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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.61 OF 2014.

Vijaykumar Vitthalrao Sarvade	]	
age:64 years,Occn. Nil		]... <u>Applicant.</u>
r/o 5/1 Gajanan Niwas, Kakan Nagar	]	(Original
J.M. Road, Bhandup (W), Mumbai 400 078	]	Complainant)

V/s.

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|---|---|---------------------|
| 1. State of Maharashtra |] | |
| |] | |
| 2. Mr. Kailash Kedarnath Agarwal, |] | |
| age: 60 years, Occn. Business |] | |
| r/at : 15 th Floor, Nishika Terrace, |] | |
| Worli Sea Face, Mumbai |] | |
| |] | |
| 3. Mr. Ganesh Vishnu Salvi |] | |
| age: 39 years, Occn. Service |] | |
| r/o Bhagwandas Mauji Chawl, Room No.15 |] | |
| Ghatkopar West, Mumbai 400 084 |] | |
| |] | |
| 4. Mr. Lalit Ashok Khanolkar |] | |
| age: 28 years,Occn. Service |] | |
| r/o Worli B.D.D. Chawl No.26, Room No.3 |] | |
| Ganpatrao Jadhav Marg, Worli, Mumbai-18 |] | |
| |] | |
| 5. Mr. Anish Sukumar Shetty |] | |
| age: 30 years, occn. Service |] | |
| r/o at 41/1489, Near Sai Baba Mandir |] | |
| Vartak nagar, MHB Colony, Thane (W) |] | <u>Respondents.</u> |
| |] | (Respondent |
| 6. Mr. Chandrkant Manohar Walke |] | Nos 2 to 8 |
| age: 37 years, Occn. Service |] | original |
| r/o Opp. B.D.D. Chawl No.25, Zopadi No.2 |] | accused) |
| Ganpat Jadhav Marg, Mumbai 18 |] | |
| |] | |

7. Mr. Nitesh Kanu Waghela]
age: 29 years, Occn. Service]
r/at Jam Mills Building No.1, Room No.16,]
Dr B.A. Road, Lalbaug, Mumbai]
]
8. Mr. Mahesh Manohar Walke]
age: 30 years, Occn.Service,]
r/o Opp. B.D.D. Chawl No.25, Zopadi No.2]
Ganpat Jadhav Marg, Mumbai 18]
]

Mr. Sudhir Hardikar, Advocate for the applicant.

Mr. Samyak K. Gimekar, advocate for respondent No.2

Mrs. A.S. Pai, APP for State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ODER ON : 11th JANUARY, 2016.

ORDER DELIVERED ON : 18th JANUARY, 2016.

Oral Order: [Per: Dr. Shalini Phansalkar-Joshi, J.]

1. This revision takes an exception to the order of discharging respondent No.2 -original accused No.7 (Kailash Kedarnath Agrawal), from the offence punishable under Sections 143 147, 149, 341, 427, 448 read with Section120(b) of the Indian Penal Code, on the ground that prosecution against him stands vitiated for want of consent from the State Government as required under Section 196(2) of Code of Criminal Procedure.

2. The impugned order is passed by Ad-Hoc Additional Sessions Judge, Sewree, Mumbai on 1.7.2013, in Criminal Revision Application No.363 of 2012. By the impugned order, Revision Application was allowed and the order passed by Metropolitan Magistrate 15th Court, Mazgaon, Mumbai, rejecting respondent No.2's application for discharge was set aside.

3. Brief facts of the revision can be stated as follows :-

On the basis of First Information Report, lodged by petitioner, Kala Chowky Police Station registered C.R.No.27 of 2006 for the offence punishable under Sections 143, 147, 149, 427, 448 r/w section 149 of the Indian Penal Code, against in all six accused persons on the allegations that accused persons had entered into shop on 26.12.2006 at about 1.30 p.m. and damaged the partition between his shop No.1 and shop No.2, they also caused damage to his xerox machine and evicted him forcibly from the possession of shop. During the course of investigation, it was transpired that respondent No.2, who was owner of the said property had hatched criminal conspiracy to take forcible possession of the shop and in prosecution of common object of the conspiracy, the other accused Nos 1 to 6 had taken forcible possession and evicted complainant from the said shop. Hence,

respondent No.2 was also arraigned as accused No.7 in the said crime.

4. As per case of respondent No.2, as he was not member of unlawful assembly nor he had participated in the commission of the offence, he cannot be prosecuted. The only allegation against him was that he has hatched conspiracy with accused Nos 1 to 6, for taking forcible possession of the shop. It was further submitted that as the offence of committing house trespass punishable under Section 448 of the Indian penal Code, is provided with punishment which may extend upto one year with fine, the consent of the State Government was essential before prosecution of accused No.7. As no such consent was obtained by investigating agency as required under Section 196(2) of Code of Criminal Procedure, the Court was precluded from taking cognizance of offence against him and hence prosecution against him was required to be quashed and set aside.

5. The trial Court, however, rejected the application of respondent No.2, by holding that offence alleged against him was not an offence against State and hence the consent of State Government under Section 196(2) of Code of Criminal Procedure was not at all required. Further it was held that as the offences alleged against him are punishable with imprisonment of more than 2 years, on that count also

consent of the State Government was not necessary for his prosecution.

