

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-20865-2018 (O&M)

Date of decision: 25.02.2019

Dr. Devender Singh

....Petitioner

Versus

Navdeep Singh and another

....Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Vivek Khatri, Advocate
for the petitioner.

Mr. Rohit Aggarwal, Advocate
for respondent No.1.

Mr. Arjun Singh Yadav, AAG, Haryana.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this petition is for quashing of the order dated 27.02.2018 (Annexure P-7) passed by the trial Court, vide which application filed by the prosecution/petitioner under Section 216 Cr.P.C. for alteration of the charge, was dismissed and also for quashing of the order dated 07.04.2018 (Annexure P-9) passed by the revisional Court, vide which the revision petition filed by the petitioner was dismissed.

Brief facts of the case are that the petitioner had given a complaint and on the basis of the same, FIR No.85 dated 21.06.2010 under

Section 469 IPC and Section 66 of Information and Technology Act, Police Station Odhan, District Sirsa was registered that some persons have created email account (DS MOR <vedsm@yahoo.in>) in the name of the petitioner and are sending mischievous complaints through this email account, to higher authorities, using mischievous language. After registration of the FIR, police conducted the investigation and on receiving the information from the service providers i.e. yahoo.in and BSNL, it was found that IP address of broadband cell of BSNL used for the aforesaid purpose was found in the name of Kavita, wife of respondent No.1-accused Navdeep Singh and one Satish Kumar, who was running an internet booth. The police thereafter recommended to register the FIR under Section 469 IPC and Section 66-A of I.T. Act.

During the investigation, respondent No.2 Navdeep Singh was arrested and the police recorded his disclosure statement and recovered the laptop set and broadband modem. After completing the investigation, challan was presented and the trial Court, vide order dated 16.01.2012, framed charge against the respondent-accused under Section 66-A of I.T. Act for sending mischievous complaints to higher authorities by using email account (DS MOR <vedsm@yahoo.in>) in the name of complainant Dr. Devender Singh, Director Principal of Chaudhary Devi Lal Memorial Engineering College, Panniwala Mota. The accused was a Professor in the said institute. The trial Court also framed charge under Section 469 IPC for forging the electronic record by creating email account (DS MOR <vedsm@yahoo.in>) with an intention to harm the reputation of

the complainant. The respondent did not plead guilty and claimed trial.

The prosecution led its evidence and thereafter, moved an application for alteration of charges and for framing the charge under Sections 419, 468, 500, 501 IPC and Section 66-D of I.T. Act. The said application was dismissed by the trial Court on 11.11.2016 observing that no prima facie evidence for the offence punishable under the offences as stated in the application is made out. The petitioner preferred a revision before the Court of Sessions, however, the same was dismissed as withdrawn with permission to file a fresh petition as per law after recording some evidence.

The prosecution moved an application under Section 311 Cr.P.C. for production of the laptop as case property in the Court, which was partly allowed. Thereafter, the petitioner filed CRM-M-42075-2016, which was decided on 29.11.2016, by passing the following order: -

“By virtue of the instant petition preferred under Section 482 Cr.P.C. petitioner has sought quashing of impugned order dated 14.09.2015 (Annexure P-6) passed by Judicial Magistrate Ist Class, Dabwali, whereby an application moved by the prosecution under Section 311 Cr.P.C. has been partly allowed but revision petition preferred by the prosecution has been declined in respect of production of laptop/case property in the court.

A close scrutiny of the impugned order transpires that the laptop was recovered from accused-respondent No.1-Navdeep Singh during investigation of the case registered against him and its production in the court was necessary for providing full opportunity of being heard to the prosecution.

Due to certain reasons, prosecution failed to produce the said laptop during the period, the case was fixed for prosecution evidence. It can be termed to be a lapse or omission on the part of the prosecution, but for that lapse or omission, the complainant cannot be made to suffer.

