

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3977 OF 2018

Laxman Karia

...Petitioner

Versus

Ashoka Pavallion Premises Co-operative
Housing Society

Through Secretary Rajan Aminbhavi & Anr.

...Respondents

....

Mr. Satyavrat Joshi Ms. Sayee Sawant i/by Vidhi Partners Advocate for
the Petitioner.

Mr. Manoj M. Gadkari, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent No.2 – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 5th FEBRUARY, 2024.

P.C.:

1. The Petitioner challenges the order dated 16th July 2018 passed by the learned Additional Sessions Judge-19, Pune in Criminal Revision Application No.289 of 2017 setting aside order dated 10th April 2017 passed by learned J.M.F.C. Pune.

2. Brief facts if complaint initiated by Respondent No.1 are as under:

i) The complainant is a cooperative society registered under Maharashtra Cooperative Society Act. The accused No.1

is the partnership firm registered under partnership Act. Accused Nos.2 & 3 were partners responsible for the day today business activities of Accused No.1 firm such as execution and registration of documents, surprising the development of the properties, constructions of buildings thereon, collecting consideration from purchasers, formation of society, execution of final conveyance, appointing representatives for the firm etc.

ii) The accused had undertaken the development of property bearing C.T.S. Nos.18 & 21 at Pune within the limits of Pune Municipal Corporation and constructed multi-storied commercial complex thereon.

iii) During the construction of building, the accused allotted various units in the building to the purchasers and the possession was handed over to them. It was represented to purchasers that accused firm had obtained the completion certificate in respect of all units. It was promised that copies of the Completion Certificates would be provided to purchasers. However despite repeated request, completion certificate was not furnished.

iv) Unit purchasers made inquiry with the corporation and found that the accused had not obtained completion certificate in respect of many units in the said building. The possession was handed over to the purchasers without obtaining completion certificate.

v) The accused neglected to perform their part of maintaining the building. The accused did not take steps for the execution of conveyance Deed. Vide Demand Notice dated 13.06.2012 the complainant called upon the accused to obtain completion certificate and convey the title of the property in favour of complainant society.

vi) The accused had willfully neglected to obtain the completion certificate in respect to many units in the building and without obtaining it handed over possession of the units to the purchasers by misrepresenting that they have obtained the completion certificate.

vii) The accused committed the offence punishable under Section 13 r/w Section 3 of Maharashtra Ownership Of Flats Act, 1963 (MOFA Act). The accused willfully neglected to convey the title of property. The accused failed to comply Section 11 of the MOFA Act, 1963.

viii) The accused Nos.2 & 3 being the partners of accused No.1 are responsible for the day to day business activities of Firm.

3. Verification statement of the complainant was recorded on 16.08.2013. Vide order dated 11.12.2013 process was issued against the accused for offence under Section 3 (11) punishable under Section 13 of the Maharashtra Ownership of Flats Act, 1963 (for short "MOFA Act").

4. The Petitioner preferred an application for discharge before the Court of learned J.M.F.C. under Section 245(2) of the Cr.P.C. on 09.12.2016. The application was opposed by complainant by filing say on 20.12.2016. Vide order dated 10.04.2017, the learned J.M.F.C. allowed the said application and the Petitioner was discharged.

5. The Respondent No.1 challenged the said order before the Sessions Court by preferring Criminal Revision Application No.289 of 2017. The revision application was allowed vide order dated 16.07.2018 and the order dated 10.04.2017 passed by the learned Magistrate was set aside.

6. Learned Advocate for the Petitioner submitted that the impugned order passed by the learned Sessions Judge is contrary to

