

(2014) 04 GAU CK 0024

Gauhati High Court**Case No:** Criminal Revision Petition No. 302/2013

Sri Ranjan Borah

APPELLANT

Vs

Sri Nathmal Tibrewala

RESPONDENT

Date of Decision: April 28, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 200, 202, 239, 240
- Penal Code, 1860 (IPC) - Section 34, 406, 420

Citation: (2014) 3 GLD 685 : (2014) 2 GLT 657**Hon'ble Judges:** C.R. Sarma, J**Bench:** Single Bench**Advocate:** T.C. Khetri, Sr. Advocate., Mr. B. Pusila and Mr. S.K. Jain, Advocate for the Appellant; K. Sarma, Advocate for the Respondent**Final Decision:** Allowed

Judgement

C.R. Sarma, J.

By this criminal revision, filed under Sections 397/401/482 of the Code of Criminal Procedure (for short, CRPC), the petitioner has challenged the judgment and order, dated 25.06.2013, passed by the learned Sessions Judge, Sonitpur, in Criminal Revision No. 44(S-3) of 2012, filed by the respondent.

2. The respondent, as complainant, filed a complaint case being C.R. Case No. 765/2006, under Sections 420/406/34 IPC, against the petitioner and Smti. Anamika Baruah.

3. The complainant's case, may, in brief, be stated as follows:

Smti Anamika Baruah, one of the accused person (s), proposed to sale a plot of her land in favour of the complainant and his witness No. 1, who agreed to purchase the land at Rs. 20,00,000/- (Rupees Twenty Lakhs). Accordingly, an agreement was executed between the said parties and the petitioner also signed the same as

witness.

The said vendor received an amount of Rupees eight lakh on 17.05.2006 i.e. in the date of agreement itself. As per agreement, the vendor agreed to execute the sale deed within 30.09.2006. On 31.05.2006 she (vendors) requested the complainant to give her another amount of rupees one lakh and, on being agreed by the complainant to pay the said amount, she sent the petitioner to collect the same and thus, the said amount was paid to her through the petitioner. However, as Smti. Baruah failed to execute the Sale Deed, the complainant issued Pleader's notice to her, demanding execution of the Sale Deed within 30.09.2006. Subsequently, it was noticed that the said land was already mortgaged with the Bank of Baroda and, by issuing a paper publication, Smti. Baruah denied to have entered into any agreement within the complainant.

In view of the above, the complainant filed the complaint case against Smti. Baruah and the petitioner alleging that she, with the help of the petitioner, dishonestly induced the complainant to pay the said money, with false promise to sell the land.

4. In the said complaint, pending before the learned SDJM, Sonitpur, Tezpur, the trial court, after enquiry u/s 200 and 202 Cr.P.C., issued process against the petitioner and Smti. Anamika Baruah for the offences under Sections 406/420/34 IPC. The complainant, before charge, examined himself as PW-1 while considering the matter regarding framing of charge, the learned SDJM framed charge for the offence u/s 420 IPC, against Smti. Anamika Baruah and discharged the petitioner, for want of sufficient evidence.

5. Aggrieved by the said order of discharge, the complainant, as petitioner, filed a criminal revision, being Criminal Revision No. 44(S-3) of 2012. The learned Sessions Judge, by the impugned judgment and order, partly set aside the impugned order, so far it related to the discharge of the petitioner and directed the trial Court to frame charge u/s 420/34 IPC against the petitioner. This order has been challenged in this revision.

6. I have heard Mr. T. Khetri, learned Sr. Counsel, appearing for the petitioner and Mr. K. Sarma, learned Counsel, appearing for the respondent.

Mr. Khetri, learned Sr. Counsel, referring to the complaint, the evidence given by the witnesses, the alleged agreement for sale and the judgment and orders, passed by the Courts below, has submitted that there being no evidence, regarding offence committed by the petitioner, the trial Court rightly discharged him, but the learned Sessions Judge, by failing to properly appreciate the provisions of Sections 240 and 245 Cr.P.C. committed gross illegality by directing to frame charge u/s 420 IPC against the petitioner. It is also contended, by the learned Sr. Counsel, that there is no evidence, on-record, to believe that the petitioner had committed the offence u/s 420 IPC and as such, the order requiring framing of charge u/s 420 IPC, against the petitioner, is illegal and in violation of the statutory provision of law.

