

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 180 OF 2023

Fulabai w/o Bhausahab Bansude

Petitioner

Versus

The State of Maharashtra & another

Respondents

Mr. Rajendra Deshmukh, Senior Counsel instructed by Mr. Jay Veer and Devand Deshmukh, Advocates for the petitioner.

Mrs. G. L. Deshpande, APP for the State.

Mr. Deepak Bansude, party-in-person.

CORAM : R. M. JOSHI, J.

RESERVED ON : 26th OCTOBER, 2023.

PRONOUNCED ON : 3rd NOVEMBER, 2023.

ORDER

1. Petitioner has preferred this petition being aggrieved by the order dated 22nd December, 2022, passed in Criminal Revision Application No. 18/2020 whereby the learned Additional Sessions Judge has set aside the order dated 18th February, 2020 passed by Judicial Magistrate First Class below Exhibit 36 in RCC No. 76/2016 and remanded the application for discharge for its decision afresh.

2. Petitioner filed complaint with Gandhi Chowk Police Station making allegations against respondent No. 2 and co-accused

of commission of offence under Sections 406, 420, 465, 467, 468, 471, 201 read with Section 34 of Indian Penal Code. Report was registered vide First Information Report No. 166/2015 on 22nd June, 2015. After investigation into the said crime, charge-sheet came to be filed which was numbered as RCC No. 76/2016. Learned Magistrate issued summons against the accused persons. In response thereto, they appeared before the Court. Respondent No. 2 who is accused No. 1 therein filed application below exhibit 36 under Section 239 of Code of Criminal Procedure seeking discharge. The said application was dismissed by passing order dated 18th February, 2020. Being aggrieved by said order, criminal revision under Section 397 of Code of Criminal Procedure came to be preferred and by the impugned order passed by learned Additional Sessions Judge, the order passed by the Magistrate was set aside. The Magistrate was directed to decide the application (Exhibit 36) afresh.

3. Learned Senior Counsel for the petitioner submits that having regard to the scope of Section 239 of Code of Criminal Procedure and taking into consideration material placed before the Court in the charge-sheet, the learned Magistrate has rightly rejected the application for discharge. It is submitted that the Revisional

Court has exceeded its jurisdiction while entertaining petition under Section 397 of Code of Criminal Procedure. It is submitted that unless there is jurisdictional error or a patent error, it is not open for the Revisional Court to cause interference in the order passed by the Magistrate. By referring to the charge-sheet, it is sought to be submitted that if the material on record goes unchallenged, the same is sufficient to prove the guilt of the accused. It is submitted that for the purpose of framing of charge, the Court need not consider as to whether the trial will culminate into acquittal or conviction but strong suspicion is also enough to frame the charge. It is submitted that having regard to the facts of the case and the scope of Section 239 of Code of Criminal Procedure, the order passed by the Magistrate deserves to be maintained.

4. Respondent No. 2, in person, submitted that the writ petitioner has suppressed material facts. It is his contention that complaint dated 12th June, 2015 which is first in time, itself discloses any offence. It is sought to be canvassed that the informant/complainant is an illiterate lady and that the signature on the said complaint does not belong to her. He further contends that it is a case of false implication. By referring to the documents on

record, it is sought to be canvassed that respondent No. 2 herein has no concern with the crime in question as neither he is alleged to have prepared the will in question nor is the beneficiary of the same. On these amongst other submissions, he sought to support impugned order. He placed reliance on 27 judgments. This Court has carefully gone through the said case laws.

5. It is settled law that the scope of Section 239 of Code of Criminal Procedure limits the jurisdiction of the Magistrate to consider as to whether the material placed before it creates strong suspicion in order to frame charge against accused. For that purpose, the Court is required to hear prosecution as well as accused. Revisional Court, by referring to the judgment of Hon'ble Apex Court in case of Satish Mehra vs. Delhi Administration and another, (1996) 9 Supreme Court Cases 766, has held that to determine existence of sufficient ground to proceed against the accused, the Court is not debarred from looking into any material produced by accused at that stage. In the said judgment, it is observed that hearing of accused at the time of framing of charge against him is not confined to oral argument and there is nothing in the said provision which curtails the scope of such an audience to

oral argument only. With these observations, the impugned order was set aside with a direction to the Magistrate to consider the documents placed on record by the accused for the purpose of passing order of discharge.

