

HON'BLE SRI JUSTICE Dr. B. SIVA SANKARA RAO

CRIMINAL PETITION No.14030 of 2016

ORDER:

The petitioner is the accused of C.C.No.487 of 2015 on the file of XIV Special Magistrate, Hyderabad, and the 1st respondent is the complainant.

Originally the 1st respondent-complainant filed a private complaint against the accused for the offence under Section 138 of Negotiable Instruments Act (for short 'the Act') basing on the cheque return memo and the learned VIII Metropolitan Magistrate, Cyberabad, taken cognizance for the said offence and subsequently due to the amended NI Act, the case came before the learned III Additional Chief Metropolitan Magistrate, Nampally, and later as per the orders of learned Metropolitan Sessions Judge, Hyderabad, the matter was transferred to learned XIV Special Magistrate, Erramanzil, for the purpose of conducting trial. During the course of trial, the complainant examined as PW.1 and during the cross examination of PW.1, the petitioner/accused taken a plea that the cheque under question does not belong to accused and the same was not drawn from the account of accused. Subsequently the petitioner/accused adduced evidence and examined the Bank Manager of Bank of Baroda, Attapur Branch, Ranga Reddy District as RW.1 wherein the RW.1 clearly stated that the cheque in question was not drawn from the account of the accused and the same was from the account of Smt. K. Shanta Kumari. At that stage, the 1st respondent-complainant filed CrI.M.P.No.1864 of 2016 under Section 216 Cr.P.C. seeking to alter the charge under Section 138 of NI Act to Section 420 IPC and the same was allowed

by the learned Special Magistrate on 08.09.2016. Impugning the said order, the petitioner/accused maintained the present quash petition to quash the proceedings.

The contentions of the learned counsel for the petitioner/accused apart from reiterating the above contentions are that after taking cognizance of the offence under Section 138 of the Act, the Sessions Court has sent the file to learned XIV Special Magistrate to conduct the trial under Section 138 of the Act, thereby the learned Special Magistrate has to confine only to the extent of conducting the trial under Section 138 of the Act, but the Special Courts have no power to alter the charge the offence under Section 138 of the Act to Section 420 IPC, otherwise the entire trial will be vitiated. It is also contended that because of alteration, it is causing prejudice to the accused and also Section 420 IPC is not the original charge and it is also pertinent to mention here that Section 138 of the Act is summary case and Section 420 IPC is warrant case and warrant procedure and the application itself is not maintainable and the same is against the law and thereby sought for quashing of the proceedings by allowing the Criminal Petition.

Whereas the learned counsel for the 2nd respondent submits that the impugned order no way requires interference and sought for dismissal of the quash petition.

Heard both sides and perused the material on record.

The impugned order of the lower Court speaks that on 07.04.2014 the accused borrowed an amount of Rs.3,00,000/- from the complainant and executed demand promissory note and towards the discharge of the said amount the accused issued the

cheque bearing No.506848 with post date 19.02.2015 drawn on Bank of Baroda, Attapur Branch, Hyderabad, in favour of the complainant and the complainant when presented the said cheque with his Banker, State Bank of India, Yousufguda Branch, the same was returned dishonoured for “insufficient funds” and after statutory notice, the private complaint was filed. It further speaks that the accused opposed the petition by filing counter and pleaded that she never issued the cheque in question and she is not having account with said Bank and further pleaded that the special court has not power to alter the penal section. It also speaks that it is the case of the complainant that the accused issued the cheque in question in favour of the complainant claiming that she is having account in Bank of Baroda, Attapur Branch, Hyderabad, and during the cross examination of PW.1-complainant, the accused suggested that she did not issue the cheque in question and she is not having account in the said Bank. Therefore, it has become necessary to alter penal law from Section 138 of the Act to Section 420 IPC. The respondent/accused objected that she did not issue Ex.P2 cheque in favour of complainant and she is not having account in Attapur Branch.

The truth or otherwise of the rival contentions of both sides are to be decided in the main case and not in this petition. Secondly, the accused objected the maintainability of the petition. The complainant relied upon CrI.A.No.1064 of 2006 of Madras High Court in **R. Selvaraj Vs. Murugesan**. As per the facts of the said decision penal Section of law can be altered by the trial Court. Considering the above, the present petition is maintained. In the light of the discussions made above, the complainant made out a

case to alter penal law from Section 138 of the NI Act to Section 420 IPC.

