

(2023) 02 BOM CK 0094

In the Bombay High Court

Case No : Criminal Application (APL) No.978 Of 2018

Hari Prakash

APPELLANT

Vs

Shailesh And Others

RESPONDENT

Date of Decision : 24-02-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 195, 197, 200, 201, 202, 203, 204, 244, 245(1), 245(2), 246, 247, 248, 249, 250, 340, 482
Indian Penal Code, 1860 — Section 192, 193, 204

Citation : (2023) 02 BOM CK 0094

Hon'ble Judges : G. A. Sanap, J

Bench : Single Bench

Advocate : S. K. Mishra, Kaustubh Deogade, V. V. Bhangde, S. A. Ashirgade

Final Decision : Allowed/Disposed Of

Judgement

G. A. Sanap, J

1. In this application, made under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C."), challenge is to the judgment dated 17.09.2018 passed by the learned Additional Sessions Judge-2, Nagpur in Criminal Revision Application No. 402/2012, whereby the learned Additional Sessions Judge dismissed the revision application and confirmed the order dated 18.05.2012 passed by the learned Judicial Magistrate, First Class, Court No.6, Nagpur.

2. Learned Judicial Magistrate, First Class, Court No.6, Nagpur vide order dated 18.05.2012 had rejected the applications (Exhs.35, 40 and 38) made by accused nos.1 to 3 for dismissal of the complaint and for their discharge in Criminal Complaint Case No. 1208/2007.

3. The relevant facts of the case are as under :

The parties in this judgment would be referred by their nomenclature in the complaint. The applicant is accused no.1 and non-applicant no.1 is the complainant. The complainant has stated that as per the contract agreement

dated 23.12.2002, railway contract for executing the painting of railway still girder bridges was awarded to him. The dispute arose between the complainant and the accused in the matter of execution of the work. In terms of the arbitration clause, the dispute was referred for arbitration.

4. It is the case of the complainant that in the arbitration proceeding, he came to know that the accused persons have fabricated the false evidence to substantiate their claim. It is the case of the complainant that in the arbitration proceeding on the application of the complainant, the Arbitral Tribunal had directed the accused to produce the original record for inspection and examination. The record was produced. On examination of the record, the complainant, found that the document at annexure-13, a letter No. E/2/WAB/Br-Painting/SHK dated 24.03.2003, issued by Sr.DEN(C)/SE Railway/NGP was allegedly sent to M/s S. H. Kulkarni at his address. It was found that at the bottom of the said letter, a postal receipt No. 3428 dated 24.03.2003, issued by the Department of Posts was affixed to prove that the said letter was dispatched by Registered Post and served to the complainant. This letter was not received by the complainant and therefore, he demanded production of the evidence.

5. It is stated that Shri Sanjeev Kumar, the present Sr.DEN (C) representing the DRM Engineering SECR, Nagpur produced the original documents. The documents were examined by the complainant and three members of the Arbitral Tribunal. The examination of the documents revealed that the postal receipt of registered article issued by the Department of Posts for another document/article bearing No.E/WAB/45/BG dated 24.03.2003 was used and affixed on the letter under question to prove the dispatch of the said document to the complainant. It is stated that the railway document at annexure-13 was not at all served to the complainant under the registered post receipt No. 3428 dated 24.03.2003. On examination of the dispatch register, the Arbitral Tribunal found that there was no entry in the register of the dispatch of document dated 24.03.2003 i.e. annexure-13. It is, therefore, contended that the accused have fabricated this evidence by affixing registered post receipt of another document at the bottom of the letter annexure-13 to prove that the same was dispatched and served to the complainant. It is the case of the complainant that this document was fabricated with an intention to persuade the Arbitral Tribunal to entertain an erroneous opinion on the issue of service of notice. It is the case of the complainant that the accused have, therefore, committed the offences punishable under Sections 193 and 204 of the Indian Penal Code.

6. Learned Magistrate, on filing of the complaint, recorded the verification statement of the complainant. Learned Magistrate on the basis of the facts stated in the complaint and the verification statement, took cognizance of the offences and issued process against the accused persons.

