

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO. 29 OF 2023**

Shubham s/o. Arun Pawar (deleted since ...Petitioners  
deceased) Amit S/o Ramkrushna Pawar  
and Others

**Vs.**

The State of Maharashtra and Others ...Respondents

**SAYALI  
DEEPAK  
UPASANI**

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Mr. Nitin Gaware Patil with Mr. Shubham Wadne and  
Shantanu Kolhe, for Petitioners.

Mr. Babu V. Holambe Patil, APP for State-Respondent No. 1.

**CORAM:- N. J. JAMADAR, J.**

**DATED:- 12<sup>th</sup> MARCH, 2024**

**JUDGMENT:-**

1) Rule. Rule made returnable forthwith and, with the consent of the learned Counsels for the parties, heard finally.

2) The challenge in this Petition is to an order dated 20<sup>th</sup> June, 2022, passed by the learned Additional Sessions Judge, on an application for discharge (Exhibit-3) in Sessions Case No. 619 of 2021, under Section 227 of the Code of Criminal Procedure, 1973 ("the Code, 1973"), whereby the learned Additional Sessions Judge was persuaded to reject the application preferred by the petitioners to discharge them of the

prosecution arising out of CR No. 92 of 2020, registered with Bibvewadi Police Station for the offences punishable under Sections 353, 332 and 160 of the Indian Penal Code, 1860.

**3)** Shorn of unnecessary details, the background facts can be stated as under:

**(a)** Ramkrushna Pawar, the father of the petitioner/accused Nos. 2 and 3 purchased a flat bearing Flat No. 2 adm 713 sq.ft from Mahesh Sahakari Gruharachana Sanstha Maryadit (Sanmitra Building), Bibvewadi/Munjeri, Pune from Satish Tanksale and others. The members of the Borule family, also laid a claim over the Flat on the strength of an earnest note allegedly executed by Manorama Tanksale and others. A dispute arose between Pawars' on the one side and Borules' on the other. The Borules' have instituted a Suit, being Civil Suit No. 363 of 2020 in the Civil Court, Pune.

**(b)** On 1st March, 2020 at about 5.05 pm, an intimation was received in the control room that there was a quarrel between the two groups near Shankar Temple, Mahesh Society. A police team led by Vishwanath Shinde, Head Constable – the first informant, reached the 2nd floor of Sanmitra Building where the commotion was going on. There were two groups. Members

of one group were abusing the members of the other group in loud voice, and fisticuffs had broken out. When the first informant went to separate them, Rohan Borule (A2) caught hold of the the first informant by the collar of his shirt and punched the first informant in his face. Other accused also manhandled the first informant. The buttons on the uniform of the first informant were broken. The first informant thus lodged the report against Sunil Borule (A1), Rohan Borule (2) and Pratiksha Borule (A3), the members of Borule family, and Shubham Pawar (A5), Amit Pawar (A6), Sumit Pawar (A7) and Archana Pawar (A4), the members of Pawar family, for the offences punishable under Sections 353 and 160 of the Penal Code, 1860.

(c) The petitioners preferred an application for discharge under Section 227 of the Code, 1973, on the premise that the applicant did not share the common intention with the Borules' and, therefore, there was no sufficient ground to proceed against the petitioners for the offences punishable under Sections 353, 332 and 160 of the Penal Code, 1860. The learned Additional Sessions Judge was of the view that though the allegations of assaulting the first informant were against Rohan Borule (A2)

only, yet petitioners also shared such common intention. Hence, the application came to be rejected.

4) Mr. Nitin Gaware Patil, the learned Counsel for the petitioners, submitted that the learned Additional Sessions Judge committed a manifest error in holding that the accused shared a common intention to commit offences punishable under Section 353, 332 and 160 of the Penal Code, 1860, with Rohan Borule (A2) and other members of the Borule family. Laying emphasis on the fact that the petitioners were at the loggerheads with the Borules' on account of the dispute over the proprietary title to the Flat in Sanmitra Building, Mr. Patil urged that it is inconceivable that the petitioners could share the common intention with the co-accused Rohan Borule (A2) and other members of the Borule family. Mr. Patil invited the attention of the Court to the statement of Rahul Nandkishor Savadatkar, who has clearly named members of the Borule family, who abused and manhandled the first informant and other members of the police party. In the face of the aforesaid material, the learned Sessions Judge ought to have discharged the petitioners, submitted Mr. Patil.

