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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 567 OF 2016

Prakash Premchand Dhandia . . .Applicant

Vs.

State of Maharashtra & Anr. . .Respondents

Mr. Subhash Jha a/w Ms. Rushita Jain i/b Law Global Advocates for
Applicant.

Ms. Anamika Malhotra, APP for State.

Mr. M.G. Kocharekar, for Respondent No.2.

CORAM: A.S. GADKARI, J.

DATE : 15th June 2016.

P.C.

1 By the present application, under Section 482 of Cr. P.C., the applicant/original complainant has challenged the Judgment and Order dated 6.1.2015 passed by the learned Special Judge,(CBI), Greater Mumbai in Criminal Revision Application No.890 of 2013 thereby setting aside the order dated 20.8.2013 passed below Exhibit-6 by the learned Additional Chief Metropolitan Magistrate, 4th Court Girgaon, Mumbai in CC No.397/PW/11.

By order dated 20.8.2013 passed below Exhibit-6, the learned Additional Chief Metropolitan Magistrate, 4th Court, Girgaon Mumbai was pleased to dismiss the application for discharge preferred by the respondent No.2 under Section 239 of Cr. P.C.

2 Heard the learned Counsel for the applicant and the learned Counsel for the respondent No.2.

3 As per the final report under Section 173(2), the respondent No.2 is the original accused No.7. The applicant herein filed a F.I.R. dated 7.7.2011 with Tardeo Police Station under Section 406, 420 read with 34 of the Indian Penal Code. The record further discloses that after completion of investigation, the Police have submitted final report as stated earlier. The respondent No.2 thereafter preferred an application seeking discharge from the aforesaid crime which came to be rejected by the learned Additional Chief Metropolitan Magistrate, Girgaon by its Order dated 20.8.2013. Feeling aggrieved, the respondent No.2 preferred Criminal Revision Application bearing No.890 of 2013 in the Court of Sessions, Greater Mumbai. The learned Additional Sessions Special Judge by the impugned Judgment and Order dated 6.1.2015, while allowing the said Revision, has set aside the order passed by the learned Magistrate and has further

directed the Magistrate to deal with the application preferred by the respondent No.2/original accused de-novo with the observations made in the impugned Order within stipulated period.

4 The learned counsel for the applicant submitted that the learned Judge of the Revisional Court has committed error while appreciating the evidence on record and allowing the Revision, by setting aside the Order passed by the learned Trial Court below Exhibit-6 dated 20.8.2013 and directing to deal with the application for discharge de-novo, which is contrary to the decision of the Supreme Court in the case of Palwinder Singh Vs. Balwinder Singh & Ors. reported in (2008) 14 SCC 504. He therefore prayed that the impugned Judgment and Order passed by the Revisional Court be set aside and the Order passed by the learned Magistrate dated 20.8.2013 be restored.

On the other hand, Mr. Kocharekar, the learned counsel for the respondent No.2-original accused, supported the impugned Judgment and Order dated 6.1.2015 passed by the Revisional Court and submitted that the Revisional Court was right in appreciating the evidence available on record and setting aside the Order dated 20.8.2013 below Exhibit-6 passed by the learned Magistrate. He prayed that the present application is without any merit and the same may be dismissed accordingly.

5 The Supreme Court in the celebrated Judgment, in the case of R.S. Nayak Vs. A.R. Antulay & Anr reported in AIR 1986 SC 2045, while dealing with the provisions of Sections 227, 239 and 245 of Cr. P.C., in unequivocal, has held in para-44 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 not 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 find 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 Palwinder Singh Vs. Balwinder Singh (supra) while dealing with the 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.

6 In this background I propose to deal with the material which has been produced and relied upon by the prosecution against the respondent No.2 in the present case. A bare perusal of the first information report discloses that it is a specific case of the applicant/original complainant that he entered into an agreement with M/s Satellite Holding through its partner late Vallabh Thakkar for purchase of apartments

bearing Nos.1001 and 1501 in the name of his son and wife respectively. That he had also paid an amount of Rs.42,40,000/- to Shri Vallabh Thakkar. That Shri Vallabh Thakkar expired in the year 1997 and thereafter his son namely Hemal took over the said business. That the said Hemal Thakkar left the work incomplete and left the country. It is further stated that prior to leaving the country, the said Hemal Thakkar entrusted the work of M/s Satellite Holding into the hands of newly inducted partners who are the other accused in the present case. That the applicant is the maternal uncle of the said Hemal Thakkar. The said Hemal Thakkar entrusted the construction work into the hands of the respondent No.2 and his sister namely Ms. Manisha Sheth. The applicant in his report has further stated that, he on various occasions contacted the respondent No.2 for executing agreement for sale, however, the respondent No.2 did not respond. It is further stated that the applicant in the year 2007 came to know that the said M/s Satellite Holding sold the said two flats namely Flat Nos.1001 and 1501 to other persons. The applicant in his report has further stated that on 21.2.2010, he made an application with the Police against the respondent No.2 and other partners of M/s Satellite Holding, when on behalf of respondent No.2 the co-accused assured the complainant that instead of flat Nos.1001 and 1501, the applicant will be given flats on either 10th, 13th or

17th floor of the said building within 90 days. As the applicant did not receive the said flats on alternate floors, he again enquired with the respondent No.2 and other accused persons when the accused persons informed the applicant that they will provide him flat bearing Nos.702 and 703 in 'Orbit Plaza', Prabhadevi, Mumbai. However, the respondent No.2 and other accused person did not honour their commitment and applicant did not get the said flats as stated earlier. The applicant has categorically stated in the report that the respondent No.2 in connivance with the other co-accused persons after accepting the entire payment of flat bearing Nos.1001 and 1501, sold the said flats to other persons and has committed criminal breach of trust and cheated him for valuable consideration. In the premise the first information report is lodged.

7 The statements of witnesses which are on record namely Kiran Mehta, Shailesh Mahimtura and Dinesh Rana, specifically mention about the role of the respondent No.2 in the business of the said Satellite Company. The said witnesses have stated that the entire business was being looked after by the respondent No.2. After going through the statement of the complainant and other witnesses, I am of the considered view that a strong prima facie case to frame charge against the respondent No.2 is made out by the prosecution. I am of the opinion that the Order dated

20.8.2013 passed by the learned Magistrate below Exhibit 6 does not suffer from any infirmity either in law or on facts and the impugned Order dated 6.1.2015 passed by the Revisional Court is not in conformity with the ratio laid down by the Supreme Court in the aforesaid Judgments and deserves to be quashed and set aside.

9 Hence, the following Order:

(i) The impugned Order dated 6.1.2015 passed by the Special Judge (CBI), Greater Mumbai in Criminal Revision Application No.890 of 2013 is hereby quashed and set aside and the Order dated 20.8.2013 passed below Exhibit 6 by the learned Additional Chief Metropolitan Magistrate, Girgaon in CC No.397/PW/11 is hereby restored.

(ii) As the chargesheet in the present case is filed in the year 2011 and since then the trial pertaining to the CC No.397/PW/11 is pending, the learned Magistrate seized of the said case is hereby directed to make an endeavour to complete the trial of the said case within a period of one year from the date of receipt of the present Order.

(iii) The application is allowed in the aforesaid terms.

(A.S. GADKARI,J.)