



Crl.O.P.No.4037 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 16.03.2023

Pronounced on : .03.2023

CORAM:

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

Crl.O.P.No.4037 of 2021

and

Crl.M.P.Nos.2483 and 2486 of 2021

1.Pradeep Saran

2.Narayanan

3.Sundar Ganesan

... Petitioners

Vs.

1.The State by

Represented by Inspector of Police

Team – 14, Cyber Crime Cell,

Central Crime Branch,

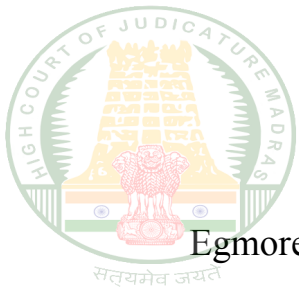
Vepery,

Chennai – 600 007.

2.Kirlosh Kumar IAS

Managing Director, TASMAL Limited,

4th Floor, CMDA Tower – II,



Crl.O.P.No.4037 of 2021

Egmore, Chennai – 600 008.

...Respondents

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Prayer: This Criminal Original Petition has been filed to call for the records in C.C.No.5311 of 2020 pending before the Hon'ble Special Court for CCB & CBCID Cases, Egmore and quash the same.

For Petitioners : Mr.P.H.Manoj Pandian

Senior Counsel

Mr. Abdul Saleem

For R1 : Mr.Leonard Arul Joseph Selvam

Government Advocate (Crl.Side)

For R2 : Mr.K.Sathish Kumar, Standing Counsel.

ORDER

This petition is to quash the final report in C.C.No.5311 of 2020 for the alleged offences under Sections 420 IPC and 66 D of Information Technology Act, 2000.

2.It is alleged in the charge sheet that the petitioners 1 and 2 started a partnership firm by name Future Stacks for website development in 2016; that they were involved in development of Real Time Online Food Ordering Application; that while so, the third petitioner approached the second petitioner



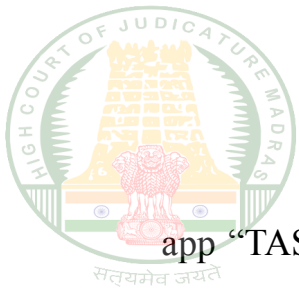
CrI.O.P.No.4037 of 2021

for developing a new online liquor ordering application <http://try-tasmac.web.app/>

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and decided to sell liquor online to the general public; that the second and third petitioners requested the first petitioner to develop an online liquor selling App; that the petitioners intentionally created web based application by name <http://try-tasmac.web.app/> without obtaining official permission or tender permission order from TASMAC and used the TASMAC logo, brand name and intentionally circulated it as a genuine web application in online social media platform which got more than 15000 links in a day and caused web traffic; that due to the said impersonated application, the general public believed it as a web application developed by the TASMAC and tried to order liquor online; that TASMAC received lot of calls; that as a result of this web application by misusing the name of TASMAC, the petitioners got more web traffic to their company namely Future Stacks and thereby, it increased their business; and hence, the petitioners are liable for the aforesaid offences.

3.Mr.P.H.Manoj Pandian, the learned Senior counsel for the petitioners submitted that the petitioners, inspired by the suggestion made by this Court in a writ petition, that liquor could be supplied online, wanted to develop a demo web

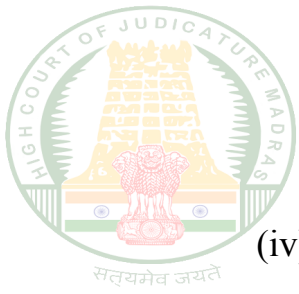


app “TASMAC” so that, it can be pitched to the Tamil Nadu Government owned WEB C “TASMAC”. They created this beta version (trial version) of the App with the TASMAC logo, brand name and deployed it to Google's test hosting web application server for sandbox testing under the URL <https://try-tasmac.web.app>. The learned senior counsel submitted that it was only a trial version and it is a standard practice in the Information Technology and Design Industries to use the client's logo; that this was not intended to deceive anyone and in any event, there is no evidence to show that because of the representation, even assuming it to be false, there was any wrongful loss to any person or wrongful gain to the petitioners. The learned senior counsel relied upon the following Judgments:

(i) ***Vijay Kumar Ghai and others vs. State of West Bengal and others*** reported in ***(2022) 7 SCC 124***.

(ii) ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others vs. Nimra Cerglass Technics Private Ltd and another*** reported in ***(2016) 1 SCC 348***.