7. Accused no.1 applied before the learned Magistrate for dismissal of the complaint and for his discharge in the case. Learned Magistrate vide order dated 18.05.2012 rejected the application. This order was challenged by accused no.1

by filing revision in the Sessions Court. Learned Additional Sessions Judge-3, Nagpur vide order dated 11. 06.2015 allowed the revision and set aside the order passed by the learned Magistrate. The application made by accused no.1 for dismissal of the complainant and for his discharge was allowed. The complainant challenged the said order before this Court by filing Criminal Application (APL) No. 670/2015. This Court (Coram : A.S. Chandurkar, J.) vide order dated 06.11.2017 set aside the order dated 11.06.2015 and restored the revision application to the file of Sessions Court for deciding it afresh in accordance with law. As per the directions of this Court, learned Additional Sessions Judge-2, Nagpur decided the revision application vide order dated 17.09.2018. The learned Additional Sessions Judge dismissed the revision application and confirmed the order passed by the learned Magistrate dated 18.05.2012. The accused is before this Court against the said order.

8. I have heard Mr. S.K. Mishra, learned Senior Advocate assisted by Mr. K.C. Deogade, learned advocate for the accused/ applicant, Mr. V.V. Bhangade, learned advocate for complainant/non-applicant no.1 and Mr. S.A. Ashirgade, learned Additional Public Prosecutor for the State/non-applicant no.2. Perused the record and proceedings.

9. Learned Senior Advocate for the accused submitted that in the facts and circumstances, the offences alleged to have been committed by the accused have not been made out. Learned Senior Advocate submitted that no specific role has been attributed to the accused nos.1 to 3 in commission of the crime. Learned Senior Advocate submitted that on the basis of the vague and general allegations vis-a-vis the involvement of a particular person in the commission of the alleged offence, the process was issued by the learned Magistrate. Learned Senior Advocate submitted that mens rea is the main ingredient of the offence defined under Section 192 of the IPC. Learned Senior Advocate submitted that the document alleged to have been fabricated was not relied upon in support of the claim before the Arbitral Tribunal by the accused persons. Learned Senior Advocate submitted that pursuant to the order of the Arbitral Tribunal on the application of the complainant, the record was produced. Learned Senior Advocate submitted that this fact would indicate that the alleged document was not relied upon to prove any claim by the accused persons. Learned Senior Advocate submitted that therefore, this would reflect upon the mens rea. Learned Senior Advocate further submitted that in the arbitration proceeding, the issue of service of the notice of termination of the contract was one of the issues. Learned Senior Advocate, by drawing my attention to the documents on record and the observations made by the Arbitral Tribunal, submitted that service of notice of termination of the contract was admitted by the complainant. Learned Senior Advocate took me through the arbitration award and pointed out the observations made by the Arbitral Tribunal on the issue of service of termination notice to the complainant. He also pointed out that in the deliberations of the proceeding held in the meeting of the Arbitral Tribunal dated 28.06.2005, the complainant and the accused persons had admitted that the termination notice of

the instant contract was personally served to the complainant on 08.04.2003. Learned Senior Advocate submitted that the Arbitral Tribunal, in the award at number of places, has categorically observed that the action taken by the accused persons for termination of the contract was in order. The Arbitral Tribunal further observed that termination of the contract was done by the accused persons by following proper procedure. Learned Senior Advocate submitted that all the above facts have not been taken into consideration by the learned Judicial Magistrate, First Class as well as by the learned Additional Sessions Judge.

10. Learned Senior Advocate further submitted that the documents alleged to have been fabricated were given in a proceeding before the Arbitral Tribunal and therefore, in view of Section 195 of the Cr.P.C., the learned Magistrate should not have taken cognizance of the same, except on the complaint in writing by the Arbitral Tribunal.

11. Learned Senior Advocate submitted that the accused persons are the government servants and the act alleged to have been done by them was in exercise of their official duties and therefore, the complaint filed without obtaining prior sanction for their prosecution was not at all maintainable. Learned Senior Advocate submitted that the learned Magistrate and the learned Additional Sessions Judge have not properly appreciated his point. Learned Senior Advocate further submitted that the applications for discharge made by accused nos.1 to 3 were maintainable as per the provisions of Section 245(2) of the Code of Criminal Procedure. In order to substantiate this submission, learned advocate placed heavy reliance on the decision of Hon'ble Apex Court in the case of Ajoy Kumar Ghose .vs. State of Jharkhand and another, reported at (2009) 14 SCC 115. Learned Senior Advocate, therefore, submitted that this is a fit case to discharge the accused persons and ultimately dismiss the complaint.

