

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2649 OF 2019

- | | | | |
|----|-------------------------------|---|-----------------|
| 1. | Gautam Ramanbhai Patel |] | |
| 2. | Sonzal Gautam Patel |] | |
| 3. | Ghanshyam Harbhagwan Malhotra |] | |
| 4. | Poonam Ghanshyam Malhotra |] | |
| 5. | Mitesh N. Malhotra |] | |
| 6. | Manju N. Malhotra |] | |
| 7. | Meena Vijay Mehta |] | ... Petitioners |

V/s.

- | | | | |
|----|--|---|-----------------|
| 1. | The Vitthal Nagar Co-Op. Housing Soc. Ltd. |] | |
| | Having its office at Jai-hind Club, |] | |
| | Jai-Hind Society, N.S. Road No.11, |] | |
| | N.V.P.D. Scheme, Vile Parle, |] | |
| | Mumbai – 400 049 |] | |
| 2. | The State of Maharashtra |] | ... Respondents |

Mr.Subodh Desai i/b. Mr.Aditya Sawant for Petitioners.

Mrs.Smita G. Dandige for Respondent No.1.

Mr.Amit Palkar, A.P.P. for Respondent No.2-State.

CORAM : A.S. GADKARI, J.
DATE : 26th February 2021.

PC. :

The petitioners have impugned Order dated 1st April 2019 passed below Exh.4 in CC No.247/SW/2012 by learned Metropolitan Magistrate, 10th Court, Andheri, Mumbai, rejecting their application for discharge.

2. Heard Mr.Desai, learned counsel for Petitioners, Mrs.Dandige, learned counsel for Respondent No.1 and Mr.Palkar, learned A.P.P. for Respondent No.2-State. Perused record annexed to the Petition.

3. The admitted facts on record are that, the respondent No.1 is the original complainant in the said Criminal Case No. 247/SW/2012 pending on the file of learned Metropolitan Magistrate, 10th Court, Andheri, Mumbai. Learned Magistrate by its Order dated 25th August 2014 has issued summons against the petitioners under Section 406, 447 read with 120-B of the Indian Penal Code. After receipt of summons, the petitioners appeared before the Trial Court and filed application for discharge on 9th October 2015, under Section 239 of the Code of Criminal Procedure. The Trial Court by its impugned Order dated 1st April 2019 has rejected the said application.

It is the further admitted fact on record that, the complaint instituted by the respondent No.1 is warrant triable case by the Magistrate, instituted otherwise than on police report. Though, it was erroneously typed in the discharge application that, the said application was preferred under Section 239 of the Cr.P.C., as a matter of fact and legally also it was an application under Section 245 and more precisely under Section 245 (2) of Cr.P.C.. The Trial Court by its impugned Order while rejecting the said application has observed that, the said application was a premature application, filed before recording of evidence.

4. Section 245(2) of Cr.P.C. reads as under :

“Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

The Hon’ble Supreme Court in the case of *Ajoy Kumar Ghose Vs. State of Jharkhand & Another*, reported in (2009) 14 SCC 115, in para Nos.22, 24, 25, 26 and 31 has held as under :-

“22. In the warrant trial instituted otherwise than the police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the framing of the charge. Of course, under Section 245(2) Cr.P.C., a Magistrate can discharge the accused at any previous stage of the case, if he finds the charge to be groundless.

24. Now, there is a clear difference in Sections 245(1) and 245(2) of Cr.P.C. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) Cr.P.C.

25. The situation under Section 245(2) Cr.P.C. is, however,

different. There, under sub-Section (2), the Magistrate has the power of discharging the accused at any previous stage of the case, i.e., even before such evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244 Cr.P.C. The words appearing in Section 245(2) Cr.P.C. "at any previous stage of the case", clearly bring out this position.

26. *It will be better to see what is that "previous stage". The previous stage would obviously be before the evidence of the prosecution under Section 244(1) Cr.P.C. is completed or any stage prior to that. Such stages would be under Section 200 Cr.P.C. to Section 204 Cr.P.C. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a Court has made the complaint or further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 Cr.P.C. Under Section 201 Cr.P.C., if*

the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper Court or direct the complainant to a proper Court.

31. *The situation under Section 245(2) Cr.PC., however, is different, as has already been pointed out earlier. The Magistrate thereunder, has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 Cr.PC. and till the completion of the evidence of prosecution under Section 244 Cr.PC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 Cr.PC., makes an application for discharge.”*

In view of the clear interpretation and enunciation of law by the Hon’ble Supreme Court, in the case of Ajoy Kumar Ghose (supra), there is no space for the Courts to be reluctant in entertaining an application under Section 245(2) of Cr.PC. in a warrant triable case instituted otherwise than on police report.

5. In view of the above, the impugned Order dated 1st April 2019 passed below Exh.4 in CC No.247/SW/2012 is quashed and set-aside and the said application is remanded to the Trial Court for its consideration afresh.

6. The petitioners are permitted to amend the cause title of their application filed below Exh.4 and delete Section 239 from the cause title and instead to incorporate Section 245(2) of Cr.PC..

7. Petition is allowed in the aforesaid terms.

8. It is needless to mention that, the learned Magistrate will hear both the parties before passing appropriate orders in the matter.

The contentions of both the parties on merits of the said application are expressly kept open.

9. As the said application filed below Exh.4 is of the year 2015, the learned Magistrate is requested to decide the said application within a period of four months from the date of receipt of the present Order.

[A.S. GADKARI, J.]

Omkar S.
Kumbhakarn
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by Omkar S.
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