

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL.REV.PET. NO. 117/2011

Judgment reserved on 16th March, 2011

% Judgment delivered on 20th May, 2011

SHRI VARUN SHARMA (CARLAY) PETITIONER

Through: Mr. Tanveer Ahmed Mir, Adv.

Versus

THE STATE (NCT, DELHI) & ORS. RESPONDENTS

Through: Mr. Arvind Gupta, APP for the State.

Mr. Adbhut Pathak, Adv. for respondent No. 2.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

A.K. PATHAK, J.

1. Complainant (respondent No. 2) is husband of respondent No. 3. Petitioner is brother-in-law (wife's husband) of respondent No. 2. In the month of April, 1997, respondent Nos. 2 and 3 met each other in a train while travelling from Delhi to Hyderabad. They became friends. They continued to meet thereafter. With the passage of time love blossomed between them. Ultimately, they got married on 28th November, 1997 at Arya Samaj Mandir, Rathkhana, Bikaner according to Hindu rites and ceremonies. It

appears that after the marriage their relations became estranged. Respondent No. 2, inter alia, alleged that respondent No. 3 had concealed her real age, her marital status and the fact that she was having two children out of her previous wedlock with one Wasif Khalil. She had also concealed that at the time of marriage with Wasif Khalil she had embraced Islam. Respondent No. 3 filed a petition for dissolution of marriage by a decree of nullity under Sections 5 and 12 of the Hindu Marriage Act, 1955 in the month of November, 2000.

2. On 16th September, 2000, that is, few months prior to filing of the petition for dissolution of marriage, respondent No. 2 had filed a complaint under Section 200 Cr.P.C. before the Additional Chief Metropolitan Magistrate, New Delhi (ACMM), praying therein that petitioner and respondent No.3 be summoned tried and punished for the offences under Sections 406/415/419/420/463/468/469/471 IPC. Pursuant to the directions of the court under Section 156 (3) Cr.P.C., FIR No. 690/2000 under Sections 406/419/420 IPC has been registered at Police Station Kalkaji. After the investigation, charge-sheet was filed in the court of Metropolitan Magistrate, Delhi, who took cognizance of the offences and summoned the petitioner and respondent No. 3 vide order dated 23rd August, 2002. Petitioner filed an application seeking his discharge. This application was allowed by the Metropolitan Magistrate vide order dated 11th April, 2005. Petitioner was discharged. Respondent No. 1 (State)

preferred a Criminal Revision Petition No. 68/2006 before the Additional Sessions Judge, New Delhi against the discharge of petitioner. By the order impugned in this petition, Revision Petition has been allowed. Additional Sessions Judge has held that a, prima facie, case was made against the petitioner for having committed offence under Sections 406 read with Section 120-B IPC and he be charged accordingly by the Trial Court.

3. That is how petitioner is before this court by way of present petition under Section 397 Cr.P.C. Initially petitioner had filed the petition under Section 482 Cr.P.C. praying therein that FIR No. 690/2000 under Sections 406/419/420 IPC registered at Police Station Kalkaji and the consequent proceedings emanating therefrom be quashed; order dated 5th March, 2007 passed by Additional Sessions Judge be also set aside. However, since counsel for the respondent No. 2 had challenged the maintainability of petition under Section 482 Cr.P.C., at the request of petitioner's counsel, present petition has been treated as a Criminal Revision Petition under Section 397 read with Section 401 Cr.P.C. vide order dated 11th March, 2011, inasmuch as, petitioner has confined his prayer only with regard to setting aside of the order of Additional Sessions Judge.

4. Learned counsel for respondent No. 2 has contended that the petitioner had earlier filed a petition under Section 482 Cr.P.C. for quashing of the FIR. However, during the course of arguments of the said petition, he did not press the said relief

and confined his prayer only to the grant of bail. This fact has been concealed in this petition, thus, present petition is liable to be dismissed. Reliance has been placed on ***S.P. Chengalvaraya Naidu vs. Jagannath and Ors. (1994) 1 SCC 1*** and ***Rajinder Prasad vs. Bashir & Ors. JT 2001 (7) SC 652***. I do not find much force in this contention. It appears that earlier petition had been filed at the initial stages. Petitioner did not press quashing of the FIR at that stage and confined his prayer only to the grant of bail. By way of present petition, petitioner is not seeking quashing of the FIR. He seeks to challenge the order of the Additional Sessions Judge, whereby Trial Court has been directed to frame charge under Section 406 read with Section 120-B IPC against him. Thus, remedy to challenge the order on charge is available to the petitioner under Section 397 Cr.P.C. It is not the case that petitioner had obtained any relief by concealing the material facts which may make any order or decree a nullity. In S.P. Chengalvaraya Naidu's case (supra) respondent had obtained a decree against the appellant by concealing the "release deed". In these facts, it was held that if a party withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the other party and such decree is liable to be set aside. In Rajinder Prasad's case (supra) earlier Revision Petition filed under Section 397 Cr.P.C. had been dismissed as not pressed. Petitioner preferred a petition under Section 482 Cr.P.C. seeking same relief as sought in the Revision Petition. In

