

(2007) 10 MAD CK 0109

In the Madras High Court

Case No : Criminal Revision Case No. 1448 of 2007 and M.P. No's. 1 and 2 of 2007

V.R. Eswaramoorthy

APPELLANT

Vs

Suriya Chakra Spinning Mills Pvt. Ltd. and L. Latha

RESPONDENT

Date of Decision : 30-10-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216, 314, 319, 482
Evidence Act, 1872 — Section 3
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 304, 420

Citation : (2007) 5 CTC 473 : (2008) 1 LW(Cri) 413

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; S. Jayakumar, for the Respondent

Final Decision : Dismissed

Judgement

K. Mohan Ram, J.—The complainant in C.C. No. 602 of 2006 on the file of the Judicial Magistrate No. I, Erode, is the petitioner in the

above criminal revision case. On the basis of the complaint filed by the petitioner against the respondents herein, the learned Magistrate has taken

the complaint on file for an offence punishable u/s 138 of the Negotiable Instruments Act in C.C. No. 602 of 2006. The cheque in question is

alleged to have been returned/ unpaid with an endorsement ""Account transferred to suit filed account"". After completion of trial and hearing of

arguments was over and when the judgment has been reserved, the petitioner filed a petition in C.M.P. No. 1384 of 2007 u/s 216 of the Criminal

Procedure Code (in short ""Cr.P.C."")praying to alter / add a charge u/s 420 Indian Penal Code (in short ""IPC"") against the respondents herein on

the basis of the contentions raised in the written arguments submitted by the learned Counsel for the respondents. The respondents herein raised objections for entertaining the said petition contending that there is absolutely no material on record to alter / add the charge for an offence u/s 420 IPC and merely on the basis of legal contentions put forth in the written arguments a new charge cannot be framed. The learned Magistrate after considering the materials on record dismissed the said petition and being aggrieved by that the complainant is before this Court in the above revision.

2. Heard both sides.

3. Mr. N. Manoharan learned Counsel for the petitioner submitted that the cheque in question was returned with an endorsement ""Account

transferred to suit filed account"" on 05.04.2004 and it shows that on the date of issuing the cheque the respondents had no account in the bank and

therefore they deceitfully issued the cheque to cheat the complainant and hence an offence u/s 420 IPC is made out in the light of the materials

available on record. He further submitted that the provisions contained in Section 216 of the Cr.P.C gives wide power to the Court to alter or add

any charge at any time before the judgment is pronounced and the written arguments filed by the accused would amply prove the commission of

the offence u/s 420 IPC and therefore the order of the learned Magistrate is liable to be set-aside.

4. (i) In support of his above contentions the learned Counsel for the petitioner relied upon the decision of the Apex Court reported in Hasanbhai

Valibhai Qureshi Vs. State of Gujarat and Others, , wherein in paragraph 10 it is observed as follows:

10. Therefore, if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and

documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to

appropriately act as the exigencies of the case warrant or necessitate.

(ii) Learned Counsel for the petitioner also relied on a Full Bench decision of the Andhra Pradesh High Court reported in OPTS Marketing (P)

Ltd. and others Vs. State of A.P. and another, (FB), wherein in paragraph 29 (ii) it is observed as follows:

29 (ii) Even after introduction of Section 138 of the Negotiable Instruments Act, prosecution u/s 420, IPC is maintainable in case of dishonour of

cheques or postdated cheques issued towards payment of price of the goods purchased or hand loan taken, or in discharge of an antecedent debt

or towards payment of goods supplier earlier, if the charge-sheet contains an allegation that the accused had dishonest intention not to pay even at

the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation.

Private complaint or FIR alleging offence u/s 420, IPC for dishonour of cheques or postdated cheques cannot be quashed u/s 482, Cr.P.C., if the

averments in the complaint show that the accused had, with a dishonest intention and to cause damage to his mind, body or reputation, issued the

cheque which was not honoured"".

(iii) Learned Counsel for the petitioner also relied upon a decision of the learned Judge of this Court reported in 2007 2 L.W. (Cri.) 880 (N.

Anbarasu v. M. Ganesan), wherein in paragraphs 6 and 7 it is observed as follows:

6. u/s 216 Cr.P.C, the Court may alter or add any charge at any time before the judgment is pronounced. After alteration or addition of the

charge, the learned Magistrate may proceed with the trial, as if the altered or added charge had been the original charge. The trial Court may have

to take care of the accused, so that prejudice should not be caused to him and thereby all opportunities must be given to him.

