



CrI.A.No.315 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18 .08.2023

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Judgment Reserved On 04.01.2023	Judgment Pronounced On 18.08.2023
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CrI.A.No.315 of 2014

C.V.Thambidurai

... Appellant/Complainant

Vs.

1.A.Natarajan

2.A.Gopalraj

3.V.Saraswathi

... Respondents/A1 to A3

PRAYER: Criminal Appeal is filed under Section 378(4) of Cr.P.C., to call for the records in C.C.No.630 of 2007, and set aside the judgment of acquittal passed by the learned Judicial Magistrate No.VII, Coimbatore, dated 28.10.2013.

For Appellant : Mr.C.Arunkumar
for Mr.S.Gopinath

For Respondents : Mr.A.Ashwin Kumar
Legal Aid Counsel



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JUDGMENT

This Criminal Appeal is arising out of acquittal of the respondents/Accused Nos.1 to 3 passed by the learned Judicial Magistrate No.VII, Coimbatore, in C.C.No.630 of 2007, dated 28.10.2013.

2. For the sake of convenience, the appellant and the respondents are referred to as 'complainant' and 'accused', respectively.

3. The brief facts of the case, as projected by the prosecution, are as follows:

(i) Accused Nos.1 to 3 and one N.Pachiammal and S.Palaniammal/Accused Nos.4 and 5 are the owners of the land comprised in S.F.No.834/1, to an extent of 14.90 Acres, situated at Chettipalayam Village. All the accused agreed to sell the property to the complainant for a sale consideration of Rs.2,23,500/-. On 06.07.1992 all the accused executed an agreement for sale after receiving advance amount of Rs.15,000/-. Ex.P.1 is the Agreement for Sale. Thereafter, the complainant had paid balance sale consideration on various dates. Ex.P.7 series are the Receipts. After



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receiving the entire amount, on 09.03.1994, all the accused issued Ex.P.2

Receipt and executed a Power of Attorney in favour of the complainant with respect to the above said property. Ex.P.3 is the Power of Attorney. Thereafter, the complainant spent huge sum and formed a layout in the property, divided into plots and sold 129 sites to various persons and 54 sites were remaining for sale.

(ii) In the meanwhile, all the accused cancelled the Power of Attorney, through a registered cancellation deed, dated 16.03.2007. Ex.P.6 is the Cancellation Deed. Thereafter, the accused sent Ex.P.4 Notice to the complainant on 19.03.2007, for which, the complainant sent Ex.P.5 Reply Notice. Exs.P.8 to P.11 are the Balance Sheet of Jay Jay Associates, owned by the complainant, Income Tax Returns and Balance Sheet. All the accused after receiving entire sale consideration with an intention to cheat the complainant, cancelled the Power of Attorney.

(iii) During the pendency of trial, the said N.Pachiammal and S.Palaniammal/Accused Nos.4 and 5 died and therefore, charge against them stood abated.



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3. Before the trial Court, on the side of prosecution, P.Ws.1 and 2 were examined and Exs.P.1 to P.11 were marked, no material object was produced. On completion of examination of the witnesses on the side of the prosecution, the accused were questioned under Section 313(1)(b) Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses and they denied them as false. On behalf of the defence, no witness was examined, but Exs.D.1 to D.8 were marked as defence documents.

4. Considering the evidence available on record, the learned Judicial Magistrate No.VII, Coimbatore, by judgment dated 28.10.2013, found the accused not guilty for the offence under Section 420 I.P.C. and acquitted them, as the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Challenging the said judgment of acquittal, the complainant has preferred this appeal.

