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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 4080/2018, CRL.M.A. 29898/2018

O P DAWAR

.....Petitioner

Through: Mr. O.P. Gulabani, Mr. Paras Kumar
Jha, Advs.

versus

STATE & ANR

.....Respondents

Through: Mr. Raghuvinder Varma, APP for the
State with SI Sanjeet Rathee, PS
Malviya Nagar
Mr. Divyendu Sharma, Adv. for R-2

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

03.07.2024

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1. The present petition has been filed under section 482 of CrPC seeking setting aside of the order dated 06.07.2018 passed by Learned Additional Sessions Judge, South District, Saket Courts, New Delhi in CRL.R.P. No. 67/2018 wherein the Court dismissed the revision petition of the petitioner for setting aside of order dated 04.01.2018 in CC 2566/1/07 titled as "*Suman Batra vs. O.P. Dawar*" passed by Learned MM-02, South, Saket Courts, New Delhi whereby charge under section 420 of IPC was ordered to be framed on 04.01.2018 against the petitioner.
2. Brief facts of the case as alleged by the petitioner are that Mrs. Suman Batra filed a complaint under Section 200 of the Cr.P.C. against the petitioner and Mrs. Meeta Galgotia for the commission of offence punishable under Section 420/406/468/471/34 r/w Section 120B IPC. Ld. MM vide order dated 17.09.2007 took the cognizance and



adjourned the matter for the complainant evidence. The complainant examined herself as CW-1 and Sh. Rajender Kumar Batra as CW-2. On 14.11.2007 the learned MM ordered for an enquiry under Section 202 Cr.P.C. regarding the allegation of criminal conspiracy between the respondents. SHO PS Malaviya Nagar submitted the report dated 18.01.2008. Ld. MM vide order dated 01.03.2008 taking into account the complete testimony of the witnesses and the enquiry report inter alia held that a prima facie offence under Section 420/468/471 IPC is disclosed against the petitioner. The petitioner was accordingly summoned.

3. In the pre-charge evidence the complainant examined CW-1 and CW-2. After pre-charge evidence vide order dated 04.01.2018, Ld. MM inter alia held that there is sufficient material on record to frame charges against the petitioner for the offence punishable under Section 420 IPC. It was further inter alia held that Section 468 and 471 IPC are not made out even prima facie as there is no specific allegation of forgery in the complaint and the pre-charge evidence.
4. The petitioner aggrieved of this filed Revision Petition bearing CR No. 67/2018 titled as *O.P. Dawar Vs. Suman Batra*. Learned ASJ *inter alia* held that at the stage of framing of charge, the court has to see the prima facie case and did not find any infirmity in the impugned order and dismissed the revision petition. The petitioner aggrieved of this has filed the present petition and challenged the order of the Ld. MM and Ld. ASJ as totally erroneous and contrary to the proposition of law.
5. Learned counsel for the petitioner submitted that the test applied by the Ld. MM and Ld. ASJ for framing of the charge in the present case,



which is a warrant triable case instituted on a private complaint, is totally incorrect. The test for framing of the charge in such cases is entirely different from that applied in Section 227, 228, 239 and 240 Cr. P.C. Learned counsel submits that the Ld. MM has also fallen into grave error by inter alia holding that the suggestions put to the complainant witness in a pre-charge evidence are in the nature of defence to be established by the accused during trial, and at the stage of framing of charge, the defence of the accused, cannot be considered by the Court. Learned counsel submits that therefore the order dated 04.01.2018 framing of the charge and the order of the Ld. ASJ confirming the same are liable to be set aside.

6. *Per contra*, learned counsel for respondent No.2 stated that the order of the Ld. MM framing of the charge under Section 420 IPC is in accordance with the law. However, learned counsel submits that the order discharging the accused under Section 468 and 471 IPC is erroneous. Learned APP for the state has also supported the order passed by the Ld. MM.
7. Before proceeding further it is necessary to advert to the scheme of the Code of Criminal Procedure 1973 regarding the private complaints. Chapter-XV of the Code of Criminal Procedure provides procedure about "Complaints to Magistrates". The procedure relating to private complaint can be summed up as under:
 - i. The private complaint is filed under 200 of the Cr.P.C. The Magistrate before taking the cognizance under Section 190 Cr.P.C. may refer the complaint in cognizable case for investigation to the police exercising its power under Section 156(3) Cr.P.C.