5) As against this, Mr. Holambe Patil, the learned APP for the State submitted that there is sufficient material to proceed against the petitioners. The first informant, other members of the police party, as well as the independent witnesses have clearly stated that the co-accused abused and assaulted the first informant. Whether the petitioners shared the common intention with the co-accused, would be a matter for adjudication at the trial. In the circumstances, the learned Additional Sessions Judge committed no error in rejecting the application for discharge.

6) I have carefully perused the report lodged by the first informant, the statements of the other members of the police party, and the statement of Rahul Savadatkar, who had informed the Bibvewadi Police about the quarrel between the Pawars' and Borules' over Flat No. 2. As is evident, the genesis of the alleged offences is in the dispute between the Pawars' and Borules' over Flat No. 2. On the day of occurrence, on account of the said dispute, it appears, a quarrel had broken out between the Pawars' and Borules'. Upon being informed, by the first informant, the police party had arrived at the scene of the occurrence.

7) The first informant and other members of the police party stated that when they tried to intervene Rohan Borule (A2) charged on the person of the first informant and caught hold of the first informant by his collar and punched him and other members of the Borule family, abused and manhandled the first informant. Rahul Savadatkhar, the independent witness, has categorically stated that when the police tried to intervene, Rohan Borule (A2) assaulted the first informant and the other members of the Borule family abused and pushed the other members of the police party.

8) In the backdrop of the aforesaid nature of the accusation and material pressed into service against the accused, could it be said that there was sufficient material to frame a charge against the petitioners as well, for the offences punishable under Sections 353 and 332 of the Penal Code, 1860.

9) At the stage of framing of the charge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. The words 'not

sufficient ground for proceeding against the accused' employed in Section 227 of the Code, 1973, indicate that the exercise of judicial mind to the facts of the case is warranted to determine whether a case for trial has been made out. The judge has to evaluate the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The material is not to be evaluated on the touchstone of whether it is sufficient to entail conviction of the accused.

10) A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of **Union of India Vs. Prafulla Kumar Samal**<sup>1</sup>, wherein upon consideration of previous pronouncements, the Supreme Court culled out the principles, which emerge while considering an application for discharge.

They read as under:-

“...10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

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<sup>1</sup> (1979) 3 SCC 4

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial...”

11) The aforesaid principles have been consistently followed.

(Yogesh @ Sachin Jagdish Joshi vs State Of Maharashtra)<sup>2</sup>.

12) In the case of **State of Rajasthan Vs. Ashok Kumar Kashyap**<sup>3</sup>, the Supreme Court enunciated the principles which govern the consideration of an application for discharge under Section 227 of the Code. The observations in para Nos. 11.1 and 11.2 are material and hence extracted below.

“11.1. In the case of P. Vijayan (supra), this Court had an occasion to consider Section 227 of the Cr.P.C. What is required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is

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<sup>2</sup> 2008 (10) SCC 394

<sup>3</sup> (2021) 11 SCC 191

observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C., if not, he will discharge the accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11.2. In the recent decision of this Court in the case of M.R. Hiremath (supra), one of us (Justice D.Y. Chandrachud) speaking for the Bench has observed and held in paragraph 25 as under:

25. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the

ingredients necessary to constitute the offence. In *State of T.N. v. N. Suresh Rajan* [*State of T.N. v. N. Suresh Rajan*, (2014) 11 SCC 709, advertent to the earlier decisions on the subject, this Court held: (SCC pp. 721-22, para 29)

“29. ... 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.”

13) Applying the aforesaid principles to the facts of the case, it is pertinent to note that the first informant as well as other witnesses categorically state that Rohan Borule (A2) charged on the person of the first informant and abused and assaulted him. Co-accused, who represented the Borule faction, namely Sunil Borule, Ankita Borule and Pratiksha Borule also allegedly abused and manhandled members of the police party.

14) None of the witnesses have stated that members of the Pawar family also assaulted the public servant with intent to prevent or deter him from discharging his duty as such public servant or voluntarily caused hurt to him in order to deter him from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by him in discharge of his lawful duty.

15) In the aforesaid backdrop, the only question which warrants consideration is whether the petitioners could have been implicated by invoking Section 34 of the Penal Code, as has been done by the learned Additional Sessions Judge.

