

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.11.2016

CORAM

THE HON'BLE MR.JUSTICE P.N.PRAKASH

Crl.O.P. No.19572 of 2016

and

Crl.M.P.Nos.9162 and 9163 of 2016

1.M.Paulmani

2.R.Lakshmi

... Petitioners/Accused

Vs.

A. Sivaraj

... Respondent/Complainant

Criminal Original Petition filed under Section 482, Cr.P.C. to call for the records on the file of the Judicial Magistrate Court No.2, Tiruppur, in C.C.No.254 of 2010 and quash the same.

For Petitioners : Mr.V.Karthik
Senior Counsel
for Mr.V.Rajamohan

For Respondent : Mr.Mohideen Pitchai

ORDER

This Criminal Original Petition has been filed to call for the records on the file of the Judicial Magistrate Court No., Tiruppur, in C.C.No.254 of 2010 and quash the same.

2. For the sake of convenience, the petitioners and the respondent will be referred to as accused and complainant respectively.

3. The complainant filed a private complaint in C.C.No.254 of 2010, which is now pending on the file of the Judicial Magistrate Court No.II, Tiruppur, against the accused alleging that, the complainant and Lakshmi (A2) were partners in Sree Lakshmi Agencies, holding 50% share in the firm and that they were engaged in manufacturing hosiery. It is also alleged that the complainant and Lakshmi (A2) had authorised Paulmani (A1) to operate the bank account No.31277 in Punjab National Bank, Tiruppur. It is further alleged that taking advantage of this, the accused were slowly siphoning of the funds of the Company over a period of time and had misappropriated the funds without the knowledge of the complainant.

4. In support of the prosecution case, the complainant examined one Ragavan and Shankar u/s 202 Cr.P.C. and when the Court found that there were prima facie materials, summons were issued to the accused. Since it is a private complaint, the procedure under Chapter XIX-B Cr.P.C. - Cases instituted otherwise than on police report, was followed. The complainant examined four witnesses u/s 244 Cr.P.C., who were extensively cross-examined by the accused. Thereafter, the trial Court framed three charges on 03.07.2015, which are as follows:

(1) Against Paulmani u/s 409 IPC and against Lakshmi u/s 409 r/w 109 IPC.

(2) Against Paulmani and Lakshmi u/s 424 IPC.

(3) Against Paulmani and Lakshmi u/s 411 IPC.

5. Challenging the framing of the charges, the accused filed CrI.R.C.No.1008 of 2015 before this Court and after notice to the complainant, the matter was heard and the following order was passed on 14.07.2016:

"Learned counsel for petitioner seeks permission of this Court to withdraw this Criminal Revision and he has also made an endorsement to that effect and the same reads as follows:

"The revision petition may be dismissed as withdrawn with liberty to file quash petition."

2. The above said endorsement is recorded.

3. In view of the said endorsement, this Criminal Revision is dismissed as withdrawn, with liberty to file fresh petition in accordance with law. Consequently, connected miscellaneous petition is closed."

Thereafter, the accused have filed the present quash application to quash the charges.

6. At the outset, when this Court posed a question, as to how a petition u/s 482 Cr.P.C. is maintainable against the framing of charges, when a revision u/s 397 Cr.P.C. can be filed, Mr.Karthik, learned Senior Counsel appearing for the accused submitted that, they had filed CrI.R.C.No.1008 of 2015 and after getting liberty from this Court, have filed the present quash application for quashing the charges.

7. Per contra, Mr.Mohideen Pitchai, learned counsel for the complainant submitted that, when the learned Judge was

about to dismiss CrI.R.C.No.1008 of 2015, learned counsel for the accused sought permission to withdraw the said case and only in those circumstances, the Criminal Revision Case was dismissed as withdrawn, with liberty, as aforestated.

8. Be that as it may, now it has to be seen as to whether there are prima facie materials against the accused for the trial to proceed with.

9. Mr.Karthik, learned Senior Counsel took this Court through certain portions of the evidence of the witnesses and submitted that the charges as framed are not maintainable. He further contended that the trial Court had erroneously framed a charge u/s 409 r/w 109 IPC against Lakshmi (A2) when admittedly, she is a partner in the firm and not a servant or agent. The learned Senior Counsel further contended that u/s 219 Cr.P.C., the trial Court ought not to have framed a single charge in respect of transactions that have taken place between 28.03.2001 and 30.06.2004. Finally, he submitted that the third charge u/s 411 IPC is not maintainable, as the accused were not found to be in possession of the stolen party.

10. In a petition filed under Section 482, Cr.P.C. challenging the charges framed by the Trial Court, this Court cannot step into the shoes of the Trial Court and appraise the evidence adduced by the prosecution like a Court of first appeal. There is much force in the submission of Mr. Moideen Pitchai, learned counsel for the complainant that after the accused withdrew CrI.R.C. No.1008 of 2015 when the learned Single Judge was not inclined to allow the same, they cannot once again, re-agitate factual matters in a petition under Section 482, Cr.P.C.

11. Incontrovertibly, the accused filed CrI.R.C. No.1008 of 2015 and interim stay was granted by this Court. The complainant filed an application for vacating the order of stay and at that juncture, the accused have withdrawn CrI.R.C. No.1008 of 2015 on 14.07.2016 and filed the present quash petition.

12. In the considered opinion of this Court, this is indeed forum shopping, which cannot be permitted. However, since the learned Single Judge had granted liberty to the accused to file this quash petition, this Court heard the learned counsel for the accused extensively and perused the records.

