

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2019

PRONOUNCED ON : 23.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.RC.Nos.1115 and 1116 of 2009

Mrs.Pasupathi Petitioner / Defacto Complainant
in both Revisions

Vs

1.Vadivazhagi 1st Respondent / A-1 in
Crl.RC.No.1115/2009

2.Nalliappan 1st Respondent / A-2
in Crl.RC.No.1116/2009

3.State by Sub Inspector of Police
Central Crime Branch
Egmore, Chennai 600 008. 2nd Respondent in both
Crime No.365/06 Petitions

Prayer:- These Criminal Revision Petitions are filed, under Sections 397 and 401 of Cr.PC, against the order of the learned Additional District Judge, Fast Track Court No.III, Thiruvallur, dated 30.06.2009, made in Crl.RP.Nos.3 and 4 of 2009, allowing the criminal revision petitions, and thereby setting aside the orders, dated 19.11.2007, passed by the learned Judicial Magistrate No.1, Poonamallee, in the Discharge Petitions in CMP.Nos.603 and 3099 of 2007 in CC.No.212/2006.

For Petitioner : Mr.Ar.L.Sundaresan, SC
for Mrs.AL. Gandhimathi in both Petitions

For Respondents: Mr.B.Kumar, SC for Mr.A.Jenasenan-R1 in
both Petitions

Mr.K.Prabakar, APP-R2 in both Petitions

COMMON ORDER

1.These Criminal Revision Petitions are filed, under Sections 397 and 401 of Cr.PC, challenging the orders of the learned

Additional District Judge, Fast Track Court No.III, Thiruvallur, dated 30.06.2009, made in CrI.RP.Nos.3 and 4 of 2009, allowing the criminal revision petition and thereby setting aside the orders, dated 19.11.2007 passed by the learned Judicial Magistrate No.1, Poonamallee, dismissing the Discharge Petitions in CMP.Nos.603 and 3099 of 2007 in CC.No.212/2006.

2.The facts leading to filing of these Criminal Original Petitions are as follows:-

- a) The 1st Respondents in these Criminal Original Petitions, namely, Vadivazhagi/A1 and Nalliappan/A2 are wife and husband and that, A1 was allotted a plot by the Tamil Nadu Housing Board, vide proceedings, dated 12.06.1992 at Plot No.3/PC-15 at Mogappair West, Anna Nagar, Chennai-40, admeasuring to an extent of 2 grounds and 547 sq.ft. On 13.05.1994, both the accused induced the defacto complainant/revision petitioner herein and his daughter to purchase the said plot for a sale consideration of Rs.20 Lakhs, for which A1 had entered into an Agreement of Sale, with the complainant and also executed a General Power of Attorney, in the name of the complainant and the same was registered, as Document No.976 of 94 on the file of the Sub Registrar, Anna Nagar and A2 signed as a witness to the same, after receiving a sum of Rs.6,50,000/- from the complainant, with an assurance to the complainant to pay the balance amount of Rs.15,50,000/- to the Tamil Nadu Housing Board, which was due to be paid by A1. The complainant also paid the said balance amount during the period between 31.08.1994 and 13.01.1995. But, the accused neither executed the Sale Deed nor repaid the amount paid by the defacto complainant and thereby, cheated them. Hence, a complaint came to be registered for the alleged commission of the offence under Section 420 read with 34 of IPC, which had culminated into a charge sheet, after investigation, in CC.No.212/2006.
- b) At the stage of framing charges, before the Trial Court, the accused filed petitions for discharge under Section 239 of Cr.PC, in CMP.Nos.603 and 3099/2007. The Trial Court, upon hearing the submissions made on either side, had dismissed the said discharge petitions on 19.11.2007, on the ground that without a full-fledged trial and without letting in any evidence or examination of any witnesses, the Court cannot reach a conclusion to discharge the accused and that the trial has not commenced. Challenging the said dismissal of the discharge petitions, the accused persons preferred CrI.RP.Nos.3 and 4 of 2009, before the Lower Revisional Court, viz., the Court of Additional District Judge, Fast Track Court No.3, Tiruvallur. Pending the said revision petitions, the defacto complainant, namely, Jayaraman, had died and the case is being

prosecuted by his daughter, viz., Mrs.Pasupathy, who is the revision petitioner herein. The Lower Appellate Court, vide common order dated 30.06.2009, had allowed the said revision petitions filed by the accused, thereby setting aside the dismissal of the discharge petitions, by observing that the charge framed against the accused is groundless. Aggrieved by the said common order, the defacto complainant, has preferred the present Criminal Revision Petitions before this Court.

