

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.44 OF 2017

Yogendra J.Poddar

.. Applicant

Vs.

Samruddhi Co-operative Housing
Society Ltd. & Anr.

.. Respondents

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Mr.Shreepad Murthy a/w. Ms.Reema Oke i/b. Mr.Abhishek Patil,
Advocate for the Applicant.

Mr.Pankaj G. Jain, Advocate for Advocate No.1.

Mr.A.R. Patil, APP for the Respondent No.2 - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : JUNE 8, 2018.

P.C. :

The applicant has challenged the order dated 7th November, 2016, passed by the learned Metropolitan Magistrate 17th Court, Borivali, Mumbai, rejecting the application for discharge preferred by the applicant. The respondent no.1 filed a private complaint, alleging offences under Sections 11 and 14 read with Section 13 of MOFA. The process was issued for the said offences.

2 The applicant preferred an application for discharge before the trial Court on 20th March, 2009. The said application

was opposed by the respondents on the ground that in the absence of evidence before charge, stage of discharge under Section 245 of the Code of Criminal Procedure, does not arise. It was also submitted that applicant had played role in the transaction. Learned Magistrate, while rejecting the said application had observed that this is a warrant triable case instituted otherwise than on a police report, hence provisions of Section 244 of Cr.P.C. will be applicable to this case. The evidence before charge is not yet recorded. It is further observed that Section 245 of Cr.P.C. will come in picture only in the event of Court recording evidence under Section 244 of Cr.P.C. and come to conclusion that there is no material to frame charge against the accused. It was further observed that the liability of accused can be decided after recording evidence before charge.

3 While dealing with the judgment of this Court in the case of ***D.D. Udeshi & Ors. Vs. State of Maharashtra***¹, relied upon by the applicant it was observed that application in that case was filed under Section 482 of Cr.P.C. for quashing the process issued by Court. However, in this case the accused did not challenge the order of process. The accused did not file any

1 Cri. Application No.4311 of 2016, dt. 30.06.2008

application under Section 482 of Cr.P.C. for quashing the proceedings. So in the absence of these two steps on part of accused applicable under Section 245 of Cr.P.C. is not tenable. It was than observed that, in the absence of evidence before charge, allowing the application would amount to court reviewing its own order of process which isi not permissible in the eyes of law. Since evidence before charge is not recorded, there is no question of discharge of accused. No doubt, the last line of order mentions that grounds mentioned in the application are not satisfactory. The tenor of order, however, indicates that the application was rejected on the basis of observations stated hereinabove.

4 Learned counsel for the applicant Mr.Shreepad Murthy submitted that the order passed by the learned Magistrate is contrary to the provisions of law. The Court has ignored Section 245(2) of Criminal Procedure Code while rejecting the application. It is further submitted that the applicant has no role to play in the alleged transaction and he is not the promoter and the provisions under MOFA Act are not applicable in this case.

5 Learned counsel for respondent vehemently opposed grant of any reliefs to the applicant. It is submitted that the proceedings are pending for a long period of time and the applicant is delaying the said proceedings. The trial Court had issued process against the applicant and it was not possible to review the said order. The Court ought to record the evidence and such an application could have been preferred at the relevant stage. This is not the stage to entertain such application. He, therefore, submitted that there is no infirmity in the order passed by the trial Court and the application be rejected.

6 Learned counsel for the respondent relied upon the judgment in the case of ***State of Bihar & Anr. Vs. K.J.D. Singh²***, dealing with the powers of the High Court under Section 482 of Criminal Procedure Code. The Apex Court had observed that in the light of the evidence before the Court, the High Court ought not to have appreciated the same while exercising the powers under Section 482 of the Criminal Procedure Code.

7 It is relevant to note that in accordance with Section 245(2) of Criminal Procedure Code, the Court is empowered to

2 Decided on 17th February, 1993

discharge the accused at any previous stage of the case if for the reasons to be recorded by Magistrate, he considers the charge to be groundless.

8 Section 244 of Cr.P.C. relates to evidence for prosecution in relation to warrant case. Section 245 of Cr.P.C. relates to discharge of accused. The provisions reads 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.”*

Thus, Sub-section 2 of Section 245 does not prevent the Court from discharging accused at any previous stage of the case, if for reasons to be recorded by Court, he considers the

charge to be groundless, the observations of trial Court, referred to above are contrary to the above provisions. The trial Court has completely ignored the said provision. The trial Court proceeded to observe that in the absence of evidence recorded within the meaning of Section 244 of Cr.P.C. there would be no question of discharge under Section 245 of Cr.P.C. the observations are contrary to well established principles of law.

9 In the circumstances, without making any observations on the merits of the case, it would be appropriate to set aside the order passed by the learned Magistrate and remand the matter back to the trial Court to consider the application afresh in accordance with Section 245(2) of the Criminal Procedure Code.

10 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Application No.44 of 2017, is partly allowed;
- (ii) The order dated 7th November, 2016 is set aside;

- (iii) The trial Court is directed to hear the application for discharge preferred by the applicant afresh and decide the same in accordance with law;
- (iv) It is expressly made clear that this Court has not dealt with the merits of the case and all contentions of both the parties are kept open;
- (v) Since the proceedings are pending before the trial Court for a long period of time, the trial Court is directed to decide the application for discharge filed by the applicant as expeditiously as possible and preferably within a period of 12 weeks from today;
- (vi) Criminal Application stands disposed of.

(PRAKASH D. NAIK, J.)