In other words, the accused also cannot drive any benefit for the non-production of the case property/laptop in the court. The production of the other evidence by the prosecution could be well supported from the material available in the laptop to bring truth to the fore and to punish the guilty person. Moreover, the discretion provided under Section 311 Cr.P.C. has to be exercised judiciously and this court is of the considered view that it would be fitness of things that the laptop be produced in the Court and it is only thereafter it would bring some fruitful result.

Taking into consideration the aforesaid discussion, instant petition is allowed and the order dated 14.09.2015 is set aside. Consequently, prosecution is allowed to produce the case property in the Court within a period of one month from the date of receipt of certified copy of this order or on any date convenient to the trial court.

Since, this order has been passed in the absence of the respondent No.1/accused, if he is so aggrieved, he may approach this Court.”

In the meantime, the prosecution filed two applications for confirming the Mac ID of the laptop by sending the same to FSL, which was allowed vide order dated 07.07.2017 and another application for directing the SHO to take the laptop to Director, Central Forensic Laboratory, New Delhi for verifying the Mac ID of the laptop, which was recovered from the

respondent. This application was allowed on 19.08.2017.

Thereafter, the trial Court recorded the statement of two prosecution witnesses i.e. PW9 Sukhdeep Singh, who has produced the laptop and the modem before the trial Court and PW10 Sushil Bana, who has also produced the record regarding laptop of the Dell company, which was allotted to the respondents-accused. The prosecution then moved another application for alteration of the charges under Section 216 Cr.P.C. and prayed for framing of additional charge under Sections 419, 468, 500, 501 IPC read with Section 66-D of I.T. Act. The trial Court dismissed the said application, by passing the following order: -

“In the case in hand, the accused has already been charged for the commission of offences punishable under Sections 469 of IPC and 66-A of Information Technology Act, 2000. Now, by moving the present application the prosecution/complainant wants to get the accused charged for the commission of offences punishable under Sections 419, 468, 500, 501 IPC and Section 66-D of Information Technology Act, 2000. However, the prosecution/complainant have nowhere mentioned in the application that what evidence has come against the accused for the commission of above said offences. I have also gone through the statements of all the prosecution witnesses examined till now. In my considered view, no prima facie evidence for the offences punishable under above said sections is available on record. Further, fresh evidence which

has come on record is the MAC ID of the laptop in question from which certain emails were allegedly sent by the respondent/accused but the same is not going to affect the charges already framed against the respondent/accused.

*Moreover, in **Parminder Singh Versus State of Punjab and another, 2013 (2) RCR (Criminal) 256**, it has been held that the framing of charge is itself a prima facie order, indicative of the fact the trial judge has formed the opinion upon considering the police report, other documents and after hearing both the parties that there is ground for presuming that the accused have committed the offence, as contemplated under Sections 225 to 228 Cr.P.C. Therefore, in view of above said discussion and referred case, this Court is of the considered opinion that this Court had earlier framed the charges after considering the entire material on record and as such the present application is without any merit and not maintainable. Accordingly, the present application is hereby dismissed.*

Nothing contained herein above shall be considered to be the expression of my opinion on the merits of the case.”

The petitioner preferred the revision petition before the revisional Court and the revisional Court dismissed the same by passing the following order: -

“After going through above facts, evidence and submissions of

learned counsels for the parties, it is expressed that in the instant case it is not disputed that revisionist had filed earlier an application under section 216 of Cr.P.C for addition and alteration of charge and that application was dismissed by the learned lower court vide order dated 10.11.2016 and the revisionist had challenged order dated 10.11.2016 in earlier revision and that revision was dismissed as withdrawn on 20.2.2017 with permission to file after adducing the additional evidence allowed by Hon'ble High Court in revision petition bearing no. CRM-M-4275 dated 29.11.2016 as per law. It is also not disputed that after allowing additional evidence by Hon'ble High Court prosecution has examined PW9 Sukhdeep Singh and PW10 Sushil Bana.

