

VESA HOLDINGS P. LTD. & ANR.

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v.

STATE OF KERALA & ORS.

(Criminal Appeal No. 2341 of 2011)

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MARCH 17, 2015

[V. GOPALA GOWDA AND C. NAGAPPAN, JJ.]

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Penal Code, 1860: s. 420 – Cheating – Proceedings under – Petition for quashing the proceedings – Dismissed by High Court – On appeal, held: Every breach of contract would not give rise to an offence of cheating – For the purpose of constituting an offence of cheating, fraudulent or dishonest intention should exist at the inception and if such intention is developed later, would not encompass within itself the offence of cheating – In the facts of the present case, offence u/s. 420 not made out – Code of Criminal Procedure, 1973 – s. 482.

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Code of Criminal Procedure, 1973 – s. 482 – Quashing of criminal proceedings – Held: If set of facts make out a civil wrong as also criminal offence, only because civil remedy is available, that itself cannot be a ground to quash a criminal proceeding.

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Administration of Justice – Abuse of process of court – Held: Criminal proceedings not to be encouraged, if found to be malafide or otherwise an abuse of process of court.

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Allowing the appeals, the Court

HELD: 1. Every breach of contract would not give rise to an offence of cheating and only in those cases

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A breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise of representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of IPC can be said to have been made out. [Para 8] [35-B-D]

2. A given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. The complaint does not disclose any criminal offence at all. [Para 9] [35-E-G]

3. Criminal proceedings should not be encouraged which it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In the facts of the present case, allowing the police investigation to continue would amount to an abuse of the process of court and the High

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Court committed an error in refusing to exercise the power under Section 482 CrPC to quash the proceedings. [Para 9] [35-G-H; 36-A]] A

Uma Shankar Gopalika Vs. State of Bihar and Anr. (2005) 10 SCC 336; All Cargo Movers (India) Private Limited & Ors. Vs. Dhanesh Badarmal Jain and Anr. (2007) SCC 776 : 2007 (11) SCR 271; V. Y. Jose and Anr. Vs. State of Gujarat and Anr. (2009) 3 SCC 8 : 2008 (17) SCR 588 – relied on. B

Vjayander Kumar and Ors. Vs. State of Rajasthan and Anr. (2014) 3 SCC 389 : 2014 (1) CR 1012 - referred to. C

Case Law Reference D

(2005) 10 SCC 336 **relied on** **Para 3**

2007 (11) SCR 271 **relied on** **Para 3**

2008 (17) SCR 588 **relied on** **Para 3** E

2014 (1) CR 1012 **referred to** **Para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2341 of 2011. F

From the Judgment and Order dated 28.01.2011 of the High Court of Kerala at Ernakulam in Criminal Miscellaneous Case No. 221 of 2011

WITH G

Criminal Appeal Nos. 2342 - 2344 of 2011.

A. Ramesh, R. Anand Padmanabhan, R. U. Deepan, Shashi Bhushan Kumar for the Appellants. H

A Devashish Bharuka, Ravi Bharuka, Jogy Scaria,
Reegan S. Bel for the Respondents.

The Judgment of the Court was delivered by

B **C. NAGAPPAN, J.** 1. All these appeals are filed
challenging the impugned common order dated 28.1.2011
passed by the High Court of Kerala at Ernakulam in Criminal
Misc. Nos.220 to 222 of 2011 whereby the petition filed by the
C appellants under Section 482 of Criminal Procedure Code
seeking to quash the FIR in Crime No.1461/2010 registered
by Changanasserry Police Station against the appellants
under Sections 417, 418, 420, 120B and 34 IPC was
dismissed.

D 2. The undisputed facts in brief are as follows: The
appellant in Criminal Appeal No.2341 of 2011 is a Limited
company of which appellants Venkataraman in Criminal
Appeal No.2344 of 2011 and appellant Mani Prasad in
Criminal Appeal No.2343 of 2011 were Directors and the
E appellant Chandrasekhran in Criminal Appeal No.2342 of 2011
was the promoter. The Company availed a loan from the
Industrial Investment Bank of India and respondent No.3 herein/
complainant as the AGM of the said bank at the relevant time,
dealt with their loan application and had sanctioned the same.
F The company defaulted in repayment and wanted to settle the
loan amount. The 3rd respondent on retirement from the bank
agreed to act as a Consultant of the company in settling the
loan and the company issued a letter dated 6.8.2008 stating
G that the settlement of the Company dues should be at Rs.8.25
crores and the acceptance letter from the IIBI should be
obtained on or before 30.10.2008 and it was also agreed that
Rs.75 lakhs would be given towards consultancy fees for the
above settlement, out of which Rs.5 lakhs was given in advance
H to the 3rd respondent and the balance amount to be paid on