(iii) ***Paul F. Morris vs. State represented by Inspector of Police*** reported in ***2016 SCC Online Mad 33715***



Crl.O.P.No.4037 of 2021

(iv) ***Sushil Sethi and another vs. State of Arunachal Pradesh and others***

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4.Mr.Leonard Arul Joseph Selvam, learned Government Advocate (Crl.Side) appearing for the first respondent would submit that the petitioners had deliberately and willfully used the TASMAL logo without any authorization; that because of the petitioner's act, the TASMAL Department had received a number of calls from general public and were put to hardship and embarrassment. Further, because of the false and fabricated web application, they got more web traffic to their company and thereby, increased their business and they had gained wrongfully and hence, the offences are made out.

5.Mr.K.Sathish Kumar, learned standing counsel for the defacto complainant/respondent would submit that because of the unauthorised web link created by the petitioners, the general public were misled. They believed it that it was a genuine web application of the TASMAL Department. The TASMAL Department received a lot of calls from general public regarding the authenticity of the online sale of liquor in the name of TASMAL. The accused have misused

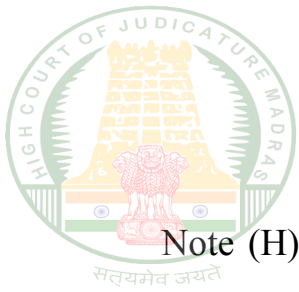


Crl.O.P.No.4037 of 2021

the logo, brand name and made a duplicate application with a false promise of online liquor sale and earned attention of the general public. Hence, the learned counsel for the defacto complainant prayed for dismissal of the petition.

6. Heard Mr.P.H.Manoj Pandian, learned Senior counsel for the petitioners, and Mr.Leonard Arul Joseph Selvam, learned Government Advocate (Crl.Side) appearing for the first respondent and Mr.K.Sathish Kumar, the learned Standing counsel for the second respondent/defacto complainant.

7.This Court finds that the petitioners' claim is that they had used only a beta (trial version) and they had not developed a real app. The conduct of the petitioners in creating a web application and making it appear that it was created by the TASMAC Department, misusing the logo and brand name is a reprehensible conduct. It certainly amounts to a false representation to the general public. But the question is whether the said conduct and false representation would constitute the offences alleged. It has to be remembered that the framers of the Penal Code did not intend to punish all wrongful or immoral acts as could be seen from their note annexed along with the original draft of the Penal Code prepared in 1837. In

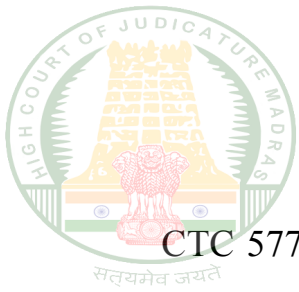


Note (H), which is a Note on the Chapter of Offences relating to Marriage, the

framers stated thus:

*“...We cannot admit that the **Penal Code** is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic; yet we have punishment for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness.”*

The Hon'ble Supreme Court has extracted the above portion in two of its Judgments viz. ***R.Sai Bharathi vs. J.Jayalalitha and others***, reported in 2003 (4)



Crl.O.P.No.4037 of 2021

CTC 577 (SC) : 2004 (2) SCC 9 at Para No.56 and in ***Subramanian Swamy vs.***

Union of India, reported in 2016 (7) SCC 221 (Para 90).

8. Therefore, the question is whether the act of the petitioners would constitute the offences under Section 420 IPC and Section 66 D of the Information Technology Act. In order to constitute the offence of cheating defined under Section 415 IPC, the following ingredients have to be established.

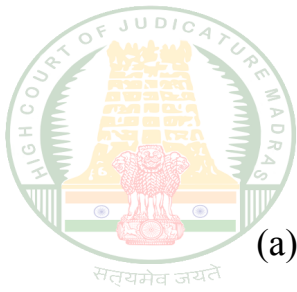
(a) **Deception** – a false representation would amount to deception. The explanation to Section 415 I.P.C., states that dishonest concealment of facts is also a deception.

(b) **Fraudulently or Dishonestly.**

(c) (i) Induces the person so deceived to deliver any property to any person.

(ii) or to consent that any person shall retain any property.

(iii) 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 such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. However, for the aggravated form of cheating under Section 420 IPC, the following ingredients are essential :-



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(a) dishonestly, induce the person deceived to deliver property to any person.

(b) to make, alter or destroy the whole or any part of the valuable security or anything which is signed or sealed which is capable of being converted to valuable security. The observations of the Hon'ble Supreme Court in ***Vijay Kumar Ghai and others vs. State of West Bengal and others*** reported in (2022) 7 SCC 124 which is extracted hereunder would make that clear.

36. As observed and held by this Court in R.K. Vijayasathathy v. Sudha Seetharam 28, the ingredients to constitute an offence under Section 420 are as follows:

(i) a person must commit the offence of cheating under Section 415 and

(ii) the person cheated must be dishonestly induced to:

(a) deliver property to any person: or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC.



