
(2011) 03 MAD CK 0588

In the Madras High Court

Case No : Criminal R.C. No. 873 of 2005 and Criminal M.P. No. 5463 of 2005

S.S. Karikalan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 319(1)
Penal Code, 1860 (IPC) — Section 420, 467, 468, 471

Citation : (2011) 03 MAD CK 0588

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : R. Vivekanandan, for the Appellant; S. Rajakumar, . Advocate (Crl. side), for the Respondent

Final Decision : Allowed

Judgement

R. Mala, J.—This revision arises out of the summons issued to the Petitioner u/s 319 Code of Criminal Procedure as an additional accused in the case in Crl. M.P. No. 113 of 2005 in C.C. No. 384 of 2003 dated 18.01.2005, on the file of the District Munsif-cum-Judicial Magistrate Court, Thittakudi.

2. The case of the prosecution is as follows:

The Petitioner is the Proprietor of M/S. Net Income Net Limited and the second Respondent joined as a Member of the said Company. On the basis of the complaint given by P.W.1, the Branch Manager of the Central Co-operative Bank, Thittakudi, a case was registered in Crime No. 2 of 2003, on the file of the first Respondent for the offences under Sections 420, 468 and 471 I.P.C. After investigation, the first Respondent had filed a final report against one Ganesan, who is the second Respondent/A1, which was taken on file in C.C. No. 384 of 2003 for the offences under Sections 467, 471 and 420 I.P.C. After furnishing the copies, charges were framed against the second Respondent.

3. During the trial, P.W.1 to P.W.3 were examined. After recording their oral

evidence, the learned Assistant Public Prosecutor appearing for Inspector of Economic Offence Wing, filed a petition in CrI. M.P. No. 113 of 2005 u/s 319 Code of Criminal Procedure to impale the Petitioner, who is cited as List Witness No. 8, stating that he is the Proprietor of M/S. Net Income Net Limited and he received the forged two Demand Drafts issued by the P.W.1/Bank, which was submitted by the second Respondent. Hence the trial Court considered the arguments of both sides counsel, allowed the petition in CrI. M.P. No. 113 of 2005 and issued summons to the Petitioner here in to add him as an additional accused. Challenging that order, the Petitioner has come forward with this revision.

4. The learned Counsel for the Petitioner submitted that there is no incriminating evidence against this Petitioner. It is true that the Petitioner is the Proprietor of M/S. Net Income Net Limited and it is a network, where the second Respondent/A2 is an Agent and he was working on commission basis. The above said Company was paying incentives to the persons, who were bringing additional Members. The second Respondent received commission for admitting the new Members. The second Respondent obtained two Demand Drafts issued by the Central Co-Operative Bank, Thittakudi Branch and deposited the same in ICICI. Bank, Numgambakkam and the same were encased. The Petitioner also paid commission to the second Respondent/A1. There is no incriminating facts against the Petitioner and no fresh evidence was given by P.W.1 to P.W.3, to rope this Petitioner in the commission of said offence. The trial Court has not considered this aspect, hence he prayed for setting aside the order. To substantiate his arguments, he relied upon the decision reported in the Apex Court.

5. Refuting the same, the learned Government Advocate (CrI. side) appearing for the first Respondent submitted that it is true, a charge sheet was filed against only the second Respondent/A1, who is the sole accused. During the trial, P.W.3/ Sadasivam has stated that the Petitioner herein is the proprietor of M/S. Net India Net Limited Company and he received the amount. The amount is yet to be repaid to the Bank. So the Petitioner had miss-appropriated the amount and on that basis only, he was imp leaded as a second accused in this case. The learned Judicial Magistrate considered this aspect in proper perspective, allowed the petition and issued summons to the additional accused/Petitioner. Hence there is no infirmity or illegality in the order passed by the learned Magistrate and he prayed for dismissal of this revision. To substantiate his arguments, he relied upon the decision reported in the Apex Court.

