

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 149 OF 2018

LUKAS FERNANDES AND 2 ORS., ... Petitioners

Versus

ELVIRA MONTEIRO E. FERNANDES., ... Respondent

Mr. Vivek Angelo Rodrigues and Mr. V. Naik, Advocates for the Petitioners.

Mr. Amey Prabhu Dessai and Mr. Showmik H. Pai, Advocates for the Respondent.

Coram:- C. V. BHADANG, J.

Date:- 16th March 2019

P.C

By this petition, the petitioner is challenging the part of the judgment and order passed by the learned Sessions Judge on 07.08.2018 in Criminal Revision Application No.11/2018 by which, while confirming the order of framing of charge under Section 323 read with Section 34 of Indian Penal Code (IPC), the learned Sessions Judge has reversed the order of discharge passed by the Magistrate insofar as the offence punishable under Section 341 read with Section 506(II) of the IPC is concerned.

2. The only contention raised by Mr. Rodrigues, the learned Counsel for the petitioners is that, in a Criminal Revision Application filed by the petitioners/accused, challenging the

order of framing of charge under Section 323 read with Section 34 of IPC, the learned Sessions Judge could not have reversed the order of their discharge insofar as the offence punishable under Sections 341 and 506(II) of IPC are concerned. For this purpose, the learned Counsel has placed reliance on the decision of this Court in the case of VITHHALRAO S/o. KONDIBA WAGHMARE & ORS. vs. THE STATE OF MAHARASHTRA in WPCR NO.403/2015 decided on 30.08.2016. The learned Counsel in all fairness has submitted that the petitioners are not pressing for the challenge insofar as the framing of charge under Section 323 read with Section 34 of IPC is concerned.

3. The learned Counsel for the respondents does not dispute that there was no specific notice issued by the learned Sessions Judge by which the petitioners were put to notice that the learned Sessions Judge in exercise of the suo motu powers would also be examining the question of the legality of the order passed by the learned Magistrate discharging the petitioners under Sections 341 and 506(II) of IPC is concerned.

4. It is well settled that under Section 397 read with Section 399 of the Cr.P.C., the learned Sessions Judge as well as this Court has concurrent powers to suo motu examine the legality, propriety or the correctness of any order passed or a finding recorded by a sub-ordinate Criminal Court. However, under

Section 401(2) of Cr.P.C., no adverse order can be passed unless the person against whom such order is being passed is granted an opportunity of being heard.

5. This Court in the case of VITHHALRAO WAGHMARE (supra) has held that in such a case it would be appropriate that the Sessions Court registers a separate suo motu proceeding of the revision alongwith the revision preferred by the accused and in a given case can also pass an order in the Criminal Revision Application filed by the petitioner thereby putting the petitioner/accused on notice that the Court would also be considering the legality and the propriety of the order passed insofar as the offence in which the petitioners/accused are discharged.

6. One can draw an analogy with the situation in a criminal appeal filed by an accused challenging his conviction. The Appellate Court may find that there is a case for enhancement of the sentence made out and the Appellate Court can in fact enhance the sentence, however, not without issuing a specific notice to the appellant/accused for such enhancement.

7. In that view of the matter, the impugned order passed by the learned Sessions Judge reversing the order of the learned Magistrate discharging the petitioner under Sections 341 and

506(II) of IPC is concerned, will have to be set aside.

8. The petition is therefore partly allowed. The Criminal Revision Application No.11/2018 is restored to the file of the learned Sessions Judge. The learned Sessions Judge shall hear the petitioners specifically on the point of the reversal of the order of discharge under Sections 341 and 506(II) of IPC is concerned and then pass appropriate orders as may be necessary in the circumstances and in accordance with law. This shall accordingly be considered as a notice to the petitioners.

9. The rival contentions of the parties are left open.

10. The parties to appear before the learned Sessions Judge on 16.04.2019 at 10.00 a.m.

C. V. BHADANG, J.

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