PW9 Sukhdeep Singh has merely produced the parcel containing laptop and modem whereas PW10 has produced the record vide which the laptop of dell company was given to respondent/accused. So, the evidence of PW9 and PW10 is not sufficient to frame charge under sections 419, 468, 500, 501 IPC and 66D of I.T Act and the learned lower court has rightly framed the charges against the respondent/accused vide order dated 16.1.2012 after taking into consideration the material available on the file and the learned lower court has also rightly held that prosecution has not adduced any evidence on the basis of which a prima facie charges under sections

419,468, 500,501 IPC and 66D of I.T Act could be framed.

In view of above discussion and findings this court is of the considered view that there is no illegality or infirmity in the impugned order passed by the learned Magistrate and no interference of the revisional court is warranted. Hence, this revision petition is hereby dismissed. Parties are directed to appear before the trial court on the date fixed to attend further proceedings. File of trial court be sent back with one copy of this order. File of this revision petition be consigned to the records.”

Learned counsel for the petitioner has argued that the charge under Section 469 IPC read with Section 66-A of I.T. Act, with reference to offence, which was committed on 13.03.2010 and 11.04.2010, vide which two emails were sent to the Chief Minister, Haryana at ID cm@hry.nic.in and Chief Secretary, Haryana on his email ID cs@hry.nic.in. It is further submitted that both these emails were exhibited in the statement of the petitioner/complainant as Ex.PW5/B and Ex.PW5/C and contents of the same make out not only defamatory allegations but the same have been sent by impersonation and by creating a fake email ID in the name of the petitioner, by using a computer, which was allotted to the respondent-accused in the capacity of a Professor of the institution, where the petitioner is working as Director Principal.

Learned counsel, with reference to the lower Court record, which was requisitioned on request of the parties, vide order dated

24.09.2018, has read over the emails Ex.PW5/B & Ex.PW5/C, wherein the accused posing himself as petitioner, has addressed to the Chief Minister and Chief Secretary that he never take care of the grievance of the students, uses the official car for his private purpose by making tours for his enjoyment, uses huge grant-in-aid as per his own wishes, has no interest in the development of the institution, has never taught a single student in his life and his life target is to become VC of any university by hook or crook and he works for his own interest. In the other email, declaration was made on behalf of the petitioner that he has bought the decree of doctorate from some person. It is further submitted that after framing of the charge, the Hon'ble Supreme Court in **Shreya Singhal Vs. Union of India, 2015 (2) RCR (CrI.) 403** has struck down the provisions of Section 66-A of I.T. Act in its entirety and therefore, the Courts below have not looked into this aspect of the case that the charge framed against the respondent-accused on 16.01.2012 under Section 66-A of I.T. Act needs to be altered in view of the fact that Section 66-A of I.T. Act was struck down by the Hon'ble Supreme Court on 24.03.2015.

It is further argued that after amendment in the I.T. Act, vide which Section 81 was incorporated w.e.f. 27.03.2009, it is provided as under: -

“81. Act to have overriding effect.-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Learned counsel for the petitioner has relied upon **Sharat Babu Digumarti Vs. Government (NCT of Delhi), (2017) 2 Supreme Court Cases 18**, wherein the Hon'ble Supreme Court has held as under: -

“ In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-

“81. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act 1957 or the Patents Act 1970.”

The proviso has been inserted by Act 10 of 2009 w.e.f. 27.10.2009.

Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Shreya Singhal (supra) and we concur with the same.

Section 81 also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.”

It is thus argued by learned counsel for the petitioner that in view of Section 81 of I.T. Act, which came in existence prior to the commission of offence in the present FIR, the substantive charge, which could be framed against the respondent, was under Section 66-D of I.T. Act, which reads as under: -

“66-D. Punishment for cheating by personation by using computer resource. -Whoever, by means for any communication device or computer resource cheats by

personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.”

Learned counsel for the petitioner has further argued that from the FSL report, it is apparent that Mac ID of the laptop used by the respondent stands proved and from other evidence collected, it is also proved that the respondent has created aforesaid fake email ID in the name of the petitioner and by using IP address of the BSNL broadband, which was found in the name of his wife, he has sent the emails to Chief Minister, Haryana as well as Chief Secretary, Haryana, by impersonating himself as petitioner and as a result of sending the emails from fake ID, the petitioner has even faced departmental action from the higher authorities. It is further submitted that the petitioner or the prosecution did not want to lead any fresh evidence, if the charges are amended/altered.