law. In the absence of any evidence to proceed against the Petitioner, the order of discharge passed by the trial Court ought not to have been set aside by the Sessions Court. The complaint does not make out any offence. The Petitioner had resigned w.e.f. 26.12.2000. Extract issued by the Registrar of Firms fortifies the fact of resignation. The complainant had sent a legal notice dated 13.06.2012 to accused No.1 and accused No.2. This notice was not addressed to the Petitioner as the complainant was aware that at the relevant time the Petitioner was not concerned with day to day affairs of accused No.1. The complainant has relied upon the agreement dated 23.03.2011 executed between accused Nos.1 & 2 on one side and one of the purchaser. The Petitioner is not signatory to the said agreement. The complaint was filed after a period of about 12 years from the date of resignation of the Petitioner. Since the Petitioner ceased to be the partner of accused No.1, he cannot be prosecuted vicariously for the acts of accused No.1. No specific role as to the functioning of petitioner in partnership Firm is attributed to Petitioner. The execution proceedings between the same parties was challenged by Petitioner before Hon'ble Supreme Court and by order dated 27.01.2020 the said proceedings are stayed. The learned Magistrate has considered the aspects of resignation of the Petitioner and by

assigning reasons allowed the application for discharge. There was no reason to interfere in the said order. The trial Court was empowered to discharge the accused in exercise of powers under Section 245(2) of Cr.P.C.

7. Learned Advocate for the Respondent No.1 submitted that the complainant must be given an opportunity to prove their case by adducing the evidence. The Court has limited scope to discharge the accused in exercise of powers under Section 245(2) of Cr.P.C. Prima facie case is made out against the accused. The trial Court ought not to have allowed the application for discharge on the basis of debatable issue which has to be urged during trial. Although the Petitioner has claimed that he had resigned w.e.f. 26.12.2000. There are several documents on record which has to be adduced in evidence during trial which shows that the Petitioner had participated in the transaction of the accused No.1-firm. Even after the purported resignation, the Petitioner has actively participated in the affairs of accused No.1. It is not disputed that the Petitioner was the partner of accused No.1-firm. Provisions of Section 32(3) of Indian Partnership Act mandate that “Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for

any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement. The petitioner was a party to Agreement dated 31.12.2012 between Gopi Constructions and Rajashree Ravtani. Petitioner was a party as partner of Gopi Constructions in agreement dated 04.10.2002 in favour of Tarannum Jafar Shaikh. In Index-II it is noted that the petitioner has represented as partners of the firm. The copies of relevant documents are filed alongwith reply by Respondent No.1. In the agreement it is specifically stated that, it is an agreement for sale executed on 04.10.2002 between M/s. Gopi Constructions, through its partner Laxman Karia (Petitioner). Documents clearly establish that although the petitioner claims that he has retired form the firm on 26.12.2000, he continued to actively participate in the business of the said Firm and execute and register or cause to be executed or registered various Agreements as partner of the Firm. Only on the basis of the statement of the Petitioner that he retired from the firm with effect from 26.12.2000 he could not have been discharged from the case. As per Section 14 of the Act, not only the partners but every person who at the time of the offence committed was in charge of and responsible to the firm for the conduct of business of the firm shall be be deemed guilty of the offence and liable to be

proceeded with. The complaint cannot be quashed at the threshold when prima facie case was made out against the accused and the process was issued against him.

8. The learned Sessions Judge while deciding the revision application has considered the law relating to Section 245(2) of Cr.P.C. and the documents on record and set aside the order passed by the learned Magistrate which does not warrant interference.

9. The Petitioner was arraigned as accused No.3. In the complaint filed by Respondent No.1 alleging offences under Sections 3 (11) r/w Section 13 of the MOFA Act. The Petitioner was impleaded as a partner of accused No.1-M/s. Gopi Construction. It is not not disputed that the Petitioner was partner of firm. The contention of the Petitioner is that he had resigned w.e.f. 26.12.2000 and therefore cannot be held responsible for the day to day affairs of accused No.1 post his resignation. The learned Magistrate perused the complaint and documents and held that prima facie case is made out for offences under Section 3, 11 r/w Section 13 of the MOFA Act and issued process against the accused. The Petitioner preferred an application for discharge primarily on the ground that he had resigned from the partnership firm w.e.f. 26.12.2000. The Petitioner contends that the agreement between

accused No.1 and Society/Complainant was executed after the Petitioner had resigned from the partnership firm.