- 3.This court heard the submissions of the learned counsel on either side.
- 4.The learned counsel for the Petitioner would contend that the lower revisional court erred in condoning the delay of more than one year in filing the said revisions and no notice has been issued to the defacto complainant before entertaining the revision petitions of the accused. He would further contend that in spite of a finding of the court below that the complainant P.Jayaraman, died and the Petitioner herein is the daughter of the complainant, no notice was given to the Petitioner herein to raise her objections before deciding the case.
- 5.The learned counsel for the Petitioner would further submit that the lower revisional court did not follow the procedure contemplated under the Code of Criminal Procedure and that the lower appellate erred in relying on the extraneous materials produced by the accused at the stage of the revision petition and that the documents, which were not filed before the Trial Court, and furnished to the accused in compliance of Section 207 of Cr.PC, cannot be looked into and ought not to have been accepted by the revision Court. He would further submit that the revisional/sessions court erred in marking the documents as exhibits on the side of the accused, at the stage of revision and that as the scope of revisional jurisdiction being very limited, the lower revisional court ought to have appreciated that the power of the lower revisional court is restricted to limited extent of finding out whether there was a prima facie case or not for framing charges and for proceeding against the accused and hence, cannot enter into a detailed discussion of the merits or demerits of the case, by conducting a roving enquiry or mini trial and thereby the lower revisional court has exceeded its jurisdiction, in setting aside the order of the Trial Court and in such circumstances, the impugned order is against law, and thereby, liable to be set aside. In support of his contentions, the learned counsel for the Petitioner would rely on the decisions of the Honourable Supreme Court reported in 2014 11 SCC 709 (N.Suresh Rajan and others Vs. State by Deputy Superintendent of Police, VAC), 2006 4 CTC 60 (IOC Vs. NEPC) and 2013 11 SCC 476 (Sheoraj Singh Ahlawat and others Vs. State of UP and another).

6. The learned senior counsel for the 1st Respondent, while denying the contentions of the Petitioner in toto, would contend that the accused is given the right to file an application for discharge under Section 239 of Cr.PC and they filed a revision petition to the Sessions court, as against the refusal to discharge and that the defacto complainant has to seek permission under Section 301 of Cr.PC and that after the case is instituted, the Public Prosecutor becomes in charge to conduct the prosecution in this case and nobody else and that the counsel appointed by the defacto complainant cannot act independently or displace the Public Prosecutor and he must act under the Public Prosecutor as a person assisting the Prosecution.
7. The learned senior counsel for the 1st Respondent would further submit that it is not open to the defacto complainant to raise any objection to the documents filed before the revision Court, as the order has been passed only after hearing the Public Prosecutor. He would further submit that marking the documents by giving them exhibit numbers is a procedure not to be faulted and it is a convenient method of referring the documents and that Ex.P7 Ex.P8 and Ex.P10 are the documents, which are unimpeachable documents of sterling quality and that the agreement in question is void in law since there is a Clause No.13 in the allotment order, stating that the allottee shall not sell, otherwise dispose of the site/house for a period of five years from the date of allotment and that such an agreement contrary to the provisions contained in the allotment order is void in law.
8. The learned senior counsel for the 1st Respondent would submit that the defacto complainant need not be put on notice or heard in a revision filed against the refusal to discharge. The accused had challenged the final report under Section 173 of Cr.PC and thereby the contest is only between the accused and the Prosecution. He would submit that as per the decision reported in 2001 3 SCC 402 (JK International Vs. State), there is a bar for the defacto complainant to assist the Prosecution without permission from the Court and thereby, notice was not necessary to the defacto complainant and that the agreement between the defacto complainant at the stage of revision and the accused being opposed to public policy, the proceedings pending before the Trial Court cannot be sustained and that further, the consequences of the agreement between the parties being void and contrary to the Statute having no legal sanctity, the Prosecution based on such agreement cannot be sustained and that the agreement contrary to law cannot be a base for conviction and so long as the sale deed not being obtained from the Tamil Nadu Housing Board, there is no obligation on the part of the Respondents/ accused to execute the sale deed and that there was no dishonest intention to

cheat the defacto complainant.