5. The learned counsel for the complainant submitted that the complainant entered into an agreement for sale with the accused on



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06.07.1992 in respect of a property owned by the accused in Chettipalayam Village, to an extent of 14.90 Acres. The sale consideration was fixed as Rs.2,23,500/- *i.e.*, Rs.15,000/- per Acre and on the day of entering into sale agreement, an advance of Rs.15,000/- was paid to the accused by the complainant. The entire sale consideration was paid in parts on various dates between 08.10.1992 and 27.02.1994. On receipt of entire sale consideration, the accused executed a registered Power of Attorney in the name of the complainant on 09.03.1994 to deal with the property. Thereafter, the complainant made plots on the said land and sold 129 plots by 2007, by executing sale deeds as a Power Agent. All of a sudden, lured by escalating prices on land, the accused made demands for further amount from the complainant, even though there was no due from the complainant. Aggrieved over the inability to procure further sums, the accused with an ulterior motive cancelled the Power of Attorney on 16.03.2007 after 13 years from its execution and issued a notice dated 19.03.2007. The complainant replied to the legal notice through his counsel on 02.04.2007 and the same was not considered, the complainant approached the local Police for registration of a case against the accused on 23.04.2007. As the



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same was refused, a complaint came to be preferred by the complainant against the accused before the learned Judicial Magistrate No.VII, Coimbatore, on 27.04.2007, for suitable action.

6. The learned counsel for the complainant further submitted that the learned Magistrate after recording the sworn statement of the complainant and a witness, dismissed the complaint on 29.06.2007 holding that in spite of having paid the entire sale consideration in 1994, the complainant had not obtained the sale deed in his favour and that the Power of Attorney can be cancelled by the Principals and the said cancellation cannot amount to an offence. Aggrieved over the same, the complainant preferred Crl.R.C.No.1520 of 2007 before this Court. This Court set aside the order of the learned Magistrate and proceeded to hold that *prima facie* criminal intention was seen on the part of the accused. Pursuant to the orders of this Court, the learned Judicial Magistrate No.VII, Coimbatore, took the complaint on file in C.C.No.630 of 2007, vide order dated 07.11.2007. Thereafter, the trial commenced and on the side of the complainant, two witnesses were examined and 11 documents were marked. While so, the



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accused preferred an application under Section 245(2) Cr.P.C. to discharge them from the case. The Trial Court after perusal of documents and evidence on record, came to the conclusion that there were sufficient materials to frame a charge and proceed with the trial against the accused and thus, dismissed the discharge application, vide order dated 13.10.2010. Thereafter, on 06.06.2011, the revision preferred against the dismissal of discharge application by the learned Magistrate came to be dismissed as withdrawn by this Court. Thereafter, P.W.1 and P.W.2 were cross-examined by the accused and 11 documents were marked and eight documents were marked on behalf of the accused as defense exhibits. In order to delay the proceedings, on 29.01.2013, the accused filed an application under Section 91 of Cr.P.C. to summon the Information Officer in the District Registrar Office to produce documents regarding the stamp papers bought by the complainant despite the enquiry having been closed by the District Crime Branch. The said application was dismissed by the learned Magistrate on 11.06.2013. Thereafter, on 28.10.2013, the impugned judgment of acquittal was passed by the learned Judicial Magistrate No.VII, Coimbatore, wherein, the learned Magistrate rendered the acquittal on the



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ground that for the offence of cheating, deception must be at the inception of transaction, which was absent in the present case and thus, no offence under Section 415 I.P.C. was made out.

7. The learned counsel further submitted that on 17.03.2010 one of the accused by name, A.Natarajan preferred a complaint to the District Crime Branch, Coimbatore, against the complainant alleging that the complainant indulged in using fake stamp papers to create sale deeds. Aggrieved over the fact that the complaint was pending without any progress, the accused Natarajan preferred a petition before this Court, vide Crl.O.P.No.15805 of 2010 seeking a direction to the Police authorities to conduct enquiry. This Court, by order dated 15.07.2010, directed the DCB, Coimbatore, to conduct enquiry. Again, on 10.02.2011, the accused Natarajan preferred Crl.O.P.No.2582 of 2011 before this Court seeking to direct the DCB, Coimbatore, to conduct enquiry. In the said Petition, this Court directed the DCB, Coimbatore, to conduct appropriate enquiry and register a case if cognizable offence was made out. Accordingly, the DCB conducted enquiry and filed a report on 19.09.2011 stating that the stamp



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papers, which were alleged to be forged by the complainant, were genuine and thus, no further investigation was required.