these facts, it was held that earlier Revision Petition filed under Section 397 Cr.P.C. having been dismissed as not pressed, accused cannot be allowed to invoke the inherent powers of the High Court for the grant of same relief. In the present case, by the earlier petition under Section 482 Cr.P.C., petitioner had prayed for quashing of the FIR at the initial stage; whereas present Revision Petition has been filed challenging the order of the Additional Sessions Judge whereby it has been held that a, prima facie, case was made out against the petitioner for framing of charge under Section 406 read with Section 120-B IPC. Non-mentioning of factum of dismissal of the earlier petition under Section 482 Cr.P.C. in these circumstances, by itself, would not be sufficient and adequate to throw away this Revision Petition.

5. Learned counsel for the respondent No. 2 has next contended that application of the petitioner seeking his discharge was disposed of by the Metropolitan Magistrate, vide order dated 11th April, 2005. In the Revision filed by the State this order has been set aside and the learned Additional Sessions Judge has directed the Trial Court to frame charge against the petitioner under Section 406 read with Section 120-B IPC. Charge has already been framed by the Trial Court. Thus, present petition assailing the order of Additional Sessions Judge has become infructuous. Reliance has been placed on ***Uma Shankar Singh vs. State of Bihar 2010 (9) SCC 479***. I do not find any force in this contention of learned counsel either. It is not the case that

after setting aside the order of the Trial Court, Additional Sessions Judge has remanded the case back to the Trial Court for considering the matter afresh on charge. Additional Sessions Judge has returned a categorical finding that a, prima facie, case was made out against the petitioner under Section 406 read with Section 120-B IPC and the charge be framed against him. Metropolitan Magistrate has framed charge pursuant to this order. Petitioner cannot be made remediless against the order on charge. Present petition challenging the framing of charge, thus, is maintainable. Uma Shankar Singh's case (supra) is in the context of different facts and is not applicable to the facts of the present case.

6. By placing reliance on ***Sajjan Kumar vs. Central Bureau of Investigation, 2010 (9) SCC 368, State of Bihar vs. Ramesh Singh, 1977 (4) SCC 39, State of Andhra Pradesh vs. Aravapally Venkanna & Ors. 2009(2) Crimes (SC) 455 and Mrs. Sapna Ahuja vs. State & Ors. 1999 (2) JCC [DELHI] 534,*** learned counsel for the respondent no.2 has contended that at the stage of framing of charge court has only to see as to whether any, prima facie, case is made out against the accused on the basis of material collected during the investigation. Court has not to make any roving enquiry or to look into the records for the purposes of acquittal/conviction of the accused. Metropolitan Magistrate had made a roving enquiry and made an elaborate analysis of the facts and material placed on record as if the trial

had been concluded and prosecution had failed to prove its case beyond the shadow of reasonable doubt. Additional Sessions Judge has rightly arrived at a finding on the basis of material placed on record of Trial Court that a, prima facie, case was disclosed against the petitioner for having committed the offences under Section 406 read with Section 120-B IPC.

7. Indubitably, at the stage of framing of charge court has only to see as to whether any, prima facie, case is disclosed against the accused, for framing the charge against him for the offence for which he has been sent to face trial, on the basis of material collected during the investigation. At the stage of framing of charge court has not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. On the material collected during the investigation, if there is ground for presuming that accused has committed the offence, the court can justifiably say that a, prima facie, case against him exists. At that stage, probative value of the materials on record cannot be gone into. At the same time, a court, at the time of framing of charge, is not to act merely as a post-office or mouth-piece of the prosecution, but has powers to sift and weigh the evidence, but for a limited purpose only. This exercise has to be undertaken by him only with a view to find out as to whether a, prima facie, case is made out or not. The existence of a, prima facie, case may be found even on the basis of strong suspicion against the accused. At the stage of framing

of charge, court has only to assess, evaluate and weigh the prosecution evidence purely to see whether a, prima facie, case exists and frame charge after forming an opinion that the commission of offence was possible on the part of the accused.

