

(1980) 01 BOM CK 0014
In the Bombay High Court
Case No : Criminal Application No. 97 of 1979

Hirjitsingh Bedi

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 15-01-1980

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 321, 321(a), 333
Penal Code, 1860 (IPC) — Section 147, 148, 302, 323, 34

Citation : (1980) MhLj 787

Hon'ble Judges : N.K. Parekh, J; M.D. Kambli, J

Bench : Division Bench

Advocate : R.T. Hattangadi with A.P. Vaze, for the Appellant; D.Y. Deshmukh, Public Prosecutor and J.C. Rajani with R.K. Thakkar for respondents 4 to 6, for the Respondent

Final Decision : Allowed

Judgement

M.D. Kambli, J.—The petitioner has filed this application under Articles 226 and 227 of the Constitution for setting aside the order of Judicial Magistrate, First Class, Pune Cantonment, dated 2-12-1978, whereby he granted an application filed by the Public Prosecutor, Pune, seeking permission to withdraw a criminal case against respondent Nos. 4 to 6 (hereinafter referred to as the accused) and purporting to discharge them u/s 321 (a) of the Criminal Procedure Code.

2. The 4th respondent is the owner of a bungalow in Pune bearing No. 15 at Casteleno Road, he having purchased the same in the year 1956. The case of the present petitioner was that in or about the end of January, 1973, respondent No. 4 let the petitioner in possession of the said bungalow on certain monthly rent, upon the petitioner carrying out the required repairs which according to the petitioner were to the tune of Rs. 25,000. It was further agreed that a sum of Rs. 150 was to be deducted from the monthly rent on account of the cost of the repairs to be incurred by the petitioner. The case of the petitioner is that after he

was so put in possession of the house, he carried out the repairs and spent a sum of about Rs. 26,000. However, later on the fourth respondent changed his mind and entertained the idea of not letting out the suit bungalow to the petitioner.

3. According to the petitioner, on the night of 8th May, 1973, his two servants Narsing and Pyarelal were in the house. The petitioner and his family members were not residing therein because all the repairs were not completed. Respondent Nos. 4 to 6, alongwith their servants and hirelings came to the said bungalow and demanded possession of the same from the servants. However, the said servants refused to deliver possession and closed the doors. According to the petitioner, the respondents, their servants and hirelings broke open the door, assaulted the said servants, tied them and forcibly took them away in a car against their wishes. They caused damage to the goods and articles that were lying in the same house and belonging to the petitioner. The petitioner was informed about this incident at about 11 p. m. by one Balbirsingh. As a result thereof, the petitioner alongwith his servants went to the said house. After seeing the damage to the property and realising what had happened, the petitioner went to the police station at Pune Cantonment and brought the police to the premises. At that time respondent Nos. 4 to 6 and others were present there. The police asked the parties to maintain the status quo. Next morning on 9th May 1973, the petitioner lodged a regular complaint in respect of the said incident. This complaint has been annexed to the petition as Ex. "A".

4. At or about the same time or rather during the same night the 4th respondent also lodged a complaint against the petitioner, his father, brother and the petitioner's two servants accusing them of criminal trespass, house breaking etc. punishable under sections 457, 426 and 451 of the Indian Penal Code.

5. The petitioner states in his petition that upon his complaint, the respondent Nos. 4 to 6 were arrested and released on bail; that upon the complaint 4th respondent the petitioner was also put under arrest and released on bail. After the police investigated into the complaint, they filed a charge sheet against respondent Nos. 4 to 6 on 7-8-1973. The charge-sheet against the petitioner, his father, brother and two servants was filed on 10th July 1973.

6. It appears that on or about 15th June 1973, the petitioner filed suit No. 1705 of 1973 in the Court of Small Causes at Pune for a declaration that the petitioner was a tenant of the said bungalow and for an injunction to restrain respondent No. 4 from dispossessing the petitioner of the said bungalow, except by due process of law.

7. The petitioner further states in his petition that thereafter in view of the pending civil suit, as well as the circumstance that the dispute created by the 4th respondent was a purely civil dispute and that he had only distorted the facts in order to falsely implicate the petitioner and others on criminal charges, the petitioner applied to the Commissioner of Police, Pune, praying for the withdrawal

of the criminal proceedings against him filed by the fourth respondent. It is averred that after a proper consideration of the said application, the then Public Prosecutor applied for withdrawal of the prosecution against the petitioner and the Court by its order dated January 30, 1974, granted permission for such withdrawal.