- ii. In case the complaint is not referred for investigation under Section 156(3) Cr.P.C., the Magistrate may take the cognizance under Section 190 (1)(a) of Cr.P.C. and shall proceed to examine upon oath the complainant and the witnesses. However, the complainant and the witnesses are not required to be examined if the complaint is made by a public servant acting or purporting to act in the discharge of his official duties; or a Court has made the complaint; or the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192;
 - iii. The Magistrate after taking the cognizance may also direct an investigation to be made by a police officer or by such other person as he thinks fit under Section 202 Cr.P.C. for the purpose of deciding whether or not there is sufficient grounds for proceedings. However, such reference cannot be made if the offence complaint is triable exclusively by the court of Session or if the complaint has been made by a Court.
 - iv. The Magistrate shall dismiss the complaint if on the basis of the statement so recorded or on the basis of enquiry or investigation under Section 202 Cr.P.C. there is no sufficient ground for proceeding after briefly recording his reason. The Magistrate shall issue the process under Section 204 Cr.P.C. if there are sufficient grounds for proceeding. In case of a summons case, the Magistrate shall issue summons and in the case of warrant case, the Magistrate may also issue the warrants.
8. It is pertinent to mention here that the present private complaint falls within the warrant triable cases as prescribed under Section 2(X) of the



Cr.P.C. The procedure for trial of warrant cases triable by Magistrate is provided in Chapter XIX. Section 234 to 243 deals with “Cases instituted on a police report”. Chapter XIX(B) from Section 244 to 250 deals with “Cases instituted otherwise than on police report”. Presently we are concerned with the cases instituted otherwise than on the police report.

9. It is pertinent to mention here that the provision for framing of the charge in the Session trial cases are provided in Section 227 and 228 Cr.P.C. The provision for framing of charge in warrant cases are provided in Section 239 and 240 Cr.P.C. and the provisions for framing of charge in cases instituted otherwise than on the police report is provided in Section 245 and 246 Cr.P.C.
10. The scope of jurisdiction to be exercised in such provisions can be summarised as follows:

Section 227-228 Cr.P.C.	In the Session trial cases, the court under Section 227 shall discharge the accused if there are no sufficient ground for proceeding against the accused and shall proceed to frame the charge under Section 228 Cr.P.C. if there are ground for presuming that the accused has committed an offence.
Section 239-240 Cr.P.C.	In warrant triable cases by the Magistrate the accused shall be discharged, if the Magistrate considers the charges against the accused to be groundless. The charges shall be framed if there are grounds for presuming that the accused has committed an offence triable under this



	chapter.
Section 245-246 Cr.P.C.	In cases instituted otherwise than on police report the accused shall be discharged if upon taking all the evidence referred to in Section 244 no case against the accused has been made out which, if unrebutted, would warrant his conviction. The charges shall be framed if there are grounds for presuming that the accused has committed an offence. In such cases, the accused can also be discharged under Section 245(2) if at any “previous stage of the case” if the magistrate considers the charge to be groundless.

11. Thus, the bare perusal of Section 227-228, 239-240 and 244-245 of Cr.P.C. makes it clear that the scope of jurisdiction to be exercised in all the three cases is entirely different. The degree of satisfaction to be required in the “cases instituted otherwise than on the police report” is much higher than the warrant cases on police report or the Session triable cases. The procedure to be adopted in such cases has been lucidly explained by the Supreme Court in *Ajoy Kumar Ghose vs. State of Jharkhand & Anr.*, 2009 (14) SCC 115 wherein it was inter alia held that the essential difference of procedure in the trial of warrant case on the basis of a police report and that instituted otherwise than on the police report, is particularly marked in Sections 238 and 239 Cr.P.C. on one side and Sections 244 and 245 Cr.P.C., on the other. It was further inter alia held that in a warrant trial instituted otherwise than on a police report, when the accused appears or is brought before



the Magistrate under Section 244(1) Cr.P.C., the Magistrate has to hear the prosecution and take all such evidence, as may be produced in support of the prosecution, and it is after all this, evidence is taken, then the Magistrate has to consider under Section 245(1) Cr.P.C., whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge him, on the other hand, if he is satisfied about the *prima facie* case against the accused, the Magistrate would frame a charge under Section 246(1) Cr.P.C.

12. It is pertinent to mention that in the warrant trial instituted otherwise than the police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the charge. Of course, under Section 245(2) Cr.P.C., a Magistrate can discharge the accused at any previous stage of the case, if he finds the charge to be groundless.
13. It was further *inter-alia* held in **Ajoy Kumar Ghose (Supra)** that there is a clear difference in Sections 245(1) and 245(2) of the Cr.P.C. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) Cr.P.C. The situation under Section 245(2) Cr.P.C. is, however, different. There, under sub-Section (2), the Magistrate has the power of discharging the accused at any previous



stage of the case, i.e., even before such evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244 Cr.P.C.

14. It was further inter alia held that at the stage of Section 245(1) Cr.P.C., the Magistrate takes up the task of considering all the evidence taken under Section 244(1) Cr.P.C., and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.
15. It was further inter-alia held that that while Section 245(2) Cr.P.C. speaks about the discharge of the accused on the ground that the charge is groundless, Section 246(1) operates in entirely different sphere. An order under Section 245(2) Cr.P.C. results in discharge of the accused, whereas, an order under Section 246 Cr.P.C. creates a situation for the accused to face a full-fledged trial. Therefore, the two Sections would have to be interpreted in slightly different manner, keeping in mind the different spheres, in which they operate. The words "or at any previous stage of the case" appearing in Section 246 Cr.P.C. would include Section 245 also, where the accused has not been discharged under Section 245 Cr.P.C., while the similar term in Section 246(2) can include the stage even before entire evidence is recorded. It cannot, therefore, be held that the words "at any previous stage of the case" as



appearing in Section 245 (2) Cr.P.C., would have to be given the same meaning when those words appear in Section 246 (2) Cr.P.C.

