

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
(APPELLATE SIDE)**

Present:
The Hon'ble Justice Rai Chattopadhyay

**C.R.R No. 3857 of 2016
With
CRAN 9 of 2019 (Old No: CRAN 5041 of 2019)**

**Bithika Chakraborty & Ors.
Vs.
Kamal Kanti Biswas**

For the Petitioners : Mr. Sourav Chatterjee,
: Mr. Satadru Lahiri,
: Mr. Safdar Azam,

For the Respondent : Mr. Debasis Kar,
: Mr. Arka Tilak Bhadra.

Hearing concluded on: 13/04/2023

Judgment on: 20/04/2023

Rai Chattopadhyay, J.

1. The order dated 3.9.2016 passed by the Judicial Magistrate, 4th court at Barrackpore, North 24 Parganas, in Complaint Case No. 19 of 2007, is under challenge in this revision, filed by the petitioner, under section 482 of the CrPC. The present petitioner, that is, the accused person in the said complaint case, filed in the trial Court, his prayer for discharge, vide his application dated 22. 3. 2016. The same was

disposed of by the trial Court vide the impugned order dated 3.9.2016 for the reason inter alia that the materials on evidence as well as that on record had disclosed sufficiently to proceed against the present petitioner/accused person. Thus the petitioner was aggrieved and has challenged the said impugned order in this revision.

2. In this case, while adjudicating to decide whether the petitioner would have been entitled under the law, for an order of discharge, this Court would delve upon the points, firstly, as to whether the previous order of the Coordinate Bench rejecting petitioner's prayer for quashing of the criminal proceeding against him, should act as a debarring factor to go into the prayer of the petitioner in this case, which is virtually the same as that in his previous case. Then, whether there has been so compelling change in circumstances, after the previous order of the Coordinate Bench rejecting petitioner's prayer for quashing of the criminal proceeding, to be taken into consideration, to assess his prayer in this case, which is virtually similar to that in the previous case. The Court will see if the nonproduction of any vital document/information, said to have prompted the Coordinate Bench previously, to consider petitioner's case, not in its proper perspective, and if the same should again be considered in this case, to weigh if the petitioner would have been eligible for an order of discharge as the evidence and materials would not have made out a case against him. The court shall consider, if petitioner's case is comprised with the questions of facts only, legible to be decided in a trial.

3. Since this case is germane to an order of the trial Court under section 245 of the CrPC, at the threshold the said provision may be extracted:

“245. When accused shall be discharged.-

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) 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.”

4. Therefore, the law is that the Magistrate shall apply his mind and consider the evidence of the prosecution. The Magistrate shall also give the prosecution/complainant, an opportunity of being heard. He shall apply mind to all the materials as above and shall come to a finding that no case against the accused has been made out which, if unrebutted, would warrant his conviction. Law has further mandated that the reasons so formulated by him to support his decision should be recorded in writing. Only then an order of discharge passed by him can be stated to be in terms of and compliance with the statutory provision and not otherwise.

5. At this stage let the chronology of facts be stated in a nutshell. The petitioners owned and possessed the property, some portion of which, measuring 3 Cottahas 13 Chittaks 38 sqft, in MoujaMulajore, R.S Dag No.790, Khatian No.1607, J.L.No. 18, Touji No.655, was purchased by the complainant/opposite party. Date of execution of the sale deed is 26.12.2005. Classification of the said

land is at the core of the dispute between the parties. The complainant has alleged that he has been deceived by the petitioners, who misrepresented intentionally and induced him about the classification of the said property to be “danga” (land), whereas the property was originally classified as “doba” (water body). He filed Complaint Case No. 19/2007, in the court of ACJM, Barrackpore on 2.7.2007 against the present petitioners under section 420 IPC. Thereafter, the petitioners have moved this Court vide C.R.R. 2003 of 2012, with their prayer for quashing of the criminal proceeding so started against them. Coordinate Bench of this Hon’ble Court, vide order dated 26.11.2013, rejected such prayer of the petitioners for the reason inter alia that prima facie there were allegations that the property was sold by misrepresenting its description. Petitioners thereafter espoused their prayer in the trial Court under section 245 of the CrPC, for discharge. The same was also turned down by the trial Court by dint of the impugned order dated 3.9.2016.

