

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL REVISION APPLICATION NO. 148 OF 2014**

Dr. Shafique Ahmed Nisar Ahmed & OrsApplicants

Vs.

The State of Maharashtra & Ors.Respondents.

Mr. Suresh Kamble for the Applicants.

Mr. Amit Palkar APP, for the Respondent-State.

Mr. F.A. Wagif I/by N.R. Bubna for Respondent No.2.

CORAM : A. S. GADKARI, J.

DATE : 24th SEPTEMBER, 2018.

P.C.:-

By the present Revision, the Applicants-original Accused Nos. 1,2,3 and 5 have questioned the correctness and propriety of common Order dated 19th August, 2013 passed below Exhibits 35 and 39 in R.C.C. No. 1045 of 2007, by the learned Judicial Magistrate, First Class, Court No.7, Malegaon, District Nashik, rejecting their Application for discharge under Section 239 of the Code of Criminal Procedure.

2 Heard Mr. Kamble, the learned counsel appearing for the Applicants, Mr. Wagif the learned counsel for the Respondent No.2 and the learned APP. Perused the record.

3 The Respondent No.2 had filed RCC No. 1045 of 2007 against the Applicants and the Original Accused No.4 Mr. Basharti Moh. Yunus Moh. Bashast under Sections 420, 406 and 34 of the Indian Penal Code. The learned Magistrate had passed an Order under Section 156 (3) of the Code of Criminal Procedure, directing the police to investigate into the crime. The police, after investigating the crime, have submitted charge-sheet against the accused persons. The record further indicates that, the case against the original accused No.4 stands abated.

 The Applicants thereafter preferred an Application under Section 239 of the Code of Criminal Procedure for their discharge, which has been rejected by the Trial Court by the impugned Order dated 19th August, 2013.

4 The record discloses that, the Respondent No.2 in his capacity as a Chairman of Anjuman Tahajibul Akhalak Trust, lodged the first information report alleging that, though the Applicants were not having any authority, they opened and operated the bank account, in the name of the said Trust and committed defalcation of the funds of the Trust to the tune of Rs.2,50,000/- for their personal benefit thereby, caused wrongful loss to the Trust and wrongful gain for

themselves. The investigation carried out by the police reveals that, there is substance in the allegations of the Respondent No.2 and therefore, the police, after completion of the investigation, have submitted charge-sheet.

5 Mr. Kamble the learned counsel appearing for the Applicants submitted that, the issue involved in the present matter pertains to the provisions of Bombay Public Trust Act, 1950 and there is a separate mechanism provided under the said Act for dealing with the illegality committed by the Trustees of the Trust and therefore, an action under Section 50 of the said Act is necessary.

It is the settled position of law that, if the accused person commits a crime under the provisions of Indian Penal Code, which is a separate and distinct statute, a sanction under a separate statute which has no direct nexus with the act alleged is not necessary, as the offences alleged against the Applicants herein are under the provisions of Indian Penal Code for commission of a cognizable offence and not an offence alleged to have been committed under the Bombay Public Trusts Act.

6 The record further indicates that, there is sufficient material available on record in the form of statements of the witnesses

and other documents to proceed further against the Applicants.

7 A useful reference can be made to the decision of the Hon'ble Supreme Court in the case of ***R.S. Nayak vs. A.R. Antulay and Anr. Reported in AIR 1986 SC 2045***. The Supreme Court while dealing with the provisions of Sections 227, 239 and 245 of Cr.P.C., in unequivocal terms, in Para 44 has 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 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."

8 After minutely perusing the record, this Court is of the considered view that, there is sufficient material available on record to proceed against the Applicants and the charge against the Applicants is not groundless and therefore, the impugned Order passed by the Trial Court does not suffer from any illegality or error and needs no interference of this Court in its revisional jurisdiction.

9 In view thereof, I find no merits in the Application. Application is accordingly rejected.

(A.S. GADKARI, J.)