10. While adjudicating the application for discharge, the complainant had brought to the notice of the Court that there are documents on record which indicate that the Petitioner had participated in the activities of accused No.1. It was also urged that the Petitioner is partner and responsible for the day to day business activities of the accused No.1-firm. It was also pointed out that the agreement to sale dated 04.10.2002 was executed by the accused No.1 and Tarannum Jafar Shaikh and Shaikh Mohammed Taher Abdullah which shows that the Petitioner is one of the partner of the firm. In the year 2013, the name of Petitioner was seen on the documents on record executed by accused No.1-firm as its partner. The Petitioner had executed Power of Attorney dated 01.10.2002, although it is contended that he had resigned w.e.f. 26.12.2000.

11. The learned Magistrate however observed that the complaint was filed belatedly and that the certificate of resignation was issued by the Registrar of Firms indicating that the Petitioner had resigned from accused No.1-firm. Without considering the said documents pointed out by the complainant which indicate that Petitioner had

participated in activities of firm beyond the purported resignation. The accused was discharged.

12. The learned Sessions Judge while allowing the revision application has taken into consideration the scope of discharge at the stage of Section 245(2) of the Cr.P.C. and the nature of material against the Petitioner to proceed against him. The learned Sessions Judge has also observed that the charge can be said to be groundless when there is absolutely nothing to attract the charge or involvement of the accused. The trial Court lost sight of Section 14 of the MOFA besides the concept of Partnership holding over.

13. Apart from averments in the complaint about Role of Petitioner, there are documents to show participation of petitioner in day to day business of accused No.1.

14. Section 245(2) of the Cr.P.C. no doubt empowers the Court to discharge the accused. However, when prima facie case is made out against the accused, the Court ought not to have discharged him. The trial Court ignored the incriminating material brought to its notice by the Advocate for complainant. Existence of several documents relied upon by the complainant indicate that the Petitioner had participated in the activities of accused No.1 beyond the purported resignation. The claim of resignation is therefore

debatable. As per the certificate of Registrar of Firm, the Petitioner had resigned on 26.12.2000. As per the Index-II regarding deed number 4756 of 2002, the name of Petitioner can be seen to be appearing as partner of accused No.1. The said transaction is dated 04.10.2000. Another transaction with regards Deed number 257 of 2013 dated 31.12.2012 registered on 07.01.2013 disclose that the Petitioner executed agreement in the capacity of partner of accused No.1. Agreement dated 23.02.2011 indicate that the Petitioner had acted as partner of accused No.1 to execute the agreement.

15. The revisional Court in these circumstances observed that the material before the trial Court was two fold. One is the certificate of retirement dated 26.12.2000 and other is series of transactions done by the Petitioner in the capacity of Partner of accused No.1. In such situation prima facie there was material on record indicating that the Petitioner though claimed to have retired from the firm, continued to act as a partner of the firm. Thus he continued to represent the partnership firm and there was no denial from the side of the accused No.1. Thus, apparently it was partnership holding over or an implied partnership. In such circumstances when the Petitioner was found to be representing

that he was a partner in the firm and continued to execute the work of the partnership firm, he was binding to execute the work of the partnership firm. He was active in the partnership business. This would indicate that there was material on record regarding which inquiry was necessary to be done by calling upon the complainant to adduce evidence under Section 244 of Cr.P.C.

16. Learned Sessions Judge has rightly reversed the order passed by the learned Magistrate. Prima facie there was material showing involvement of the Petitioner. The trial Court ought not to have entered into the debatable issue as the Court has limitations while allowing the applications for discharge under Section 245(2) Cr.P.C. I do not find any reason to interfere in the order passed by the learned Sessions Judge. There are several documents to show the involvement of the Petitioner, even post retirement as claimed by the Petitioner. The Petitioner has apparently continued to represent himself as the partner. Hence, Petition is devoid of merits and deserves to be dismissed.

ORDER

- i) Criminal Writ Petition is rejected and disposed off.

17. At this stage, the learned counsel for the Petitioner submits that the interim relief granted by this Court may be extended by a

period of eight weeks to enable the Petitioner to challenge the order before the Higher Court. Learned counsel for the Respondent No.1 opposed the said prayer.

18. Considering the fact that the interim relief was granted by this Court and it was continued for long time, the same is extended by a period of 8 weeks from today.

(PRAKASH D. NAIK, J.)