BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.02.2024

CORAM:

THE HONOURABLE Mrs. JUSTICE R. HEMALATHA

Crl.O.P.(MD).Nos.5482 and 13312 of 2021
and
Crl.M.P(MD)Nos.3140, 3142, 6889 and 6890 of 2021

Crl.O.P.(MD).No.5482 of 2021:

Santhanaraj ... Petitioner/Accused No.2

Vs.

1.The Inspector of Police,
District Crime Branch,
Thoothukudi District.
(Crime No.15 of 2017) ...1st Respondent/Complainant

2.A.V.M.V.Mani ...2nd Respondent/de-factoComplainant

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the entire records pertaining to the case in C.C.No.20 of 2021 on the file of the Judicial Magistrate IV, Tuticorin and quash the same as against the Petitioner.

For Petitioner : Mr.A.W.D.Tilak

For R-1 : Mr.R.Sanjai Gandhi,
Government Advocate,
(Criminal Side)

For R-2 : Mr.S.Ramsundar Vijayaraj

Crl.O.P.(MD).No.13312 of 2021:

Dhanush Ram ... Petitioner/Accused No.3

Vs.

1.The Inspector of Police,
District Crime Branch,
Thoothukudi District.
(Crime No.15 of 2017) ...1st Respondent/Complainant

2.A.V.M.V.Mani ...2nd Respondent/de-facto Complainant

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the entire records pertaining to the case in C.C.No.20 of 2021 on the file of the Judicial Magistrate IV, Thoothukudi District and quash the same as against the Petitioner is concerned.

For Petitioner	:	Mr.A.Ramesh, Senior Counsel For Mr.J.Hariharan
For R-1	:	Mr.R.Sanjai Gandhi, Government Advocate, (Criminal Side)
For R-2	:	Mr.S.Ramsundar Vijayaraj

COMMON ORDER

These petitions are filed seeking to quash the final report in C.C.No.20 of 2021 on the file of the learned Judicial Magistrate No.IV, Thoothukudi.

2. The present petitions are filed by the A2 and A3. The case of the prosecution in a nutshell is as follows:

Babukumar (A1) was working as a Manager in Maris Associates Private Limited. He was given full charge of the said company by all the Directors. He was also operating the company's bank account with Indian Bank, Beach Road, Thoothukudi. It is the case of the prosecution that during the month of March 2017, the Company received a notice from the office of the Employees Provident Fund (EPF) claiming a sum of Rs.1,08,00,000/- (Rupees One Crore Eight Lakh only) for payment of provident fund for the period from July 2016 to January 2017. Thereafter, the Directors of the Company, on scrutiny of accounts found that fabricated receipts of EPF challans were found in the accounts maintained by the Maris Associates. On their further scrutiny, they found that Babukumar (A1), the Manager of the Company had transferred a sum of Rs.6,82,51,745/- (Six Crore Eighty Two Lakh and Fifty One Thousand Seven Hundred Forty Five only) from the Company Bank account to his personal accounts in Lakshmivilas Bank and Corporation Bank for the period from 2013 to 2017. They also found that A1 along with one Ramesh (A4) floated a Company in the name and style of R.B.Enterprises, R.B.Associates and R.B.Home Bazzar using the misappropriated money. Therefore, Mani, the Director of Maris Associates Private Limited, had set the criminal law into motion on 21.03.2017, by lodging a complaint with the District Crime Branch, Thoothukudi and the same was registered as FIR in Crime No.15 of 2017 against four persons namely, (i) Babukumar (A1) (ii) his father, Santhana Raj (A2) (iii) Dhanush Raj (A3) and (iv) Ramesh (A4), for the offences punishable under Sections 408, 420, 465, 468, 471, 120 (b) IPC on 21.03.2017. The Inspector of Police, District Crime Branch, Thoothukudi District, after concluding investigation laid a final report before the Judicial Magistrate IV, Thoothukudi, against all the four accused for the following offences:

(i) A1 : Sections 408, 465, 468, 471, 420, 120(b) of IPC.

(ii) A2 to A4 : Sections 465 r/w 34, 468 r/w 34, 471 r/w 34, 420 r/w 34 and 120(b) IPC.

3. Mr.A.Ramesh, learned Senior Counsel assisted by Mr.J.Hariharan, learned counsel appearing for A2 and A3 would contend that both A2 and A3 were not working in Maris Associates and that even according to the de-facto complainant's statement, he had made 283 transfers using one time password, which usually only the Managing Director could access for the period from 2013 to 2017. His further contention is that there is absolutely no averments in the final report to show that A1 transferred the amount allegedly swindled by him to the account of A2 and A3. He also relied on the following decisions:

(i) in the case of ***Central Bureau of Investigation, Hyderabad Vs K.Narayana Rao*** reported in ***(2012) 9 SCC 512***.