8. The learned counsel for the complainant further submitted that even though the facts constitute the requisite ingredients of cheating as contemplated under the Penal Code, the learned Magistrate proceeded on the lines that deception was absent at inception, thereby, misconstruing the import of Section 415 I.P.C. Further, the fact that no sale deed was executed by the accused in favour of the complainant was also relied upon by the learned Magistrate to acquit the accused, which was not warranted in view of the dishonest intention being seen, as the accused retained the sale consideration even after cancellation of the Power of Attorney. Permitting such form of cheating to continue, the same would give rise to multiple scams and thus, the impugned judgment of the learned Magistrate requires re-consideration by this Court.

9. The learned counsel further submitted that the Indian Contract Act, 1872, prescribes that an Agency coupled with interest cannot be revoked unless there is an express contract to that effect and even if such revocation is to be made, then, due notice must have been given to such agent. In this



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case, neither any intimation was given to the Agent/complainant nor any offer was made by the Principals/accused to make good the loss, which would be sustained by the complainant. Further, no attempt was made by the accused to return back the sale consideration received by them to the complainant.

10. The learned counsel further submitted that the principles regarding Agency coupled with interest and its revocation are governed by Sections 202, 203, 204 and 206 of the Indian Contract Act, 1872. Section 202 of the Indian Contract Act, 1872, lays down that an agency coupled with interest is irrevocable. Where the agent has himself an interest in the property, which forms the subject matter of the agency, the agency cannot, in the absence of any express contract, be terminated to the prejudice of such interest. Thus, even on the death of the Principal, an Agency coupled with interest cannot be revoked to the prejudice of the Agent. The nature of Agency can be determined from the terms of contract entered into between the parties. In the present case, the Power of Attorney executed in favour of



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the complainant, permitting him to deal with the property and sell it to third parties. The interest of the Agent in the property is derived from the contemporaneous documents such as, sale agreement and execution of consolidated receipt. The said contention is fortified by the observations of the Hon'ble Apex Court in **Seth Loon Karan Sethiya vs. Ivan E.John** reported in **AIR 1969 SC 73**.

11. The learned counsel further submitted that unilateral cancellation of Power of Attorney is not tenable in view of Section 202 of the Indian Contract Act, 1872 and if a Principal wants to revoke the authority given by him, such revocation must be prior to the exercise of the authority by the Agent prescribed under Section 203 of the Indian Contract Act, 1872, which reads as follows:-

"203. When principal may revoke agent's authority.-

The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal."

12. Further, an Agency which has been acted upon, can never be



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revoked, in reference to the acts already performed by the Agent. Section

204 of the Indian Contract Act, 1872 reads as follows:-

"204. Revocation where authority has been partly exercised.-

The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency."

13. The learned counsel further submitted that if the Principal fails to revoke the authority prior to exercise of such authority by the agent, then, even though subsequent cancellation is permissive, it cannot extend to the acts already performed by the agent on the strength of the power bestowed on him. Further, Section 206 of the Indian Contract Act, 1872 stipulates that there must be due notice to the Agent before such revocation takes place and also any damage incurred to the Agent must be compensated. A perusal of the aforesaid provisions would evince that an Agency coupled with interest is irrevocable, unless suitable compensatory measures are undertaken by the Principal. In the present case on hand, the learned Magistrate proceeded on a misconceived notion that Principals can revoke Power of Attorney whenever they choose to do so, thereby, failing to note the fact that the Agency in the present case was one which was coupled with



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interest. Therefore, the impugned judgment is contra to the principles of the Indian Contract Act, 1872 and thus, the same deserves to be set aside.

14. The learned counsel further submitted that the learned Magistrate misconceived that execution of Power of Attorney was the inception of the transaction, and failed to note that it was only the cancellation, which was the starting point of the transaction. In the present case, the complainant and the accused entered into an agreement for sale in 1992 and sale consideration was fully paid in 1994. Subsequently, a Power of Attorney was entered into in 1994, in lieu of sale deed and by virtue of the Power of Attorney, the complainant had entered into several sale transactions with third parties, who were interested in purchasing the layouts formed by the complainant on the land. In 2006, the accused after learning about the sale of 129 plots, approached the complainant demanding further sum on the land, in view of escalation in prices. When the same was refused by the complainant, the Power of Attorney was cancelled and thereby, cheated the complainant.