8. Thereafter being aggrieved by the order withdrawing from the prosecution against the petitioner, the fourth respondent filed criminal revision application bearing No. 248 of 1974. However, the same was dismissed by the High Court by its judgment and order dated 28th October 1974. The petitioner has annexed a copy of the said judgment which is marked as Ex. "B". The petitioner points out that thereafter, the fourth respondent filed criminal application No. 283 of 1975 challenging the said order under Article 227 of the Constitution of India. The same was, however, summarily rejected on 5th August, 1975.

9. Thereafter, the 4th respondent filed criminal application bearing No. 43 of 1975 in the High Court praying for quashing of the criminal prosecution against him and others pursuant to the charge-sheet filed by the police on the basis of the complaint filed by the petitioner in respect of the incident on the night of 8th May, 1973. That case was registered as criminal case No. 2739 of 1973. That application was dismissed by this Court on 10th March, 1978. After the dismissal of his petition to quash the criminal proceedings, the further proceedings in the criminal case in the trial Court come to be revived on 19th April, 1978. After such revival the matter was adjourned on some occasions for some reason or the other. It is averred in this petition, that thereafter arguments were advanced on behalf of respondent Nos. 4 to 6, that no charge could be framed against them upon the material that was collected in the course of the investigation. However, the learned Magistrate, by his order dated 19th August, 1978, was pleased to direct that a charge be framed. A charge so framed by the learned Magistrate has been annexed as Ex. "C" to the petition. After the charge was so framed, it is stated in the petition, that the respondents applied for adjournment on the ground that they desired to move the High Court against the order directing the framing of the charge. Ultimately, the matter was adjourned for hearing on 2nd December, 1978. The petitioner states that on or about 14th December, 1978, when he had been to the Court he came to know that on 2nd December, 1978 the learned Public Prosecutor had made an application to the Court for permission to withdraw the prosecution u/s 321 (a) of the Code of Criminal Procedure, 1973. On the same day and without issuing any notice to the petitioner, the trial Court granted such permission. A copy of the said application made by the learned Public Prosecutor has been annexed as Ex. "D" and the copy of the order made by the learned Magistrate which has been impugned in this petition is marked as Ex. "E". It is this order which has been challenged in this petition.

10. It is contended by Mr. Hattangadi, the learned counsel for the petitioner, that the impugned order is without jurisdiction, illegal and unlawful particularly

because this Court by its judgment dated 7th March, 1978, in criminal application No. 43 of 1975 had held that the Court was unable to hold that the acts alleged against the respondents 4 to 6 did not amount to any offences or that the Court was unable to hold that in the interest of equity and justice the prosecution against the said respondents deserves to be withdrawn. It is also contended that the impugned order is contrary to the principles of natural justice inasmuch as the petitioner being the original complainant and the person most affected was not heard. It is also submitted that the reasons given by the public prosecutor for permissions to withdraw the criminal case against respondent Nos. 4 to 6 were not proper and that the learned Magistrate had not applied his mind to the legal and equitable aspect of the matter before passing the impugned order.

11. Mr. Hattangadi invited our attention to a paragraph from the judgment of the Civil Judge, S. D., in Civil Suit No. 101 of 1975. That was a suit filed by respondent No. 4 against the present petitioner for a declaration of his title and for possession of the suit property. That suit was decreed. However, while decreeing that suit, the learned Civil Judge made certain observations to the effect that on 8th May 1973, the defendant (the petitioner herein) was already in possession of the suit premises, and that it was plaintiff (Respondent No. 4) who tried to take the possession of the premises forcibly. Relying upon these observations in the judgment of the learned Civil Judge, S. D., Mr. Hattangadi submitted that the petitioner was not a trespasser in the property and that respondent No. 4 was not justified in taking law in his own hands and in trying to oust the petitioner and his men from the property, except by due process of law. Mr. Hattangadi further submitted that the case against respondents Nos. 4 to 6 did not involve a pure dispute of civil nature. According to him, the petitioner being in possession of the property, respondent No. 4 committed the offences for which he was prosecuted. The withdrawal from the prosecution, therefore, by the learned public prosecutor and the consequent consent granted to the same by the learned magistrate was, according to the learned counsel, not justified.