12. Learned advocate for the complainant/non-applicant no.1, apart from supporting the orders passed by the learned Magistrate and the learned Additional Sessions Judge, submitted that the documents were fabricated to establish that the notice of termination of contract was dispatched and served to the complainant. Learned advocate took me through the minutes of the arbitration proceeding dated 28.06.2005 and submitted that this fact has been recorded in the said minutes. Learned advocate submitted that in order to establish service of notice of termination of contract dated 24.03.2003, a postal receipt of another letter despatched to the complainant on the same date, bearing No. 3428, was affixed at the bottom of the letter in question. Learned advocate submitted that pasting of the receipt of another article and that too of different number despatched to the complainant, was nothing but fabrication of false evidence. Learned advocate submitted that it was done with an intention to persuade the Arbitral Tribunal to form an opinion upon that evidence, to entertain an erroneous opinion on the point of service of the notice of termination of the contract. Learned advocate submitted that in the arbitration

award, the Arbitral Tribunal has categorically observed that in the Dispatch Register in the relevant column, there was no entry of despatch of two documents relied upon by the accused persons to substantiate their claim. Learned advocate submitted that on the basis of the facts stated in the complaint, the intention of the accused behind fabrication of the documents has been prima facie established. Learned advocate submitted that the criminal offence of fabrication of false evidence is not part of the official duties of the accused persons and therefore, there was no need of sanction to prosecute the accused persons. Learned advocate further submitted that the Arbitral Tribunal is not a 'Court' and therefore, learned Magistrate was not barred from taking the cognizance of the complaint. In short, learned advocate submitted that in the facts and circumstances, reliance placed on Section 195 of Cr.P.C. is totally misplaced. In order to substantiate this submission, the learned advocate relied on the decision of the Hon'ble Apex Court in Manohar Lal .vs. Vinesh Anand and others, reported at (2001) 5 SCC 407. Learned advocate, in short, submitted that the well reasoned order passed by the learned Additional Sessions Judge does not warrant interference.

13. Learned advocate for the complainant, in all fairness, submitted that the offence under Section 204 of the Indian Penal Code cannot be attracted in this case against the accused.

14. In order to appreciate the rival submissions, it would be necessary at the outset to consider the basic ingredients of Section 192 of the Indian Penal Code. Section 192 of the IPC is a part of Chapter XI, which deals with the offence of false evidence and offences against public justice. In order to invoke Section 192, following ingredients must be established -

- i] It must be established that the accused has caused any circumstance to exist or made any document or electronic record containing a false statement ;
- ii] Such an act must be done with an intention that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant or before an arbitrator ; and
- iii] Such act must be done with an intention that such circumstance, false entry or false statement so appearing in evidence may cause any person, who in such a proceeding is to form an opinion upon evidence to entertain an erroneous opinion touching any point material to the result of such proceeding.

15. It is, therefore, apparent that mere fabrication of a document is not sufficient. It must be fabricated with an intention to produce such document as an evidence in the proceeding and that too with an intention to cause any person, who in such a proceeding is to form an opinion upon the evidence to entertain erroneous opinion on the fact in issue based on that false evidence. The mens rea is, therefore, the most important ingredient of this offence. Whether there is mens rea in commission of an offence is a question of fact and it has to be addressed in view of the facts and circumstances of each and every case.