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15. The learned counsel further submitted that the subsequent demand of money from the complainant is not mere breach of promise, but acting in violation/contra to the terms of the contract, which ultimately led to the cancellation of the very document itself. The demand of money is the inception in the present case and the conduct of the parties has to be adjudged from that point. In this regard, the learned counsel placed reliance on the judgment in **Kishore Kumar Ganguly vs. State of Chhattisgarh**, decided on 5th March 2011, wherein the Chattisgarh High Court had an occasion to deal with a case with similar set of facts and concluded that the subsequent conduct on the part of the vendors in not executing the sale deed and thereafter, cancelling the Power of Attorney, evinces the intention to cheat the purchaser. Relevant portion of the dictum is extracted hereunder:-

"7. In the present case, as per the complaint, virtually, the applicant has sold the plot to the complainant after receiving full amount of consideration and handed over possession to the complainant. The applicant was seller and nothing was required to be performed on behalf of the purchaser i.e. the complainant for execution of sale deed. The applicant was under legal obligation to obtain necessary permission, if required, and execute sale deed in favour of the complainant, but he has not discharged his legal obligation till 2002. Although the applicant has executed power of attorney in favour of



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*brother-in-law of the complainant who was competent to execute sale deed in favour of his sister-in-law on behalf of the applicant, but the power of attorney holder was not competent to obtain permission from the competent authority. In the year 2002 when the power of attorney holder tried to obtain permission for the applicant from the competent authority, **the applicant has informed the competent authority that he is cancelling the power of attorney executed in favour of brother-in-law of the complainant and in year 2007, the applicant has executed sale deed in favour of third party i.e. Ashok Jadwani.***

.....

*13. **However, the applicant has not discharged any of his legal obligations at any stage and contrary to discharge of such legal obligations virtually, he has restrained his power of attorney holder from executing sale deed and thereafter, he himself has executed sale deed in favour of third person.***

.....

*16. **All these subsequent conducts are prima facie sufficient to indicate that intention of the applicant was fraudulent and dishonest since its inception and in connivance with the subsequent purchaser, he has tried to deprive the complainant and cause damage to the complainant from the property and from its rightful enjoyment. These circumstances clearly satisfy the commission of cheating to the complainant in connivance with the second purchaser, as defined in Section 415 of the IPC punishable under Section 420 of the IPC."***

Applying the aforesaid ratio to the facts of the present case, the dishonest intention of the accused is prevalent from the following factors:



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(a) Receipt of entire sale consideration not denied by the accused.

(b) No effort taken by the accused to return the sale consideration.

(c) Prior intimation not given before cancelling the Power of Attorney.

(d) The accused made an endorsement to the full receipt of money even after two years from the date of agreement. Endorsement on the reverse of the sale agreement and the execution of the Power of Attorney was on the same day, which are concurrent transactions. The endorsement is to the effect that there was no further due from the complainant to the accused.

(e) Demand of further money from the complainant and subsequent to the same, the Power of Attorney was cancelled, which would reflect that the accused were not desirous of fulfilling their obligations.

(f) Cancellation of Power of Attorney after 13 years was due to escalation of prices in land, which shows the criminal intend of the accused. The aforesaid facts would establish that the accused did have an intention to cause wrongful loss to the complainant and the subsequent conduct of the accused clearly confirms the intention of the accused to cheat and therefore,



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the ingredients for the offence of cheating under Section 415 I.P.C. punishable under Section 420 I.P.C. is made out as against the accused.

Thus, the judgment of acquittal passed by the learned Magistrate needs to be re-appreciated and set aside.

