



Crl.R.C.No.605 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 15.06.2022

Order Pronounced on : **21.06.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.R.C.No.605 of 2022

N.Syamasundara Naidu

.. Petitioner

Versus

1. V.Dakshinamoorthy

2. B.H.Himagiribabu

3. State rep. By
The Inspector of Police,
D.C.B. (ALGSC) Vellore,
Crime No.42 of 2014.

Respondents

..

Prayer : Criminal Revision Case is filed under Section 397 and 401 of Cr.P.C., to set aside the order, dated 24.02.2022 passed by the learned Judicial Magistrate No.II, Vellore in Crl.M.P.No.9152 of 2021.

For Petitioner : Mr.R.Vijaya Raghavan



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For Respondents : Mr.K.Srinivasan, for RR-1 and 2
: Mr.S.Vinoth Kumar, for R3



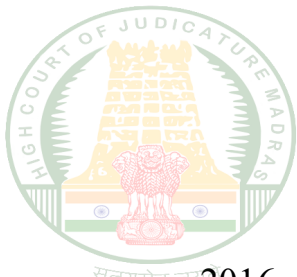
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ORDER

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This Revision is filed challenging the order of the learned Judicial Magistrate No.II, Vellore, dated 24.02.2022 in CrI.M.P.No.9152 of 2021 in C.C.No.10 of 2016.

2. The gist of the allegations of the prosecution is that the property in Alandur village S.Nos.376/1B1 and 376/1C1, totally ad-measuring to 3 Acres 76 Cents belongs to N.Syamasundara Naidu, the de-facto complainant, he having purchased the same by a registered sale deed, dated 23.05.2012. Taking advantage of the fact that he was absent in the village and was living in Tirupathi, the first and second accused entered into a conspiracy and so as to grab the said property, forged a sale agreement in respect of the said property and on the strength of the sale agreement, filed O.S.No.130 of 2014 and also tried to trespass into the property and when the de-facto complainant came to know of the same, they also threatened to do away his life. On the above allegations, a case was registered in Crime No.42 of 2014 by the Inspector of Police, District Crime Branch (ALGSC), Vellore and a Final Report was filed proposing the accused guilty of certain offences. Thereafter, upon the case being taken on file as C.C.No.10 of

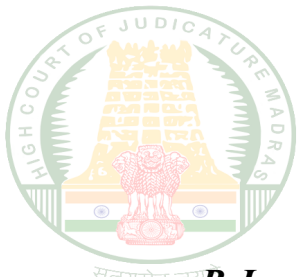


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2016, on 18.02.2016, the learned Magistrate framed the charges under Section 120(B), 419, 420, 423, 447, 465, 468, 471 and 506(i) of the Indian Penal Code and the Trial is being proceeded with. P.W.1, de-facto complainant namely, N.Syamasundara Naidu, was also permitted to appoint a learned Counsel to assist the learned Public Prosecutor.

3. The stage of the case is that the examination of the other witnesses are over and the matter is posted for examination of the Investigating Officer. At this stage, the petitioner/de-facto complainant filed above CrI.M.P.No.9152 of 2021 under Section 216 of the Code of Criminal Procedure to frame additional charges under Sections 34, 109, 467 and 474 of the Indian Penal Code. The said petition was resisted by both the accused Nos.1 and 2 in the case as well as the Police by filing separate counter statements. By the order impugned in the Revision, the Trial Court considered Section 301 of the Code of Criminal Procedure and in view of the Section 301(2) of the Code of Criminal Procedure, held that the private pleader, who was appointed, cannot conduct an independent prosecution himself and therefore, he had no locus to plead on behalf of the prosecution and conduct the case. The Trial Court relied upon the judgment in



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B.Janakiramaiah Chetty Vs. A.K.Parthasarathi¹ and the judgment of the
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Hon'ble Supreme Court of India in **Rekha Murarka Vs. The State of West Bengal**² (Criminal Appeal No.1727 of 2019) and held that within the bounds of the Code of Criminal Procedure, it is open for the private pleader to put-forth his written arguments post completion of evidence and learned Public Prosecutor's arguments and held that a petition to alter the charges cannot be filed at this stage.