9. The learned senior counsel for the 1st Respondent would contend that the complaint was filed after lapse of nine years and that such a complaint to enforce an unenforceable civil right, is not maintainable and that there was no prejudice caused to the complainant since the entire amount had been paid to the Tamil Nadu Housing Board and that since the Tamil Nadu Housing Board had not executed the sale deed till date, the dishonest intention could not be attributed to the accused and that it is a well established principle of law that the revisional court will not interfere even if a wrong order is passed by a Court having jurisdiction, in the absence of jurisdictional error. He would rely on the decisions reported in 2009 8 SCC 751 (Mohammed Ibrahim and others Vs. State of Bihar and another), 2009 14 SCC 696 (Dalip Kaur and others Vs. Jagnar Singh and another), 2019 SCC Online SC 138 (Bir Singh Vs. Mukesh Kumar), 2016 SCC Online SC 923 (Prem Kumar Vs State of Rajasthan), 2015 1 LW 881 (Radha Lakshmanan Vs. M.S.Gurusamy), 2015 1 LW 889 (Pachamuthu Vs. K.Thangamuthu) and 1999 7 SCC 467 (Shiv Kumar Vs. Hukam Chand), in support of his contentions.
10. The learned senior counsel for the 1st Respondent would further submit and conclude that at the time of filing the anticipatory bail application, the Respondents/ accused had repaid the entire amount to the Petitioner/ defacto complainant.
11. In respect of the above submissions, the learned senior counsel for the Petitioner/ defacto complainant would submit that the Trial Court having found that there are prima facie materials for framing charges, had dismissed the discharge petitions and all the factual aspects raised by the Respondents/ accused are all matter for evidence that can be agitated at the time of trial and at the stage of discharge, a mini trial cannot be conducted regarding the merits and demerits of the facts of the case and that the Court when dealing with powers of revision cannot appraise the evidence.
12. The learned senior counsel for the Petitioner/ defacto complainant would further submit that returning the amount by the accused will not absolve themselves from the offence committed by them and that the entire amount has been kept in a deposit and it has not been used by the Petitioner/ defacto complainant and that that is not a matter for consideration in these revisions and only the legality of the impugned order passed by the lower revisional court has to be considered in these revisions.
13. The learned Additional Public Prosecutor for the State would submit that the Trial Court having found that there are prima facie materials available for framing the charges, had rightly dismissed the discharge petitions and the Executive Engineer of the Tamil Nadu Housing Board, had by letter dated,

7.6.2006, had stated that the draft sale deed in favour of the accused was approved by the Executive Engineer and the Administrative Officer, vide letter dated, 11.4.2006 in JJA/10/2342/04 and despite that the Respondents/ accused having received the entire money from the complainant did not keep the promise and cancelled the Power of Attorney.