6. Mr. Chatterjee, who represents the petitioner, has first mentioned in his arguments that while delivering the order as impugned in this case, the Magistrate has not taken into consideration and applied his mind to all the materials available with him, which, he says that the Magistrate was duty bound under the law, to do. As for instance, he has relied on a report of police, submitted in the case, dated 10.6.2007. It is noted, as indicated, that the report speaks of the finding of an enquiry pursuant to the court’s order, that the property concerned is a “doba” (water body) and the

complainant being a local resident, had knowledge of that and purchased the same as it is. The report further indicates that after execution of the deed, possession of the property was duly handed over to the complainant/purchaser by the present petitioners, that is, the vendors. According to the said report, the complainant has been in possession of the concerned property since after purchase and that his allegation against the present petitioners of not handing him over the possession of the property, is only baseless. The said report has further revealed that as the complainant made endeavours to fill up the water body, he was restrained by the local residents in his illegal pursuits touching the ecological balance of the locality. It is stated that the water body was visibly existent within knowledge of everybody at the locality and the complainant, being a local resident could not deny its existence. Mr Chatterjee says that the report as above contains very vital piece of information relating to the case and bearing relevance and effect to its root, which the Magistrate has not taken into consideration while adjudicating his client's prayer under section 245 CrPC. He says that such inaction of the trial Court has in one hand prejudiced the interests of his clients and in the other hand has prompted the Court to arrive at an erroneous finding in the impugned order, rejecting his client's prayer for discharge thereby, which cannot be said to be based on available materials, as required under law.

7. The other point Mr. Chatterjee has argued for the petitioners is that, the previous order of the Coordinate Bench dated

26.11.2013, rejecting petitioner's prayer for quashing of the proceeding that is the instant one, cannot act as res judicata with respect to the present case, as there has been subsequent development in the case by way of an application being filed by the petitioners in the trial Court under section 245 CrPC, which has been rejected by the trial Court. He relies on the judgment of the Hon'ble Supreme Court reported in **(2008) 8 SCC 673 [State represented by DSP, SB CID, Chennai vs. K.V. Rajendran and Others]**, where the Hon'ble Supreme Court has been pleased to hold that filing of a fresh petition under section 482 CrPC is permissible in view of any subsequent events that had taken place after the final order disposing of the earlier criminal revision. On this, another judgment of the said Court has been relied on, that is reported in **(2009) 7 SCC 495 [Devendra vs State of Uttar Pradesh and Another]**, where the Hon'ble Court finds and lays down that the principle of res judicata has no application in a criminal proceeding. **"The principles of res judicata as adumbrated in section 11 of the Code of Civil Procedure or the general principles thereof will have no manner of application in a proceeding under section 482 of the CrPC"** – the Hon'ble Court finds. Therefore, he says that rejection of petitioner's prayer by this Court vide order dated 26.11.2013 shall have no bearing as regards the maintainability of the present case under section 482 of the CrPC, by the petitioners.

8. Mr. Chatterjee has mentioned about the previous civil suit filed by the complainant in a competent court, where the complainant has prayed for a decree of declaration to change the classification of

the concerned property “as ‘Doba’ instead of ‘Danga’”. He says that since the complainant has mentioned about this civil suit in his evidence before the Magistrate, the same and its implication was required due consideration of the trial Court while disposing of petitioner’s prayer under section 245 of the CrPC. He further says that complainant’s prayer in the said suit, would naturally imply that his allegations against the petitioners regarding false representation of the classification of land sold to him and that of deception are only fabricated and concocted.

9. He has further relied on a judgment of the Apex Court reported in **(2019) 18 SCC 69 [Harish Dahiya @ Harish and Another vs State of Punjab and Others]** where the Court has held as follows :

“4. Be that as it may, we find that the order dated 26-10-2018 refusing to discharge the appellants suffers from abdication of jurisdiction. Merely because an earlier application to quash the entire prosecution under Section 482 CrPC may have been dismissed, the Additional Sessions Judge could not decline to consider the application for discharge on that ground. The grounds for quashing a criminal proceeding and the reasons for allowing or disallowing an application for discharge preferred by the accused are completely different. The grounds falling for consideration in the two jurisdictions are completely different.”

10. He submits that thus the law is settled well that the order of the High Court under section 482 of the CRPC should not bear any relevance at the stage of consideration of prayer for discharge by the accused person, in the trial Court.

11. The petitioners have prayed for setting aside the impugned order dated 3.9.2016 of the trial Court and passing necessary order in this case for the ends of justice.

12. The petitioner's contentions and prayer is vehemently objected to, on behalf of the opposite party/complainant. Mr. Debasis Kar appearing for the opposite party/ complainant would first submit that at the stage of quashing / discharge and while exercising powers under 482 of the CRPC, the High Court shall not conduct a 'mini trial' but only look for the prima facie materials against the accused persons to be available. On this he has relied on a recent **unreported judgment of the Hon'ble Apex Court, dated 10.4.2023 [Criminal Appeals No. 1025-1026 of 2023 CBI vs Aryan Singh]**, where the Bench headed by the Hon'ble Justice M.R.Shah has been pleased to hold that :

"4. Having gone through the impugned common judgment and order passed by the High Court quashing the criminal proceedings and discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings in exercise of the limited powers under Section 482 Cr.P.C. and/or in exercise of the powers under Article 226 of the Constitution of India.

