

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1665 OF 2018

1. Asht Bhuja Nath s/o Mrityunjay
Nath Tripathi, Age: 32 Yrs.,
occ. Business,
R/o At present PlotNo.9,
Amar Sahakari Gruha Nirman
Sanstha, N-8, CIDCO,
Aurangabad.
2. Priti w/o Asht Bhuja Nath
Tripathi @ Priti D/o Ghanshyam
Dongre, Age: 43 Yrs.,
occ.Household,
R/o At present Plot No.9,
Amar Sahakari Gruha Nirman
Sanstha, N-8, CIDCO,
Aurangabad. = PETITIONERS

VERSUS

1. The State of Maharashtra
2. Lata Madan Kharat
Age: 56 Yrs., occu. Housewife,
Plot No.9, Amar Sahakari
Gruha Nirman Sanstha,
N-8, CIDCO, Aurangabad. = RESPONDENTS

Mr.RS Deshmukh, Adv. h/for Mr.RG Joshi & HB Kadu,Advocates for Petitioner/s;

Mrs. PV Diggikar, APP for Respondent-State;

Mr. Arun S.Shejwal, Adv. For Resp.No.2.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON : 10th December, 2020

PRONOUNCED ON : 20th JANUARY,2020

JUDGMENT

1. Present petition has been filed by the original accused persons challenging the order passed on 27-07-2018 by learned Judicial Magistrate First Class, Court No. 14, Aurangabad in RCC No. 2202 of 2017; thereby rejecting their application under Section 239 of the Code of Criminal Procedure. The petitioners have also challenged the order passed by learned Ad-hoc District Judge-2 and Additional Sessions Judge, Aurangabad on 1-11-2018; whereby he has rejected the Criminal Revision Application No.247 of 2018 filed by them to challenge the order passed by learned Magistrate.

2. The factual matrix leading to the present petition are that, petitioner No.2 is real sister of respondent No. 2. Petitioner No.2 had filed First Information Report (FIR) against respondent

No.2, her husband and son under Section 344, 354 (a), 323, 504, 506 r/w 34 of Indian Penal Code on 19-03-2017. Respondent No.2 has then lodged a report against the present petitioners on 23-03-2017 as counter-blast. Crime has been registered vide CR No.220 of 2017 against them on the basis of said report. It has been alleged in the FIR that she is residing with her husband and son in a house which was standing in the name of her father. There is only one staircase to the flat and her house consists of three rooms. The dispute is going on in Court of law in respect of the house between her and the accused persons. She was in house around 2.00 p. m. On 22-03-2017, accused entered her house unlawfully and accused No.1 had abused and assaulted her. He pulled her scarf (*odhani*) and pressed her breast. He had outraged her modesty. When she raised shouts, her husband came and when fact was narrated to him, and he asked accused No. 1 about his acts, he was also assaulted. In the meantime, accused No.2 entered the house forcefully and assaulted informant. Threats were given to them by the accused that they would see how they continue to stay there, they would be evicted.

3. After the completion of the investigation, charge-sheet has been filed. Accused persons have been released on bail. They appeared after the charge-sheet was filed. They filed an application for discharge under Section 239 of the Code. It was contended that accused No.1 was attending an institution on 22-03-2017 between 1.00 p. m. To 2.00 p. m. He was not at all present when the alleged incident had taken place. There is a civil dispute pending between accused No.2 and informant in connection with the house property. Accused No.2 had lodged report against the informant, her husband and son. It is prior in time. A false report has been lodged to give counter-blast to the report filed by the accused No.2.

4. The said application was resisted by prosecution on the ground that the investigation officer has collected sufficient material against the accused persons. The evidence collected would show that the charge can be framed and matter can proceed further. Accused can put forward any defence as they can, at the time of trial.

5. After hearing both sides, the learned Magistrate has rejected the application for discharge, holding that no material has been shown by the accused persons, on the basis of which it can be said that the charge would be groundless against them. The said order has been upheld in the revision, by the learned Revisional Court. Hence, present writ petition.

6. It has been vehemently submitted by learned Advocate Mr. R.S. Deshmukh instructed by Advocate Mr. R.G. Joshi appearing for petitioners that the learned Additional Sessions Judge, who heard the revision, has not given the decision in judgment format. The revision under Section 397 of the Code was finally heard and therefore, it was expected that judgment ought to have been delivered touching all the points those were raised. The matter has been disposed of by passing an order below Exh.1. This shows the causal approach of the learned Judge and non-application of mind. Complainant had filed the said complaint with malafide intention and as a counterblast to the complaint lodged by petitioner No.2 against respondent No.2 and her family members. That

incident had taken place on 19-03-2017 vide FIR No. 206/17 under Sections 452, 344, 354(A), 323, 504, 506, read with 34 of Indian Penal Code. In fact, petitioner No.2 and respondent No.2 are the real sisters. There is civil dispute going on between them in respect of the property. Their relationship is strained. After the charge-sheet was filed against the petitioners, they had filed said application for discharge under Section 239 of Indian Penal Code. Learned Magistrate as well as learned Revisional Court failed to consider the documents those were produced on record. Petitioner No.1 had specifically stated that he was not present at the place of alleged offence at the relevant time. He had in fact made a request to police officer investigating the case also to collect evidence in that respect; however, no such evidence was collected. A certificate was produced issued by Rajshree Shahu Institute, MIDC, Chikalthana, Aurangabad dt.22-03-2017, certifying that petitioner No.1 was present in their institute for delivering a lecture on that day between 1.00 p.m. To 3.00 p.m. Original complainant had contended that the offence took place at about 2.00

p.m. on 22-03-2017 in the house of the complainant.

