

21.Insofar as the offence under Section 506(i) of I.P.C is concerned, to attract the offence, threat and intention to cause an alarm are main ingredients. The third ingredient is that the intention must be to cause any person to do any act which he is not legally bound to do or to omit to do any act which that person is legally entitled to do, subsequent to the main ingredients. Whereas in the case on hand, there is no ingredient to attract the offence as against the petitioner.

22.In this regard, It is relevant to rely upon the judgment of this Court in ***Crl.O.P.(MD)No.11030 of 2014 (Abdul Agis Vs. State through the Inspector of Police***), which reads as follows:-

> "7.*It is seen from the statements recorded under Section 161(3) of Cr.P.C. of the second respondent/ defacto complainant that it does not contain any obscene words, which were uttered by the petitioner herein and the entire allegations are very simple in nature. It is also seen from the statement of one Uthami, that the petitioner threatened the defacto complainant with dire consequences when he dashed the defacto complainant. The entire allegations are trivial in nature. Further, to attract the offence under Section 506(i) of I.P.C., there was a threatening only by words. As pointed by the learned counsel appearing for the petitioner, the threat should be a real one and not just a mere word when the petition uttering does not exactly mean what he says and also when the person to whom threat is launched does not feel threatened actually. Therefore, the offences under Sections 294(b) and 506(i) of I.P.C. are not made out as against the petitioner herein and also the entire criminal proceedings is clear an abuse of process of Court. Therefore, this Court is inclined to quash the entire proceedings."*

23.In view of the above, this Court has no hesitation to invoke the jurisdiction under Section 482 of Cr.P.C to quash the proceedings. Accordingly, the proceedings in C.C.No.825 of 2020 on the file of the learned Judicial Magistrate No.IV, Trichy West is quashed and this Criminal Original Petition stands allowed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

ps

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Judicial Magistrate No.IV,
Trichy West.

2.The Inspector of Police,
City Crime Branch,
Trichy City.

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

COPY TO:-

The Section Officer,
Criminal Section, (Records)
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.K. SIVABALAN, Advocate (SR-19190[F] dated 19/04/2022)

+1 CC to M/s.AL. GANTHIMATHI, Advocate (SR-19812[F] dated 20/04/2022)

Order made in
Crl.O.P(MD)No.1759 of 2021
19.04.2022

SG(CO)
GC(05.05.2022) 11P 8C