6. Respondent No.2, challenged this order in the Sessions Court. Sessions Court allowed his contention and held that as the offence alleged against him is of for committing criminal trespass, punishable under Section 448 read with Section 120(B) of Indian Penal Code for which the imprisonment is less than two years, the consent of State Government was necessary, hence trial Court has committed an error in proceeding to frame charge against him, the prosecution against him being vitiated for want of consent from the State Government. The Sessions Court, accordingly discharged respondent No.2 from the offences alleged against him.

7. This order of the Sessions Court is challenged in this revision, by learned counsel for the petitioner by submitting that only when the offence of criminal conspiracy is alleged against State, the consent of State Government is required for prosecution. Here in the case, dispute is between the private parties and hence no such consent was warranted at all. Secondly, it is submitted that offences alleged against respondent No.2 are punishable with imprisonment for a period more than 2 years and therefore, in view of sub clause (2) section 196 of Code of Criminal Procedure, the consent of State Government is not at

all necessary. Hence according to learned counsel for petitioner, Sessions Court has committed a grave error in discharging respondent No.2 of the offences alleged against him.

8. Per contra, learned counsel for respondent No.2 has supported the impugned order of Sessions Court, by submitting that as respondent No.2 was not present at the time of commission of the offence, he cannot be prosecuted for the offence of forming unlawful assembly. At the most the only allegation which may remain tenable against him is of committing house trespass punishable under Section 448 of the Indian Penal Code, the punishment for which is imprisonment which may extend upto one year only. Hence the consent of State Government was very much essential for his prosecution. According to him, therefore, the Sessions Court has rightly held the proceeding against respondent No.2 vitiated for want of such consent and, thus, rightly discharged him.

9. In my considered opinion, in order to appreciate the rival submissions advanced at Bar, by learned counsel for the petitioner and respondent, it will be useful to reproduce Section 196 of Code of Criminal Procedure in its entirety.

“196. Prosecution for offences against the State and for

criminal conspiracy to commit such offence (1) No Court shall take cognizance of-

- (a) any offence punishable under Section VI or under Section 153A, [section 295A) or sub section (1) of Section 505] of the Indian Penal Code (45 of 1860), or
- (b) a criminal conspiracy to commit such offence, or
- (c) any such abetment, as is described in section 108A of the Indian Penal Code (45 of 1860),

except with the previous sanction of the Central Government or of the State Government.

[(1A) No Court shall take cognizance of -

- (a) any offence punishable under section 153B or sub section (2) or sub section (3) of section 505 of the Indian Penal Code (45 of 1860)

- (b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.

- (2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120B of the Indian penal Code (45 of 1860), other than a criminal conspiracy to commit (an offence) punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate

has consented in writing to the initiation of the proceedings.

Provided that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction (under sub section (1) or sub section (1A) and the District Magistrate may, before according sanction under sub section (1A) and the State Government or the District Magistrate may, before giving consent under sub section (2), order a preliminary investigation by a police officer not being below th rank of Inspector, in which case such police officer shall have the powers referred to in sub section (3) of Section 155.”.

10. In this case, indisputably offence alleged is between private parties. As such the provisions of Section 196(1) of Code of Criminal Procedure, which deal with offence against Government, for which the consent of respective Central or State Government is required, are not applicable to the instant case.

11. The present case then falls under Section 196(2) of Code of Criminal Procedure. As per this section, only when criminal conspiracy is to commit an offence punishable with death,

imprisonment for life or rigorous imprisonment for a period of two years or upwards, the consent of State Government, or the District Magistrate is not required, otherwise such consent is necessary. In the instant case, criminal conspiracy on the part of respondent No.2 is alleged for evicting the petitioner from the shop premises. As per prosecution case, the main object of unlawful assembly or criminal conspiracy was to restrain the petitioner from entering in the premises and then to evict him therefrom. Therefore, it is apparent that the criminal conspiracy is alleged to be hatched for commission of offences which are not only cognizable in nature, but for which punishment prescribed is more than two years. If in prosecution of the said object, other cognizable offences or offences punishable with imprisonment for period of less than two years are committed, that cannot be treated as main object of criminal conspiracy. The Apex Court in the case of **Bhanwar Singh and another -vs- State of Rajasthan, AIR 1968 Supreme Court 709**, has clearly held that when main object is to commit offence which is cognizable and while committing said offence if any non cognizable offence is also committed, then under such circumstances, trial without sanction or consent is not illegal.

12. From the avernments made by the prosecution it is clear that the main object of hatching conspiracy was not only to cause mischief or to commit only criminal trespass. The main object of criminal conspiracy is alleged to be to evict the petitioner and thereafter to restrain him from entering in the premises by forming an unlawful assembly. The sequence of the events also reflect that accused has tried to restrain the petitioner from entering into premises, putting locks on the door and thereafter in order to show that the petitioner is not in possession, committed criminal trespass. Therefore, the offence which is alleged against respondent No.2 in the instant case is of hatching criminal conspiracy, to form unlawful assembly with the common object of evicting the petitioner from shop premises. The trial Court has accordingly rightly held that consent or sanction of the State Government is not required for prosecution against respondent No.2. The Revisional Court, has however, committed an error in bifurcating the offences and holding that criminal conspiracy was only for the purpose of committing house trespass and there was no material to show that mischief was committed damaging property more than Rs.50/-. In view thereof, the impugned order of the Sessions Court is required to be quashed

and set aside.

13. Hence the Revision Application is allowed. The impugned order of the Sessions Court, discharging respondent No.2 from offences alleged against him is quashed and set aside thereby confirming the order passed by the trial Court of dismissing application for discharge as filed by respondent No.2.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.