the completion of the assignment. The Company also issued A
a cheque dated 6.8.2008 for a sum of Rs.30 lakhs drawn on
HDFC Bank Limited and the same was agreed to be
presented to the bank after obtaining the acceptance letter
from IIBI on or before 30.10.2008 or otherwise the cheque
should be returned to the company. The 3rd respondent made B
an endorsement in writing in the said letter agreeing to the
said terms and signed it. The 3rd respondent filed a private
complaint dated 13.10.2010 against the company, its Directors
and Promoter in the Court of Judicial First Class Magistrate C
Changanasserry and the same was forwarded to the police
for investigation under Section 156(3) of the Code of Criminal
Procedure and the Police registered a case in Crime No.1461
of 2010 for the alleged offences under Sections 417, 418, 420,
120B and 34 IPC. It is alleged in the complaint that the loan D
transaction of the company with IIBI was settled with the efforts
of the complainant/respondent No.3 herein but the company,
Directors and Promoter did not pay him the consultancy fee
as promised and they conspired together to deceive the
complainant and committed offences as alleged. The company E
and its Directors filed petitions under Section 482 Criminal
Procedure Code in Criminal M.C.No.220 to 222 of 2011 on
the file of the High Court of Kerala at Ernakulam contending
that the understanding between the company and the
complainant was that the settlement with the IIBI should be F
completed by 30.10.2008 and the complainant was not able
to settle the loan before the said date and hence he could not
present the cheque in the light of the condition imposed on
him in the letter dated 6.8.2008 and the settlement was G
completed only on 5.1.2009 due to the efforts of the company
itself and not at the instance of the complainant and at any rate
it can only be breach of contract for which no criminal liability
can be fastened against the company and its Directors. The
High Court dismissed the petitions by holding that the truth of H

A the allegations have to be ascertained by the investigating
agency. Challenging the said order the present appeals have
been preferred.

3. The learned senior counsel Mr. A. Ramesh appearing
B for the appellants contended that the contract under letter dated
6.8.2008 was time bound and there was no element of fraud
or dishonest intention in it and nothing fructified on the side of
the complainant and due to continued efforts of the appellants
C the loan was settled by making payment of Rs. 10.50 crores in
total and the 3rd respondent to enrich himself illegally has
resorted to criminal prosecution and it is liable to be quashed.
It is his further contention that the allegation in the complaint
does not disclose the commission of offence of cheating and
D only discloses the civil dispute at best and the complaint is
nothing but an abuse of process to harass and extort money
from the appellants and the High Court erroneously refused to
quash the same. In support of submissions he relied on the
following decisions - **Uma Shankar Gopalika Vs. State of**
Bihar and Another [(2005) 10 SCC 336]; All Cargo Movers
(India) Private Limited and others Vs. Dhanesh Badarmal
Jain and Another [(2007) 14 SCC 776]; and V.Y. Jose and
Another Vs. State of Gujarat and another [(2009)3 SCC
78].

F 4. Per contra the learned counsel appearing for
respondent No.3 contended that there is no merit in the
contention of the appellants that the FIR discloses only a civil
case or that there is no allegation making out the criminal
G offence of cheating. It is his further contention that the facts in
the present case may make out a civil wrong as also a criminal
offence and only because a civil remedy may also be available
to the complainant that by itself cannot be a ground to quash
the criminal proceedings. In support of his submission he relied

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on the decision of this Court in **Vijayander Kumar and others Vs. State of Rajasthan and another [(2014) 3 SCC 389]** A

5. We also heard the learned counsel for the State namely respondent Nos. 1 and 2.

6. We have been taken through the complaint petition in its entirety. The letter dated 6.8.2008 contains the offer of the appellants as well as the acceptance made by 3rd respondent, and it reads thus : B

“August 6, 2008 C

Mr. K.G.S. Nair
Keezhoot, Changanasserry
Kerala. D

Dear Sir,

Sub: Settlement of IIBI dues at Rs.8.25 Crores. E

Please refer to the discussion we had on the above subject. As discussed we are agreeable to pay you a lump sum amount of Rs. 75 lacs towards consultancy fee for the above settlement, out of this amount Rs.5 lacs will be paid upfront for out of pocket expenses and the balance amount Rs.70 lacs will be paid on completion of the assignment. F G

We enclose herewith a cheque bearing number 47025 for Rs.30,00,000 (Thirty lacs only) dated 06.08.2008 drawn on HDFC Bank Ltd, which as agreed, this cheque should be presented to bank only after obtaining H

A acceptance letter from IIBI on or before 30th October 2008 or otherwise the cheque should be returned to . Please note that company should be informed before presenting the said cheque.

B If it is agreeable you may return the duplicate of this letter, duly signed in token of acceptance of the offer.

Thanking you,

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Yours faithfully,
For Vesa Holdings Private Limited

Director

D I Accord my consent to this assignment.
(K.G.S. Nair)”

E 7. It is also not in dispute that the IIBI did not issue any acceptance letter on or before 30.10.2008 with regard to the settlement of disputes of the appellant company. The 3rd respondent also did not present the cheque dated 6.8.2008 issued by the appellant company for encashing a sum of Rs.30 lakhs. Due to the efforts of the appellant company IIBI finally agreed and issued letter of acceptance dated 5.1.2009. One year later, the 3rd respondent sent a letter dated 6.3.2010 to the appellant company demanding the balance amount of Rs.70 lakhs towards the consultancy fee. No allegation whatsoever

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3rd respondent did not ask for re-issue of the same.

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8. From the decisions cited by the appellant, the settled proposition of law is that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In other words for the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

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9. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court

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A committed an error in refusing to exercise the power under Section 482 Criminal Procedure Code to quash the proceedings.

10. Accordingly all the appeals are allowed and the impugned order dated 28.1.2011 rendered by the High Court is set aside and the complaint and the proceedings in Crime No. 1461/2010 of Changanasserry Police Station against the appellants are hereby quashed.

C Kalpana K. Tripathy

Appeals allowed.