

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1136 OF 2018

Mohd. Jahir Mohd. Shikur
Age: 28 years, Occu: Labour,
R/o. Raj Mohalla, Jintur,
Tq. Jintur, Dist. Parbhani

.. PETITIONER

Versus

- 1] The State of Maharashtra,
Through its Jintur Police
Station, Tq. Jintur,
Dist. Parbhani.
- 2] Ejat Khan s/o. Ayub Khan
Age: 28 years, Occu: Meson,
- 3] Billal Khan s/o Rajbuddin Khan
Age: 27 years, occu: Meson
- 4] Mansoor Ali Khan s/o Umar Khan
Age: 42 years, occu: Meson
- 5] Rahmat Khan s/o Sultan Khan
Age: 31 years, Occu: Meson & Driver
- 6] Ayub Khan s/o Umar Khan
Age: 53 years, Occu: Meson & Driver
- 7] Aref Khan s/o Rauf Khan
Age: 31 years, Occu: Meson
- 8] Rajboddin Khan s/o Umar Khan
Age: 56 years, Occu: Mechanic

Resp. No.1 to 8 All R/o. Raj Mohalla,
Jintur, Tq. Jintur Dist. Parbhani

.. RESPONDENTS

...

Mr. S.K. Chavan, Advocate for petitioner.
Mr. R.J. Nirmal, Advocate for respondent Nos.2 to 8.
Mrs. P.V. Diggikar, APP for respondent No.1-State.

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17th December, 2019.

JUDGMENT :

. Rule. Rule is made returnable forthwith and by consent of both the parties matter is taken up for final hearing at the stage of admission.

2. Present petition has been filed by the original complainant who had filed private complaint before the Chief Judicial Magistrate, Parbhani. Initially, he had filed application M.A. No.130 of 2012, however, thereafter when it was found that the complaint ought to have been filed with learned Judicial Magistrate First Class, Jintur, the learned Chief Judicial Magistrate, Parbhani has returned the complaint for its presentation before appropriate Court. After the complaint was registered with the learned Judicial Magistrate First Class, Jintur i.e.

R.C.C. No.284 of 2013, it appears that after verification, inquiry under Section 202 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") was conducted. When it was found that evidence on record showed that accused have committed alleged offence of dacoity i.e. punishable under Section 395 of the Indian Penal Code (hereinafter referred to as "IPC"), process was issued against all the accused. After the summons was served and appearance of all the accused persons, the said case was committed to the Court of Sessions taking into consideration the fact that the offence punishable under Section 395 of Cr.P.C. is exclusively triable by the Court of Sessions.

3. After the case was committed to the Court of Sessions, the learned Additional Sessions Judge has heard both the parties and it was found as per Section 227 of Cr.P.C. that no case is made out for offence punishable under Section 395 of the IPC, but the charge can be framed for the offences punishable under

Sections 324, 323, 506 read with Section 34 of the IPC. In view of Section 228(1)(a) of the Cr.P.C., the matter was transferred to the Court of Judicial Magistrate First Class, Jintur by order dated 09-01-2018. The said order is under challenge in this writ petition.

4. Heard learned Advocate Mr. S. K. Chavan for petitioner, learned Advocate Mr. R. J. Nirmal for respondent Nos.2 to 8 and learned APP Mrs. P. V. Diggikar for respondent No.1 - State.

5. It has been vehemently submitted on behalf of the original complainant - present petitioner that the procedure adopted by the learned Additional Sessions Judge in discharging all the accused persons under Section 395 of the IPC was erroneous. He went onto consider the merits of the case, when in fact he was supposed to consider only the prima facie facts and circumstances. The complainant in his complaint itself had stated that though he went to police with all the necessary facts, yet, only non cognizable offence was registered. It was not considered that the amount of

Rs.23,700/- was forcibly taken away by all the accused by beating the complainant. So also they had taken the golden ring of 5 gms. from his finger forcibly. When this lacuna was found by the complainant, he had filed the complaint giving all the details and thereupon, the learned Magistrate had issued the process under Section 395 of the IPC, thereupon the case was committed to the Court of sessions. By placing his reliance on **State of Bihar Vs. Ramesh Singh, [AIR 1977 SC 2018]**, it was submitted that the procedure as contemplated in this ruling ought to have been considered. It has been observed :-

"Reading Ss. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance

whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under S. 227 or S. 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction."

He, therefore, prayed for setting aside the order passed below Exhibit-01 in S.T. No.81 of 2014 by learned Additional Sessions Judge and prayed that the concern Court be directed to frame charge against the accused persons in respect of offence punishable under Section 395 of IPC also.