12. As against this, Mr. Rajani, the learned counsel for the respondent Nos. 4 to 6, submitted that a criminal case instituted against the petitioner for offences arising out of the same incident viz. Criminal case No. 2242 of 1973 was withdrawn by the learned public prosecutor with the consent of the Court, on 31st January 1974. Criminal Revision Application No. 248 of 1974 preferred by respondent No. 4 against that withdrawal was dismissed by this Court. Mr. Rajani, therefore, contended that the withdrawal of the criminal case against respondent Nos. 4 to 6, as it arises out of the same incident cannot now be called in question. The criminal case against the petitioner was withdrawn on the ground that the dispute involved was one of civil nature and the criminal case against respondent Nos. 4 to 6 has been withdrawn on the same ground. He further pointed out that the Small Cause Suit bearing No. 1705 of 1973 filed by the petitioner against respondent Nos. 4 to 6 for a declaration that he was a tenant of the premises has been dismissed. He also pointed out that the Special Civil Suit No. 101 of 1975 filed by respondent No. 4 against the order for possession

of the suit premises has been dismissed and the Civil Court held that the petitioner was a trespasser. The result of the civil litigation thus shows that the petitioner had no right, title and interest in the suit property and that therefore no offences could be committed by respondent Nos. 4 to 6 in respect of that property. According to the learned counsel, the withdrawal of the case was perfectly legal and in the interest of justice.

13. Mr. B. Y. Deshmukh, the learned Public Prosecutor for the State-- supported the order of withdrawal. In addition to supporting the submissions made on behalf of respondent Nos. 4 to 6, he pointed out that as the case stands today respondent Nos. 4 to 6 have succeeded in the civil litigation; that shows that the petitioner had no right, title and interest in the said property. He further submitted that the criminal case arises out of the incident that is alleged to have been committed in the month of May, 1973; that seven years have elapsed since then and it would not be proper and in the interest of justice that the prosecution against respondent Nos. 4 to 6 should be continued. He, therefore, supported the order of withdrawal passed by the learned magistrate.

14. Before we proceed to consider the rival submissions, advanced before us, it would be proper to examine the scope and scheme of section 321 of the Code of Criminal Procedure. The material part of section 321 reads as follows:

Section 321--The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal:

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

Section 321 of the Code of Criminal Procedure, 1973 corresponds to section 494 of the Criminal Procedure Code, 1898 and has been worded in identical terms. The section does not give any indication in express terms as to the grounds on which the public prosecutor may make the application for permission to withdraw from the prosecution or the considerations on which the Court is to accord the consent. Section 321 is an enabling section and vests in the public prosecutor the discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The section requires that such a withdrawal has to be with the consent of the Court. The consent if granted by the Court has to be followed up by discharge or acquittal as the case may be. As observed by the Supreme Court in the *The State of Bihar Vs. Ram Naresh Pandey*, there can be no doubt that the resultant order, on the granting of the consent, being an order of "discharge" or "acquittal" would attract the applicability of correction by the High Court under its appellate or revisional or writ jurisdiction. The function of the Court

therefore in granting its consent, may well be taken to be a judicial function. It follows that in granting the consent, the Court must exercise the judicial discretion. But as observed by the Supreme Court in the said case of Ram Naresh Panday, it does not follow that the discretion is to be exercised only with reference to material "gathered by the judicial method". Otherwise, the apparently wide language of section 494 of the Criminal Procedure Code would become considerably narrowed down in its application. The initiative is that of the Public Prosecutor and the said section gives a general executive discretion to the Public Prosecutor to withdraw from the prosecution subject to the consent of the Court. To quote the words of the Supreme Court in the case of Ram Naresh Pandey :

The judicial function, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes".

Analysing the scheme of the Code of Criminal Procedure regarding the investigation of the offences and subsequent filing of the charge-sheet against the offenders, the Supreme Court has pointed out that in this country, the scheme of the administration of criminal justice is that the primary responsibility of prosecuting the serious offences (which are classified as cognizable offences) is on the executive authorities. Once information of the commission of any such offence reaches the constituted authorities, the investigation, including the collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the magistrate also has his allotted functions in the course of these stages. The magistrate's functions in these matters as the Supreme Court has pointed out are not only supplementary, at higher level, to those of the executive but are intended to prevent abuse. The Supreme Court points out that section 494 of the Criminal Procedure Code requiring the consent of the Court for withdrawal by the Public Prosecutor is more in line with this scheme.

