

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

907 CRIMINAL APPEAL NO. 259 OF 2018
WITH APEAL/260/2018

PRAFUL S/O. ANIL MADIWALE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Appellant : Mr. Joshi Rahul G. And Hashmi
Taufeeque Ahmed

APP for Respondents: Mr. A. A. Jagatkar

Advocate for Intervenors: Mr. S. R. Shirsath h/f. Mr. Kingaonkar

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**CORAM : P.R. BORA, J.
DATED : 12th APRIL, 2018.**

Oral Judgment :-

1. Heard finally with the consent of the learned Counsel appearing for the parties.
2. The only grievance raised in both these appeals is that without hearing the appellants on framing of charge and without deciding their application for discharge, the learned Special Court has framed the charge against them.
3. Shri. Joshi, learned Counsel appearing for the Appellants taking me through the Roznama in the Special Case submitted that on 27th March 2018, the matter before the Trial Court was not for framing of charge but for hearing on Exhibit-192. The learned Counsel further submitted that on 27th March 2018, the Appellants in both these appeals filed appropriate

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applications seeking discharge. However, the learned Special Judge rejected both said applications stating that they were filed after the charge was framed.

4. The learned Counsel pointed out that when the charge was framed by the Court, neither the complainant nor the Learned APP were present; nor the accused were present before the Court. The learned Counsel submitted that the appellants have right to make their submissions before framing of the charge and also can validly claim their discharge by filing application in that regard. Learned Counsel further submitted that it is a substantive step to be followed by the Trial Court and unless the same is followed, the charge cannot be framed against the accused persons. The learned Counsel in the circumstances prayed for setting aside the order of framing charge against the appellants by the Special Court on 27th March 2018 and direct the learned Special Court to first consider and decide the application filed by the present appellants seeking their discharge from the offences for which they are being prosecuted.

5. Learned APP inviting my attention to the order passed below Exhibit-1 by the learned Special Judge submitted that the learned Special Judge was constrained to proceed further since

both the sides were absent when the matter was taken up for hearing by the said court on framing of charge and in the circumstances perusing the investigation papers, the learned Special Court has framed the charge against the accused person. The learned APP submitted that from the roznama it can be noticed that present appellants had tried to prolong the proceeding before the Special Court and in the circumstances the appellants do not have any right now to claim that they were not heard before framing of the charge. The learned APP submitted that the Special Judge has rightly rejected the application filed by the present appellants since the applications were presented before the said court after the charge was framed. The learned APP submitted that there is no reason for causing any interference in the order so passed.

6. Learned Counsel Shri. S. R. Shirsath appearing for the intervenors, submitted that interest of several depositors is involved in the criminal prosecution initiated against the appellants before the Special Court under the provision of M.P.I.D. Act. The learned Counsel further submitted that time and again the proceedings were tried to be stalled by the present appellants and now no further opportunity is to be given to the appellants to stall these proceedings further. Learned Counsel submitted that even otherwise the order passed by the Special

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Judge below Exhibit-1 volumely speaks that there is ample material collected by the prosecution against the appellants, which is sufficient to frame the charge against the appellants. The learned Counsel therefore prayed for dismissing both the appeals.

7. I have given due consideration to the submissions made by the learned Counsel appearing for the respective parties. I have perused the impugned order as well as the other material placed on record and more particularly the order passed by the Special Court below Exhibit-1 on 27th March 2018 and the roznama in the Special Case before the Trial Court. The immediate preceding date to 27th March 2018, on which the impugned orders are passed by the Special Court, was 21st March 2018. I deem it appropriate to reproduce herein below the roznama carried out on the said date which reads thus:

Today's Date	Roznama	Next/Disposal Date
21-03-2018	Accused No.3 with his Adv. Present. D-235 Appli. of Accused No.3 Adv file taken on todays board. D-236 Appli. of Accused No.3 for cancelled order of NBW. NBW cancelled letter issued. Case Adjourn for: Say/Hearing on Exh.192 Ready. Judge	27-03-2018

8. From the roznama carried out on 21st March 2018, it is quite evident that the matter was adjourned to 27th March 2018 for say/hearing of Exhibit-192. Having regard to the roznama as above, the contention raised on behalf of the appellants that they were not aware that on 27th March 2018, the Court was likely to frame the charge against them is difficult to be ruled out.

9. It was sought to be canvased by learned APP, Shri. Sonpawale that there is no such requirement that there should be a specific stage like 'for framing charge'. The contention of the learned APP cannot be accepted in view of the provisions prescribed under the Code of Criminal Procedure.

10. Chapter XXVIII of the Code prescribes the stages of the trial before the Court of Sessions. Section 225 of the Code provides that in every trial before the Court of Session, the prosecution shall be conducted by public prosecutor. Section 226 of the Code says that the prosecutor shall open his case by describing the charge brought against accused and stating by what evidence he proposes to prove the guilt of the accused.

11. Section 227 of the Code deals with discharge and it reads as follows:

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"227. Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

As per the aforesaid provision, upon consideration of the records of the case and the documents submitted before him and after hearing the submissions of the party-accused and the prosecution, if the Judge is of the opinion that no sufficient ground is made out to proceed against the accused he is required to discharge the accused and record his reasons for doing so.