6. Per contra, learned Advocate for the original accused persons submitted that though contentions were raised in the complaint that offence punishable under Section 395 of IPC was made out and the said offence is

exclusively triable by the Court of Sessions, when the Court of Sessions was required to consider as to whether it can frame charge or not, the considerations by the Sessions Court were different. Taking into consideration the evidence that was produced along with the complaint by the complainant himself on record, it was found that offence under Section 395 of IPC is not made out. Hence, the case cannot be tried by Sessions Court. The learned Additional Sessions Judge found that case is made out under Sections 324, 323, 506 read with Section 34 of IPC against accused Nos.1 to 4 and those charges are not exclusively triable by the Court of Sessions. Therefore, the case was transferred for trial to the Magistrate. A correct procedure has been adopted by the learned Additional Sessions Judge, Parbhani and therefore, no interference is required.

7. At the outset, it is to be noted that a private complaint was filed by the present petitioner. He had come with the case that since prior to the date of incident there was enmity between him and the

accused persons. On 11-05-2012, at about 2.00 p.m, he went to Masjid for offering prayer at Raj Mohalla, Jintur. Accused persons were present there. It is the contention of the complainant that accused Billal Khan with intent to create quarrel pushed complainant. When complainant asked him about his said action, Billal Khan threatened to see him when he comes out of Masjid. Accused No.1 - Ejjat Khan assaulted complainant by stick on the head of the complainant as a result of which blood started oozing out of the injuries and he says that he became unconscious. It is also stated that all the 7 accused persons, with their common intention to beat, dragged complainant out of Masjid and on public road, he was beaten with fist blows. Complainant has stated that the accused had forcibly taken amount of Rs.23,700/- from his pocket and also took away the gold ring of 5 gms. worth Rs.14,000/-. Complainant was rescued by the witnesses and was taken to rural hospital for treatment. On the next day, he went to Head Constable of out post Police Chowki Civil Hospital, Parbhani and at that time, his statement was

recorded which was then transmitted to police station, Jintur. On the basis of that complaint, NC No.147 of 2012 under Sections 323, 504, 506 read with Section 34 of IPC was registered. It is stated that even after the certificate was produced in respect of his treatment, offence under Section 324 of IPC was not registered against him. So also when offence was not registered under Sections 395, 147, 148, 149 read with Section 109 of IPC, he had made complaint with Superintendent of Police, Parbhani on 30-05-2012. No action was taken and, therefore, private complaint has been filed.

8. Taking into consideration the contents of the complaint, it appears that after the verification was recorded, the learned Magistrate had directed the inquiry under Section 202 of Cr.P.C. which is applicable to the case where offence exclusively triable by Court of Sessions is alleged. After perusal of the oral evidence laid by the complainant and two of his witnesses, it was found that process is required to

be issued against all the accused persons for the offence punishable under Section 395 of IPC and after the process was issued, all the accused appeared before the learned Magistrate. Compliance under Section 208 of Cr.P.C. has been made and then, the case has been committed to the Court of Sessions under Section 209 of Cr.P.C. After committal of the case, definitely the procedure, as contemplated under Chapter XVIII of Cr.P.C., was required to be undertaken and therefore, after the trial to be conducted by public prosecutor in respect of present case by the complainant, opening has to be under Section 226 of Cr.P.C., i.e. though the word 'prosecution' is used it will have to be taken as complaint herein, is required to be adopted. Section 227 of Cr.P.C. provides for discharge of the accused. If upon the record of the case and the documents submitted therewith, and after hearing submissions of the accused and the prosecution in this behalf, if the judge considers that there is no sufficient ground for proceeding against the accused, then he shall discharge the accused and record his reasons for so doing.

Sections 227 and 228 are required to be read conjointly and therefore, the observations in **Ramesh Singh's** case (Supra) were required to be considered. In that case itself, it is further observed :-

"If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Sections 227 or 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

9. A well reasoned order has been passed by the learned Additional Sessions Judge. He has perused the contents of the complaint, the copy of N.C. case which was on record and the contents of the complaint in respect of N.C. case. Important point to be noted is that the complainant at no point of time has stated that the said N.C. was not taken as per his statements. He has absolutely not given any explanation as to why

he did not mention at the time of said complaint to the police head constable that the amount as well as the gold ring was taken forcibly by the accused persons, rather he has stated at that time that in the said scuffle or incident, the said amount as well as his ring went missing. The two propositions that articles going missing and they are forcibly taken away have different meaning and different consequences. When the contents of the complaint as well as the N.C. case lodged by him; if read together, were showing that no case is made out to frame a charge under Section 395 of IPC, the learned Additional Sessions Judge was justified in discharging the accused from the said offence but then as regards the other contents are concerned, a specific observation is made that the case is made out for framing charge for the other offences which are exclusively triable by the learned Judicial Magistrate First Class. The learned Additional Sessions Judge was correct in transferring the trial as against accused Nos.1 to 4 in view of Section 228 (1) (a) of Cr.P.C. to the Court of learned Judicial

Magistrate First Class, Jintur. When a well reasoned order with all necessary legal aspects has been passed, there is no question of invoking constitutional powers under Articles 226 and 227 of the Constitution of India by this Court. There is no merit in the present criminal writ petition. Hence, criminal writ petition stands rejected. Rule is discharged.

[SMT. VIBHA KANKANWADI, J.]

SCM