15. It would thus appear that the function of the public prosecutor in withdrawing from the prosecution is an executive function. The Court has to be satisfied that executive function has not been improperly exercised. The consent has not to be tightly given without a careful and proper scrutiny of the grounds on which the application for consent is made. It is not correct to say that where an application for consent is made on the ground of insufficiency of reliable evidence, it is an improper exercise of discretion for the Court to grant consent before actual evidence is taken, if it is reasonably satisfied otherwise, that the evidence if actually taken is not likely to result in conviction.

16. The Supreme Court had an occasion to consider the question regarding the scope of the power of the Public Prosecutor in withdrawing from the prosecution and the ground on which the consent could be granted by the Court in the case

of M.N. Sankarayarayanan Nair Vs. P.V. Balakrishnan and Others, .

17. The Supreme Court observed there that the power contained in section 494 of the Criminal Procedure Code gives a general executive discretion to the Public Prosecutor to withdraw from the prosecution subject to the consent of the Court which may be determined on many possible grounds and is therefore wide and un-controlled by any other provisions in the Code. The Supreme Court further observed as under:

The section does not, however, indicate the reasons which should weigh with the Public Prosecutor to move the Court for permission nor the grounds on which the Court will grant or refuse permission. Though the section is in general terms and does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice which may be either that it will not be able to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances which it is difficult to predicate as they are dependant entirely on the facts and circumstances of each case. Nonetheless it is the duty of the Court also to see in furtherance of justice that the permission is not sought on grounds extraneous to the interest of justice or that offences which are offences against the State go unpunished merely because the Government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the Public Prosecutor to withdraw from the prosecution and the Public Prosecutor merely does so at its behest.

In Nair's case (supra) one of the grounds on which the permission was sought was that the dispute involved was one of civil nature. Holding that ground was not a proper ground, the Supreme Court observed:

It may be that the acts of the Respondent may make them both liable under the Civil law but it does not justify either the seeking of the permission to withdraw from the prosecution or granting of it unless the matter before the Criminal Court is of a purely civil nature.

The Supreme Court, with reference to the facts of that case, pointed out that the accused in the case had been charged with offences of cheating, of the forgery of valuable securities with the intention that the documents forged shall be used for the purpose of cheating and/or for using them as genuine which they knew or had reason to believe to be forged documents. Having regard to these and other circumstances that were apparent from the facts of that case, the Supreme Court found that the ground on which the consent could be granted by the Court.

18. In Bansi Lal Vs. Chandan Lal and Others, , the Supreme Court observed as under:

Permission to withdraw from the prosecution should not be granted for the mere

asking but the Court must be satisfied on the materials placed before it that the grant of permission would serve the administration of justice.

That was the case where five persons were charge-sheeted for offences under sections 147, 148, 302 of Indian Penal Code and some other offences. The Additional Sessions Judge, on the application of the Public Prosecutor allowed the case against one of the accused viz. Sukhlal to be withdrawn. On the next day, the charges were framed against the remaining accused persons, including the respondents before the Supreme Court. Some days thereafter, the Public Prosecutor made an application before the Additional Sessions Judge, praying for permission to withdraw the case against the two respondents. The ground given in the application made by the Public Prosecutor was that the prosecution did not want to produce evidence and continue the criminal matter against the two respondents. While setting aside the order of consent granted by the Court for withdrawal from the prosecution, the Supreme Court observed that the request to grant permission u/s 494 should not be accepted "as a necessary formality" "for the mere asking", but the Court must be satisfied on the materials placed before it that the grant of permission would serve the administration of justice and that the permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain. Referring to the facts of the case, the Supreme Court pointed out that the prosecution had reached the stage of framing charges against the accused and no occasion for the defence to make out the case had yet arisen. According to the Supreme Court, therefore, on the facts of that case there was no material before the Court justifying the withdrawal of the case against some accused. The Supreme Court pointed out that when the Additional Sessions Judge made the impugned order, there was no material before him to warrant the conclusion that sufficient evidence would not be forthcoming to sustain the charges or that there was reliable subsequent information falsifying the prosecution case or any other circumstance justifying withdrawal of the case against the respondents. The Supreme Court also pointed out that if the material before the Additional Sessions Judge was considered sufficient to enable him to frame the charges against the respondents, it was not possible to say that there was no evidence in support of the prosecution case. The Supreme Court set aside the order of the Additional Sessions Judge permitting withdrawal of the case which was confirmed by the High Court.