16. The learned counsel further submitted that the cancellation of Power of Attorney was done after 13 years. However, the learned Magistrate concluded that the accused did not have an intention to cheat the complainant. This had weighed on the mind of the learned Magistrate heavily to acquit the accused. Further, the accused threatened the complainant and the third party purchasers, which resulted in preferring the present complaint. A loss had been incurred to the complainant due to cancellation of Power of Attorney. Further, the complainant produced the relevant income tax records to prove the payments made to the accused. No explanation from the accused as to why they were still retaining the sale consideration after cancellation of Power of Attorney and no notice was issued to the complainant while cancelling the Power of Attorney. The aforesaid factors would further clinch the stand of the complainant that the accused resorted to dubious methods of cheating. On perusal of the



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judgment, it is discerned that the Magistrate had not appreciated the evidence in its proper perspective and proceeded to acquit the accused on the technical ground. Therefore, the judgment of acquittal passed by the learned Magistrate is erroneous, against law and the evidence on record. Hence, the evidence needs to be re-analyzed and the acquittal so passed be set aside.

17. The learned counsel also submitted that complainant filed O.S.No.69 of 2011 before the III Additional Sub Court, Coimbatore, seeking permanent injunction in respect of the property in question, which was decreed on 25.10.2021.

18. The learned Legal Aid Counsel for the respondents submitted that where a criminal proceeding is manifestly attended with *mala fides* and where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance, the proceedings could be quashed. Therefore, one of the ingredients of cheating as defined in Section 415 of the Penal Code is existence of a fraudulent or dishonest intention of making initial promise or existence thereof from the very beginning of formation of contract. Failure to keep promise subsequently, such a culpable intention right at the



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beginning, cannot be presumed.

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19. The learned counsel further submitted that on the strength of the Power of Attorney executed by the accused, the complainant started to sell the landed properties as several parts to various persons, but he has not informed any particulars or details of those alleged sale deeds executed by him. As per the terms and conditions of the Power of Attorney, the complainant is duty bound to disclose the details of the sale deeds and also liable to give true, genuine and proper accounts by way of rendition of accounts, which is the one of the major conditions in the Power of Attorney and thereby, violated the terms and conditions of the Power of Attorney.

20. The learned counsel further submitted that the complainant entered into an agreement for sale with the accused on 06.07.1992 undertaking to pay the entire sale consideration *i.e.*, Rs.2,23,500/- within a period of nine months, which came to an end on 06.04.1993. On the contrary, he paid substantial portion of the amount *i.e.*, Rs.1,57,250/- after the time limit and the last payment of Rs.51,250/- was made only on 09.03.1994 *i.e.*, after 1 ½ years from the date of agreement and thereby,



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violated the terms and conditions of the said agreement.

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21. The learned counsel further submitted that as per clause 11 of the Power of Attorney dated 08.03.1994, for executing the Power of Attorney, the accused did not receive any consideration from the complainant. He further submitted no witness to the receipt of the aforesaid amount was examined.

22. The learned counsel further submitted that the allegations levelled against the accused do not reveal any dishonest and fraudulent intention to cheat the complainant from the very inception. It is well settled that where the allegations contained in the F.I.R., even if given face value and taken to be correct, do not disclose the commission of criminal offence and it can be only a civil dispute, hence, the proceedings are liable to be quashed.

23. In support of his contentions, the learned counsel relied on the following judgments:-

(a) Bhoom Rajam and another vs. State of A.P. and another



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reported in **2002 SCC Online AP 1492** for the principle that, when the dispute is civil in nature, no criminal offence can be culled out on the strength of the averments found therein.

(b) In the case of **Dalip Kaur and others vs. Jagnar Singh and another** reported in **2009 (14) SCC 696**, the Hon'ble Apex Court had defined, if the dispute between the parties was essentially a civil dispute, resulting from a breach of contract on the part of the appellants therein by non-refunding the amount of advance, the same would not constitute an offence of cheating.

(c) In **T.Chandrasekhar vs. State and another** reported in **2011 SCC Online Mad 396** and **R.Robert Denson vs. State, Rep. By Inspector of Police, Central Crime Branch, Chennai and another** reported in **2014 SCC Online Mad 7235**, this Court had followed the same principle.

Thus, the learned counsel for the respondents submitted that the consistent view of the Hon'ble Apex Court is that deception for cheating must be at the time of inception and breach of contract would not amount to an offence of cheating.