4.1 From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of Criminal Appeal Nos. 1025-1026 of 2023 discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr.P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not

proved. This is not the stage where the prosecution / investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution / investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr.P.C., the Court has a very limited jurisdiction and is required to consider “whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not”.

13. Mr. Kar has also relied on several other judgments, which are mentioned as herein below:-

(i) 2022 Cri.L.R. (SC) 1296 (State of Uttar Pradesh & Anr. vs. Akhil Sharda & ors.

Judgment of the Hon’ble Apex Court, dated 05.05.2022 in

(ii) Criminal Appeal No.741 of 2022 (Jagmohan Singh vs. Vimlesh Kumar & Ors.)

“8. While exercising jurisdiction under Section 482 of the Cr.P.C., the High Court should not ordinarily embark upon an enquiry into whether there is reliable evidence or not. The jurisdiction has to be exercised sparingly, carefully and with caution only when such exercise is justified by the specific provisions of Section 482 Cr.P.C. itself.

9. The criminal proceedings can be said to be in abuse of the process of Court, to warrant intervention under Section 482 Cr.P.C., when the allegations in the FIR do not at all disclose any offence or there are materials on record from which the Court can reasonably arrive at a finding that the proceedings are in abuse of the process of the Court.”

It is submitted that, the findings of the Hon’ble Coordinate Bench being in place, vide order dated 3.9.2016, the situation

that the FIR has not disclosed any offence in this case is only farfetched. In a situation otherwise, ratio of this judgment squarely applies in this case.

(iii) (2021) 8 SCC 583 (Saranya vs. Bharathi & Anr.) This case has been relied on to emphasize the proposition settled therein, i.e.,:-

“Things High Court must keep in mind while exercising jurisdiction under Section 482 Cr.P.C. at stage of framing of charge – High Court is not required to appreciate the evidence to see whether person charged is likely to be convicted or not.”

Another judgment, on the similar point has been relied on, that is,

(iv) (2021) 9 SCC 35 (Kaptan Singh vs. The State of Uttar Pradesh & Ors).

The next point of argument, on behalf of the opposite party would be that, in this case, disputed questions of facts are involved relating to the issues of classification of the concerned land, alleged suppression and misrepresentation of the material fact at the time of transaction of property, claim in counter to such allegations like the vendee/opposite party were made aware about the land classification etc. In view of involvement of several questions of fact involved in this case, Mr. Kar submits, that those are only to be determined by the trial Court, on evidence and this would not be an appropriate

stage to embark upon those questions of fact. On this he has relied on a judgment of the Supreme Court reported in

(v) 2014 Cr.L.R. (SC) 186 (Ashfaq Ahmed Quereshi & Anr. vs. Namrata Chopra & Ors.), where the Hon'ble Court has held that where disputed questions of fact are involved, quashing of the proceedings under Section 482 Cr.P.C, is not possible.

It is submitted, that after this Court's order dated 3.9.2016, there was sufficient reason for the Magistrate to pass an order for framing of charge in this case. The reason being that for framing of charge, the Court is required to form an opinion that there is ground for presuming that accused has committed the offence. He says that the law, settled as above, would render the impugned order as flawless. On this he has relied on a judgment reported in

(vi) 2007 (sup) (SC) 1873 (Lalu Prasad @ Lalu Prasad Yadav vs. State of Bihar Through CBI (AHD) Patna).

By referring to the judgment reported in

(vii) 2009 AIR (SC) 2646 (The State of Andhra Pradesh vs. Vangaveeti Nagaiah), it has been mentioned that allegations of mala fide, as has been lodged in this case by the petitioner against the opposite party/complainant shall have no bearing as regards quashing of a proceeding, and that meticulous scrutiny of evidence would not be a requirement at this stage.

(viii) 2018 (2) Cal Cri LR 198 (Vipul Raj vs. The Central Bureau of Investigation) is the other Coordinate Bench judgment relied on by the opposite party to emphasize the point that :- If it appears to the Court prima facie that the allegation is more or less acceptable and it constitutes an offence, then question exercising jurisdiction under section 482 of Cr.P.C, 1973 would not lie and if the High Court becomes fully satisfied that the material produced or relied by the accused leads to a question that there is defence based on sound reasons only then High Court shall interfere.