7. In such circumstances, during the course of trial of a summons case, when new materials came into existence through the evidence, the

complainant is entitled to invoke the provisions of Section 216 Cr.P.C.

5. Countering the submissions made by the learned Counsel for the petitioner, Mr. S. Jayaraman, learned Counsel for the respondents submitted

that the petition u/s 216 Cr.P.C was filed by the revision petitioner after the examination of all the witnesses were completed, after filing of the

written arguments u/s 314 Cr.P.C, and when the case was posted for delivering judgment. Learned Counsel for the respondents further submitted

that earlier the petitioner filed Crl.R.C. No. 622 of 2007 and obtained stay of further proceedings in the case and ultimately by an order dated

17.04.2007 the criminal revision case was disposed of with a direction to

complete the trial within a period of two weeks from the date of receipt of a copy of the order passed in the said revision; again the petitioner filed Crl.O.P. No. 11976 of 2007 seeking transfer of the case to some other court and obtained stay and ultimately the said criminal original petition was disposed of by an order dated 27.04.2007; thereafter, the said CMP has been filed u/s 216 Cr.P.C with an intention to further delay the proceedings and to harass the respondents herein. Learned Counsel further submitted that a new charge can be added or altered only if there is material in the evidence and because there were no allegations in the complaint and there was no material in the evidence to prima facie establish a charge u/s 420 IPC the court below has rightly dismissed the petition filed by the complainant. Learned Counsel further submitted that the legal contention raised in the written arguments that the endorsement ""Account transferred to suit filed account"" will amount to closure of account cannot be the basis for altering the charge; the submissions contained in the written arguments cannot be considered to be evidence on record and therefore the learned Counsel contended that the order passed by the Court below does not call for any interference. In support of the above said contentions, the learned Counsel for the respondents relied upon the following decisions:

- (i) 1999 2 L.W.(Cri.) 807 (A. Balasubramaniam v. State, etc.).
- (ii) Rajendra Singh Sethia Vs. The State and Others,
- (iii) T.J. Edward Vs. C.A. Victor Immanuel and Another,
- (iv) (2006) 2 M.L.J. 173 (Lak Ram v. Nihal Singh)
- (v) State of Maharashtra Vs. Salman Salim Khan and Another, .

(I) In 1999 2 L.W. (Cri.) 807 (referred to supra) in paragraphs 9 and 10 it is observed as follows:

9. Section 3 of the Evidence Act, while defining the word ""evidence"", would provide that the statements made before the Court by the witnesses and documents produced for the inspection of the Court are called oral evidence and documentary evidence respectively. 10. Admittedly, in the instant case, the evidence has not been adduced before the trial Court. "Evidence" means, the evidence recorded during the course of enquiry or trial by the Court and not the statements at the stage of investigation recorded

by the police. In other words, unless there is evidence recorded by the Court, Section 319 Cr.P.C. cannot be invoked.

(II) In *Rajendra Singh Sethia Vs. The State and Others*, in paragraph 6 it is observed as follows:

6. ...This power to add to or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or the non-framing of a charge and whether they are discovered at the inception of the trial or at subsequent stage of the trial, prior to pronouncement of judgment *The State Vs. Baijnath and Others*, . This power to add to or alter a charge cannot, however, be exercised unless there are evidences on record to support the addition or alteration of charge....

(III) In *T.J. Edward Vs. C.A. Victor Immanuel and Another*, it is observed as follows:

...The legal position is also that a new charge can be added only if there are material before Court either in the complaint or in the evidence to

justify such action. For justifying alteration of charge also there should be material either in the complaint or in the evidence. The learned Sessions

Judge held that the question of altering charge arises only when the charge is framed and as the offence alleged to be committed is punishable u/s

138 of the Act (offence is triable as a summons case) no charge need be framed (only particulars of the offence of which revision petitioner is

accused need be stated to him) and therefore, no question of framing additional charge as prayed for by the revision petitioner. Even treating the

application moved by revision petitioner as one filed u/s 216 Cr.P.C. to frame a new charge u/s 420, IPC there is no material either in the

complaint or in evidence to frame such a charge. It may also be pointed out here that application for alteration of the charge should be made

immediately after the charge been read out and explained by Magistrate (See *Sohoni's Code of Criminal Procedure*, 1973, 19th Edn., Vol.3, page

2514). As there is no material to hold that a prima facie case against the respondent exists to frame charge against him for commission of offence

punishable u/s 420, IPC, no charge can be framed against the respondent u/s 420, IPC.