8. In the backdrop of the above settled legal position it has to be now seen as to whether a, prima facie, is disclosed against the accused for having committed the offence under Section 406 read with Section 120-B IPC.

9. At this stage, relevant it would be to refer to para Nos. 8, 11, 13 and 16 of the complaint, concerning the petitioner, which reads as under:

“8. That during one of his visits to Delhi in April, '99, the complainant entrusted his Sony Handycam recorder (Value approx. ₹30,000/-) to the accused No. 1 and her younger brother, Varun Sharma (accused No. 2), for two days as they were having a party at Faridabad, the complainant gave them the same with the understanding that the it will be returned to him in two days. The same has not been returned despite the complainant's repeated requests, and has been dishonestly misappropriated and converted to their own use by the accused No. 1 and her brother, Varun (accused No. 2).

11. That in the first week of January 2000, Varun Sharma (accused No. 2, the younger brother of the accused No. 1) who claimed to be a computer engineer called up the complainant when he was in Delhi and told the complainant of a supposedly good bargain for a computer which the complainant had planned to buy. Accused No. 2 said that the complainant should not let personal state of relations stop the complainant from taking advantage of the bargain he was telling of. The complainant asked him to come to Narula's Connaught Place, where Bhavna (the accused No. 1) also came. The complainant gave

the accused No. 2 and Bhavna (the accused No. 1) ₹ 7,000/- in cash and two blank cheques which were to be used for the payment after the complainant got the loan sanctioned, and on delivery of the computer. The price of the Pentium – III computer was to be ₹67,000/- which he claimed to be at least 20% cheaper than the then prevailing prices in the market.

13. That in April, 2000, the complainant's account was debited for an amount of ₹41,000/- and subsequently for ₹13,000/- by means of the said two blank cheques. The complainant pursued Varun and Bhavna (accused No. 2 & 1) for the computer and on inquiry the complainant has now learned that they have misappropriated these two cheques and the ₹7,000/- in cash, by issuing the two cheques in settlement of her (the accused No. 1's) dues payable to the landlord at Vasant Kunj where the accused No. 1 was a tenant and ₹13,000/- for the settlement of her transportation bills. The two have also dishonestly misappropriated the ₹7,000/- paid in cash.

16. That on 21st July, 2000, the accused No. 1 phoned the complainant at Chandigarh and asked the complainant to come to Faridabad to amicably settle for a divorce and other pending issues, and in connection with a problem she was facing at Faridabad. The complainant reached Faridabad and called upon the accused No. 1 (Bhavna) and her brother (accused No. 2) to return his moneys and goods. The complainant also raised the issue of divorce. Before discussing divorce, Bhavna asked the complainant to visit one Mr. S.D. Aggarwal alongwith her, who was creating problems for her. On 22.7.2000, a fray ensued and the complainant was injured. The complainant later learnt that Mr. S.D. Aggarwal did not know complainant's story and the correct facts. In fact he and the colony people were fed-up of strangers visiting Bhavna at odd hours. They claimed that by her behavior the accused No. 1 was vitiating the atmosphere of the colony and creating a bad influence on the young of the colony."

10. During the investigation, respondent No. 2 was asked by the Investigating Officer to produce the receipt of purchase of Sony Handycam recorder. He promised that he would hand over the same to the Investigating Officer. However, no such receipt was ever produced during the investigation nor has been placed on record by the prosecution. In the month of April, 1999, respondent No. 2 had not married respondent No. 3. Their courtship was going on. It was only on 28th November, 1999 respondent Nos. 2 and 3 had married in Arya Samaj Mandir, Rathkhana, Bikaner. It has nowhere been mentioned that the marriage was solemnized between the parties with the consent of their respective parents. It appears to be a love marriage. After the alleged incident of handing over of Sony Handycam Recorder respondent No.2 had been married respondent No.3 in a temple. These allegations of misappropriation of Handycam have only surfaced after the relationship between respondent Nos. 2 and 3 became sour, inasmuch as, the allegations of handing over of Sony Handycam recorder to respondent No. 3 and petitioner lack material particulars as regards place and time. Respondent No. 2 has not even produced any documentary evidence before the Investigating Officer to show that he, in fact, possessed any such Handycam recorder in the month of April, 1999. As regards the allegation of respondent No. 2 handing over of the two blank cheques to the petitioner along with ₹7,000/- in cash is concerned, the same do not inspire much confidence. Admittedly, the alleged two blank cheques had not been used by