4. The order of the learned Magistrate, *per se*, cannot be sustained.

Firstly, Section 301 of the Code of Criminal Procedure is not at all applicable to the instant case. It is useful to quote Sections 301 and 302 of the Code of Criminal Procedure, which read as follows:-

“301. Appearance by Public Prosecutors.

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so

¹ 2002 Cr. LJ 4062 (AP)

² (2020) 2 SCC 474



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instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

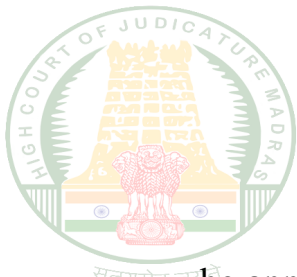
302. Permission to conduct prosecution.

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission: Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

5. The Hon’ble Supreme Court of India in ***Shiv Kumar Vs. Hukam Chand and Another***³, after considering the nature of Sections 301 and 302 of the Code of Criminal Procedure, categorically held that a reading of the Sections 301 and 302 of the Code of Criminal Procedure, it would be clear that Section 302 of the Code of Criminal Procedure would be applicable for the Magistrate Court and Section 301 of the Code of Criminal Procedure will

³ (1999) 7 SCC 467



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be applicable only for the other Courts. It is useful to extract the paragraph

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No.12 of the said judgment, which reads as follows:-

“ 12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to Magistrate Courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words “any court” in Section 301. In view of the provision made in the succeeding section as for Magistrate Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. ”

Therefore, the entire reasoning, which is based on Section 301 of the Code of Criminal Procedure, is unsustainable as it is not applicable to the Magistrate Courts.

6. Secondly, the passage extracted by the learned Magistrate from the judgment of ***Rekha Murarka Vs. The State of West Bengal*** (cited supra), which is reproduced hereunder, reads as follows:-

“12.5. However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim’s counsel, the victim’s counsel may still not be given the unbridled mantle of making oral arguments or



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*examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the Court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 of the CrPC or Section 165 of the Indian Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in **Smt. Uma Saha v. State of Tripura 2014 SCC OnLine Tri 859** that the victim's counsel has a limited right of assisting the prosecution, which may extend to **suggesting questions to the Court or the prosecution, but not putting them by himself.**"*

(Emphasis supplied)

Thus, it may be seen that even in the said case, it has been held that the victim's learned Counsel cannot take the role of conducting the prosecution himself by examining the witnesses or making arguments, but, certainly, it would be within his right to bring it to the notice of the Court and if the learned Judge finds merits in any of the shortcomings complained, it is the Court which invokes its powers and acts accordingly. In the instant case also, P.W.1, victim, has filed an application bringing to the notice of the Court about the fact that certain specific charges are



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omitted to be framed, arising out of the self-same allegations, for which there need not be further investigation or additional evidence and therefore, it is for the Court to consider the same on merits. Therefore, on the mere reason that same is not emanating from the learned Public Prosecutor/Police, it cannot be thrown out. Therefore, the order of the learned Magistrate is unsustainable.

7. In this regard, as rightly relied upon by the learned Counsel, the Honble Supreme Court of India, in **Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana and Another**⁴, had held that just because an application to add a charge is filed, the same would not amount to a private lawyer takes control of the proceedings. It is useful to extract the relevant portion of paragraph No.22 which is reads as follows:-

“ 22. Being of this view, this Court upheld the order passed by the High Court. The said decision in Shiv Kumar case [Shiv Kumar v. Hukam Chand, (1999) 7 SCC 467 : 1999 SCC (Cri) 1277] is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge under Section 406 IPC as there were allegations against the husband about the

⁴ (2016) 6 SCC 105



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criminal breach of trust as far as her stridhan is concerned.”