(IV) In (2006) 2 M.L.J. 173 (referred to supra) in paragraphs 7 and 8 the Apex Court has observed as follows:

7. ...The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence....

8. ...The word ""evidence"" in Section 319 contemplates that evidence of witnesses given in the Court....

(V) In State of Maharashtra Vs. Salman Salim Khan and Another, in paragraph 13 the Apex Court has observed as follows:

Therefore, we think it appropriate that the findings in regard to the sufficiency or otherwise of the material to frame a charge punishable u/s 304

Part II IPC of both the courts below should be set aside and it should be left to be decided by the court trying the offence to alter or modify any

such charge at an appropriate stage based on material produced by way of evidence.

6. I have carefully considered the submissions made by the learned Counsel on either side. A close reading of the decisions relied upon by the

learned Counsel on either side makes it abundantly clear that the law governing the trial on criminal offence provides for alteration of charges at any

stage of the proceedings depending upon the evidence adduced in the case. As observed by the Apex Court the word ""evidence"" in Section 319

Cr.P.C. contemplates ""evidence of witnesses given in the Court"". The trial court can alter or add a charge only on the basis of evidence adduced

before it and not on the basis of any other material which do not constitute evidence. If there is any material either in the complaint or in the

evidence adduced during the course of trial, it is open to the trial court to frame a new charge. As per Section 3 of the Evidence Act the word

evidence"" would mean the statements made before the Court by the witnesses and documents produced for the inspection of the Court and they

are called oral evidence and documentary evidence respectively.

7. In the light of the above said principles culled out from the various decisions cited supra it has to be considered as to whether any evidence was

made available in the course of trial which warranted the addition of a charge u/s 420 IPC in this case. Learned Counsel for the petitioner fairly

submitted that except the contentions put forth in the written arguments filed by

the learned Counsel for the respondents u/s 314 Cr.P.C, there is no other material, which warrants the addition of a charge u/s 420 IPC. In the written arguments it is contended that since the cheque in question was returned with the endorsement ""Account transferred to suit filed account"" it should be construed that on the date when the cheque was returned by the bank, the accused did not have an account in the bank. The above said contention is a legal contention put forth by the learned Counsel for the accused and such a legal contention cannot be considered as ""evidence"". Therefore, on the basis of the above said legal contention a new charge u/s 420 IPC could not be added.

8. As rightly contended by the learned Counsel for the respondents, earlier on two occasions the petitioner had approached this Court and obtained stay and that has caused delay in the disposal of the case. This Court, while disposing of CrI.R.C. No. 622 of 2007 has directed the trial court to complete the trial within a period of two weeks from the date of receipt of a copy of that order and thereafter the petitioner filed CrI.O.P. No. 11976 of 2007 for transfer which was ultimately disposed of on 27.04.2007. When the examination of the witnesses was closed, oral arguments heard and written arguments have also been filed and the case was reserved for judgment, the present petition u/s 216 Cr.P.C. has been filed. As rightly pointed out by the trial court this is only an attempt on the part of the complainant to further drag on the proceedings.

9. The decision reported in 2007 2 L.W. (Cri.) 880 (referred to supra) is not applicable to the facts of this case because in that case as new facts have been revealed through the evidence of P.W.2 the complainant filed a petition u/s 216 Cr.P.C. to include 420 IPC in the case to proceed against the accused and only in such circumstances the trial court altered the charge and when such alteration of charge was challenged, the challenge was rejected on the ground that as new materials came into existence through the evidence the complainant is entitled to invoke the provisions contained in Section 216 Cr.P.C. But as pointed out above in the case on hand there is no material either in the complaint or in the evidence to frame a new charge u/s 420 IPC. Therefore, this Court is of the considered view that there is no irregularity or illegality in the order passed by the Court below and as such this Court is not inclined to interfere with

the order of the lower Court and accordingly the above criminal revision case fails and the same is dismissed. Consequently, the connected MPs are closed.