IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.10.2023

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.30276 of 2018
and
Crl.M.P.No.17792 of 2018

S.Krishna Kumar ... Petitioner

Vs.

1.State represented by
the Sub-Inspector of Police,
Central Crime Branch, Team – II,
Egmore, Chennai.

2.M.D.Suresh Kumar ... Respondents

Prayer: Criminal Original Petition is filed under Section 482 of the Criminal Procedure Code, to call for the records in C.C.No.5738 of 2018 on the file of the Metropolitan Magistrate for exclusive Trial of CCB cases and CBCID cases, Chennai and quash the same.

For Petitioner : Mr.B.Thilak Narayanan

For Respondents : Mr.L.Baskaran,
Public Prosecutor

O R D E R

This petition has been filed for quashing the proceedings in C.C.No.5738 of2018 on the file of the Metropolitan Magistrate for exclusive trial of CCB cases and CBCID cases, Chennai.

2. The case of the prosecution is that when the second respondent / defecto complainant was looking for a property, the accused A1 and A2 had offered to sell their property admeasuring 32.12 acres situated at Village Bo.53, Perumbakkam Village, Madurantagam Revenue Taluk, Kancheepuram District for the total sale consideration of Rs.1,36,15,000/-. Believing their representation, the second respondent / defecto complainant had entered into an unregistered agreement for sale dated 21.03.2015 and paid a sum of Rs.35,00,000/- as advance consideration. The accused A1 and A2 had agreed to execute the Sale Deed within a period of two months from the date of agreement.

3. Though the second respondent / defacto complainant was ready to pay the balance sale consideration amount, the accused A1 and A2 had refused to execute the same. Later, the second respondent / defecto complainant came to an understanding that the property was already mortgaged with the Bank of Baroda, who in turn had initiated legal proceedings to recover the borrowed amount by

selling the property before the Debt Recovery Tribunal. Hence, the second respondent has filed a complaint dated 01.02.2016 before the first respondent.

4. Initially, the complaint was not taken for consideration and as such, the second respondent had approached this Court by filing a Criminal Original Petition in Crl.O.P.No.15154 of 2017 and as per the direction of this Court by order dated 08.08.2017, the first respondent has registered a case in CCB I, Crime No.314 of 2017 for offences under Sections 420 read with 34 of the Indian Penal Code. After completion of the investigation, the first respondent had filed the final report and the same was taken cognizance by the Trial Court.

5. The specific case of the petitioner is that admittedly, they have entered into an agreement for sale with the second respondent along with his brother viz., A2 for the total sale consideration of Rs.1,36,15,000/- and received a sum of Rs.35,00,000/-, as advance. Insofar as the subject property admeasuring 32.12 acres is concerned, the same was purchased by them in the year 2004 by a registered sale deed from their vendor, who in turn seemed to have borrowed loan from the Bank of Baroda in the year 1993 itself. Thereafter, the vendor has committed default and as such, the subject property was under the proceedings before the Debt Recovery Tribunal. It was suppressed by the vendor and executed

Sale Deed in their favour and therefore, the petitioner is neither the borrower nor mortgaged the property anyway. Immediately after coming to an understanding about the proceedings initiated before the Debt Recovery Tribunal, the accused had challenged the recovery order and subsequently, the Recovery Officer, Debt Recovery Tribunal deferred the sale and upheld the claim in their favour by order dated 18.07.2013. Therefore, the accused A1 and A2 had entered into an unregistered agreement with the second respondent for sale on 21.03.2015. However, in the year 2016, the Bank of Baroda filed an appeal in Appeal No.1 of 2016 against the order of the Land Recovery Officer before the Debt Recovery Tribunal, Chennai and the same was allowed by order dated 04.12.2018. Therefore, the petitioner and accused A1 and A2 could not be able to execute the Sale Deed as aggrieved by them. However, before filing the final report itself the accused had entered into a Memorandum of Understanding with the second respondent and thereby, agreed to execute the Sale Deed in respect of the land admeasuring 10.19 acres. Accordingly, the accused persons have executed a Sale Deed in favour of the wife of the second respondent in respect of the land admeasuring 10.19 acres by a registered Sale Deed vide Document No.3230 of 2017 in the office of the Sub-Registrar, Madhuranthagam. Subsequently, the second respondent / defecto complainant also had agreed to withdraw the prosecution initiated by the accused persons. However, the second respondent / defecto complainant had failed to withdraw the same. In the meantime, the first respondent had completed the investigation and filed the final report and the same has been taken cognizance by the Trial Court. In fact the balance sale 11,55,215/- was paid by the second respondent / defecto complainant in favour of the petitioner on 29.03.2018.

