

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1738 OF 2019

Arun Rangnathrao Patharwalkar,
Age 78 yrs., Occ. Pensioner,
R/o Plot No.23, Sumitra, SBH Colony,
Peer Bazar, Dargah Road, Aurangabad.

... Petitioner

... **Versus** ...

- 1 The State of Maharashtra
- 2 Deepak Venkatrao Kulkarni,
Age 58 yrs., Occ. Architech,
R/o Office at 14, Deogiri Colony,
Samta Nagar Chowk,
Kranti Chowk Police Station Road,
Kranti Chowk, Aurangabad.
- 3 Uday Rangnathrao Patharwalkar,
Age 63 yrs., Occ. Pensioner,
R/o Plot No.28, Rangnath Krupa,
Beside Raghvendra Swami Math,
Behind V.C. Chavhan Natya Grah,
Shardasharm Colony, Aurangabad.

... **Respondents**

...

Mr. R.G. Joshi, Advocate for petitioner

Mr. A.M. Phule, APP for respondent No.1

Mr. J.V. Deshpande and Mr. S.N. Dudhate, Advocate for respondent No.2

Mr. K.F. Shingare, Advocate for respondent No.3

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CORAM : SMT. VIBHA KANKANWADI, J.
DATE : 25th NOVEMBER, 2020

JUDGMENT :

1 Present petition has been filed by the original complainant invoking the Constitutional powers of this Court under Articles 226 and 227 of the Constitution of India to challenge order dated 20.09.2019 passed in Criminal Revision No.180 of 2019 by learned Additional Sessions Judge, Aurangabad, thereby allowing the criminal revision that was filed by respondent No.2 and discharging him from the offence.

2 Heard learned Advocate Mr. R.G. Joshi for the petitioner, learned APP Mr. A.M. Phule for respondent No.1-State, learned Advocates Mr. J.V. Deshpande and S.N. Dudhate for respondent No.2 and learned Advocate Mr. K.F. Shingare for respondent No.3.

3 It has been vehemently submitted on behalf of the petitioner that the present petitioner is the original complainant, who has filed private complaint bearing Regular Criminal Case No.1418/2017 against present respondent Nos.2 and 3. Respondent No.3 is original accused No.1. He is step brother of the present petitioner. Respondent No.2 is original accused No.2, who is an Architect by profession and his services were engaged by

accused No.1. The family members of complainant and accused No.1 are the parties to memorandum dated 26.12.1988 and beneficiaries in affidavit dated 15.03.1988. CTS No.17773 admeasuring 467.2 sq.mtrs. situated at Shardashram Colony, Aurangabad was originally belonging to the father of complainant and accused No.1. The complainant has alleged that accused No.1 has made erasers and corrections in those original documents and by conspiring with the accused No.2 false copies were submitted to the Municipal Corporation and they have obtained sanction for construction. All the details have been given in the complaint and after considering the contents of the complaint, verification and hearing the learned Advocate for the complainant, process was issued by the learned Chief Judicial Magistrate, Aurangabad on 17.02.2018, against both the accused persons, for the offence punishable under Section 420, 467, 468, 471 and 120(B) read with Section 34 of the Indian Penal Code. Thereafter, complainant has led evidence before charge. He has examined himself, his son, CW 2 Vijaykumar Krishnarao Patharwalkar, CW 4 Kailas Purushottam Joshi, CW 5 Omprakash Tulshiram Agrawal, who had made inspection of CTS No.17773 and had given report Exh.27. After the evidence was then led, application was filed for discharge under Section 239 of the Code of Criminal Procedure by accused No.1 at Exh.30. Though the separate application was given, it came to be rejected by the learned Chief Judicial Magistrate, Aurangabad, by passing a detail order

on 02.05.2019. However, thereafter the accused No.2 approached the Revisional Court by filing Criminal Revision No.180/2019 and it has been allowed. Accused No.2 has been discharged. Hence, present revision.

4 Learned Advocate for the petitioner further submitted that learned Revisional Court failed to consider the evidence, that was led before charge by the complainant, and considered the facts as giving rise to relief under Civil Law only and went on to observe that since it is giving civil remedy the charge cannot be framed. It is an erroneous order. When complainant had made allegations that there were erasers and a different document was prepared, it was presented along with the map, which was submitted for sanction with the Municipal Corporation and thereafter permission has been obtained for construction, then definitely prima facie case to frame charge against the accused was made out. Learned Advocate for the petitioner has taken this Court through contents of the complaint, oral evidence, that is adduced, and the documentary evidence which was in the nature of original memorandum of partition, affidavit left by the mother of the present petitioner dated 15.03.1988, legal notices given by complainant, commencement certificate issued by Municipal Corporation, other documents from Municipal Corporation, which were along with the map, that was submitted for sanction. It has been submitted that the perusal of the original

memorandum as well as the affidavit would show that there is eraser, which appears to have been made with the help of whitener, enhances the measurement of the space alleged to the accused No.1. Further, there is statement of PW 2, who says that when he found that there are erasers he had made inquiry with the accused No.1 about the said eraser and then he was informed by accused No.1 that it has been made on the say of accused No.2. The learned Chief Judicial Magistrate had rightly rejected the application for discharge. The Court, at that time, was required to see only the prima facie case and not the merits of the case. Whether the accused would be convicted or not should not be the point when the stage for framing charge arrives. The grounds, those were shown in the application Exh.30, were not sufficient to render the charge that would be framed as groundless, and therefore, the Revisional Court ought not to have interfered with the decision by the learned Trial Judge.