16. At the outset, the undisputed facts which would basically reflect upon the mens rea or intention of the accused, need to be stated. According to the accused persons, there was breach of contract by the complainant awarded to him. The contract was, therefore, terminated. It is undisputed that in view of the arbitration clause in the contract agreement, the dispute was referred for arbitration. An Arbitral Tribunal, consisting three members, was constituted. The main issue before the Arbitral Tribunal was with regard to the right of the complainant to get the compensation or damages claimed by him in his claim application. The ancillary issue was with regard to the issuance and service of notice of termination of the contract by the accused to the complainant. Few dates in this context are relevant. The Arbitral Tribunal passed the award on 25.08.2007. The complainant filed this complaint on 12.04.2007. It is not the case of the complainant that he made any grievance or application before the Arbitral Tribunal and made a request to the Arbitral Tribunal to initiate criminal proceeding against the accused persons for fabricating false evidence. It is undisputed that the document alleged to have been fabricated was not produced by the accused persons in the arbitration proceeding. On the application of the complainant, pursuant to the order passed by the Arbitral Tribunal, the record and proceeding containing the alleged fabricated document was produced. This fact undisputedly indicates that this document was not produced as an evidence to substantiate their claim and to convince the Arbitral Tribunal to accept their case. The notice of termination of the contract, dated 24.03.2003 was personally served to the complainant on 08.04.2003. A copy of the said notice is at page 98 of this application. The complainant has not disputed that he had received the said notice on 08.04.2003 at 11.40 hours and acknowledged the same in writing. This notice with the acknowledgment of the complainant was produced in the arbitration proceeding.

17. There are certain other important undisputed facts. Mention of these facts needs to be made at this stage. In the arbitration award, the Arbitral Tribunal has recorded that total 20 arbitration hearings were held. The dates of hearing have been set out in the arbitration award. The important document, relied upon by both the parties, is the minutes of 8th arbitration proceeding conducted on 28.06.2005. In the said minutes of the proceeding, there is a reference to the production of documents by the accused persons as per the direction of the Arbitral Tribunal. The anomaly with regard to service of the notice of termination of the contract was pointed out by the complainant. It is recorded in the minutes dated 28.06.2005 that both the parties had admitted that the notice of termination of the instant contract was handed over to the complainant on 08.04.2003. Perusal of the arbitration award would show that all the contentions of the parties were properly dealt with by the Arbitral Tribunal. Perusal of the arbitration award would show that on this point the Arbitral Tribunal has recorded a concrete finding and held that the contention of the complainant that termination of the contract was improper and biased, was not sustainable. The Arbitral Tribunal has observed at number of places in the award that the action

taken by the accused persons for termination of the contract was in order. It is also held that the termination of the contract by the accused persons was by following proper procedure. The Arbitral Tribunal, as can be seen from the arbitration award, has nowhere stated that there was either improper service of notice or there was fabrication of the evidence to support the contention of the accused persons on that count. It is to be noted that the genesis of the complaint lies in the arbitration proceeding. Therefore, the issues involved in this proceeding before me, need to be considered in the backdrop of above stated undisputed facts.

18. The complainant neither made a grievance nor any written application before the Arbitral Tribunal contending that in order to substantiate their claim, the accused persons have fabricated false evidence. It is pertinent to note that the complaint was filed four months prior to the arbitration award. The copy of complaint was not placed on record of the Arbitral Tribunal. It is, therefore, apparent on the face of the record that the mens rea, required to be established to invoke Section 192 of the IPC, is missing in this case. The alleged fabricated document was not produced to substantiate the claim of the accused persons. Therefore, it is not possible to attribute an intention to them that such a document was created with an intention that it shall appear in evidence in a judicial proceeding or in a proceeding taken by the Arbitrator. According to the complainant, on the basis of the fabricated false evidence, the accused persons persuaded the Arbitral Tribunal to entertain erroneous opinion touching this point of service of notice. In my view, this second plank of section 192 of the IPC, which deals with mens rea is also absent in this case.

19. Perusal of the arbitration award would further show that the Arbitral Tribunal has not entertained any erroneous opinion touching any point material to the result of the arbitration proceeding on the basis of alleged fabricated document. In my view, if the provisions of law, particularly Section 192 of the IPC, are applied to the facts obtained on record and stated herein above, it would clearly indicate that the mens rea in this case is completely missing. At this stage, it is necessary to mention that both the parties have accepted the arbitration award. The complainant did not challenge the arbitration award. Perusal of the arbitration award would further show that the claim of the claimant was partly allowed on the basis of the evidence placed on record by the parties. It is, therefore, not possible to accept the contention of the complainant that by entertaining any erroneous opinion by the Arbitral Tribunal on the basis of fabricated document, the claim was rejected in entirety.