14. The learned Additional Public Prosecutor for the State would submit that the Trial Court, having found that there are prima facie materials available for framing charges had dismissed the discharge petitions and that no notice was issued to the revision petitioner/defacto complainant by the lower revisional Court at the time of revision, however, the lower revisional Court, in utter violation of the procedure, had deviated from the scope of revision and conducted a roving enquiry and mini trial in respect of the merits of the case and relied on extraneous materials and passed the illegal order, traversing beyond the powers granted to him. He would further submit that though no petition has been filed by the Petitioner to assist the Prosecution, this Court, as a revisional Court, can suo moto take cognizance and set right any order passed by the lower revisional Court, when it is manifestly illegal, perverse and beyond the scope of powers under Section 397 of Cr.PC.
15. I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire evidence available on record and also perused the impugned judgement of the lower revisional Court, allowing the revision and discharging the accused by setting aside the order of dismissal of discharge petition, including the relevant provisions of Law and authorities of various Courts.
16. Now what is to be seen is whether the order passed by the lower revisional Court by relying upon the extraneous materials is legally sustainable or not?
17. When this Court restricts the issue to the limited extent of deciding the legality or otherwise of the impugned order of the lower revisional Court, this Court deems it appropriate to refrain itself from venturing into discussing the facts of the case, which might affect the prospects of either party at the stage of trial.
18. On a perusal of the impugned order of the Trial Court, it is seen that the Trial Court has dealt with the revision petitions as if dealing in a petition under Section 482 of Cr.PC though an objection has been raised by the Prosecutor that the materials produced by the Respondents/ accused cannot be scrutinised at the stage of revision and that it could be done only in the trial.
19. Admittedly, the lower revisional court has taken into consideration the extraneous materials, which have been marked as Ex.P7 to Ex.P12 and Ex.P15 to Ex.P17, while passing the impugned orders.

20. In this context, it is apposite to refer to the decisions of the Honourable Supreme Court reported in 2005 1 SCC 568 (State of Orissa Vs. Debendra Nath Padhi) and 2018 13 SCC 455 (State by the Inspector of Police, Chennai Vs. S.Selvi and another).

21. In 2005 1 SCC 568 (State of Orissa Vs. Debendra Nath Padhi), the Honourable Supreme Court has held as under:-

"The law is that at the time of framing charge or taking cognizance, the accused has no right to produce any material. No provision in the Code of Criminal Procedure, 1973 grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Satish Mehra Case, 1996 9 SCC 766 holding that the trial Court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence."

22. In 2018 13 SCC 455 (State by the Inspector of Police, Chennai Vs. S.Selvi and another) the Honourable Supreme Court has relied on its various decisions, regarding the scope of powers of revision, and has held as under:-

"6. It is well settled by this Court in a catena of judgments including Union of India v. Prafulla Kumar Samal [Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4 : 1979 SCC (Cri) 609], Dilawar Balu Kurane v. State of Maharashtra [Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135 : 2002 SCC (Cri) 310], Sajjan Kumar v. CBI [Sajjan Kumar v. CBI, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371], State v. A. Arun Kumar [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505], Sonu Gupta v. Deepak Gupta [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265], State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688], Niranjana Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya [Niranjana Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76 : 1991 SCC (Cri) 47] and Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja [Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038] that the Judge while considering the question of framing

charge under Section 227 of the Code in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his rights to discharge the accused. The Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial.

7. In *Sajjan Kumar v. CBI* [*Sajjan Kumar v. CBI*, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371], this Court on consideration of the various decisions about the scope of Sections 227 and 228 of the Code, laid down the following principles: (SCC pp. 376-77, para 21)

"(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this

stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

8. This Court in *State v. A. Arun Kumar* [State v. A. Arun Kumar, (2015) 2 SCC 417 : (2015) 2 SCC (Cri) 96 : (2015) 1 SCC (L&S) 505] , *Sonu Gupta v. Deepak Gupta* [Sonu Gupta v. Deepak Gupta, (2015) 3 SCC 424 : (2015) 2 SCC (Cri) 265] , *State of Orissa v. Debendra Nath Padhi* [State of Orissa v. Debendra Nath Padhi, (2003) 2 SCC 711 : 2003 SCC (Cri) 688] and *State of T.N. v. N. Suresh Rajan* [State of T.N. v. N. Suresh Rajan, (2014) 11 SCC 709 : (2014) 3 SCC (Cri) 529 : (2014) 2 SCC (L&S) 721] has reiterated almost the aforementioned principles. However, in *State of Haryana v. Bhajan Lal* [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , relied upon by the counsel for Respondent 1 is not

applicable to the facts of the case inasmuch as the said matter arose out of the judgment of the High Court quashing the entire criminal proceedings inclusive of the registration of first information report. The said matter was not concerned with the discharge of the accused.