19. The Supreme Court in *Balwant Singh and Others Vs. State of Bihar*, had an occasion to consider the question as to on what grounds, the Public Prosecutor would be justified in withdrawing from the prosecution. The Supreme Court observed:

The sole consideration for the Public Prosecutor when he decides to withdraw from a prosecution is the larger factor of the administration of justice--not political favours nor party pressures nor like concerns. of course, the interests of public justice being the paramount consideration they may transcend and

overflow the legal justice of the particular litigation.

The Supreme Court went on to observe:

The Criminal Procedure Code is the only master of the Public Prosecutor and he has to guide himself with reference to Criminal Procedure Code only. So guided, the consideration which must weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution.

The Supreme Court ruled :

Whether in an ordinary criminal case, the Public Prosecutor is ordered by the District Magistrate to move for withdrawal and the Public Prosecutor obeys and not acts, and no public policy bearing on the administration of justice is involved, the Court will refuse to accord permission.

The Supreme Court also observed :

It may be open to the District Magistrate to bring to the notice of the Public Prosecutor materials and suggest to him to consider whether the prosecution should be withdrawn or not. He cannot command where he can only commend.

It would thus be seen that the sole consideration for the Public Prosecutor when he decides to withdraw from a prosecution is a larger factor of the administration of public justice. The interest of public justice should be the paramount consideration. For instance, the communal feuds which may have been amicably settled, should not re-erupt on account of one or the two prosecutions pending. Labour disputes which might have given rise to criminal cases when settled, might probably be another instance where the interest of public justice in the broader connotation may perhaps warrant withdrawal from the prosecution. As pointed out by the Supreme Court, there may be other instances also where public justice may be served by withdrawal even apart from the merits of the case. Referring to the case before them, the learned Judge observed :

Here is an ordinary criminal case where the first informant gave information to the police, investigation followed and charge-sheet was filed. Thereafter, the learned Magistrate who tried the case framed charges. Somehow by a suspiciously mysterious process--the State Criminal Intelligence Department went into the veracity of the prosecution story by a second investigation. At that time the criminal case was already pending and the Magistrate was seized of the case. There was no reason for the police to start off on a second investigatory course. Moreover, the District Magistrate, on a report from the Superintendent of Police examined the matter and satisfied himself that the second investigation was truer than the first and therefore came to the conclusion that the case which the police brought before the Court was a false one and directed the Public Prosecutor to withdraw from the case.

The Supreme Court further observed that the statutory responsibility for deciding

upon withdrawal squarely vests on the Public Prosecutor. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. It was observed that the consideration which should weigh with him is, whether the broader cause of public justice will be advanced or retarded by the withdrawal or continuance of the prosecution. It appears that in that case the order whereby consent was granted by the Magistrate stated that "the record had been perused by the Court; the District Magistrate had directed the Public Prosecutor; the Public Prosecutor had duly obeyed and the District Magistrate had also mentioned that the Superintendent of Police had reported to him to withdraw the case." The order of the learned Magistrate did not show that he had applied his mind to find out whether there were sufficient grounds for permitting the withdrawal. The Supreme Court observed that:

Justice ordinarily demands that every case must reach its destination, not interrupted en route. If some policy consideration bearing on the administration of justice justifies withdrawal, the Court may accord permission; not if no public policy bearing on the administration of justice is involved." Referring to the facts of the case the learned Judges observed that the surrender of the discretion by the Public Prosecutor and the Magistrate were unfortunate. They pointed out that "the State should not stultify the Court by first stating that there is a true case to be tried and then make a volteface to the effect that on a second investigation the case had been discovered to be false.

20. A reference may also be made to the decision of the Division Bench of Kerala High Court in Ouseph Yakob Vs. Jose and Others, . That was a case where in a case of noting involving the breaking of bones, alleged to arise out of celebrations for victory in general election, the Public Prosecutor applied for withdrawal on the ground that "the Government have been pleased to sanction to move the Court for withdrawal". It appears that the learned Magistrate was pleased to grant consent to the withdrawal. Holding that there was no sufficient reason for the Court to give consent. The learned Judges observed :

Under section 494 it is the Public Prosecutor and not the Government that withdraws from prosecution. He does this in his own right and not on behalf of the Government, unlike the Advocate General acting u/s 333, Criminal Procedure Code, and, although he functions in an executive capacity and is therefore not precluded from acting at the instance of the Government, the withdrawal itself can only be by him and since it is a matter on which the Court must give or refuse consent in the exercise of its judicial discretion, he must give adequate reasons in support of his withdrawal. That he has acted under the directions, or with the approval of the Government, is something with which the Court is not concerned.