20. The next important question is whether the first part of Section 192 of IPC with regard to fabrication of false evidence has been made out or not. In my view, on this count also the case of the complainant cannot be accepted. It is true that on 24.03.2003, in respect of two different contracts, two notices were issued to the complainant. It is his case that he did not receive notice dated 24.3.2003 in respect of this contract. It is his case that in order to prove the

factum of issuance and service of this notice, at the bottom of the copy of the said notice, postal receipt of another postal article bearing No. 3428 dated 24.03.2003 was affixed. It is to be noted that this notice was not produced by the accused persons to fortify their claim. This fact can be discerned on reading of paragraph 3 of the complaint. It is stated in paragraph 3 that this fact was found after examination of the record produced for inspection as per the direction issued by the Arbitral Tribunal. The question is whether the facts stated in the complaint are sufficient to come to a conclusion that the accused persons had fabricated false evidence ?

21. Perusal of paragraph 4 of the complaint indicates that in order to justify fabrication of false evidence, an envelope received under postal receipt No. 3428 dated 24.03.2003 was produced by the complainant. It is the case of the complainant that postal receipt for another document No. E/WAB/45/BG dated 24.03.2003 was pasted on the document at annexure-13, which relates to this contract. It is to be noted that the complainant had produced only the photo copy of the envelope. The complainant did not produce the document, which was received under that envelope. In my view, it was necessary because the complainant has categorically admitted the receipt of notice dated 24.03.2003 in person on 08.04.2003. It is not the case of the complainant that this envelope of another document with the document in question was produced before the Arbitral Tribunal. The complaint, therefore, does not show that the letter received in an envelope under postal receipt bearing No. 3428 dated 24.03.2004 was not in respect of this contract, but it was in respect of different contract. Perusal of the complaint in entirety would show that all the ingredients of the offence under Section 192 of the IPC are not prima facie made out.

22. As stated above, the complaint was filed on 12.04.2007 and the arbitration award was passed on 25.08.2007. Perusal of paragraph 7 of the complaint would clearly indicate that before passing the arbitration award by the Arbitral Tribunal, the complainant formed an opinion that the accused persons have fabricated false evidence and the fabricated document has led Arbitral Tribunal to entertain an erroneous view of the matter. This fact clearly indicates that in the complaint, unfounded allegations were made touching this point. I, therefore, conclude that if the facts stated in the complaint are considered in juxtaposition with admitted and undisputed facts, the minutes of the arbitration proceeding dated 28.06.2005, the arbitration award and acceptance of the service of notice of termination of contract by the complainant on 08.04.2003, it clearly indicate that the offence under Section 192 of the IPC has not at all been made out.

23. The next important issue is with regard to the specific role attributed to accused nos.1, 2 and 3. A minute perusal of the complaint would show that no specific role has been attributed to accused nos.1 to 3. It has not been stated in the complaint as to how and in what capacity they were concerned with the fabrication of false evidence. It is further pertinent to note that there is no allegation that the postal receipt bearing No. 3428 dated 24.03.2003 or any

other postal receipt was fabricated. It, therefore, goes without saying that the postal receipt was issued by the Postal Authority. It is not the case of the complainant that immediately before production of the record before the Arbitral Tribunal, this postal receipt was fabricated. It is undisputed that on the same day, two letters were sent to the complainant by the accused persons. Therefore, in my view, the vague and general allegations made in the complaint are not sufficient to continue the complaint against accused nos.1 to 3.

24. In view of the above findings, the submissions made by the learned Senior Advocate for the accused and learned advocate for the complainant touching Sections 195 and 197 of the Cr.P.C. have become academic. However, in order to have complete adjudication, it is necessary to deal with the same. Learned Senior Advocate for the accused submitted that in this case, without the complaint in writing by the Arbitral Tribunal, the learned Magistrate was not competent to take cognizance of the offence. Learned Senior advocate, in short, submitted that the Arbitral Tribunal is a Court as understood by the provisions of Section 195 of the Cr.P.C. In order to meet this argument, learned advocate for the complainant placed heavy reliance on the decision in Manohar Lal's case (supra). In this case, the Hon'ble Apex Court has held that the Arbitrator cannot be termed to be a Court within Section 195 of the Cr.P.C. It is held that, therefore, the question of applicability of Section 340 of the Cr.P.C. in a proceeding before the Arbitrator does not and cannot arise. In my view, therefore, the submissions advanced by the learned Senior Advocate on this point cannot be accepted.