The said order is now in challenge. From the hearing of both sides in coming to the merits, it is necessary to consider the scope of Section 216 Cr.P.C. and Sections 244 to 246 Cr.P.C. besides Section 251 Cr.P.C. and Section 143 of the Act.

Sections 216 & 217 Cr.P.C. read as follows:

216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) to recall or re- summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as

the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material. B.- Joinder of charges.”

From the above the Court got power in its discretion to alter or add to any charge at any time before the judgment is pronounced.

The question of altering a charge arises when there are possibilities of framing of charges. Whether in the case under Section 138 of the Act from the cognizance taken under Section 142 of the Act for the procedure contemplated under Section 143 of the Act is there any possibility of framing a charge much less for its alteration or addition subsequently.

In this context, it is necessary to reproduce Section 143 of the Act reads as follows:

143. Power of Court to try cases summarily.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials: Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees: Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to

that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

[\(2\)](#) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

[\(3\)](#) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

From the above, the procedure contemplated is a summary trial. It is the mandate of the law of the land from several expressions of the Apex Court to strictly follow as contemplated by Section 143 of the Act to try the cases summarily as expeditiously as possible. For the summary trial the procedure contemplated by summons case generally be followed besides what Section 143(1) supra speaks of Sections 262 to 265 Cr.P.C. to the extent practicable shall apply and therefrom even as per wording of Section 262 Cr.P.C. procedure specified in the case of summons shall be followed except on the sentence not exceeding 3 months in case of conviction. In fact that Section 262 (2) Cr.P.C. no way applies here for the reason, the provisos 1 & 2 of Section 143(1) speaks of what is sentence of imprisonment and fine that to be imposed is specified from non-absentee clause of irrespective of what is contained in Cr.P.C. though further in saying Section 262 to 265 Cr.P.C. apply as far as may be for trial. In fact for summary trial by adopting summons procedure as referred supra, there is no need by any statutory provision for framing of charge. What

Section 251 Cr.P.C. in summons case to be adopted, after supply of copies to accused on appearance or is brought before the learned Magistrate, the particulars of the offence in which he is accused shall be stated to him and he shall be asked whether pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. Thus, there is no need of framing a charge and it is not even the case from the impugned order that any charge is framed and on the said charge accused is examined for the examination under Section 251 Cr.P.C. much less by any hearing of the accused before framing of such charge otherwise contemplated for warrant cases and sessions case from the procedure contemplated. The question of invoking Section 216 Cr.P.C. much less to add Section 420 IPC by the impugned order of the learned Magistrate does not arise. It is for the reason of once there is no charge contemplated and no charge framed for the offence under Section 138 of the Act, there is no question of alteration of charge or addition of non-est charge much less to include any penal section particularly Section 420 IPC for which there is procedure contemplated of warrant procedure either warrant procedure on police report or warrant procedure on private complaint from combined reading of Sections 238 to 250 Cr.P.C. In fact it is the private complaint case even for the learned Magistrate to invoke Section 420 IPC it must be outcome of private complaint warrant procedure and from the evidence of prosecution at pre charge stage being recorded and from which not discharged, if before recording evidence under Section 245(2) Cr.P.C., at least after recording evidence from Section 245(1) Cr.P.C., the procedure contemplated is provided by Sections 246 & 247 Cr.P.C. and the

learned Magistrate cannot simply include Section 420 IPC in the case covered by Section 138 of the Act also for the above reasons, but for if at all remedy of the complainant available if any is otherwise and not even from any enabling provision to file application much less to ask the learned Special Magistrate in the private complaint case for the offence under Section 138 of the Act that too during trial, from the defence evidence in progress, to entertain application to include Section 420 IPC in view of the above. These aspects are not drawn attention by the learned Special Magistrate in simply allowing the application of the complainant by including Section 420 IPC as can be seen of allowed for the sake of asking by referring to an expression of the learned Single Judge of the Madras High Court without discussing what are the facts and what is the principle laid down therein and how it is applicable to the case on hand to the application of the petitioner even.

Having regard to the above, the impugned order of the learned Magistrate dated 08.09.2016 in CrI.M.P.No.1864 of 2016 in altering Section 420 IPC in the private complaint case during defence evidence for the offence under Section 138 of the Act, is unsustainable and set aside.

Accordingly and in the result, the Criminal Petition is allowed.

Consequently, miscellaneous petitions, if any shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date:01.11.2017

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Note: LR copy to be marked.