6. The only contention raised by the second respondent / defecto complainant after knowing the fact that the property was already mortgaged before the Debt Recovery Tribunal, not with an intention to cheat the second respondent/ defecto complainant, the accused had entered into an agreement for Sale Deed with the second respondent and received a sum of Rs.35,00,000/-. The first respondent challenged the F.I.R in Crime No.314 of 2017 and the same was also dismissed by this Court by order dated 31.08.2021 in Crl.O.P.No.28260 of 2017, observing that the petitioners had no knowledge about the mortgage of subject property and even their property had entered into agreement for sale consideration earlier as well as the proceedings of the Debt Recovery Tribunal.

7. As stated supra, initially the accused had challenged the recovery

certificate and it was allowed and there was no appeal preferred till the year 2016. In the meanwhile, on 21.03.2015, the accused had entered into an agreement for sale with the second respondent/ defecto complainant. Therefore, at the time of entering into an agreement for sale, there were no proceedings pending as against the subject property. Now, as per the understanding between the accused and the second respondent / defecto complainant, the accused had executed a Sale Deed in favour of the wife of the second respondent to an extent of 10.19 acres. It is also seen from the settlement of accounts of the petitioner, that the second respondent / defecto complainant had paid the remaining sale consideration of Rs.11,55,250/- on 29.03.2018 apart from 35,00,000/- of advance, which was already received by the accused. Therefore, no loss to the second respondent / defecto complainant and at the same time, no wrongful gain by the accused by unlawful means of property.

8. The word 'Cheating' under Section 415 of IPC is defined as “Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and

which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

9. The word 'Dishonestly' defined under Section 24 of the IPC that “whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly”.

10. The word 'Fraudulent' under Section 25 is defined as “a person is said to do a thing fraudulently if he does that thing with intend to defraud but not otherwise”.

11. The words “Wrongful Loss” and “Wrongful Gain” are defined in Section 23 of IPC that “Wrongful Gain” is a gain by unlawful means of property to which the person gaining is not legally entitled and “Wrongful Loss” is the loss by unlawful means of property to which the person losing it is legally entitled.

12. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well

as when such person is wrongfully deprived of property.

13. Section 420 of IPC is defined as "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 several years, and shall also be liable to fine."

14. On conjoint reading of the above provisions, it is clear that the essential ingredients for Section 420 of IPC are:

1. cheating;
2. Dishonest inducement to delivery property or to make, alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security;
3. Mens rea of the accused at the time of making the inducement.

15. Applying these ingredients when a promise was made by an agreement or contract or MOU and later failed to perform the same, the Apex Court clarified it in a judgment reported in 2005 (10) SCC 228, ***"Anil Mahajan -vs- Bhor***

Industries Ltd., that a distinction has to be kept in mind between mere breach of contract and the offence of cheating. The subsequent context is not sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction, the Supreme Court has held that the subsequent conduct has to be seen. Mere use of the expression "Cheating" in the complaint is of no consequence. Except mention of the words "Cheating" in the complaint is of no consequence. Except mention of the words "Deceive" and "Cheat" in the complaint filed before the Magistrate and "Cheating" in the complaint filed before the police, there is no averment about deceit, cheating or fraudulent intention of the accused at the time of entering into MOU where from it can be inferred that the accused had the intention to deceive the complainant to pay. The breach of contract will always lie in Civil Court.

16. The Apex Court had pointed out the distinction between the breach of contract and cheating in the case of ***International Advanced Research Centre for Power Metallurgy and New Materials (ARCI) -vs- NIMRA Cerglass Techniques Ltd.,*** reported in JT 2015 (8) SC 536 that the distinction would depend upon the intention of the accused at the time of alleged inducement. If it is established that the intention of the accused was dishonest at the very time when

he made a promise and entered into a transaction with the complainant to part with his property or money, then the liability is criminal. The accused is guilty of the offence of cheating. If it is established that a representation made by the accused has subsequently not kept, criminal liability cannot be foisted of the accused and the only right which the complainant acquires is the remedy for breach of contract in civil court.

17. In ***S.W.Palanitkar -vs- State of Bihar*** reported in AIR 2001 SC 2960, the Apex Court had held that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the documents was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that the committed an act of cheating. A mere failure to keep up the promise subsequently cannot be presumed as an act leading to cheating.

18. In view of the above, no offence is made out against the petitioner and the entire proceedings cannot be sustained and liable to be quashed. Accordingly, the C.C.No.5738 of 2018 on the file of the Metropolitan Magistrate for exclusive

trial of CCB cases and CBCID cases, Chennai, is quashed and this Criminal Original Petition stands **allowed**. Consequently, the connected Miscellaneous Petition is closed.

09.10.2023

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Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No

To

The Sub-Inspector of Police,
Central Crime Branch, Team – II,
Egmore, Chennai.

G.K.ILANTHIRAIYAN, J.

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