10. If on the basis of the material on record, the Court would form prima facie opinion that the accused might have committed the offence, it can frame charge, though for conviction it is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of charges, the probative value of the material on record has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant conviction. The Court is required to evaluate the material on record at the stage of Sections 227 or 239 of the Code, as the case may be, only with a view to find out if the facts emerging therefrom taken at the face value discloses the existence of all the ingredients constituting the alleged offence. It is trite that at the stage of consideration of an application for discharge, the Court has to proceed with the presumption that materials brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom taken at their face value disclose existence of the ingredients of the offence."

23. With regard to the participation of the defacto complainant in the criminal proceedings, the Honourable Supreme Court in a later decision reported in 2016 6 SCC 699 (Amanullah and another Vs State of Bihar and another), referring to JK. International's case, has widened the scope of "locus standi" and has relaxed the strict rule allowing any person from Society not related to cause of action to approach the Court if bona fide seeking justice. In this case, the Petitioner/ defacto complainant is an affected party entitled to such justice.

24. In 2012 9 SCC 460 (Amit Kapoor Vs. Ramesh Chander and another), wherein the order of the High Court, quashing the charges framed was under challenge, the Honourable Supreme Court has held that framing of charge is a kind of tentative view, which is subject to final culmination of the proceedings and that the Court is not expected to form even a firm opinion at this stage, but a tentative view would evoke presumption referred to under Section 228 of Cr.PC. It was finally held that the High Court erred in quashing the charges, by

reevaluating and re-appreciating the evidence, which was beyond the jurisdiction, either revisional or inherent, when the High Court itself, was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial. The Honourable Supreme Court holding so, had set aside the order of the High Court, quashing the charges and directed the Trial Court to proceed with the Trial, in accordance with law.

25.As stated above, the Trial Court is expected to proceed with the presumption that materials brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom taken at their face value disclose existence of the ingredients of the offence. The Trial Court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the lower revisional court should make a roving enquiry into the pros and cons of the matter and weigh the materials as if it was conducting a trial or deciding the petition as if exercising power under Section 482 of Cr.PC. In this case, the lower revisional court has not only relied on extraneous materials, but also relied on the judgements relating to quashing of proceedings, assuming power of a Constitutional Court which is illegal and hence, the impugned order has to be set aside.

26.Further, in 2012 1 SCC 680 (Ashis Chadha Vs. Ashakumar), the Honourable Supreme Court has held that it is impermissible for the revisional Court to reappreciate the evidence and it is the Trial Court which has to decide whether the evidence on record is sufficient to make out a prima facie case against the accused to frame charges.

27.As stated above, in order to avoid any prejudice to either parties before the Trial Court during the trial, this Court is not expressing any opinion on the merits or demerits, regarding the facts of the case and only traversing into the question as to whether the procedure adopted by the lower revisional court in relying upon the extraneous materials is proper or not. In view of the above decisions of the Honourable Supreme Court, the procedure adopted by the lower revisional court, relying and analysing the extraneous materials, as if it was conducting a trial, which resulted in setting aside the order of the Trial Court, dismissing the discharge petition, is illegal and thereby, not sustainable.

28.In the result, these Criminal Revision Petitions are allowed and the impugned order passed by the lower revisional court, dated 30.06.2009, made in CrI.RP.Nos.3 and 4 of 2009, is set aside. The Respondents/ accused shall appear before the Trial Court for facing trial. Since the case is of the year 2006, the Trial Court is expected to proceed with the trial and conclude it, as expeditiously as possible.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

Srcm

To:

- 1.The Sub Inspector of Police, Central Crime Branch, Egmore,
Chennai 600 008.
- 2.The Additional District Judge, Fast Track Court No.III,
Thiruvallur
- 3.do Thro The Principal Sessions Judge, Thiruvallur.
- 4.The Judicial Magistrate No.1, Poonamallee,
- 5.do Thro The Chief Judicial Magistrate,
Poonamallee.
- 6.The Public Prosecutor, High Court, Madras

+2cc to M/s.AL.Ganthimathi, Advocate sr.39040, 39041
+2cc to M/s.A.Jenasenan, Advocate sr.38742, 38741

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