8. The nature of exercise of power under Section 216 of the Code of Criminal Procedure is explained by the Hon'ble Supreme Court of India in ***Dr.Nallapareddy Sridhar Reddy Vs. State of Andhra Pradesh and Others***⁵ and it necessary to extract paragraph No.16 of the said judgment which reads as follows:-

“ 16. Section 216 appears in Chapter XVII CrPC. Under the provisions of Section 216, the court is authorised to alter or add to the charge at any time before the judgment is pronounced. Whenever such an alteration or addition is made, it is to be read out and explained to the accused. The phrase “add to any charge” in sub-section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done “at any time before judgment is pronounced”. Sub-section (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the prosecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court

5 (2020) 12 SCC 467



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to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 CrPC deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial.”

9. Thereafter, after considering all the previous judgments in this regard, the Hon'ble Supreme Court of India held in paragraph No.21 as follows:-

“ 21.From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words “at any time before judgment is pronounced” in subsection (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely



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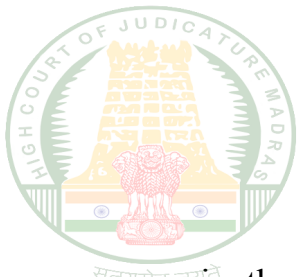


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commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges. Sub-section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused.”

Thus, it may be seen that the charges can be added if there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. And the second test is that the Court should examine whether such alteration/addition of charges would cause prejudice to the defence of the accused.

10. Now, by applying the ratio to the instant case, the first grievance of the petitioner is that the charge under Section 34 of the Indian Penal Code is not framed. In this regard, the Hon'ble Supreme Court of India had, in detail, dealt with regarding the nature of Section 34 of the Indian Penal Code



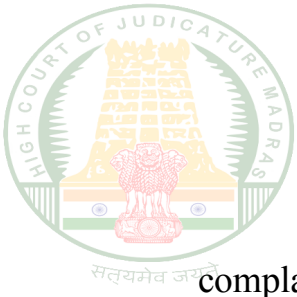
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in the judgment *Abdul Sayeed Vs. State of Madhya Pradesh*⁶ and it is useful to extract paragraph No.4 of the said judgment which reads as follows:-

*“ 49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the “common intention” to commit the offence. The phrase “common intention” implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the “same intention” or “similar intention” or “common object”. The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See **Mohan Singh v. State of Punjab [AIR 1963 SC 174 : (1963) 1 Cri LJ 100]** .)”*

Therefore, a perusal of even the charges framed by the Trial Court, it is clear that the first and second accused, in this case, conspired with each other and there is a common intention to grab the property of the de-facto

⁶ (2010) 10 SCC 259



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complainant and such common intention is formed well before the commission of the offenses and thus, the ingredients are already clearly put-forth in the other charges framed.

11. As a matter of fact, from the certified copy of the charges framed on 18.02.2016, it does not read that a charge under Section 34 of the Indian Penal Code is framed, however, in the questions framed for questioning the accused, it reads as follows:-

“ கேள்வி
.....பொய் ஆவணம் புனைந்தும்,
மேற்படி பொய்யாக புனைப்பட்ட
ஆவணத்தை உண்மையானது என சொல்லி
நீதிமன்றத்தில் பயன்படுத்தி அந்தவகையில்
இ.த.ச. பிரிவுகள் 120பி, 419, 420 உ/இ 34,
423, 447, 465, 468, 471 மற்றும் 506(1)ன்
தண்டிக்கும்படியான குற்றத்தை
புரிந்துள்ளதாக உம்மீது மாவட்ட குற்ற
பிரிவு (நில அபகரிப்பு தடுப்பு சிறப்பு பிரிவு)
காவல் ஆய்வாளர் இறுதி அறிக்கை
தாக்கல் செய்துள்ளார் அது பற்றி என்ன
கூறகிறீர்? ”

(Emphasis Supplied)

Therefore, it may be seen that non-framing of charge is a mere omission and as a matter of fact, it appears to be a clerical error. Therefore, no prejudice whatsoever will be caused and such a charge, in the facts and circumstances of the case, can be deemed to be an original charge framed at