A person can not be present at two places at the same time. When he was not present at the sight, there was no question of commission of any crime by him. Both the Courts have also failed to consider that there was delay in lodging the FIR and that delay is not at all explained by the respondent No.

2. There was nothing on record to show even *prima facie* which can suggest that the petitioners were involved in any such crime. The material collected by the police was not sufficient to frame charge against petitioners. When the said fact was not considered by the learned Magistrate, the Revisional Court ought to have corrected it. Instead of that, a cryptic order, that too not in format, has been passed. It needs to be corrected in this petition.

7. Per contra, the learned Advocate appearing for original informant submitted that both the Courts have rightly held that the case is made out for framing of the charge. The Revisional Court might not have given the decision in proper format, but the contents show the application of mind. Though there is dispute between both the

sisters and their family members, that can not be the ground to **negative** the story in the FIR. Charge has to be framed, when prima facie case is made out. The statements of witnesses support the story in the FIR. Accused No.2 will have a right to lead evidence to prove alibi. Merely on the basis of certificate produced by him, we can not throw the FIR.

8. Learned APP has also supported the argument submitted on behalf of informant. He further submitted that the learned Magistrate was not supposed to appreciate the evidence at that stage. Only on the basis of prima facie material produced on record, he ought to have come to the conclusion as to whether charge needs to be framed. The certificate issued by the institute is yet to be proved. Material was found to be sufficient and therefore, application for discharge has been rightly rejected.

9. At the out set, it can be said that the learned Ad-hoc District Judge-2 and Additional Sessions Judge, Aurangabad has not given his decision in the Revision Petition in proper format.

It ought to have been in judgment format. However, this Court can not take too technical approach and come to a conclusion that the said decision does not reflect proper application of mind. The contents of the order/decision are required to be considered here. It shows that all the points, those were argued on behalf of revision applicant, so also all the documents, were considered.

10. Now turning to the points raised, it is to be noted that the application under Section 239 of the Code was filed by the present petitioners for discharge. Section 239 of the Code runs as follows :

"239- When accused shall be discharge, -
If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

11. Thus, if the Magistrate considers after

going through all the documents and the report as well as after hearing accused that the charge against accused would be groundless, then he can discharge the accused. Now when in this case, the present petitioners had approached the Magistrate with request to discharge them, then they should show that the charge against them would be groundless if the material placed before the learned Magistrate is considered. In Onkar Nath Mishra and Ors v/s. State (NCT of Delhi) and anr [(2008) 2 SCC 561] it has been observed, " It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads

the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence".

12. Notes of other decisions of the Apex Court were also taken in which the 'material to be considered' while framing charge was laid down in para No.12 to 14 of the said judgment and they are reproduced here as under -

"12. In State of Karnataka Vs. L. Muniswamy [(1977) 2 SCC 699], a three judge Bench of this Court had observed that at the stage of framing the charge, the Court has to apply its mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasized.

13. Then again in State of Maharashtra and others Vs. Som Nath Thapa and others [1996 Supreme Court Cases (Cri) 820], a three judge Bench of this Court, after noting three pairs of sections viz. (i)

Sections 227 and 228 insofar as Sessions trial is concerned; (ii) Sections 239 and 240 relatable to trial of warrant cases; and (iii) Sections 245(1) and (2) qua trial of summons cases, which dealt with the question of framing of charge or discharge, stated thus:

"...if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

14. In a later decision in State of M.P. Vs. Mohanlal Soni [(2000) 6 SCC 338], this Court, referring to several previous decisions held that the crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against

the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused".

13. Thus, all these pronouncements guide us to the factors to be considered while framing charge. The material which was before the learned Magistrate in this case, was the charge-sheet containing FIR and statements of witnesses, with documents. The documents produced by accused are not part of charge-sheet. Those documents viz. Certificate of the Institute showing that accused No.2 was present in that institute between 1.00 p.m. To 3.00 p.m. and copies of plaint in civil suit have been produced by accused along with their application under Section 239 of the Code. In the case of Rukmini Narvekar v. Vijaya Satardekar and others, reported in AIR 2009 SC 1013, in para 29 of the judgment, the Supreme Court has made the following observations:-

"29. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare

cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted. We agree with Shri Lalit that in some very rare cases the Court is justified in looking into the material produced by the defence at the time of framing of the charges, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted."

14. Thus, the law on the point regarding whether the documents of the accused should be considered by the Court or not at the time of framing charge, it was ruled that there cannot be an absolute proposition that under no circumstances can the Court look into the material produced by the defence at the time of framing of the charge, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted and then the court is justified in looking into the material produced by the defence at the time of framing of charge. Now, when the petitioner No.2 intends to take the defence of

alibi then, burden is on him to prove the same. It can not be considered before parties put their evidence. Merely on the basis of certificate issued by an Institution, he can not be discharged, before the said certificate is proved.

15. There appears to be civil dispute pending between the real sisters in respect of property. Pendency of dispute also *per se* is not the ground to discharge the accused persons, unless it is proved that there is malice on the part of informant due to civil dispute. There is no presumption about presence of malice in case of civil dispute. Same is the case, about point of complaint filed as counter-blast to the complaint filed by the accused. It should be proved by strong evidence, at the stage of discharge under Section 239 of the Code.

16. There is no error committed by the learned Magistrate to reject the application filed by the accused persons for discharge under Section 239 of the Code. So also the learned Additional Sessions Judge has not committed any error in

rejecting the revision application. There is no merit in the present petition. Hence, it stands dismissed.

(SMT. VIBHA KANKANWADI,J.)

BDV

fldr 16.1.20