The learned Sr. Counsel has relied on the decisions held in the cases of (i) [Onkar Nath Mishra and Others Vs. State \(NCT of Delhi\) and Another,](#), (ii) [Shiv Kumar Daga Vs. State of Assam and Another,](#) and (iii) [Sri Manik Chandra Hazarika Vs. Sri Bibhison Pegu and Another,](#).

7. Refuting the said argument, advanced by the learned Sr. Counsel for the petitioner, Mr. K. Sarma, learned Counsel for the respondent has submitted that there is sufficient material, on-record, justifying framing of charge, u/s 420 IPC, against the petitioner, inasmuch as the evidence adduced by the PW-1 sufficiently leads to hold the petitioner guilty of the offence u/s 420 IPC.

8. Having heard the learned Counsel for both the parties, I have carefully perused the impugned judgment and order, passed by the learned trial Court, the agreement for sale, the complaint and the evidence of PW-1.

This being a warrant procedure case instituted otherwise than on a Police report, the procedure for framing of charge and or discharge of accused is governed by Section 245 and 246 Cr.P.C.

Sections 245 and 246 Cr.P.C. read as follows:

245. When accused shall be discharged.-(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

246. Procedure where accused is not discharged.-(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in this opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under subsection (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and if so, which, of the witnesses for the prosecution whose evidence has been

taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examined and re-examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any), they shall also be discharged.

9. A close reading of Sections 245 and 246 Cr.P.C. indicates that the Magistrate is required to take into consideration the evidence with a view to ascertain as to whether the available evidence, in its face value i.e. if unrebutted, would warrant conviction. If the answer is found in affirmative, then charge can be framed and if the answer is in negative then the accused is to be discharged. For such consideration, the evidence means the evidence already recorded u/s 244 Cr.P.C. However, u/s 245(2) Cr.P.C. Magistrate has power to discharge an accused at any, earlier stage, if for reasons to be recorded by the Magistrate, he considers the charge to be groundless.

But u/s 239 Cr.P.C. i.e. in respect of cases instituted on Police report, the Magistrate, at the time of consideration of charge, is to consider the Police report and the documents sent u/s 173 Cr.P.C.

10. In the case of Onkar Nath Mishra and Ors.-Vs.-State (NCT of Delhi) and Anr. (supra), the Supreme Court observed that framing of charge affects a person's liberty substantially and therefore, in framing charge, proper consideration and application of mind is necessary.

The Supreme Court, in the said case further observed-

It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At this stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

The above cited case arose out of an FIR resulting submission of charge-sheet by Police. In respect of a case instituted on a Police report, the law regarding consideration of charge has been prescribed by Section 240 Cr.P.C. u/s 240 Cr.P.C. existence of grounds for presumption of guilt of the accused is sufficient to frame charge. Therefore, there is basic difference with regard to criteria and standard of

applying judicial mind for consideration u/s 240 and 245 Cr.P.C. u/s 240 Cr.P.C. existence of ground, on the basis of the material, on record, leading to the presumption that the accused has committed an offence triable by a Magistrate is sufficient to frame charge. But for framing charge u/s 246 Cr.P.C. as provided by Section 245(i) Cr.P.C., the Magistrate must be satisfied that the evidence, i.e. the evidence recorded u/s 244 Cr.P.C., on its face value is, sufficient to base conviction.

11. In the case of Manik Chandra Hazarika-Vs.-Bibhison Pegu and Another (supra), a learned Single Judge of this Court observed-

Thus, the standard of evidence, which has to be available for framing of charge in a warrant case, instituted otherwise than on police report, is far higher than the materials, which are required to be in existence for the purpose of framing of charge in a warrant case instituted on a police report inasmuch a Magistrate is bound to frame a charge in a warrant case, instituted than on a police report, unless he finds the charge to be groundless; whereas the standard for framing of charge in a warrant case, instituted otherwise than on police report, is that the Magistrate shall determine whether the evidence on record, if remains unrebutted, would warrant conviction of the accused or else, the Magistrate shall discharge the accused.