12. Section 228 relates to framing of charge and reads as follows:

228. Framing of charge.

"(1) if, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of Session, he may, frame charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for trial of warrant - cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

13. Sub-section (1) of Section 228, thus, clearly lays down that after such consideration and hearing as given under

Section 227, if the Judge forms an opinion that there is ground for presuming that the accused has committed an offence, the Judge may frame charge(s). Wordings of Section 228, further clearly spell that no separate hearing is required to be given for framing the charge if the accused is not discharged upon consideration of the record of the case and documents and after hearing the submissions under Section 227.

14. From the provisions as above, it is abundantly clear that hearing under Section 227 is mandatory. The contention raised by the learned APP that there is no such specific requirement of the Code that the matter be specifically fixed for hearing the accused and the prosecution as envisaged under Section 227 of the Code, therefore cannot be accepted.

15. Vide Section 227 of the Code, a substantive right is provided to the accused to seek his discharge from the offences for which he is prosecuted. As noted herein above, only if the accused is not discharged that the next stage comes of framing of charge. From the wording of Section 227 and 228, it is explicit that hearing is must under Section 227 of the Code though no separate hearing is required to be given for framing charge under Section 228 of the Code.

16. A practice is being generally followed by the Sessions Courts to fix the case for framing of charge. The stage so fixed in itself includes the stage of hearing the parties before framing of charge. The very purpose of prescribing such a stage is to provide an opportunity to the accused to file application seeking his discharge, if any, if he so desires. Otherwise also, even if, no such application is filed, it is mandatory for the court to hear the submissions of the accused and the prosecution and consider the record of the case so as to form an opinion whether sufficient ground(s) exist for proceeding against the accused.

17. In the instant matter on 27th March 2018, the stage prescribed was hearing on Exhibit-192 and not for framing of charge or for hearing parties as envisaged under Section 227 of the Act. In the circumstances, the very opening sentence in the order passed by the learned Special Judge on 27th March 2018 below Exhibit-1 to the effect that '**both sides are absent for hearing on framing of charge**' appears contrary to the record. There is nothing on record on the basis of which it can be said that the parties were aware of or were given an understanding that on 27th March 2018, the court would be hearing them on framing of charge.

18. As noted by the Special Court in the aforesaid order, both the sides were absent when it passed the aforesaid order below Exhibit-1. There is reason to believe that the special case might have been taken for consideration by the Special Court immediately after commencement of the court working. From the record it is further revealed that present appellants later on appeared before the Court and filed the application for discharge. It appears that the said applications were kept aside by the learned Special Judge and he first proceeded to frame the charge against the accused and directed the accused to record their plea. The record further reveals that the present appellants refused to record their plea. It is further revealed that thereafter the learned Special Judge passed an order on the discharge applications filed by the present appellants observing that the applications were submitted after the charge was framed and hence rejected the said applications.

19. After having considered the events in the aforesaid chronology, it appears that some haste has been committed by the learned Special Judge in proceeding with the matter. In the order passed below Exh-1 on 27.3.2018 when the Special Court has noted that 'both sides are absent for hearing on framing of charge', it means that the Special Court was fully aware that before framing the charge the parties are to be heard. The

Special Court though seems to have complied with the legal requirement, it is apparent that its a mere 'technical compliance' and not the compliance in spirit. It is evident that the appellants have been denied an opportunity of exercising their right to seek discharge from the offences leveled against them. I reiterate that the right envisaged under Section 227 of the Code is a substantive right. In fact as I have noted herein above unless the hearing is given under Section 227 of the Code and unless the Judge forms an opinion that there is a ground for presuming that accused has committed an offence, the Judge cannot proceeded for framing charge under Section 228 of the Code. It appears to me that the learned Special Judge could not have and should not have refused the request made by the present appellants to consider the applications filed by them seeking their discharge from the offences leveled against them. Without deciding the said applications, the learned Special Judge should not have straightaway proceeded for framing the charge.

20. In the aforesaid circumstances, the appeals filed by the present appellants deserve to be allowed. While allowing the present appeals, of course the anxiety and the apprehension expressed by the learned APP as well as learned Counsel for the intervenors that such opportunity is likely to be misused by the appellants in unduly protracting the proceedings certainly needs

to be taken care of by imposing certain obligations on the appellants.

21. For the reasons stated above the following order is passed:

ORDER

- (i) The charge framed against the appellants is set aside.
- (ii) The orders passed by the Special Court on 27th March 2018, below Exhibits 250 and 251 are quashed and set aside.
- (iii) The learned Special Judge shall hear and decide the applications at Exhibit-250 and Exhibit-251 on its own merits and in accordance with law by giving due opportunity to the parties concerned.
- (iv) The appellants shall appear before the Special Court on 27th March 2018, which is the date already scheduled in the special case.
- (v) The learned Special Judge shall fix a date of a week thereafter or before that for hearing the applications at Exhibits 250 and 251. On the date which may be so fixed, the present appellants shall without asking any adjournment make their submissions and the learned Special Judge shall pass an order on the said applications

as expeditiously as possible and preferably within one week and depending upon the order which may be passed on the said applications shall proceed further in accordance with law.

22. Both these appeals stand allowed in the aforesaid terms.

(P.R. BORA, J.)