(ii) in the case of ***M.Mani Vs. The Inspector of Police CB-CID, Coimbatore District and Others*** reported in ***MANU/TN/2451/2020.***

(iii) in the case of ***K.S.Narayanan and others Vs S.Gopinathan*** reported in ***1981 SCC Online Mad 289: 1982 Cri LJ 1611***.

(iv) in the case of ***Thermax Limited and Others Vs K.M.Johny and Others*** reported in ***(2011) 13 SCC 412***.

(v) in the case of ***Maharashtra State Electricity Distribution Company Limited and Another Vs Datar Switchgear Limited and Others*** reported in ***(2010) 10 SCC 479.***

(vi) in the case of ***Asoke Basak Vs State of Maharashtra and Others*** reported in ***(2010) 10 SCC 660.***

(vii) in the case of ***Manju Gupta Vs M.S.Paintal*** reported in ***MANU/SC/0542/1982.***

(viii) in the case of ***Nagendran Vs State through Inspector of Police*** reported in ***2018 SCC Online Mad 13988.***

(ix) in the case of ***N.Muthiah Vs State represented by the Sub-Inspector of Police DCB, Theni*** reported in ***2016 SCC Online Mad 10763.***

and contended that there are no materials in the instant case against present petitioners to attract the offences under Section 408, 465, 468, 471, 120(b) IPC and that the petitioners were unnecessarily roped in by the prosecution merely because they are father and brother of A1 respectively.

4. The learned Senior counsel also contended that in the above decisions, the Apex Court and various High Courts had time and again cited the following essential principles that are required to make a person liable under Section 34 IPC.

(i) the complaint must, prima facie, reflect a common prior concert or pre planning, but such plan must precede the act constituting the offence.

(ii) persons sought to be so held liable had a specific role or participation in some manner in the act constituting the offence. His specific contention is that the final report in this case, does not *prima facie* reflect a common prior concert / pre planning between the accused 1 and 4 and the petitioners (A2 and A3), nor any participation of the petitioners in the commission of offence. They also drew the attention of this Court to the final report filed by the Police and the Statements of witnesses under Section 161(3) of Cr.P.C recorded by the Police and contended that none of the witnesses have specifically stated that the petitioners committed forgery or any other offence. He would therefore contend that the question of prosecuting the petitioners (A2 and A3) with the aid of Section 34 and 120 (b) of IPC would not arise, as far as the present case is concerned. It is further contended that the father of A1 was a Painting

Contractor and is also running a Travel Agency for a long period. With his hard earned money, he had purchased 5 acres of land at Singampatti village which is a very remote village and the prosecution states that he is running the travel agency and purchased 5 acres of land only from the money swindled by his son (A1), without any iota of evidence. Hence, he prayed for quashing the final report.

5. Per contra, MrR.Sanjai Gandhi, the learned Government Advocate (Criminal Side) and the learned counsel appearing for the de-facto complainant would contend that A2 had purchased a property in his name from the money swindled by A1 and that since both A2 and A3 are beneficiaries, they have been charged for the offences punishable under Sections 465 r/w 34, 468 r/w 34, 471 r/w 34, 420 r/w 34 and 120(b) IPC. They also relied on the decision in ***State of Madhya Pradesh Vs. Yogendra Singh Jadon and Another reported in (2020) 12 SCC 588*** and contended that when the petitioners are beneficiaries, the power under Section 482 Code of Criminal Procedure cannot be exercised, as the allegations are required to be proved in a Court of law. Reliance was also placed upon the decision in ***Hardeo Singh Vs State of Bihar and Another reported in (2000) 5 SCC 623***, wherein it is held that Section 120(b) is an independent offence and while it is true that the gist of the offence is an agreement between two or more offenders, but particular facts of the conspiracy

need not even be shown in the charge. Some general evidence pertaining to the conspiracy would be sufficient to form part of the charge of conspiracy in the charge sheet. As a matter fact, some connecting link or connecting factors somewhere would be good enough for framing charge, since framing of charge and to establish the charge of conspiracy cannot possibly be placed on a par. They also drew the attention of this Court to the properties purchased by A2 and A4 through a registered sale deed and contended that the amount swindled by the first accused was used for purchasing these properties and therefore A2 and A4 should be held liable for the offences punishable under Sections 465 r/w 34, 468 r/w 34, 471 r/w 34, 420 r/w 34 and 120(b) IPC.