6. Considered the rival submissions made on either side.

7. Admittedly, on the basis of the complaint given by P.W.1, a case was registered in Crime No. 2 of 2003 against one Ganesan, the second Respondent for the offences under Sections 468, 471 and 420 I.P.C. After examination of 15 witnesses and seizing of the documents, investigation agency filed charge sheet against the second Respondent for the offences under Sections 467, 471 and 420 I.P.C. The learned Magistrate, after considering the materials, has taken as

cognizable offence, filed a case in C.C. No. 384 of 2003 under Sections 467, 471 and 420 I.P.C. against the second Respondent/A1. After furnishing copies to the second Respondent/A1 and framing necessary charges, since the second Respondent pleaded not guilty, summons were issued to the witnesses and P.W.1 to P.W.3 were examined. Since P.W.3 deposed that the Petitioner herein is the Proprietor of M/S. Net Income Net Limited, he received the two forged Demand Drafts and deposited the same in his ICICI. Bank account and encased the same. But he has not repaid the same. So the petition in CrI. M.P. No. 113 of 2005 u/s 319 Code of Criminal Procedure was filed against this Petitioner and the same was allowed. Now this Court has to decide whether any substantial evidence let in by the prosecution to add this Petitioner as an additional accused and whether such evidence is sufficient to convict this Petitioner?

8. Now it is appropriate to incorporate Sections 467, 471 and 420 I.P.C., which are as follows:

467. Forgery of valuable security, Will etc.:

Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquaintance or receipt acknowledging the payment of money, or an acquaintance or receipt for the delivery of any moveable property or valuable security, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

471. Using as genuine a forged document:

Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged (document or electronic record), shall be punished in the same manner as if he had forged such (document or electronic record).

420. Cheating and dishonestly inducing delivery of property:

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 seven years, and shall also be liable to fine.

Since the charges have been framed against the second Respondent/A1 for the offences under Sections 467, 471 and 420 I.P.C., there must be an intention of forgery of valuable security and using it as genuine a forged document. So there is no prima facie evidence to show that the Petitioner herein falsifies the record (i.e.) Demand Drafts and forged the record as (valuable security). P.W.3's

evidence is also not sufficient to conclude that the Petitioner herein is having an intention to forge the Demand Drafts and used it as a genuine and encased the same. The ingredients of Sections 467, 471 and 420 I.P.C. was not prima facie made out by the oral evidence of P.W.3. Likewise, the evidence of P.W.1 and P.W.2 is not sufficient to rope this revision Petitioner u/s 420 I.P.C. Since the ingredients of Section 420 I.P.C. was not made out by the evidence of P.W.1 to P.W.3, (i.e.) the revision Petitioner dishonestly induced the second Respondent/A1 to deliver the Demand Drafts for his benefit. In such circumstances, I am of the view that the ingredients of Sections 420, 467 and 471 I.P.C. have not been prima facie made out.

9. Now it is appropriate to consider the decisions relied upon by both sides counsel. The learned Counsel for the Petitioner relied upon the decision reported in Sarabjit Singh and Another Vs. State of Punjab and Another, in paragraphs-17 and 21, it read as follows:

17. For the purpose of this case, it is not necessary to proceed on the basis that the decision in Mohd. Shafi should be applied on all fours. We have noticed hereinbefore that Mohd. Shafi has been explained in Lal Suraj holding that a power u/s 319 of the Code can be exercised only on the basis of fresh evidence brought before it and not on the basis of the materials which had been collected during investigation particularly when a final form was submitted and the same had been accepted by the Magistrate concerned.

21. An order u/s 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

He submitted that since after filing of the charge sheet, the case was taken as cognizable by the learned Magistrate against the second Respondent/A1, no fresh evidence has been let in during the trial. In such circumstances, there is no need to issue summons to add the Petitioner as an additional accused. Considering the above citation and as already discussed in the earlier paragraph, I am of the view that the ingredients of Sections 467, 471 and 420 I.P.C. have not been prima facie made out. So there is no sufficient evidence or possibility for conviction.

10. It is appropriate to consider the decision relied upon by the learned Government Advocate (Crl. side) reported in Lal Suraj @ Suraj Singh and Another Vs. State of Jharkhand, , in paragraphs-4, 13, 14, 16 and 18, it read as follows:

4. ...The statement of PW7 is also said to be statement of dead person, then that

statement of PW7 will also be under the scrutiny on the touchstone of evidence. The name of above referred two persons Suraj Singh and Arbind Singh is stated by the informant.