the petitioner for his own personal benefits. He had not manipulated these cheques to withdraw the amount of ₹41,000/- and ₹13,000/- respectively for his personal use and benefits. In fact these cheques had been utilized by the respondent No.3, who was legally wedded wife of respondent No.2, to clear arrears of rent and pay taxi charges. The cheque for ₹41,000/- had been given to the landlord of respondent No. 3. It emerges that the respondent No. 3 had been living as a tenant in a flat in Vasant Kunj owned by one Shri. Anil Kaushik even when courtship between the private respondents was going on. There were arrears of rent payable by respondent No. 3 to said Shri Anil Kaushik. In fact, respondent No. 3 had issued a cheque for ₹6,500/- against part payment of arrears to Shri Anil Kaushik in the month of December 1998, which had been returned dishonored and a complaint case under Section 138 of the Negotiable Instruments Act, 1881 was pending between respondent No. 3 and Shri Anil Kaushik in Chandigarh. In his statement recorded under Section 161 Cr.P.C. by the Investigating Officer, Shri Anil Kaushik has categorically stated that respondent No. 2, accompanied with respondent No. 3, had met him in Chandigarh and had promised to clear the entire arrears. Anil Kaushik has also handed over photocopy of letter acknowledging the receipt of the keys of Vasant Kunj flat from respondent No.2 to the IO. It has also come on record that respondent Nos. 2 and 3 had taken House No. 667, Sector 17, Faridabad on rent sometime in the month of January, 2000 after

vacating the Vasant Kunj flat. Shri K.N. Bhatia, in his statement recorded under Section 161 Cr.P.C. has stated that House No. 667, Sector 17, Faridabad was owned by his son Sanjeev Bhatia who was working as a Captain in Navy. In the month of December, 1999 the said house was given to respondent No. 2 on monthly rent of ₹2500/- and a lease agreement to this effect was also executed. Since Sanjeev used to remain out of the city in connection with his duties, thus, he had been managing the affairs of his son. Respondent No. 2 had started living in the said house with respondent No. 3 with effect from the first week of January, 2000. As regards the cheque for ₹ 13,000/- is concerned, the same was given to A.Z. Khan towards the taxi charges. A.Z. Khan has stated in his statement under Section 161 Cr.P.C. that he was the owner of Evershine International Taxi Agency and respondent No. 3 had given him a cheque for ₹13,000/-. It is an admitted fact that private respondents had a quarrel with their neighbour S.D. Aggarwal at Faridabad on 22nd July, 2000 and had to cool their heels in jail. Both the cheques had been encashed in the month of April, 2000 much prior to this incident. It, thus, appears that the cheques had been used by wife of the respondent No.2 while they were living together. It is only after matrimonial disputes arose between them complaint has been filed wherein petitioner has also been impleaded as an accused in order to put pressure on the wife to come to terms with him. It may be noted that divorce petition has been dismissed by before the Punjab and Haryana High Court, in the

appeal. Status of private respondents is still that of husband and wife.

11. A growing tendency is noticed in matrimonial disputes between husband and wife to implicate family members of the other spouse in criminal proceedings so as to put pressure on the spouse to come to terms. The courts, therefore, have to be extremely careful and cautious in dealing with such complaints and must take pragmatic approach while dealing with the cases which arise out of the matrimonial acrimony between the husband and wife. This fact has also to be kept in mind in the facts and circumstances of this case.

12. To attract Section 120-B IPC it is to be shown that two or more persons agree to do an illegal act or an act which is not illegal by illegal means. In this case, neither the FIR was registered under Section 120-B IPC nor any investigation in this direction was carried out nor it was alleged in the charge-sheet that petitioner and respondent no. 3 had entered into a criminal conspiracy to dishonestly misappropriate or convert to their own use the Sony Handycam and the alleged cheques. Still Additional Sessions Judge, without assigning any reasons, has ordered for framing of charge against the petitioner under Section 406 IPC by taking aid of Section 120-B IPC.

13. For the foregoing reasons, in my view, Additional Sessions Judge was not right in holding that a, prima facie, case is made out against the petitioner under Section 406 read with Section

120-B IPC. The impugned order, thus, suffers from manifest illegality and perversity requiring interference of this court in exercise of its revisional jurisdiction to prevent miscarriage of justice.

14. In view of the above discussions, present petition is allowed and impugned order directing framing of charge against the petitioner for offences under Sections 406 read with 120-B IPC is set aside. Consequently, charge framed against the petitioner by the Metropolitan Magistrate on 22nd January, 2011 under Section 406 read with Section 120-B IPC is also quashed.

A.K. PATHAK, J.

MAY 20, 2011

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