It appears that the learned Judges further observed :

The reasons for the withdrawal must be such as to satisfy the judicial conscience of the Court. Consent is not to be lightly given merely because the Public

Prosecutor has asked for if, without a careful and proper scrutiny of the grounds on which it is sought. and where consent has been improperly given, the order of consent, and of discharge or acquittal consequent thereto, is open to correction by the High Court in exercise of its powers of appeal or revision, as the case may be.

Bearing in mind the principles laid down in the above cases, what we have to decide in this case is whether the consent has properly granted by the learned Magistrate for the withdrawal from the prosecution. Before dealing with the facts of the case, it would be proper to set out the application made by the learned Public Prosecutor seeking permission to withdraw from the prosecution. The application which is annexed as Ex. "D" is in the following terms:

It is submitted by the Public Prosecutor, Pune as under:

That the accused in the above case have been prosecuted for the alleged offence committed by them under sections 341, 451, 323, 426, 34 of the Indian Penal Code.

That the dispute between the complainant and the accused appears to be of Civil Nature i. e. dispute between the landlord and tenant or between the parties of contract. The Public Prosecutor, Pune, therefore, feels that it is desirable that the prosecution against the accused should be withdrawn.

The Public Prosecutor, Pune, therefore, wants to withdraw from the prosecution and that your Honour may be pleased to consent to the same and discharge the accused.

The short order by which the consent has been granted by the learned Magistrate runs as follows:

Read Ex. 34. Shri S. D. Jadhav, Public Prosecutor filed an application to withdraw the case u/s 321 (a) of Criminal Procedure Code as prosecution is not willing to proceed. Application is granted and accused are discharged u/s 321 (a) of Criminal Procedure Code for the offence alleged.

21. It has been urged on behalf of the petitioner that the simple ground for consent that has been stated by the Public Prosecutor in his application was that "the dispute between the parties appear to be of civil nature i. e. the dispute between the landlord and tenant or between the parties of contract"; that therefore the Public Prosecutor felt that it was desirable that the prosecution against the accused should be withdrawn. It would appear from the short order of the learned Magistrate quoted above that he was persuaded to grant the consent because the prosecution was not willing to proceed. No reasons have been given in this order as to why the learned Magistrate held that it was a proper case for granting the consent, it being the judicial order, ordinarily the Magistrate should have recorded the reasons. of course, even if the reasons are not recorded or are not adequately recorded, the order will not be invalid on that ground alone. It will, however, be open for the party challenging the order to

show that there were no proper grounds on which the consent could have been granted.

22. We shall now refer to the facts of the case in brief. Out of the incident that arose on 8-5-1973, both the petitioner as well as respondent No. 4 filed complaints before the police. After investigation of those complaints, the police filed a charge-sheet against the present petitioner on 10-7-1973 for offences under sections 451, 343, 323 and 426 read with section 34 of the Indian Penal Code. That case was numbered as C. C. 2242 of 1973. The charge-sheet against the respondents Nos. 4 to 6 was filed on 7-8-1973 for offences under sections 451, 426, 341 and 323 read with section 34 of the Indian Penal Code. The criminal case against the petitioner was withdrawn on 30-1-1974 with the consent of the learned Magistrate. Respondent No. 4 filed Criminal Revision Application bearing No. 248 of 1974 which was dismissed by this Court on 28-10-1974. The copy of the judgment is at Ex. "B". It appears that respondent No. 4 filed Criminal Application bearing No. 283 of 1975 challenging the order of withdrawal of the prosecution against the petitioner in this Court. That was also summarily dismissed.

23. It appears that while the criminal cases were pending, the present petitioner filed Small Cause Suit bearing No. 1705 of 1973 for declaration that he was a tenant of the suit property. It was dismissed on 31-1-1975. It further appears that respondent No. 4 filed Special Civil Suit bearing No. 101 of 1975 alleging that he was the owner of the property and for possession of the property. It was decided in favour of respondent No. 4 on 28-9-1977.