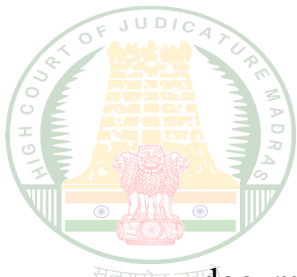


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the beginning of the Trial itself.
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12. It may be seen that the offence is alleged of forging an agreement of sale which creates a legal rights of the parties and therefore, falls within the definition of a valuable security contained in Section 30 of the Indian Penal Code and therefore, without any additional investigation or material, the materials already existing on record categorically point out to an offence under Section 467 of the Indian Penal Code and thus, it is again an omission in not framing a specific charge for the offense under Section 467.

13. The next grievance of the petitioner is that the charge has to be framed under Section 474 of the Indian Penal Code also. In this regard, it may be seen that a Charge under Section 471 of the Indian Penal Code is framed because using the forged document, the accused had already ventured to file a Civil Suit in O.S.No.130 of 2014. Section 474 of the Indian Penal Code is actually a lesser offense of the same order if the accused are in possession of the forged document intending to use the same. Therefore, I am of the view that the said charge need not be specifically framed and ultimately on the finding, if the accused had actually used the



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document, they can be convicted for the offence under Section 471 of the Indian Penal Code and if they are intending to use in future, they can be convicted for the lesser offence under Section 474 of the Indian Penal Code as the offence is of the same genus.

14. It may be seen from the material that both the accused had aided and abetted each other in respect of the mutually acts committed by the other and therefore, it is again an omission in not framing a charge under Section 109 of the Indian Penal Code also.

15. Further, a careful reading of the Section 216(3) of the Code of Criminal Procedure and the judgments of the Hon'ble Supreme Court of India referred to above, if there is no prejudice to the accused in their defence or the Prosecutor in the conduct of the case, the matter can be proceeded with the Trial as if the added charge has been original charge. In this case, absolutely no additional facts are pleaded. Neither new discovery during the time of trial is the basis for addition of the charge. The very material on record at the inception of the trial itself if taken on face value constitutes the offenses under these added charges. There is no necessity for



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fresh examination of the witnesses and therefore, I am of the view that these additional charges can be framed and questioned and thereafter, the Trial Court can be proceeded as if these charges were also part of the original charges, only be given the accused an additional opportunity to cross examine the witnesses if he so desires, in respect of the newly added charges.

16. Thus, the Criminal Revision Case is allowed on the following terms:-

(i) The order of the learned Judicial Magistrate No.II, Vellore, dated 24.02.2022 in Crl.M.P.No.9152 of 2021 in C.C.No.10 of 2016 is set aside;

(ii) The Crl.M.P.No.9152 of 2021 in C.C.No.10 of 2016 is partly allowed to the extent indicated above by directing the learned Judicial Magistrate No.II, Vellore to frame additional charges under Sections 34, 109 and 467 of the Indian Penal Code, question the accused and thereafter, proceed with the trial as if the additional charges were also originally framed;

(iii) On the basis of the answers of the accused on the newly framed charges, if the accused choose to contest the said charges and if they request



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for recalling any of already examined witnesses to be cross examined for the purpose of further cross-examination regarding the newly framed charges, the same shall be permitted;

(iv) It is seen that already a direction has been given to the Trial Court to expeditiously complete the Trial and therefore, the Trial Court is requested to take up this matter preferably on day to day basis and complete the same expeditiously;

(v) The petitioner/de-facto complainant shall also, without fail, cooperate with Trial Court for expeditious disposal of the case.

(vi) Consequently, Crl.M.P.No.6368 of 2022 is closed.

21.06.2022

Index : yes/no
Speaking/Non-speaking order
grs

To

1. The Judicial Magistrate No.II, Vellore.
2. The Public Prosecutor,
High Court of Madras.
3. The Inspector of Police,
D.C.B. (ALGSC) Vellore,
Crime No.42 of 2014.



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D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery order in
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21.06.2022