



ORDER BELOW EXH. 09 IN R. C. C. NO. 124/2022
(PASSED ON 18.04.2023)

This is an application filed for discharge vide Section 239 of Code of Criminal Procedure.

2. It is contended that, the complainant is an ex-MLA and owner of the plot No. B-37 situated at Bhagad, MIDC, Mangaon, District-Raigad. The plot of the applicant I.e plot No.B-38 situated near to the plot of the complainant. On 21/11/2011 at 11:30 am the applicant gave call from his mobile to the complainant and asked for some quantity of soil from the plot of the complainant. The complainant consented the applicant to take soil from the plot. Thereafter, the applicant took soil from the plot of the complainant. After half an hour the complainant called the applicant and instructed not to take any stone and mud from the plot of the complainant. The complainant withdrew his given earlier consent.

3. The complainant alleged that the applicant taking soil from his plot after revocation of consent. The applicant contended that, there is prima facie case made out against the applicant, provisions of the section 379 of the Indian Penal Code is not applicable. Further contended that, there is no dishonest intention

on part of the applicant, the applicant taken soil from the plot of the complainant with consent of the complainant. The complainant concealed the fact that the complainant himself given consent for taking soil, the complainant misuses his political power. No offense made out against the applicant. Hence, prayed to grant application.

4. Learned A. P. P. resisted the application on the grounds that the present application is not maintainable and tenable in the eyes of law, the applicant not filed any documentary evidence in his defence. The investigating officer filed charge-sheet after detail investigation. Accordingly, pray to reject the application

5. Heard both sides at considerable length. Perused the case record.

6. At the stage of framing of charge, the court has to prima-facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the material produced are sufficient or not for convicting the accused. At the stage of framing of charge, roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code of Criminal Procedure.

7. It is settled law that, the Court is not expected to go

deep of the probative value of the material on record what needs to be considered is whether a ground for presuming that the alleged offence has been committed. The existence of factual ingredients constituting the offence to frame the charge.

8. It is well settled law that at the stage of framing of the charges, no roving enquiry is to be made nor the pros and cons of the materials could be weighed in detail as it would tantamount to a mini trial and such is not in the scheme of the code of Criminal Procedure. The reason for this is that the prosecution ought to be allowed to bring its evidence at the trial and the case ought not to be shut out at the threshold when there is reasonable material for holding trial.

9. The learned counsel for the applicant relied upon the following judgments of the Hon'ble Apex court. Learned counsel of the plaintiffs given following citations. But, not produced said judgments for reference of this Court. Learned counsel produced copies of judgments of private website.

a) **In the case of Chandi Kumar Das Karmarkar And V/s. Abanidha, AIR 1965 SC 585, 1965 CriLJ 496, decided on 9 October, 1963,** the Hon'ble Apex court held that, the offence of theft consists in the dishonest taking of any movable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete.

Further the Hon'ble court held that, where the taking of movable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft. In this view of the matter, we are of opinion that the acquittal of the appellants ought not to have been set aside.

b) **In the case of Ram Ratan Alias Ratan Ahir And vs The State Of Bihar and Another 1965 AIR 926, 1965 SCR (1) 293, decided on 22 September, 1964.** The Hon'ble Apex court observed that, if a person seizes the cattle entering his land in form of trespassing and resulting in damage in the crops and the land in totality and he claims that he was taking the cattle to the pound, he will not be liable for committing the offence of theft.

c) **In the case of K. N. Mehra vs The State Of Rajasthan, 1957 AIR 369, 1957 SCR 623, decided on 11 February, 1957.** The Hon'ble Apex court described the elements for offence of theft as (1) moving a movable property of a person out of his possession without his consent, (2) the moving being in order to the taking of the property with a dishonest intention. Thus, (1) the absence - of the person's consent at the time of moving, and (2) the presence of dishonest intention in so taking and at the time, are the essential ingredients of the offence of theft.

10. In the present case it is contended by the applicant that, the complainant consented the applicant to take soil from the plot. Thereafter, the applicant took soil from the plot of the

complainant. After half an hour the complainant called the applicant and instructed not to take any stone and mud from the plot of the complainant. The complainant withdrew his given earlier consent. The complainant alleged that the applicant taking soil from his plot after revocation. The applicant stated that, these allegations of the complainant is not true. Fact and circumstance in the above judgments and fact and circumstance of the present case is totally different. Hence, with all respect I am of the opinion that, above said judgments are not helpful to the applicant.

11. In the present application, it is the contention of the applicant that allegations are false and the complainant has given consent for taking soil thereafter the applicant took soil from the plot of the complainant. There is no dishonest intention on part of the applicant and the applicant not taking soil without consent. Hence, the offence of theft not made out against the applicant.

12. For the offence theft, there shall movable property move dishonestly without consent of owner, soil is come under category of movable property when its taking. Apart from it, in the present case, as per report and statement of witness Santosh Chilal, there are allegations against applicant that the applicant has taken soil from the plot of the informant without consent of the complainant. On perused statement of witnesses, it is seen that witnesses specifically mentioned act of the applicant. No doubt that those are the allegations which are required to be proved by the prosecution beyond the shadow of reasonable doubt. But those allegations are sufficient to frame charge against

the applicant.

13. The applicant produced the documents of phone call history between him and the complainant in his defence. But detail evidence is required to prove when the phone call was made and when exactly the consent and permission for taking soil was taken.

14. Whether the applicant after revocation of consent of the informant taking soil from the plot of the complainant or not ?. Whether there was detailed discussion between the applicant and the informant regarding taking soil or not ?. This question needs full fledged trial and evidence. This is not the stage to go into the details and merits of the case and the evidence. Whatever, will be final judgment of the case.

15. As per the police report and documents send with it vide Section 173 of the Code of Criminal Procedure, it appears that prima-facie there is sufficient material and grounds to frame charge against accused. Therefore, the application liable to be rejected. Hence, I proceed to following order.

ORDER

Application (Exh. 09) is hereby rejected.

Mangaon,
Date : 18.04.2023

(G. C. Fulzalke)
Judicial Magistrate, First Class,
Mangaon, Dist. Raigad.