25. The next important question is with regard to absence of sanction to prosecute the accused persons, being the government servants. It is submitted by the learned Senior Advocate for the accused that no specific role has been attributed to the accused persons in the complaint. Learned Senior Advocate submitted that the acts alleged to have been done by the accused were in discharge of their official duty. Learned Senior Advocate submitted that the mens rea to maintain the complaint without sanction has not been established. Learned Senior Advocate, therefore, submitted that in the facts and circumstances, without obtaining prior sanction, the learned Magistrate should not have taken cognizance of the offence. Learned Senior Advocate further pointed out that in fact, the complainant had applied for sanction, however, he did not get the order. Learned Senior Advocate submitted that the principle of deemed sanction cannot be invoked in this case. Learned Senior Advocate, in support of his submission, has relied on the decision in Amal Kumar Jha .vs. State of Chhattisgarh and another, reported at (2016) 16 SCC 734. In this case, the Hon'ble Apex Court has held that one safe and sure test in this regard would be to consider if omission or neglect on part of public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. It is held that provision of Section 197 Cr.P.C. is available only when the alleged act done by a public servant is reasonably connected with discharge of his official duty and is not merely a cloak for doing objectionable act. It is further held that

if he is doing official duty and if he has acted in excess of his duty, but there is a reasonable connection between the act and performance of official duty, excess will not be a sufficient ground to deprive public servant of protection. It is held that the omission complained of, if found to be intrinsically connected with discharge of official duty of a public servant, then the protection under Section 197 of Cr.P.C. from prosecution without sanction of the competent authority, is available to the public servant.

26. As against this, learned advocate for the complainant, in support of his contention that in this case Section 197 of the Cr.P.C. would not be applicable, has relied on the decision in *Inspector of Police and another .vs. Battenapatla Venkata Ratnam and another*, reported at (2015) 13 SCC 87. In this case, it is held that if the government officer indulges in commission of the offence punishable under the law, such as cheating, fabrication of record or misappropriation, it cannot be said to be in discharge of his official duty. Therefore, he is not entitled for protection under Section 197 of Cr.P.C.

27. In the facts and circumstances, in my view, the submissions advanced by the learned Senior Advocate for the accused deserve acceptance. In view of the finding of fact arrived at by this Court with regard to the failure of the complainant to establish basic ingredients of Section 192 of the IPC, the protection under Section 197 of the Cr.P.C. would be available to the accused. The record was not produced to substantiate the claim. There is no averment in the complaint attributing specific role to the accused persons. Only general and vague allegations have been made in the complaint. In the facts and circumstances, the sanction was necessary to crystalize the role of accused persons. Therefore, in my view, in this case if the controversy is looked at from any angle, the accused could not have been prosecuted without prior sanction. As such, the law laid down in *Manohar Lal's case* (supra) would squarely apply to this case. I conclude that for want of sanction, the learned Magistrate should not have taken cognizance of the offence against the accused. On this count also, the accused persons are entitled for the relief.

28. The next important question is with regard to the maintainability of the application made by accused no.1 for dismissal of the complaint and for his discharge. At the outset, it has to be held that after issuance of process in a complaint case, the complaint can not be dismissed by the Magistrate. Dismissal of the complaint on such a contention, may amount to recall or review of the order of issuance of the process. Therefore, the question that needs to be addressed is whether the application for discharge was maintainable.