6. At the outset, it may be observed that the words "common intention" implies a pre-arranged plan and acting in concert pursuant to the plan. Therefore, it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan and in order to establish the same, there should be some common intention, in the sense that the pre-arranged plan between two or more persons sought to be so held liable for participating in some manner in the act constituting the offence.

7. There are three mandatory requirements to attract Section 34 of IPC which are as follows:

i) Criminal act is done by several persons;

ii) Such act is done in furtherance of the common intention of all; and

iii) Each of such persons is liable for that act in the same manner as if it were done by him alone.

The vicarious or constructive liability under Section 34 IPC can arise, only when the following two conditions stand fulfilled:

i) the mental element or the intention to commit the criminal act conjointly with another or others.

ii) the actual participation in one form or the other in the commission of the crime.

To apply Section 34 IPC, participation of the accused in the commission of an offence with the other accused is necessary. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essential as it involves vicarious liability. If participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. It is true that it is not possible to have direct evidence for common intention and it has to be inferred from the facts and circumstances of each case.

8. The contention of the prosecution is that with the tainted money A1 had floated RB Associates with A4 and for obtaining TIN for the said Associates, the A3 submitted an application before the concerned authorities. However, A3 is not at all a partner in the business of the RB Associates with A1 and A4 and merely because he had filed an application before the concerned authorities for obtaining TIN by signing a printed form, it cannot be said that he was also involved in the commission of offences punishable under Sections 465 r/w 34, 468 r/w 34, 471 r/w 34, 420 r/w 34 and 120(b) IPC. The statement of Bank account of the A3 in Lakshmi Vilas Bank shows that he had a Bank transaction for the period from 20.12.2013 to 21.08.2018 which shows that no amount was credited to his account from the account of A1. On various dates, he had deposited a sum of Rs.2000, 1000, etc., and the maximum amount deposited by him did not exceed a sum of Rs.10,000/-. On 21.04.2018, his balance was 'zero'. Similarly, no amount was transferred to the account of the A2, who is the father of the A1 and merely because he has purchased 5 acres of lands at Singampatti Village, which is a very remote Village in Ambasamudram Taluk, Tirunelveli District, the prosecution has charged him for the offences punishable under Sections 465 r/w 34, 468 r/w 34, 471 r/w 34, 420 r/w 34 and 120(b) IPC, especially when he has independent source of income. It is pertinent to point out here that there is no evidence either in the final report or

in the statements of witnesses under Section 161(3) Cr.P.C pertaining to the conspiracy between A1 on one hand and A2 and A3 on the other.

9. As a matter of fact, no connecting link or connecting factor had been indicated in the final report. Therefore, the decision in the case of ***Hardeo Singh Vs State of Bihar*** (cited supra) may not apply to the facts of the present case. It is pertinent to point out that the ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to have conspired and the said agreement should be for doing an illegal act or for doing by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence. In the absence of a direct material, a person cannot be implicated as one of the conspirators of the offences punishable under Section 120(b) IPC. Since in the instant case, as already observed that there are no materials which could be converted as evidence in the trial court, the accused cannot be charged for the offences under Section 120(b) IPC. The decision in the case of ***State of Madhya Pradesh Vs. Yogendra Singh Jadon*** (cited supra) may also not apply to the facts of the present case, since in the said case, the father as the Manager of the Bank had given his two sons cash credit limit and they were enjoying the same. In the said circumstances, they were held

beneficiaries of the grant and therefore, they were fastened with criminal liability under Sections 420, 120(b) IPC. The facts of the present case are totally different.

10. In the facts and circumstances, the final report in C.C.No.20 of 2021 is quashed, as far as the present petitioners Santhanaraj (A2) and Dhanush Ram (A3) are concerned.

11. The learned Judicial Magistrate IV, Thoothukudi is directed to proceed further with the case as against A1 and A4 and dispose of the same as expeditiously as possible.

12. In the result, the Criminal Original Petitions are allowed. Consequently, connected miscellaneous petitions are closed.

26.02.2024

NCC:yes/no
Index:yes/no
Internet:yes/no
Nsr

To

1.The Inspector of Police,
District Crime Branch,
Thoothukudi District.

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

R. HEMALATHA, J.

Nsr

Crl.O.P.(MD).Nos.5482 and 13312 of 2021

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