24. It may further be mentioned that respondent No. 4 filed Criminal Application No. 43 of 1975 under Articles 226 and 227 of the Constitution of India to quash the proceedings in Criminal Case No. 2739 of 1973. That application was dismissed by the Division Bench of this Court on 10th March, 1978. It appears from the record that the charge was thereafter framed against respondent Nos. 4 to 5 on 19-8-1978. Before the charge was framed there were arguments advanced on behalf of the respondents that there was no sufficient material to frame the charge. The learned Magistrate holding that there was sufficient material before him to frame the charge against the accused, proceeded to frame the charge under sections 451, 341 and 323 read with section 34 of the Indian Penal Code. It was thereafter that on 2-12-1978 the learned Public Prosecutor made an application to the Court stating therein that the dispute between the complainant and the accused appeared to be of civil nature and that, therefore, he felt that it was desirable that the prosecution should be withdrawn. As we have pointed out above, the learned Magistrate was pleased to grant consent observing that he had read the application of the learned Public Prosecutor to withdraw the case and that the prosecution was not willing to proceed.

25. It has been strenuously urged on behalf of the respondents 4 to 7 that the prosecution against the petitioner was withdrawn on the ground that the dispute between the parties was one of civil nature and that, therefore, the learned

Public Prosecutor was justified in applying for the withdrawal from the prosecution on the same ground so far as the Criminal Case against respondents 4 to 6 was concerned. It may be mentioned that in Criminal Application No. 43 of 1975 which was an application filed by respondent Nos. 4 to 6, for quashing the proceedings in the Criminal Case against them, the fact that the prosecution against the present petitioner was withdrawn had been brought to the notice of the learned Judges of the Division Bench of this Court. It was argued before the learned Judges that the complaints against both the parties were in respect of one and the same incident; that it was, therefore, not in the interest of equity and justice that the case against respondent Nos. 4 to 6 should proceed. Repealing that contention, the learned Judges observed that:

Although both the complaints were in respect of one and the same incident, it was possible that different offences may be disclosed against the petitioner and respondent No. 4. It is for the Court trying the case to come to the conclusion after recording the evidence, whether the dispute is of a civil nature or disclose a criminal offence.

Referring to the contention that the Criminal Case against the petitioner was already withdrawn, the learned Judges of the Division Bench observed that:

Merely because the case against respondent No. 4 has been withdrawn, it cannot be said that in the interest of equity and justice, the case against the petitioner should also be withdrawn.

This judgment was delivered on 10th March, 1978.

26. It may be mentioned that it was also brought to the notice of the learned Judge that the civil litigations had ended in favour of the petitioner before them (i. e. respondent N05. 4 to 6 herein). Referring to the decisions in the civil suits, this Court observed that:

But that cannot mean that is a valid ground for quashing the proceedings in the criminal case against the petitioner. At the most, the decisions in civil cases will show that the petitioner was the owner and possibly in possession of the bungalow and respondent No. 4 was a trespasser and was not in possession. But it is not only the offence of houses-trespass that was alleged against the petitioner. The complaint of of respondent No. 4 was also in respect of offence under sections 323 and 426 (besides section 341) of the Indian Penal Code and it cannot be said that merely because the civil rights in the property have been decided in favour of the petitioner, even those offences could not have been committed. It is only on the evidence that would be adduced in the criminal case against the petitioner that the Court trying those offences will be able to say whether the said offences against the petitioner have been proved or not.

27. It would thus be seen that the argument that the criminal case against the present petitioner was withdrawn and therefore the case against respondent Nos. 4 to 6 also deserved to be withdrawn was repelled by this Court.

28. Mr. Hattangadi, the learned counsel for the petitioner, has invited our attention to a portion from the judgment of the Civil Judge, Senior Division, decreeing the suit of respondent Nos. 4 to 6 for possession against the present petitioner. As we have stated above, the learned civil Judge observed that the defendant in that suit i. e. the present petitioner was already in possession of the suit premises and it was the plaintiff (respondent No. 4 herein) who tried to take possession of the suit premises forcibly. It cannot therefore be contended that because the criminal case against the present petitioner has been withdrawn, the case against respondent Nos. 4 to 6 also deserves to be withdrawn. We are in agreement with the observations of the learned Judges of the Division Bench of this Court when they observe that though both the complaints were in respect of one and the same incident it was possible that different offences may be disclosed against the petitioner and respondent Nos. 4 to 6.