16. In *Ajoy Ghose (Supra)* it was further inter alia held that the right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C. The accused can show, by way of the cross-examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored.
17. Hon'ble Supreme Court in *Sunil Mehta & Anr. vs. State of Gujarat & Anr.* (2013) 3 SCC (Cri) 881 further culled out the entire law on the issue and inter alia held that the expression "Evidence" in S.244 should be construed as per Sections 3 and 138 of Indian Evidence Act. Further the Court inter alia held that the cross-examination by accused even before framing of charges would not cause any prejudice to the complainant, but denial of such right shall prejudice the accused in its defence and cause failure of justice. Furthermore, under Section 246(4) for exercise of such right by the accused after the court decides to frame charges, would not negate such right of the accused under Section 244 Cr.P.C. before framing of charge. The "Evidence" cannot



be taken into consideration in these scheme of things excluding cross-examination.

18. The bare reading of these judgments, brings out the following propositions in relation to “cases instituted otherwise than on the police report”:

- i. After the accused appears before the Magistrate pursuant to the summoning, the Magistrate shall record the evidence adduced by the prosecution and may also issue a summon for procuring the appearance. (Section 244 Cr. PC)
- ii. The Magistrate upon recording the evidence under Section 244(1) Cr.P.C. shall discharge the accused, for reasons to be recorded that no case against the accused has been made which, if unrebutted, would warrant his conviction. (Section 245 (1)Cr. PC)
- iii. The Magistrate can also discharge the accused even before recording any evidence at “any previous stage” under Section 245(2) Cr.P.C if he considers the charges to be groundless. Thus, the accused also has the right to seek discharge at “any previous stage” even before any evidence is recorded under Section 244 Cr.PC The previous stage could be from Sections 200 to 204 Cr.P.C. and till the completion of the evidence of prosecution under Section 244 Cr.P.C. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 Cr.P.C. However, the Magistrate shall be required to give the reasons for such discharge. The Magistrate has the power to discharge the accused under Section 245(2) Cr.P.C. at any



- previous stage, i.e., before the evidence is recorded under Section 244(1) Cr.P.C., which seems to be the established law, particularly in view of the decision in Cricket Association of Bengal & Ors. Vs. State of West Bengal & Ors. reported in 1971 (3) SCC 239.
- iv. The Magistrate after recording the evidence shall frame the charge if there are grounds for presuming that the accused has committed an offence triable under this chapter. The charges can be framed, even before recording the entire evidence/ “all” the evidence under Section 244(1) Cr. PC if the evidence on record meets the threshold as required under Section 246 Cr. PC. However, for the purpose of clarity it may be reiterated that the charge under Section 246(1) cannot be framed if no evidence under Section 244 Cr.P.C. has been recorded. The scheme of the Section 246 Cr.P.C. is that, it is only on the basis of any evidence that the Magistrate has to decide as to whether there is a ground to presume that the accused has committed an offence triable under this Chapter.
- v. The defence shall have the right to cross-examine the witnesses produced by the prosecution under Section 244(1) Cr.P.C., being a salutary right. The evidence as referred in Section 244 of the Cr.P.C. has to be read in conjunction with Section 3 and Section 138 of the Indian Evidence Act.
- vi. The test enunciated in a case covered by Section 227 & 228 and Section 239 and 240 Cr. PC cannot be legitimately applied to a case tried under Sections 245 & 246 of Cr.P.C. The rationale behind this is that the degree of scrutiny of evidence of



prosecution is much higher in the cases instituted otherwise than on a police report.

19. Now examining the impugned orders on the proposition as laid above makes it clear that the orders passed by the Ld. MM and Ld. ASJ are not sustainable in the eyes of law. Both the courts failed to apply the test as required under Section 245 & 246 of Cr.P.C. The opinion of the Ld. MM that the suggestions put by the petitioner to the complainant witnesses cannot be considered at the stage of charge is totally erroneous and is liable to be set aside. Similarly the Ld. ASJ has also fallen into grave error by not applying the principles enunciated in Section 245 & 246 of Cr.P.C. Thus, both the orders are liable to be set aside.
20. The matter is remanded back to the Ld. Trial Court for consideration of charge afresh in accordance with the requisite of Section 245 & 246 Cr.P.C.
21. The parties are directed to appear before Ld. Trial Court on 10.09.2024.

DINESH KUMAR SHARMA, J

JULY 3, 2024

Pallavi/AJ/AR/KR...