6. In the case of Satish (supra), the Hon'ble Apex Court was dealing with altogether different set of facts which required the Court to take into consideration the relevant facts brought on record by the accused before the Court. In this context, it is observed that the scope of Section 239 of Code of Criminal Procedure does not limit to the oral argument only. In this regard, it would be relevant to take note of the latest judgment of Hon'ble Apex Court in case of State of Gujrat vs. Dilipsinh Kishorsinh Rao, 2023 SCC OnLine SC 1294. The issue involved in the present case is dealt with and decided by the Apex Court in the said judgment. It would be fruitful to take note of the relevant paragraphs of the said judgment which read thus :-

DISCUSSION AND FINDINGS

7. It is trite law that application of judicial mind being necessary to determine whether a case has been made out by the prosecution for proceeding with trial and it wouldnot be necessary to dwell into the pros and cons of the matter by examining

the defence of the accused when an application for discharge is filed. At that stage, the trial judge has to merely examine the evidence placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on basis of charge sheet material. The nature of the evidence recorded or collected by the investigating agency or the documents produced in which prima facie it reveals that there are suspicious circumstances against the accused, so as to frame a charge would suffice and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged, but if the court is of the opinion, after such consideration of the material there are grounds for presuming that accused has committed the offence which is triable, then necessarily charge has to be framed.

8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has

to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the charge-sheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the accused of making submissions as envisaged under Section 227 of the Cr.P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the

existence of the ingredients necessary of the offence alleged. This Court in State of Tamil Nadu Vs. N. Suresh Rajan And Others (2014) 11 SCC 709 adverting to the earlier propositions of law laid down on this subject has held:

“29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is

a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.”

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression “the record of the case” used in Section 227 Cr.P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the

State of Maharashtra Vs. Som Nath Thapa (1996) 4 SCC 659 and the State of MP Vs. Mohan Lal Soni (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case. It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.

It is thus clear from the aforesaid judgment that though there is no complete embargo in considering the documents placed on record however, such documents / evidence cannot be considered for the purpose of contradicting the evidence sought to be placed on record and the charge-sheet. It can be put in other words, that if extraordinary case is made out on such document/evidence that it would be impossible to hold that accused has committed crime, then might be in such circumstances an order of discharge may be sought. However, the evidence of prosecution can not be sought to be simply contradicted to claim discharge.

7. It would be relevant at this stage to refer to the grounds raised by accused before the learned Trial Court for seeking discharge which are summarised as under :-

- i) Photocopy of the will relied upon which is neither primary nor secondary evidence.
- ii) Report of handwriting expert based on photocopy is false
- iii) Dispute is civil in nature.
- iv) There is delay of 10 days in lodging First Information Report.
- v) Charge sheet is filed after 5 to 6 months thereof.
- vi) No property is transferred.
- vii) No loss suffered by the complainant nor there is gain for the accused.

8. While dealing with the said objections, the learned Magistrate has held that prima facie there is material on record to frame charge against the accused. Even the learned Magistrate has taken into consideration the audit report and copy of the statement of deceased made before the Civil Court. After duly considering the same, it is observed that these documents cannot wash out the case of the prosecution. It is thus clear that the learned Magistrate has not refused to take into consideration the documents/evidence

sought to be placed on record by the accused however, the Court was of the view that same is not sufficient to wash out the case of the prosecution. In this backdrop, the observations made by Revisional Court on the face of it exceeds its jurisdiction available under Section 397 of Code of Criminal Procedure.

9. Section 397 of Code of Criminal Procedure contemplates power of superintendence of the Sessions Court over the Magistrate. The said power can be exercised if the Court finds that there is non-exercise of jurisdiction or excess exercise thereof. Apart from this, if there is any patent illegality, the same can be allowed to be curbed by the Revisional Court. It is trite law that the Revisional Court cannot assume powers of Appellate court in order to over turn or substitute the findings of fact recorded by the Court below. In the instant case, the Revisional Court has sought to replace its view in respect of the documents/evidence sought to be relied upon by the accused in place of the view of the Trial Court which is wholly impermissible under the provisions of Section 397 of Code of Criminal Procedure.

10. This Court, therefore, finds substance in the challenge to the order impugned. Hence, petition is allowed. Impugned order is set aside.

(R. M. JOSHI)
Judge

dyb