- 14.** The petitioner has primarily relied on the grounds that consideration of the available materials and evidence before it, was imperative for the Magistrate while adjudicating petitioner's prayer under Section 245 (1) Cr.P.C. That the Magistrate failed to comply with such bounden statutory duty, in so far as the police report dated 10.06.2007 has not been considered by him, while delivering the impugned order. Petitioner's other point is that an order of this Court, passed under Section 482 Cr.P.C declining his prayer for quashing of the proceedings, does not overshadow petitioner's right under Section 245 Cr.P.C, nor it takes away any of the statutory duties cast upon the Magistrate as envisaged under the said provision, while disposing of petitioner's prayer under Section 245 Cr.P.C. The judgments relied on by the opposite party are controverted on the point that, those are the compendium of propositions, which are settled as regards applicability of discretionary power of the Court, under Section 482 of the Cr.P.C, for quashing of

the proceedings. Those are said to be not applicable in this case. So far as petitioner's point regarding maintainability of this case, that res judicata would not be applicable in a criminal proceeding and judgments of ***Devendra (supra)*** , ***K.V.Rajendran (supra)*** and ***Harish Dahiya (supra)*** are concerned, there has been no serious challenge to the same, by the opposite party. The opposite party practically relies on the order dated 3.9.2016 of the Coordinate Bench, to submit that there are prima facie material against the accused available on record and the case involves disputed questions of fact to be determined in trial. The findings of the Court, being as above, it is argued that, the Magistrate has done no wrong in the impugned order, by directing framing of charge against the petitioner, in the case.

15. Chapter XIX of the Cr.P.C where provisions for trial of warrant cases by Magistrate, has been laid down, one would find under heading '*B,- Cases instituted other than police report*', Section 245, as extracted above, to provide as to when the accused shall be discharged.

16. The law as to when an accused shall be discharged by the Court is enumerated in Section 245 (1) Cr.P.C, 1973, that the Magistrate shall have to form an opinion that no case against the accused has been made out and he shall have to put down such reasons on record, while ordering for discharge of him. Such opinion of the Magistrate shall be based on all the evidence as referred to in Section 244 of the said Code.

17. Therefore it is required that Section 244 of the Cr.P.C, be also looked into, to see what kind of evidence has been enumerated therein, for the Magistrate to take into consideration while delivering an order under Section 245 (1).

“244. Evidence for prosecution.

(1) When, in any warrant- case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.”

18. Therefore Section 244 Cr.P.C has mandated the Magistrate to take all such evidence as may be produced in support of the prosecution. This provision has not however fettered the discretionary power of the Magistrate to take into consideration the materials produced before it, excepting otherwise than by prosecution but pursuant to the order of the Court itself. The purpose is to find out any element of falsehood into the complaint against the accused person or not. This is a discretionary power to govern the Magistrate, when he considers if the accused is to be discharged. The Magistrate for the sake of fairness shall embark on to the available materials before it to formulate opinion as to the existence of the case being made out in the complaint against the accused person and put the same in writing on record, in his order passed under Section 245 (1) Cr.P.C. Therefore while exercising discretion and power under Section

245 (1) of the Cr.P.C. the Magistrate shall have to apply mind as to the evidence on record to a greater extent and depth than just only to find any prima facie materials available on the face of the complaint to make out a case against the accused. Unless it is shown that the order by the Magistrate under Section 245 (1) of the Code is passed in confirmation with the provisions under Section 244 of the Code, such an order can be said to be improper, being not in compliance with the statutory provision.

- 19.** In this case, in the impugned order dated 03.09.2016, the Court has recorded perusal and consideration of the materials on evidence as well as on record, to find sufficient of those to proceed against the present petitioner. This order of the Magistrate is definitely devoid of any reason as to why, if any document has been left outside the purview of his consideration, while deciding a prayer of the petitioner under Section 245 (1) of the Code. In my humble opinion the 'reasons to be recorded' as envisaged under Section 245 (1) of the said Code, clearly encompass specific reasons for not taking into consideration any evidence/document, which was there on record before the Magistrate at the time of considering petitioner's prayer under Section 245 (1) of the Code. The report of police dated 10.06.2007 which has been filed pursuant to the Court's order, is one of such material on record, as also the pending civil suit in connection with the concerned property which the witness speaks of, which are apparent to have not been considered by the Magistrate while

delivering the impugned order and for which he has not recorded any reasons what so ever in the impugned order.

20. This is a gross irregularity in the impugned order for which the present case is found to be a fit one to be remanded back to the Magistrate for fresh consideration of petitioner's prayer under Section 245 (1) of the Code. Needless to say that the Magistrate shall comply with the mandates of law and shall pass an expeditious order as regards the same. Therefore the impugned order dated 13.09.2007 passed by Ld. Judicial Magistrate, 1st Class, 4th Court, Barrackpore, is set aside.

21. This revision is disposed of with the direction that the case be remanded back to the Ld. Judicial Magistrate, 1st Class, 4th Court, Barrackpore, North 24 Parganas, for fresh consideration of petitioner's prayer under Section 245 (1) Cr.P.C and disposal of the same in accordance with law and with adequate promptitude.

22. Connected application being CRAN 9 of 2019 (Old No: CRAN 5041 of 2019) is disposed of.

23. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Rai Chattopadhyay, J.)