In the instant case, admittedly, there was neither any delivery of property nor was any person induced to make alter or destroy any valuable security pursuant to the false representation made by the petitioners. Therefore, the offence under Section 420 I.P.C., is not made out.

9.The next question is whether the offence of cheating punishable under Section 417 I.P.C., is made out. The first ingredient is that there must be deception. The next ingredient is that the deception must be made dishonestly or fraudulently. Dishonestly has been defined in Section 24 of I.P.C which reads as follows :

“24."Dishonestly" – 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”.

It is well settled that it is sufficient to show either “ wrongful gain to the deceiver or wrongful loss to the deceived”. Both need not coexist. The impugned final report does not state as to whether there was any wrongful gain to the petitioners pursuant to the alleged deception. The only vague averment is that the petitioners got more web traffic to their company which increased their business. There is no



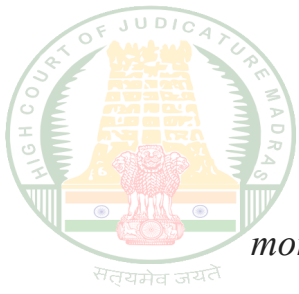
material in the impugned final report in support of the said averment. It is only an *ipse-dixit* of the first respondent. The impugned final report also does not state that any wrongful loss was caused to any person. Hence, 'dishonestly' has not been established.

10. It has to be seen whether the allegation establish the other ingredient namely “Fraudulently”. The said term is defined in Section 25 of the Indian Penal Code which reads as follows.

“25. "Fraudulently" – A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.”

The Penal Code does not define “intent to defraud”. However, the Hon'ble Supreme Court in ***Dr. Vimala vs. Delhi Administration*** reported in ***AIR 1963 SC 1572*** in held as follows:-

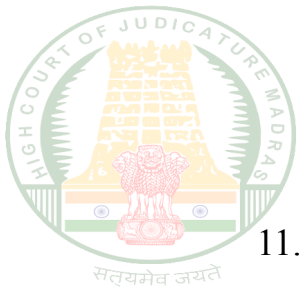
“15.To summarize : the expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of



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money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived,

The Hon'ble Supreme Court had held that defraud involves two elements namely deceit and injury. Deceit is established in this case. However, the averment in the final report do not suggest that there was any injury (i.e.,) something other than the economic loss caused to any person deceived. The injury other than the economic loss is causing harm to any person in body, mind, reputation to the person deceived. The term “Injury” is defined in Section 44 of IPC. Admittedly, the persons deceived in the instant case are the general public. There is no such allegation that any person was harmed in body, mind or reputation. Thus, the alleged acts do not fall within the definition of 'dishonestly' or 'fraudulently' which is an essential ingredient of cheating. Hence, the offence of cheating is not made out. For the very same reasons, the offence of cheating by impersonation under Section 66 D of the Information Act is not made out.



Crl.O.P.No.4037 of 2021

11.However, we may add that the petitioners have certainly used the name of “TASMAC” wrongly and unauthorizedly. TASMAC had certainly suffered hardship and nuisance because of enquiry by the general public besides embarrassment. The TASMAC ought to have resorted to appropriate remedies in civil law against the petitioners. This Court is of the view that till a legislation is enacted to curb such acts resort to the offences in the Penal Code for prosecution, in the absence of necessary ingredients may not be appropriate.

12.For the aforesaid reasons, the impugned Final Report is liable to be quashed. Hence, the Criminal Original Petition is allowed. Consequently, the connected miscellaneous petition is closed.

.03.2023

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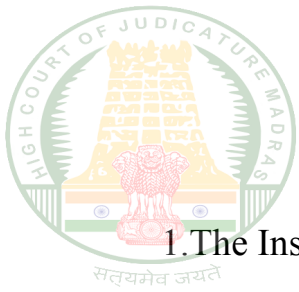
Index: Yes/No

Speaking Order / Non-Speaking Order

Neutral Citation: Yes / No

To

13 / 15



Crl.O.P.No.4037 of 2021

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Managing Director, TASMAC Limited,
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SUNDER MOHAN, J

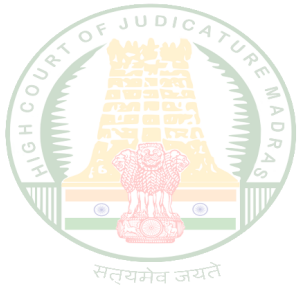
dk/ay

3. The Public Prosecutor

High Court of Madras,
Chennai.

Pre-delivery order in

Crl.O.P.No.4037 of 2021



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Crl.O.P.No.4037 of 2021

and

Crl.M.P.Nos.2483 and 2486 of 2021

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