29. It is to be noted that the complaint was registered as Regular Criminal Complaint case No. 1208/2007. The offences are triable by the learned Magistrate. The trial of the complaint would be governed by Chapter XIX of the Cr.P.C. The first part of this Chapter deals with the warrant trials/cases instituted on police report. The second part of this Chapter deals with the procedure for cases instituted otherwise than on police report. The procedure for such cases is

laid down from Sections 244 to 250 of the Cr.P.C. In this case, learned Senior Advocate for the accused submitted that in view of the provisions of Section 245, sub-section 2 of the Cr.P.C., learned Magistrate was empowered to discharge the accused. It is to be noted that in a case instituted otherwise than on a police report, before framing the charge, the stage of recording of the evidence by the prosecution is provided. Section 246 of Cr.P.C. provides for framing of Charge on the basis of the evidence recorded before framing of the charge. In this case, admittedly, evidence of the complainant and the witnesses was not recorded. On the basis of this fact, learned advocate for the complainant submitted that the application was not maintainable.

30. Learned Senior Advocate, in order to substantiate his submission that the application for discharge was maintainable under Section 245 of the Cr.P.C., placed heavy reliance on the decision in Ajoy Kumar Ghose's case (supra). In this case, the Hon'ble Apex Court has considered this issue. It is held that there is difference between Section 245(1) and 245(2) of the Cr.P.C. It is held that under Section 245(1) of Cr.P.C., learned Magistrate has an advantage of evidence led by the prosecution before him under Section 244 of Cr.P.C. and he has to consider whether the conviction of the accused would be warranted, if the evidence remains unrebutted. If there is no discernible incriminating material in the evidence, then learned Magistrate has to discharge the accused under Section 245(1) of Cr.P.C. It is further held that the situation under Section 245(2) of Cr.P.C. is, however, different. There, the Magistrate has the power to discharge the accused at any previous stage of the case i.e. even before the evidence under Section 244 of Cr.P.C. is led. It is also held that however, for discharging the accused under Section 245(2) Cr.P.C., the Magistrate has to give a finding that the Charge is groundless. It is further held that learned Magistrate can take this decision before the accused appears or brought before the Court or evidence is led under Section 244 Cr.P.C. The previous stage could be from Sections 200 to 204 of Cr.P.C. and till the completion of the evidence of the prosecution under Section 244 of Cr.P.C. It is thus held that 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. and makes an application for discharge.

31. In this case, admittedly, evidence of the complainant under Section 244 of the Cr.P.C. has not been recorded. Accused no.1 made an application for his discharge. In my view, this discharge application would be squarely covered and maintainable under Section 245(2) of the Cr.P.C. In view of this settled legal position, the submissions advanced by the learned Senior Advocate on behalf of the accused deserve acceptance.

32. On the basis of the facts and appreciation of the material on record, I conclude that the allegations made in the complaint are vague and general in nature. No specific role has been attributed to the accused. Similarly, the facts stated in the complaint and undisputed facts explicitly crystalize that the basic

ingredients of Section 192 of the IPC have not been made out. The fundamental ingredient with regard to mens rea is completely absent in the complaint. Learned Magistrate and the learned Additional Sessions Judge, as can be seen from the orders, have not taken all these facts into consideration. Therefore, the orders passed by them are required to be quashed and set aside.

33. It is seen that the applications for discharge were made by accused no.1 to 3. Accused no.1 only challenged the order of rejection of his discharge application. Accused nos.2 and 3 however did not challenge the said order. On consideration of the material, it is found that no case has been made out for taking cognizance of the offence under Section 192 of the IPC. In my view, accused nos.2 and 3 would also be entitled to get benefit of this order. The benefit extended to accused no.1 cannot be denied to accused nos.2 and 3, more particularly in view of the finding of fact recorded by this Court.

34. Accordingly, the Criminal Application is allowed.

i] The order dated 17.09.2018 passed by the learned Additional Sessions Judge-2, Nagpur in Criminal Revision Application No. 402/2012 and the order dated 18.05.2012 passed by the learned Judicial Magistrate, First Class, Court No.6, Nagpur in Regular Criminal Complaint Case No. 1208/2007, are quashed and set aside.

ii] The applications filed by accused nos.1 to 3 for discharge are allowed. Accused no. (1) Hari Prakash S/o V.N. Tripathi ; (2) P.R. Hedau ; and (3) Gagan Goel are discharged from the complaint. The complaint case stands dismissed.

iii] The criminal application stands disposed of.