

**IN THE COURT OF METROPOLITAN MAGISTRATE,
55TH COURT, VILE PARLE, MUMBAI**

C.C. No.5502198/SS/2021

ORDER BELOW EXH.01

The application is submitted by accused No.1 Jyoti Naresh More to discharge her from the offence.

2. She submits that, she is the General Manager of Human Resources in Piramal Enterprises Limited Company since many years and she was staying at Salcetan Building, Borivali(W), Mumbai. She was the owner of the premises bearing Flat No.A/202 of the said building and was elected to the post of the Secretary of the Co-operative Housing Society of the said building on 13/05/2018. She was holding the post till 27/04/2022 as the Secretary and has completed all the responsibilities shouldered upon her. She resigned the post of Secretary on 27/04/2022 and sold her flat bearing No.A/202 to Miss Sumati on 28/04/2022. She received a summons on 18/12/2021 but could not attend the Court due to the pandemic of Covid-2019.

3. She further contended that, the resolution was passed in the Annual General Meeting of the said Housing Society to conduct a structural audit of the building to take the load of the shed. The MCGM sent a letter to all the people in the building to conduct the mandatory structural audit of building as it was almost 30 years old. The society also received a notice under section 377-A of the MMC Act which was replied by the society members. The structural audit was conducted on 09/08/2021 and its report was submitted to the MCGM on

30/08/2021. The society had taken recourse to rectify the water leakage issue. The summons is not issued to the owner of the premises where leakage was found but to the Secretary of the society, which is illegal. The society is the collective owner of the building and the accused is not. As it is the collective wrong of the society members, notices were issued to each of them. The accused/applicant was doing her conscious efforts to convince the society members to take efforts to stop the leakage. But the members of the society were reluctant as they were thinking to re-develop the building. The applicant also did positive efforts to get the permission from the MCGM for construction of the sheds upon the roof of the building. The allegations against her are false and frivolous. The notice is not properly issued to her. No section is attracted against her. Therefore, it is prayed that she may be discharged from this particular case.

4. Ld. ALO filed his say to the application and submitted that, the application is not maintainable as the Court has issued the process against the accused. She has not challenged the order to issue process before the higher forum as it is the summons triable matter, discharge application is not maintainable. Hence, it is submitted that, the application may be rejected.

5. Ld. Advocate for the accused has argued the matter by relying upon the judgments of the Apex Court. He would submit that the accused, when was holding the post of the Secretary has taken every effort and nothing illegal was done on the part of the society. She is not properly served with the notice which is mandatory and when she is not working as the Secretary of the society, she should not be harassed to attend the Court. Moreover he submitted that, now she has sold her

property in the said Salcetan CHS Ltd. And she is nowhere concerned with the society.

6. He further relied upon the citation and submitted that, the discharge application even can be filed in a summons triable case and therefore, he submitted that, the application may be allowed.

7. Per Contra the Ld. ALO submitted that, the procedural code enacted in the year 1973 has laid down the procedure of each kind of the case and the Courts act upon it. When the summons triable case prescribes the specific procedure, one cannot give a go-bye to it by invoking the procedure of a warrant triable case into it. Therefore, the discharge application is barred by law and hence he submitted that, the application may be rejected.

7. From the rival submission following points arose for my determination. I am reproducing them alongwith my findings thereon as under :-

<u>Sr.No.</u>	<u>Points</u>	<u>Finding</u>
1	Whether the application is maintainable ?	Yes.
2	Whether the accused No.1 can be discharged from the offence ?	No.
3	What order?	Application is rejected.

As to points No.1 and 2 :-

8. As far as considering the point of maintainability of the petition, the procedure prescribed for a summons triable case shows that, there is no stage to frame charge. Substance of accusation of

offence are to be read over to the accused and to ask him whether he pleads guilty or has any defence to make. The accused has every right to make his defence at the initial level. The implied meaning of the term, “has any evidence to make”, is that the accused can file an application to drop the proceeding against him.

9. In the case of *K M Mathews v/s. State of Kerla (1992) 1 SCC 217*, if there are positive averments in a complaint against an accused, then the Magistrate is justified in directing to issue process against the accused. But as held in *Adalat Prasad v/s. Rupal Jindal (2004) 7 SCC 338*, if a Magistrate takes cognizance of an offence to issue process without there being any allegation against the accused or any material implicating the accused or in contravention of section 200 and 202, the order of the Magistrate may be vitiated by application of section 482 of the Cr.P.C. and not otherwise. So in the judgment of *Adalat Prasad*, the law laid down by the Supreme Court of India in the case of *K M Mathews v/s. State of Kerla (1992) 1 SCC 217* (Supra) was considered to be incorrect law.

10. As held in *S K Bhalla v/s. State (2011) SCC ONLINE DEL 2254* the Magistrate cannot proceed further against the accused merely on the basis of the order passed to issue process, in absence of any material substance against him. If there is no such substance, the Magistrate can discharge the accused.

11. As far as considering the factual aspect in the matter on hand, it is admitted by the accused that she was Secretary of the Salcetan building upto 27/04/2022. The Co-operative Housing Society is a juristic personality. It cannot represent itself unless a living person

represents it. The accused, in the capacity of the Secretary was representing the routine affairs of the society and she has mentioned the said facts in her application. The problems she has discussed in her application is not the subject matter before this Court. Those problems may or may not be resolved by the members of the society. As a Secretary, the accused has done some work for the society and the offence is also committed by the society within her tenure. So this is much sufficient to say that it is only the accused who can be held responsible for the acts of the society. Therefore, as held in *Adalat Prasad v/s. Rupal Jindal (2004) 7 SCC 338* (Supra), the proper recourse is section 482 of the Cr.P.C. when there is much evidence available on the prima facie basis against the accused. So though the application is maintainable, there is no merit to drop the proceeding against present applicant/accused. Hence, by answering point No.1 in the affirmative and point No.2 in the negative, I pass the following order -

ORDER

The application is rejected.

Place : Vile Parle, Mumbai
Date : 23/11/2022

(S. N. Sarde)
Metropolitan Magistrate,
55th Court, Vile Parle, Mumbai.