

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.443 OF 2023

Dr. Atul Ganpatrao Bhalerao,
Age : 52 years, Occ. Medical Practitioner,
R/o. Swaranjali Apartment, Ulkanagari,
Aurangabad. ...Petitioner

Versus

The State of Maharashtra ...Respondent

...
Mr. S. G. Ladda - Advocate for the petitioner
Mr. V. S. Badakh – APP for respondent/State

....

CORAM : R. M. JOSHI, J.
DATE : SEPTEMBER 04, 2023

PER COURT :

. By consent of both the sides, heard finally.

2. This petition is filed under Article 226 and 227 of the Constitution of India for quashing the order dated 03.02.2018 passed by learned Judicial Magistrate First Class, Aurangabad below Exh. 21 in R.C.C. No.1489 of 2015 and the judgment and order passed by learned Additional Sessions Judge, Aurangabad, rejecting Criminal Revision Application No.157 of 2018 filed against the said order. The petitioner is accused in R.C.C. No.1489 of 2015 which came to be

registered on the basis of FIR bearing No. 232 of 2014 registered with Jawahar Nagar Police Station, Aurangabad City, for the offences punishable under Sections 354A (i), (ii), (iii), 323, 504 and 506 of the Indian Penal Code.

3. The petitioner had filed an application below Exh.21 under Section 239 of the Code of Criminal Procedure (for short, 'Cr.P.C.) for discharge. It is the contention of the petitioner that there is no material indicating commission of any offence by him under any of the provisions of Cr.P.C. It is contended that even if entire material is not subjected to the test of cross-examination and allowed to unchallenge, yet there is no material where from it could be legitimately presumed that sufficient ground exists required for framing of the charge and proceed to try the petitioner. The petitioner also contended that the allegation against him being groundless, no charge can be framed. The said application was opposed by the prosecution by filing say. The learned Trial Court by passing order dated 03.02.2018 rejected application for discharge with a observation that the perusal of the evidence on record is *prima facie* sufficient to proceed with the matter and to frame charge

against the accused / petitioner.

4. Learned counsel for the petitioner submitted that considering the complaint dated 04.12.2013 addressed to the Police Commissioner, Aurangabad City, wherein there are no allegations with regard to the incident allegedly occurred in October – 2013, the allegations against the petitioner in FIR lodged on 06.09.2014 become groundless. Apart from this, it is his submission that the learned Magistrate has failed to examine accused before deciding application of discharge as contemplated by Section 239 of the Cr.PC.

5. Learned APP supported the impugned orders.

6. Perusal of the FIR as well as the statement recorded of the informant under Section 164 of the Cr.PC. clearly make out a case showing *prima facie* material against the petitioner indicating his involvement in the alleged crime. Thus, on merits, there is no case made out for discharge of the petitioner and hence impugned order cannot be interfered with on merits.

7. It is sought to be argued that it was mandatory for the Trial Court to examine accused under Section 239 of the Cr.PC. before passing any order with regard to the discharge and since such examination is not done, the order suffers for non compliance of the provisions. It would be relevant to take note of Section 239 of Cr.PC., which reads thus:

“239. When accused shall be discharged.

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.”

8. Perusal of the aforesaid provision clearly indicates that for the purpose of discharge of an accused, the Magistrate is required to consider the police report and all documents sent with it under Section 173. Apart from this, what is contemplated by the said section that the examination of accused, if any, if thinks fit by the Magistrate, shall be considered. After giving the prosecution and accused an opportunity of being heard, if the Magistrate considers the charge against the accused to be groundless, he / she shall discharge the accused.

9. In the instant case, the Magistrate has considered the police report and the documents sent with it under Section 173 of the Code. There is further no denial of the fact that opportunity of being heard was given to the prosecution as well as the accused. A clear cut finding is recorded that the charge is not groundless. The only fact remains for consideration is as to whether it was mandatory for the Magistrate to examine the accused before passing such order. First of all, the said provision clearly indicates that for making such examination, if any of the accused, if the accused desires to examine himself and if Magistrate thinks it necessary, the said aspect should be considered by the Magistrate. Having regard to the right of accused to remain silent, the said provision cannot be construed as mandatory requiring examination of accused in all cases by the Magistrate. Even otherwise, it clearly demonstrates from the said provision that the said examination would be only if the Magistrate thinks it necessary. In the instant case, perusal of the application does not show that accused had at any time sought his examination for the purpose of deciding the application for discharge. The accused therefore deemed to have waived such examination.

10. In such circumstances, the petitioner, on merits as well as on the ground of non-compliance of Section 239 of CrPc, has failed to make out any case for interference in the impugned order passed by the learned Magistrate. The order of learned Sessions Judge in exercise of powers under Section 397 of the Cr.P.C. also cannot be faulted with having regard to the limited jurisdiction exercised by the said Court. In view of this, the petition is dismissed.

[R. M. JOSHI]
JUDGE

GGP