5 Learned Advocate for the petitioner relied on following cases -

1 **Md. Allauddin Khan vs. The State of Bihar and others**, Criminal Appeal No.675 of 2019 decided on 15.04.2019.

2 **Vijayander Kumar and others vs. State of Rajasthan and another**, Criminal Appeal No.1297 of 2004 decided on 11.02.2014.

3 **K. Jagadish vs. Udaya Kumar G.S. and another**, Criminal Appeal No.56 of 2020 decided on 10.01.2020.

4 **Punjab National Bank and others vs. Surendra Prasad Sinha**, AIR 1992 SC 1815.

5 **Kamaladevi Agarwal vs. State of West Bengal and others**, Criminal Appeal No.1059 of 2001 decided on 17.10.2001.

6 **Rajesh Bajaj vs. State NCT of Delhi and others**, decided on 12.03.1999.

7 **R. Kalyani vs. Janak C. Mehta and others**, Criminal Appeal No.1694 of 2008 decided on 24.10.2008.

8 **Ravindra Kumar Madhanlal Goenka and another vs. M/s. Rugmini Ram Raghav Spinners Pvt. Ltd.**, decided on 13.04.2009.

9 **Ramesh Dahyalal Shah vs. The State of Maharashtra and others**, Criminal Application No.613 of 2016 and other connected matters decided on 06.12.2017.

10 **Shriram Krishnappa Asegaonkar vs. State of Maharashtra and another**, 1987 (1) Bom. C.R., 59, decided on 24.07.1986.

11 **Pratibha Rani vs. Suraj Kumar and another**, AIR 1985 SC 628.

6 It is to be noted that all these cases appeared to have been downloaded from the web site of Hon'ble Supreme Court or this Court. Learned Advocate appearing for the petitioner has not pointed out on these citations as to which part from the most of the decisions he wants to point out. However, perusal of the various decisions would give the gist that merely because the facts of the case are disclosing civil remedy as well as

criminal remedy, the party cannot be asked to opt only the civil remedy in all the cases. Further, in some of the cases it is held that if the ingredients of the offence are made out, then the accused need not be discharged. The Court is not required to evaluate the merits of the case at the time whether to frame charge against accused or not. The material that would be filed on behalf of the defence is also not required to be considered. It is only required to be considered, as to whether the evidence that is led shows prima facie case to frame charge.

7 The learned Advocate appearing for the petitioner further submitted that the Revisional Court erred in exercising his powers under Section 397 of the Code of Criminal Procedure in wrong way. He failed to consider that both the accused persons in conspiracy had prepared false documents, used it as genuine to obtain the building permission, then it was a serious offence, which ought not to have been taken lightly. He, therefore, prayed for setting aside the impugned order and he prayed for the restoration of the order passed by learned Chief Judicial Magistrate, Aurangabad.

8 Per contra, the learned Advocate Mr. J.V. Deshpande representing respondent No.2 i.e. original accused No.2 vehemently supported the reasons given by the learned Revisional Court in allowing the Criminal Revision No.180/2019. He further submitted that there was no such evidence on

record, which would show that there was any kind of conspiracy and in tune with the said conspiracy those false documents have been prepared. The silence on the part of the complainant for so many years is required to be considered. Accused No.2 is an Architect by profession. He was professionally engaged by accused No.1. He depended on the instructions, those were given by accused No.1 and also on the documents those were supplied to him. On the basis of the documents supplied by the accused No.1 he had prepared the map and had submitted the same for sanction. Therefore, there was no such evidence, which could justify framing of charge against the accused No.2.

9 In fact, in this case, respondent No.1-State and respondent No.3-original accused No.1 are the formal parties, therefore, though they are represented by APP and Advocate respectively, it is not necessary to consider their submissions.

10 At the outset, it is to be noted that for discharge of an accused under Section 239 of the Code of Criminal Procedure the parameters are different than they are required to be considered at the time of issuing process. At the time of issuing process under Section 204 of Cr.P.C. only prima facie facts in view of the complaint, verification and report under Section 202 of Cr.P.C. with its annexures, if any, are required to be

considered, in case of a private complaint. However, after the process is issued and evidence before charge is adduced, then the available evidence on record will have to be considered to see whether material, that has been placed before the Court, is sufficient to frame charge.