13. Mr. Karthick, learned Senior Counsel appearing for the accused submitted that initially, the complainant lodged a police complaint, based on which an FIR was registered and the police closed the case as "mistake of fact". The learned Senior Counsel placed reliance upon a memo of calculation that is said to have been given by the complainant during police

investigation, which showed that a sum of Rs.49,37,532/- had not gone into the account of the Paulmani (A1). This document has been marked as Ex.D.11 before the Trial Court. The learned Senior Counsel wanted this Court to rely upon this document and give a finding against the complainant.

14. This Court considered the submissions of the learned Senior Counsel. Just because, the police had closed the FIR as "mistake of fact", the complainant cannot be left without any remedy. It is well settled that the complainant can seek to prove his case by filing a private complaint and adducing evidence under Section 244, Cr.P.C. which is what the complainant has done in this case. This Court cannot appreciate the memo of calculation (Ex.D.11) under Section 482, Cr.P.C. and give a finding either way. It is for the Trial Court to appreciate the said exhibit in the light of the evidence adduced by the complainant and his witnesses in the witness stand.

15. The learned Senior Counsel submitted that there is a serious error in the charges framed by the Trial Court. He submitted that even according to the complainant, Lakshmi (A2) was a partner with the complainant in Sree Lakshmi Agencies and therefore, she cannot be prosecuted for an offence under Section 409, IPC.

16. A reading of the charges would go to show that Lakshmi (A2) is not prosecuted for an offence under Section 409, IPC simplicitor. Paulmani (A1) is charged with an offence under Section 409, IPC, as he was appointed as an agent to manage the bank accounts of Sree Lakshmi Agencies and the allegation is that he has misappropriated the money of the firm and that his sister Lakshmi (A2) had abetted commission of the offence by Paulmani (A1). Thus, the charge against Lakshmi is one under Section 409 IPC read with Section 109 IPC.

17. The learned Senior Counsel submitted that the first charge relates to six transactions spanning from 23.08.2001 to 30.06.2004 and therefore, the charge is not maintainable in the light of Section 219, Cr.P.C. The judgment of the Supreme Court in the State of Andhra Pradesh vs. Cheemalapati Ganeswara Rao and another [AIR 1963 SC 1850] is a locus classicus on the law of charges. The following passage expounds the law beyond any cavil.

"26. Mr. Bhimasankaram contended that S. 239 must be read at least subject to Ss.234(1) and 235(1) on the ground that if there are certain restrictions with respect to the trial of a single accused there is no reason why those restrictions will disappear if an accused person is tried along with several other persons. Thus he points out that where several persons are accused of more offences than one of the same kind committed by them jointly within a period

of 12 months, the number of offences for which they could be tried cannot exceed three. In this connection he relied upon the words "within the meaning of S.224" occurring in cl. (c) of S. 239. These words, he contended, clearly show that cl. (c) of S.239 is subject to the provisions of S.234. In our opinion the words " within the meaning of S.234" indicate that what was meant by the words offence of the same kind" in cl. (c) of S.239 is the same thing as was meant by the identical expression used in S.234(1) and defined in S.234(2) and nothing more. If it was the intention of the Legislature to provide that the number of offences for which several accused persons could be tried under cl. (c) of s.239 should be limited to three as provided in S.234(1), the Legislature would either have said "'persons accused of more offences than one of the same kind not exceeding three in number" or may have used the words "person accused of more than one offence of the same kind to the extent permissible under S.234". Language of this kind would have made perfectly clear that cl. (c) of S.239 was subject to S.234(1). As already stated, if S.239(c) is construed as being subject to S.234(1), there would be this anomaly that whereas the same accused person could be charged with and tried jointly for any number of offences of different kinds committed by them, for more than three offences of the same kind committed by them jointly there will have to be a separate trial with respect to such offences. Surely such could not have been the intention of the legislature. The object of enacting S.239 was to avoid multiplicity of trials and the only limitation which could properly be placed on the trial of several persons for the same kind of or different offences would be that which considerations of justice and fairness would require. No doubt, such a construction would also give rise to the result that whereas so far as the trial of a single accused person is concerned the charges must be limited to three offences committed by him within the space of 12 months from the first to the last of such offences, there would be no such limitation when along with that accused person there are one or more persons who have jointly committed those offences. The reason for this possibly is that the Legislature did not want to differentiate between cases where any number of different offences were committed jointly by a group of persons from cases where any number of offences of the same kind were committed by a group of persons."

(Section 234 of 1898 Code) can be applied only when there is one accused and it does not apply when there are more than one accused. Here, there are two accused and therefore, the provisions of Section 219, Cr.P.C. can have no application.

19. As regards the third charge under Section 411, IPC, the learned Senior Counsel submitted that the said charge cannot be maintained, inasmuch as the accused are not receivers of any stolen property.

20. There appears to be force in this submission of the learned Senior Counsel, inasmuch as the allegation against the accused is one of misappropriation and therefore, a charge under Section 411, IPC cannot be maintained against them. Mr.Moideen Pitchai, learned counsel for the complainant also fairly concurred with the submission made by the learned Senior Counsel appearing for the accused in this regard.

Accordingly, the third charge under Section 411, IPC framed against the accused by the Trial Court in C.C. No.254 of 2010 is hereby quashed and to this limited extent, this Criminal Original Petition is allowed and the same is dismissed otherwise. Connected Crl.M.Ps. are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gms/cad

To

The Judicial Magistrate No.2
Tiruppur.

+2cc's to Mr.M.Mohideen Pitchai, Advocate, S.R.No.62980
+1cc to Mr.N.Mohideen Basha, Advocate, S.R.No.63151

Crl.O.P. No.19572 of 2016

SM(CO)
CA(02/12/2016)