

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 611 OF 2003

Smt. Asha Sopan Marathe and anr. ...Applicants.

vs.

Smt. Meera Gopinath Khandagale and ors. ...Respondents.

Mr. Vinay Bhanushali i/by M.K.Kocharekar for the Applicants.

Shri.R.P Walvekar for Respondent No.1.

Smt. Anamika Malhotra, APP for the State.

CORAM : A.S.GADKARI, J.

DATE : 26th July, 2016

P.C.

By the present application under Section 482 of the Code of Criminal Procedure the applicant has challenged the Judgment and Order dated 22.10.2002 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Revision Application No.480 of 2002 thereby setting aside the order dated 2.4.2002 passed by the learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai in Case No.427/S/1994.

By the impugned Judgment and Order dated 22.10.2002 the Revisional Court has set aside the order of discharge of the applicants/accused passed by the Trial Court dated 2.4.2002 and has remanded the matter to the Trial Court for framing charge under Section 406, 465, 468 and 471 of the Indian Penal Code.

2) Heard the learned counsel for the applicant and the learned counsel for respondent No.1.

3) The record reveals that Respondent No.1 has filed private complaint against the applicants herein under Section 406, 465 468

and 471 of the Indian Penal Code alleging that the complainant was the original allottee in respect of the Flat No.2/80/LIC/HPS/TS/160, D.N. Nagar, Andheri (W), Mumbai. The said flat was allotted by MHADA in her maiden name i.e. Ms. Meera Tulsiram Borude in the year 1971. That, she was married with Gopinath Khandagale in the year 1972-73. After her marriage she met MHADA Authorities to change her name in their record as Meera Gopinath Khandagale and accordingly, her changed name was recorded in the MHADA record. The applicant No.1 is the wife of applicant No.2. The applicants approached the complainant with a request that they may be allowed to stay in the said flat. The complainant allowed the applicants to reside in the said flat. It is the further case of the complainant that taking undue advantage of the situation, the applicants herein prepared the forged and fabricated documents and got the said flat transferred in their name from the MHADA Authorities. In the premise, the complainant lodged the said complaint.

4) The record further reveals that the said complaint being warrant triable case by the Magistrate instituted otherwise than on police report, the learned Magistrate proceeded to record the evidence before charge under Section-244 of the Cr.P.C. The complainant in support of her case has examined herself as P.W.1 and the Officer from MHADA by name Babu Gurav as P.W.2. The learned Trial Court after recording the evidence and after hearing the applicant was pleased to discharge the applicants under Section 245 of the Cr.P.C. Feeling aggrieved by the order dated 2.4.2002 passed by the Addl. Chief Metropolitan Magistrate, the original

complainant preferred Criminal Revision Application No.480/2002 and the Revisional Court by the impugned Judgment and order dated 22.10.2002 quashed and set aside the order passed by the Magistrate and remanded the matter for framing Charge by the impugned Judgment.

5) The learned counsel appearing for the applicants submitted that on perusal of the evidence of the complainant recorded before framing of charge would reveal that no case at all as contemplated under Section 406 of the Indian Penal Code is made out. He further submitted that the Trial Court had rightly discharged the applicants from the charges levelled against them. He further submitted that the Revisional Court has erred while reverting the said order and remanding the matter back for framing Charge. He further submitted that the Revisional Court has not properly considered the facts and erred in allowing the same. He therefore, prayed that the present application may be allowed and the impugned order dated 22.10.2002 may be quashed and set aside.

6) Per contra, the learned counsel appearing for respondent No.1 vehemently opposed the application and submitted that the Revisional Court has rightly allowed the revision by setting aside the order of the Trial Court. He submitted that the Revisional Court has rightly appreciated the facts and reached to the correct conclusion. He further submitted that there is no necessity to set aside the impugned order dated 22.10.2002 passed by the Revisional Court and the present application therefore be dismissed.

7) A bare perusal of the evidence of the complainant Meera Khandagale would reveal that the offence as alleged having clearly

been made out against the applicants-accused. It further appears that the learned Trial Court by its order dated 2.4.2002 while discharging the applicants have not considered the prima facie case and has proceeded on some extraneous assumptions other than legal.

8) The Supreme Court in the celebrated Judgment, in the case of R.S.Nayak vs. A.R.Antulay and anr. reported in AIR 1986 SC 2045, while dealing with the provisions of Sections 227, 239 and 245 of Cr.P.C., in unequivocal terms has in Para 44 held as under.

"The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is no sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when 'the Magistrate considers the charge against the accused to be groundless.' The power to discharge is exercisable under Section 245(1) when '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....' It is a fact that Sections 227 and 239 provide for discharge being

ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed."

A further reliance can also usefully be placed on the decision of the Supreme Court in the case of *State of Maharashtra Vs. Soma Nath Thapa* reported in (1996) 4 SCC 659 wherein the Supreme Court has held that, if there is ground for framing charge against accused who has committed crime it can be said that the prima facie case has been made out against the accused. It has been further held that even if the Court finds that the accused might have committed an offence, it can frame charge. The Supreme court has further clarified in the said case that at the stage of framing of charge

probative value of the statement cannot be gone into. The Supreme Court in the case of Palvinder Singh vs. Balwinder Singh and others reported in (2008) 14 SCC 504 while dealing with the provisions of Section 227 of Cr. P.C., in para-13 has held that, the charges can also be framed on the basis of strong suspicion. That Marshalling and appreciation of evidence is not in the domain of the Court at that point of time.

Thus, it is clear that the Supreme Court has held that while considering the discharge application, the Court has to take into consideration the prima facie case as made out by the complainant.

9) After taking into consideration the aforestated settled position of law, I am of the considered opinion that the complainant has made out a strong prima facie case to proceed with the complaint and to frame charge against the applicants in the present case. I find that the Revisional Court has not committed any error either on facts or in law, while allowing the revision and setting aside the order dated 2.4.2002 passed by the learned Magistrate. The present application being devoid of any merits, is accordingly dismissed.

(A.S. GADKARI, J.)