Learned counsel has also relied upon **Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana and another, 2016 (2) RCR (Crl.) 327**, wherein the Hon'ble Supreme Court has held that an informant of the FIR has a right to file an application under Section 216 Cr.P.C. for alteration or modification of the charge and it can be altered at any time before pronouncement of the judgment.

In reply, learned State counsel, assisted by learned counsel for respondent No.1-accused, has however opposed the prayer on the ground that on an earlier occasion, a similar application was filed for alteration of

charge, which was dismissed by the trial Court on 10.11.2016 and the revision petition filed by the petitioner was dismissed as withdrawn to file fresh application if some evidence is collected. It is also submitted that the case is at the fag end and is fixed for final arguments and the application has been filed to delay the proceedings. It is further submitted that no evidence has come on record to alter the charges to be framed under Sections 419, 468, 500, 501 IPC and Section 66-D of I.T. Act.

After hearing learned counsel for the parties, I find merit in the present petition, for the following reasons: -

- (a) As per the prosecution version, two fake emails were sent on 10.03.2009 and 09.04.2009 and thereafter, the police, after verifying the facts, registered the FIR and when the challan was presented, the charges were framed on 16.01.2012. Prior thereto, there was an amendment in the I.T. Act, which came in existence on 27.10.2009, incorporating Section 81 of I.T. Act, which provides that I.T. Act have overriding effect. Therefore, while framing the charge on 16.01.2012, the trial Court has not looked into this aspect and the provisions of Section 66-D of I.T. Act, on the basis of prima facie evidence, which has come on record.
- (b) Even otherwise, after the provisions of Section 66-A of I.T. Act were quashed by the Hon'ble Supreme Court in **Shreya Singhal's** case (supra), vide judgment dated 24.03.2015, the trial Court was required to amend the charge even when first

application was filed and dismissed on 10.11.2016 and this aspect of the case was not considered by both the Courts below.

- (c) In M.A. No.3220 of 2018 in W.P.(Crl.) No.199 of 2013, titled as **Peoples' Union for Civil Liberties Vs. Union of India and others**, the Hon'ble Supreme Court has passed the following order on 15.02.2019:-

“The learned Attorney General appears before us and has made a concrete suggestion, which we accept.

The suggestion is that copies of this Court's judgment in 'Shreya Singhal v. Union of India' [(2015 5 SCC1)] will be made available by every High Court in this country to all the District Courts. This should be done within a period of eight weeks from today.

Also, we direct the Union Government to make available copies of this judgment to the Chief Secretaries of all the State Governments and the Union Territories. This should be done within a period of eight weeks from today. The Chief Secretaries will, in turn, sensitise the police departments in this country by sending copies of this judgment to the Director General of Police in each State, within a period of eight weeks thereafter.

The applicant stands disposed of accordingly.”

- (d) The findings recorded by the Courts below that no evidence has come on record to alter the charge under Section 66-A of

I.T. Act, to my mind is not correct as from perusal of the statement of PW5 read with two emails Ex.PW5/B and Ex.PW5/C, prima facie charge under Section 66-D of I.T. Act is made out.

In view of the above, present petition is allowed and it is directed that the trial Court will frame the charge under Section 66-D of I.T. Act in place of Section 66-A of I.T. Act. Since the petitioner has represented that the prosecution do not intend to lead any fresh evidence, the trial Court will proceed further at the stage, when the statement under Section 313 Cr.P.C. of the accused is recorded and grant him an opportunity to lead his defence evidence, if so required.

With the aforesaid observations, this petition is disposed of.

Nothing observed herein, will have a bearing on the merits of the case.

[ARVIND SINGH SANGWAN]
JUDGE

25.02.2019
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Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No