

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****WRIT PETITION NO. 2905 OF 2018**

Chandrika Harshad KanakiyaPetitioner.
Vs.
The State of MaharashtraRespondent.

WITH**WRIT PETITION NO. 2906 OF 2018**

Harshad KanakiyaPetitioner.
Vs.
The State of MaharashtraRespondent.

Mr. Mayur Faria for the Petitioners.

Mr. A.R. Patil APP, for the Respondent-State in Writ Petition No. 2905 of 2018.

Ms. Rutuja Ambekar APP, for the Respondent-State in Writ Petition No. 2906 of 2018.

CORAM : A. S. GADKARI, J.

DATE : 24th AUGUST, 2018.

P.C.:-

By the present Petitions, the Petitioners have challenged the Order dated 4th July, 2017 passed below Exh. 13 in C.C. No. 125/PW/2012 by the learned Metropolitan Magistrate, 73rd Court, Vikhroli, Mumbai thereby rejecting the Application under Section 245 of the Code of Criminal Procedure and the Order dated 16th March, 2018 passed by the learned Additional Sessions Judge, Greater

Mumbai in Revision Application Nos. 788 of 2017 and 789 of 2017 and thereby, dismissing the said Revisions.

2 The Petitioners are accused in MECR No. 9 of 2011 dated 29th June, 2011 registered with Pant Nagar Police Station under Sections 379, 420, 406, 120(b) of the Indian Penal Code. The first information report is lodged by the first informant Smt. Mamata Rajani.

3 The prosecution case in brief is that, by taking undue advantage of the acquaintance, the Applicants on 13th November, 2010 called the informant to their house under the pretext of purchasing ornaments and committed theft of it. The said ornaments were valued at Rs.5,90,000/-. After completion of investigation, the police have submitted charge-sheet, which is numbered as CC No. 125/PW/2012.

4 The Petitioners being, accused No. 2 (Chandrika Kanakiya) and accused No. 3 (Harshad Kanakiya) preferred common Application for discharge below Exh. 13, under Section 245 of the Code of Criminal Procedure, which has been rejected by the 73rd Metropolitan Magistrate Court, Vikhroli, Mumbai by the impugned Order dated 4th July, 2017.

5 The learned counsel for the Petitioners submitted that, the Petitioners hail from very rich background and for paltry sum of Rs.5,90,000/- they will not commit a crime. He submitted that, on the date of alleged incident the Petitioner Harshad was not at the residence and he has been falsely implicated in the crime. That, even the first information report is silent about the presence of Harshad at the said place, when the alleged crime has been committed. He further submitted that, there is no material on record to connect the Petitioners to the present crime and they have been falsely implicated and therefore, they deserve to be discharged from the said crime.

6 Per contra, the learned APP vehemently opposed the Petitions and argued in justification of the Orders passed by both the Courts below.

7 Perusal of first information report would indicate that, the presence of Petitioner Chandrika and accused No.1 Visha Kanakiya is categorically mentioned on the date and place of scene of offence. It is the specific allegation against the accused No. 1 Visha and Petitioner/accused No.2 Chandrika that, after completing their lunch the informant had been to the wash basin and in the intervening period the valuable ornaments, which were kept in her handbag, were

stolen by accused No.1 Visha and accused No. 2 Chandrika.

8 The police have applied Section 120(b) to the present crime with an allegation that, all the accused persons in furtherance of their conspiracy, have initially induced the first informant to come to their house for selecting the design of the ornaments and subsequently committed theft. It is the well settled principle of law that, in a case of conspiracy, the presence of each and every accused person at the time of commission of an offence, is not necessary. In view thereof, the contention of the learned counsel for the Petitioner that, the Applicant Harshad was not present at the time of commission of offence, cannot be accepted.

9 The contention of the Petitioners that, they being filthy rich will not commit the offence of theft, can be answered only after recording the evidence by the Trial Court and after the Petitioners are granted an opportunity to cross-examine the concerned witnesses.

10 A useful reference can be made to the decision of the Hon'ble Supreme Court in the case of *Union of India Vs. Prafulla Kumar Samal*, reported in AIR 1979 SC 366. It is necessary and useful to refer to paragraph 10 of the said judgment which reads as under:-

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roaming enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial”.

11 The Supreme Court in the case of *R.S. Nayak vs. A.R. Antulay and Anr.* Reported in AIR 1986 SC 2045, while dealing with the provisions of Sections 227, 339 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.”

12 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 presuming that the accused has committed the offence, it can be said that, a *prima facie* case has been made out against the accused. It has been further held that even if the Court finds 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 statements cannot be gone into.

 The Supreme Court in the case of *Palvinder Singh Vs. Balwinder Singh and others reported in (2008) 14 SCC 504* while dealing with the provisions of 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 marshaling and appreciation of evidence is not in the domain of the Court at that point of time.

13 Thus, it is clear that the Supreme Court in its various decisions has held that while considering the application for discharge the Court has to take into consideration the *prima facie* case as made

out by the Complainant/prosecution.

14 There is sufficient material available on record to proceed further with the Petitioners under Section 246 of the Code of Criminal Procedure. The learned Metropolitan Magistrate, 73rd Court, Vikhroli, Mumbai while passing the impugned Order dated 4th July, 2017 passed in C.C. No. 125/PW/2012 and the Revisional Court while passing the impugned Order dated 16th March, 2018 in Revisions Application Nos. 788 of 2017 and 789 of 2017 have taken into consideration the vital aspects of the matters. This Court is of the further view that, there is no error either in law or on facts committed by both the Courts below.

15 Writ Petitions are accordingly rejected.

(A.S. GADKARI, J.)

S S
Mashalkar

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