24. The learned counsel also submitted that the alleged conduct if any



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on the part of the respondents amounts to breach of contract and breach of contract simpliciter does not constitute an offence as the act of cheating or criminal breach of trust and is basically more of civil in nature and prayed for dismissal of the Criminal Appeal.

25. I have heard the learned counsel for the complainant and the learned Legal Aid Counsel for the respondents and perused the materials on record.

26. Considering the aforesaid submissions and on perusal of the materials, it is not in dispute that the complainant had approached the respondents to purchase 14.90 Acres of land in S.F.No.834/1, situated at Chettipalayam Village, Coimbatore and negotiated with them. Pursuant to the same, the respondents herein and two others had agreed to sell 14.90 Acres of land to the complainant for consideration. Thereafter, on 06.07.1992 an agreement for sale was executed and payments were made during the years from 1992 – 1994, which were acknowledged by receipts. Thereafter, on 09.03.1994 a Power of Attorney was executed in favour of the complainant. Using the said Power of Attorney, the complainant spent huge sum and formed a layout in the property, divided into Plots and sold



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129 Plots to various persons and 54 Plots were remaining for sale.

Thereafter, on 16.03.2007, the Power of Attorney was unilaterally cancelled by a cancellation deed and after cancellation, notice was issued to the complainant.

27. The case of the complainant is that, he had paid entire sale consideration to the respondents and two others and thereafter only, the Power of Attorney was executed. Using the Power of Attorney, he had developed the property making his own investments and thereafter, due to escalation of land value, the respondents became greedy, made undue demands, which was resisted by the complainant. Hence, in order to create encumbrance and obstacle for the sale of remaining 54 Plots, the respondents cancelled the Power of Attorney, which caused undue loss to him and hence, the respondents committed the offence of cheating.

28. The Trial Court considered the contention of the complainant in detail and on the evidence and material produced, had come to a conclusion that there was no intention by the respondents to defraud or cheat the complainant at the time of executing the Power of Attorney. The entire case rests on the Power of Attorney and cancellation of Power of Attorney,



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which was unilaterally done, utmost it might give a right for the complainant to resist the same citing the provisions of Sections 203, 204 and 206 of the Indian Contract Act, 1872, in a civil proceedings, certainly not by a criminal case.

29. Further, it is seen that the complainant had filed a civil suit in O.S.No.69 of 2011 against the respondents herein and the legal heirs of one N.Petchiammal and S.Palaniammal, before the III Additional Sub Court, Coimbatore, questioning the unilateral cancellation of Power of Attorney. The learned III Additional Sub Judge, Coimbatore, citing the provisions of the Indian Contract Act, 1872, held that the complainant is entitled for permanent injunction, restraining the respondents and others and their men or agents jointly and severally from making any claim over the property or encumbering or creating any document in respect of the said property. Thus, the civil right of the complainant has been upheld and his interest over the said property safeguarded. The Civil Court's finding is that unilateral cancellation of Power of Attorney is not binding on the complainant, which is subject of contract obligations, and the same cannot be automatically



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termed as offence of cheating committed. It is one thing to assess the facts and circumstances of the case for a civil remedy and that the same analogy cannot be construed to be a criminal act.

30. The Trial Court's finding is well reasoned one. In this case, from the admitted facts, it is clear that at the time of inception, there was no deception or any intention to cheat the complainant. The consistent view of the Hon'ble Apex Court as well as this Court as referred to above is that, for an offence of cheating, the deception must be at the stage of inception. In this case, there is no such deception.

31. In view of the above, this Court finds no reason to interfere with the well reasoned judgment of the Trial Court. Hence, this Criminal Appeal is dismissed.

32. Before parting with this case, this Court wishes to place on record its appreciation for the assistance rendered by Mr.A.Ashwin Kumar, learned Legal Aid Counsel for the respondents, who assisted this Court with an



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impressive preparation of the case along with case laws.

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To

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The Judicial Magistrate No.VII,
Coimbatore.



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M.NIRMAL KUMAR, J.

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Pre-delivery Judgment made in

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