29. It is important to note that the learned Magistrate in spite of the argument which appears to have been advanced on behalf of respondent Nos. 4 to 6, that no charge should be framed against them, proceeded to frame the charge, thereby holding that there was sufficient material to frame the charge against respondents Nos. 4 to 6. Even so the learned Magistrate proceeded to grant sanction to the withdrawal of the prosecution against respondent No. 4 merely on the ground that the Public Prosecutor had stated that there was a dispute of civil nature. We have already quoted the observations of the Supreme Court in Nair's case (Supra) which would show that a party may be liable both under the Civil Law as well as under the Criminal Law but it does not justify either the seeking of the permission to withdraw from the prosecution or granting of it unless the matter before the Court is of a purely civil nature. When the learned magistrate was pleased to frame a charge against respondent Nos. 4 to 6, it cannot be said that there was no case at all against respondent Nos. 4 to 6. The observations in the judgment of the Court of Civil Judge, Senior Division on which strong reliance has been placed on behalf of the petitioner show that the finding of the learned civil judge was that the present petitioner was in possession of the suit property and that respondent No. 4 tried to take forcible possession of the same. We may make it clear that we are referring to these observations only for the purpose of present petition. These observations of the learned Civil Judge (S. D.) would show that when the petitioner was in possession of the property, respondent No. 4 tried to take forcible possession of the same, otherwise than under due process of law. It is, therefore, possible to argue that the criminal liability of respondents 4 to 6 is not totally excluded. We may, again make it clear that whether any such liability has in fact been incurred, would have to be decided by the Court before which the case would ultimately come up for trial. What we desire to emphasize is that in view of the material on record, it cannot be said that the dispute between the parties was of a purely civil nature.

30. It appears that the learned Magistrate who passed the impugned order might not have before him the judgment of this Court in Criminal Application No. 43 of 1975 when he made the impugned order. If that judgment would have been

placed before him, possibly the learned Magistrate would not have been inclined to grant the consent

31. On consideration of the material on record, we are inclined to think that there was no proper ground on which the consent could have been granted by the learned Magistrate. As observed by the Supreme Court in Balwant Singh's case (Supra) here is an ordinary criminal case where the first informant gave information to the police, investigation followed and the charge-sheet was filed. Thereafter, the learned Magistrate who tried the case framed the charges. In spite of the observations made by the Division Bench of this Court that no case against respondent Nos. 4 to 6 could be quashed, because the case against the present petitioner was already withdrawn, the learned Public Prosecutor proceeded to apply for the withdrawal from the prosecution. We do not think that the learned Public Prosecutor was justified in applying for withdrawal from the prosecution. It may be mentioned that it was the case of the learned Public Prosecutor that the evidence in the case would have been insufficient to sustain the conviction, it was not the case of the learned Public Prosecutor that there was some material which was subsequently available from which it could be said that the case against respondent Nos. 4 to 6 would end in dismissal. On the contrary even though the civil litigation was decided in favour of respondent No. 4, the observations in the judgment of the Civil Judge to the effect that respondent No. 4 tried to take forcible possession of the suit property support the position that this was not a case where criminal liability would be said to have been totally excluded. On consideration of all the material on record we are inclined to think that there was no proper ground for the Public Prosecutor to withdraw from the prosecution and also the learned magistrate was not justified in granting the consent for the withdrawal from the prosecution. The order, therefore, consenting to the withdrawal from the prosecution, in our view, is liable to be quashed. The learned Magistrate while passing the order has ordered that the accused shall be discharged. As the charge was already framed against the accused, the proper order to pass was that the accused shall be acquitted. In substance, the effect of granting the consent for the withdrawal from the prosecution would be to acquit the accused. As we are quashing the order granting consent to the withdrawal from the prosecution, the order acquitting the accused will have to be quashed.

32. In the result, the petition is allowed. Rule made absolute. The impugned order dated 2-12-1978 passed by the Judicial Magistrate, First Class, Pune Cantonment granting consent for the withdrawal from the prosecution of the respondents Nos. 4 to 6 is set aside. The order of acquittal passed against them is also set aside and the case is sent back for trial according to law. We direct that after the case goes back, the case shall be tried from the stage, immediately before the stage at which the withdrawal was granted. The case shall be tried by the Chief Judicial Magistrate or some other Magistrate authorised by him to try the case, other than the Magistrate who passed the impugned order.

33. We may finally make it clear that whatever we may have observed regarding

the merits of the case is for the purpose of present petition only. The learned Magistrate before whom the case will be tried will decide the case in accordance with law and in accordance with the evidence that would be adduced before him without being unduly influenced by whatever we have stated in this judgment.