16) A fact, which conspicuously stands out, is the inimical nature of relationship between the Pawar and Borule family. Evidently, as noted above, the genesis of the offences was in the dispute between the Pawars' and Borules' over Flat No. 2. The said dispute was the cause of the quarrel; to resolve which the police party had arrived at the scene of occurrence. Could it, thus, be contended that the petitioners also shared the common intention to commit the offences qua the public servants when they tried to intervene in the quarrel ?

17) In the backdrop of the nature of the inimical relationship between the Pawars' and Borules', it would be rather difficult to accede to the submission that the petitioners also shared the common intention to commit the alleged offences. It is well recognised Section 34 of the Penal Code, 1860 does not by itself constitute a substantive offence. It incorporates a rule of evidence. It is invoked to fasten liability on a person, who may not have been directly involved in the commission of the offence for the reason that the offence was committed on the basis of a pre-arranged plan between such person and the persons who actually committed the offence. Such common intention may develop in the spur of the moment as well. Yet, there must be a meeting of minds prior to the commission of the alleged offences, in furtherance of the common intention.

18) A useful reference in this context can be made to a decision of the Supreme Court in the case of **Maharashtra Electricity Distribution Company and Others Vs. Datar Switchgear Ltd.& Ors**<sup>4</sup>, wherein the nature of the liability envisaged by Section 34 of the Penal Code was expounded. The observations in para Nos. 34 and 35 are material and, hence, extracted below.

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<sup>4</sup> (2010) 10 SCC 479

“...34. We shall now examine whether appellant No.2 could be made liable for the afore-mentioned offences by operation of Section 34 of IPC. It is trite that Section 34 IPC does not constitute a substantive offence, and is merely in the nature of a rule of evidence, and liability is fastened on a person who may have not been directly involved in the commission of the offence on the basis of a pre-arranged plan between that person and the persons who actually committed the offence. In order to attract Section 34 IPC, the following ingredients must be established:

- (i) there was common intention in the sense of a pre-arranged plan;
- (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence.”

(See: Chandrakant Murgyappa Umrani & Ors. Vs. State of Maharashtra<sup>23</sup>; Hamlet @ Sasi & Ors. Vs. State of Kerala<sup>24</sup>; SCC p. 116 , para 17 and Surendra Chauhan Vs. State of M.P.<sup>25</sup> , SCC p. 117, para 11.)

35. It is manifest that common intention refers to a prior concert or meeting of minds, and though, it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop at the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a pre-arranged plan. Therefore, in order to attract Section 34 of the IPC, the complaint must, prima facie, reflect a common prior concert or planning amongst all the accused....”

19) On the aforesaid touchstone, reverting to the facts of the case, I find substance in the submission of Mr. Patil that the Pawar and Borule family being at loggerheads and a quarrel

having been broken out between them, it is inconceivable that there would be a prior meeting of minds between the Pawars' and Borules', to commit the offences punishable under Sections 353 and 332 of the Code. In a situation of this nature when the members of one group are abusing and assaulting the members of the other group, there ought to be some material to infer that the members of the rival groups shared a common intention to cause hurt to the members of the police party, who came to resolve the quarrel. It appears that the fact situation did not afford a prior meeting of minds, much less, existence of a pre-arranged plan.

**20)** In the case at hand, there is material to show that the members of the Borule family allegedly charged towards the other members of the police party, after Rohan Borule (A2) assaulted the first informant. There is nothing to indicate that any member of the Pawar family joined in the said act in any form so as to draw an inference of sharing of common intention.

**21)** I am, therefore, impelled to hold that there is not sufficient material to proceed against the petitioners for the offences punishable under Sections 353, 332 and 160 of the Code. The additional Sessions Judge ought to have discharged the

petitioners of the offences punishable under Sections, 353 and 332 of the Code. Thus, the Petition deserves to be allowed.

**22)** Hence, the following order.

**ORDER**

1. The Petition stands allowed.
2. The impugned order passed by the learned Additional Sessions Judge stands quashed and set aside.
3. The application for discharge (Exh. 3) stands allowed.
4. The petitioners stand discharged in Sessions Case No. 619 of 2021 arising out of CR No. 92 of 2020 for the offences punishable under Sections 353, 332 and 160 of the Indian Penal Code, 1860.
5. Rule made absolute in the aforesaid terms.

**[N. J. JAMADAR, J.]**