12. In the case of Shiv Kumar Daga-Vs.-The State of Assam and Another Opposite Parties (supra), a learned Single Judge of this Court held that the documents filed by the complainant is to be considered at the time of framing the charge. In the present case there is no allegation of non consideration of document.

13. The present case being a case instituted otherwise than on a Police report, the theory of presumption of guilt per se will not be applicable. In such a case, the evidence recorded u/s 244 Cr.P.C., unless rebutted, must be sufficient to base conviction. For framing charge u/s 246 Cr.P.C., the criteria laid down in Section 245(I) Cr.P.C. must be fulfilled.

14. In the present case, the learned Sessions Judge observed that the ingredient of existence of common intention, on the part of the petitioner, would be cleared only after further evidence is adduced. The relevant observation reads as follows:

It needs to be mentioned that the complainant's case is based on breach of contract of sale of immovable property allegedly with intentional duping of the complainant, in furtherance of common intention, which aspect would be cleared only when the remaining witnesses to be adduced by the complainant are examined and cross-examined in depth, in course of the trial of the case after framing of charge. Therefore, this revisional Court finds inherently probable incriminating prima-facie sufficient evidence to frame a charge against the accused Sri Ranjan Bora u/s. 420/34 IPC.

15. In my considered opinion the learned Sessions Judge committed error by drawing presumption of commission of offence, without arriving at the findings that the evidence, recorded u/s 244 Cr.P.C. was sufficient to convict the petitioner.

16. Now scrutinizing the averment made in the complaint and the evidence of PW-1 (only witness examined u/s. 244 Cr.P.C. before charge), it appears that the petitioner had accompanied Smti. Baruah i.e. the proposed vendor, at the time of executing the agreement for sale by Smti. Baruah and he stood as witness to the said agreement. He was also sent by Smti. Baruah to collect rupees one lakh from the complainant at her request. There is nothing, either in the complaint or in the evidence of PW-1, find that the petitioner had in any manner induced the complainant to believe that the Smti. Baruah had saleable right in respect of the said land. There is also no evidence to hold that he had dishonestly induced the complainant to enter into the agreement for sale and pay the advance money, with an intention to cause damage or harm to the complainant. In fact, there is nothing, on-record, to show that this petitioner had ever discussed or talk with the complainant regarding the sale of the land.

In my considered opinion, the petitioner's action accompanying the vendor, who is alleged to have cheated the complainant with false promise to sale her land, signing the agreement as a witness and collecting money on behalf of the vendor, on being deputed by the vendor, can not amount to cheating. Even if the evidence, given by the PW-1 is taken, in its fact value, it can not be safely held that he had deceived and dishonestly induced the complainant to enter into the said agreement for sale with Smti. Baruah and pay her the said amount as advance.

17. Therefore, in the absence of any ingredients of the offence of cheating against the petitioner, it cannot be presumed that he committed the offence u/s 420 IPC, inasmuch as the said evidence, even if remains unrebutted cannot be sufficient to base conviction u/s 420 IPC. That apart, no charge could have been framed on the presumption that, in future i.e. at the time of adducing evidence, after charge, evidence involving the petitioner would be available. Framing of charge, invoking jurisdiction under Sections 245 and 246 Cr.P.C., on the presumption that evidence may be adduced by the witnesses, to be examined in future, is contrary to the statutory provisions prescribed by Sections 245 and 246 Cr.P.C. The impugned order, passed by the learned Sessions Judge, not being in conformity with the prescribed statutory provisions i.e. Sections 245 and 246 Cr.P.C., can not be maintained.

18. Hence, I find sufficient merit in this petition requiring interference with the impugned order and I do so. In the result, the revision petition is allowed.

19. Accordingly, the impugned judgment and order, dated 25.06.2013, regarding framing of charge against the petitioner aforesaid is set aside.