Thus in consideration of the entire material on record I am of the view that the materials on record is sufficient to proceed against above named Suraj Singh and Arbind Singh. Thus in view of the above observation it will be proper that summons against Suraj Singh son of Madhu Singh and Arbind Singh son of late Amarnath Singh, both resident of Village Bandubar, PS Panki, District Palamau be issued and are arrayed as accused in GR. No. 1256 of 2000 corresponding to Sadar PS Case No. 381 of 2000 to face trial....

13. The learned Sessions Judge as also the High Court as indicated hereinbefore, relied upon the deposition of Jogendra Singh (PW 6) and Karu Singh (PW 7). Jogendra Singh in his deposition merely stated that the Appellants were sitting in the said jeep. The vehicle, however, was being driven at a very high speed and, thus, he could not even see as to whether people sitting therein were holding any weapon or not. He is, therefore, not an eyewitness to the occurrence.

14. ...Occurrence had taken place on 24.10.2003 at about 4 1/2 p.m. in the evening. At that time I was at my house. On receipt of the information of the occurrence, we reached at the hospital. After reaching at the hospital, I saw that my father and Ajay Singh were on bed. Ajay Singh had died and my father was giving statement and his statement was being recorded by Ram Sagar Tiwari, Darogaji. I had also talk with my father. He told me that Suraj Singh, Arbind Singh, B.N. Singh, Pradeep Vishwakarma, Sharvan Vishwakarma, Nagendra Choubey and Mukesh Choubey had committed the crime (occurrence with him)....

16. The approach of the learned Sessions Judge was wholly incorrect. The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction u/s 319 of the Code, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction.

18. In Yuvaraj Ambar Mohite v. State of Maharashtra it was observed that there is a possibility of the accused being convicted on the basis of the evidences brought on record even if the same is taken to be correct in its entirety.

11. Furthermore, the learned Government Advocate (Crl. side) relied upon the decision reported in Hardeep Singh Vs. State of Punjab and Others, , in paragraphs-51, 56 and 71, it read as follows:

51. It is thus difficult to accept the contention of the learned Counsel for the Appellants that the term "evidence" used in Sub-section (1) of Section 319 of the

Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. The section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter word "evidence" occurring in Sub-section (1) of Section 319 is used in a comprehensive and broad sense which would also include the material collected by the investigating officer and the evidence which comes before the court and from which the court is satisfied that person not arraigned before it is involved in the commission of the crime.

56. There is yet another reason which is also very relevant and material. When a person who is not shown as an accused is sought to be added on the basis of evidence in exercise of power u/s 319 of the Code, he is not before the court. Other accused against whom the trial has commenced are very much before the court and generally they are represented by an advocate/advocates. In the evidence of a witness, when role of other person i.e. other than the accused is described by prosecution witnesses, normally, the accused who are already on record are not affected. Grant or rejection of application u/s 319 would generally not alter their position. In our considered opinion, therefore, holding that unless the cross-examination of a witness by the accused who were already on record is over and complete, no power u/s 319 of the Code can be exercised, does not appear to be sound.

71. The Court in Mohd. Shafi, stated: (SCC p.547, para12)

12. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence.

But the above citations are not applicable to the facts of the present case, because in the above citation, it was stated that there must be a direct evidence for roping the proposed accused for the commission of offence. Admittedly, when P.W.3 enquired by the investigating officer, he never whispered about the Petitioner herein. But at the time of trial, when he was in witness box, he simply stated that the proposed accused/Petitioner herein is a Proprietor of M/S. Net Income Net Limited Company and he received the disputed forged Demand Drafts from the second Respondent/A1 and deposited in his I.C.I.C.I. Bank account and appropriate that amount. But there is no evidence to prove that at the instigation of the Petitioner/accused, the second Respondent has cheated the Bank official and fabricated the Demand Drafts and handed over the same to the Petitioner, so as already stated above, the ingredients of provisions of penal

offences under Sections 467, 471 and 420 I.P.C. have not been prima facie made out against the Petitioner herein. So there is no clinching evidence to rope this Petitioner for the commission of offence and there is no sufficient evidence to convict the Petitioner/A2. But the trial Court has not considered all the above aspects in proper perspective. So, I am of the view that the impugned order is liable to be set aside.

12. In fine,

Impugned Order is set aside.

The Criminal Revision Case is allowed.

Consequently, connected CrI. M.P. No. 5463 of 2005 is closed.