11 In the present case after the process was issued against both the accused evidence before charge was led, which consisted all the testimony of the complainant himself, CW 2 Vijaykumar Krishnarao Patharwalkar, CW 3 Somitra Arun Patharwalkar-son of the complainant, CW 4 Kailas Purushottam Joshi, who is the partner of CW 3 Somitra and it appears that to whom the documents allegedly forged were shown. CW 5 Omprakash Tulshiram Agrawal, who is Engineer by profession and appears to have measured the property and given report on 11.02.2018. Taking into consideration the evidence of these witnesses the learned Magistrate has come to the conclusion that no case is made out for discharge of the accused and in fact, the material, which is placed on record by the complainant, is sufficient to frame charge against both the accused. However, after the revision was filed by original accused No.2 i.e. Criminal Revision Application No.180/2019 before learned Additional Sessions Judge, Aurangabad, it came to be allowed on 20.09.2019. Now, the original complainant is aggrieved by the said order. Under the said circumstance, it is required to be seen as to which allegations

were made against accused No.2 and what evidence was produced. At the costs of repetition, it can be seen, that the complainant is contending that there is erasers and forgery in the document styled as “स्मरणपत्र” i.e. Memorandum of Partition executed on 26.12.1988. But complaint is totally silent on the point that how many copies of the said memorandum were prepared and whether he was having any copy of the said document or not. According to the complainant, after the said memorandum was executed, the accused No.1 had kept the original with him. He had requested accused No.1 to hand over the said original to him on many occasions, but the accused No.1 avoided on one or the other pretext and it could be made available to him only on 09.12.2016. If the complainant was not diligent enough to take copy of the said document after its execution, then who is to be blamed. Naturally he himself. Merely by saying that he was time and again demanding the original from the accused No.1 will not be sufficient. It can be seen from the contents of the First Information Report that after the said document was made available to the complainant he has noticed the erasers and overwriting, but then on what basis he was saying that the accused No.2 had helped accused No.1 in doing such activity, is a question. Merely by saying that there is conspiracy or common intention, the offences cannot get attracted against the accused No.2. Important point to be noted is that even as per the contents of the complaint the first map for the construction was

got prepared by accused No.1 from accused No.2 on 07.08.1990. The complainant is not coming with a case that he could not notice that some extra area has been shown by the accused No.1 in the said map and then he got sanctioned the said map and made construction. On the contrary, it further appears from the contents of the complaint that the accused No.1 has obtained sanction to construct on the second occasion also. It is not the case of the complainant that on both the occasions he had raised any kind of objection with the Municipal Authorities. Now, the testimony of CW 5 Omprakash Agrawal has been relied by the complainant. It can be seen that what CW 5 Agrawal has noticed is that the accused No.1 has not kept the mandatory space around the construction as per the Municipal By-laws. It is also stated by him that the sanctioned map is wrong and the actual measurements at the said place are different. The simple question arises is that when the map was presented for sanction and thereafter the Municipal Authorities have given sanction, it was not objected by anybody for years together, then now, after so many years whether the complainant can be allowed to say anything in respect of the same, is a question. The complaint, therefore, suffers from delay and laches. He was sleeping over his rights for years together when he was witnessing the construction that is going on.

as his Architect. Definitely, the accused No.2 would have depended on the documents, those were supplied by accused No.1. Whatever charges he had taken from accused No.1 were the professional charges and it cannot be stated that it is a wrongful gain to him. He could not have had any intention to cause wrongful loss to the complainant, as the complainant has not come with the case that there was any kind of previous enmity or any such incident had taken place between him and accused No.2, which could have given a cause for accused No.2 to take revenge against the complainant. Therefore, whatever has been done by the accused No.2 appears to be on the basis of documents, those were supplied by accused No.1 and it was a professional thing or part of his profession. The Municipal Authorities had sanctioned the map, construction has taken place long ago, it will have to be also presumed that the accused No.1 has obtained completion certificate and while issuing such certificate the Municipal Authorities would have adhered to all the provisions of the Act and By-laws. Taking into consideration the delay in lodging the complaint, especially against the accused No.2, the learned Additional Sessions Judge was justified in discharging the accused No.2. Definitely, the aspects, which were required to be considered from the point of view allegations made against accused No.2 they were not considered properly and legally by the learned Magistrate, and therefore, the learned Additional Sessions Judge was justified in invoking his powers under Section

397 of Cr.PC. No doubt, the reasons, those have been stated by learned Additional Sessions Judge, are very much cryptic in nature and he did not consider all the aspects, especially taking into consideration the ingredients of the offence; yet, ultimate result, that is final order is correct and there is absolutely no case made out to invoke the Constitutional powers of this Court under Articles 226 and 227 of the Constitution of India to set aside the said order. The writ petition deserves to be dismissed. Accordingly, it is dismissed.

(Smt. Vibha Kankanwadi, J.)

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