

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Criminal Writ Petition No. 963 of 2015
[Vikrant Pralhad Kate & another Vs. Dr. Ranjit Vitthalrao Patil & another]

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Mr. S.D. Chande, Adv., for the petitioners.
Mr. Tembhare, APP for respondent no.2.

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CORAM : A.B. CHAUDHARI, J.

DATE : 10th December, 2015.

This Writ Petition is directed against the Order dated 05th October, 2015 passed by the Revisional Court, namely Additional Sessions Judge No.3, Akola, in Criminal Revision No. 86 of 2015 sending the matter back to the Trial Judge for fresh consideration.

The objection, that is raised by the learned counsel for the petitioner, is that the accused does not have any right to participate in the proceedings before Trial Judge and, therefore, the Revisional Court should not have entertained the Revision itself at the behest of the accused which is the well settled legal position. Perusal of the impugned order in Revision shows that the issue about the limitation was deferred by the

learned Trial Judge while making the impugned order that was the subject-matter of the Revision. Section 3 of the Limitation Act reads thus:-

“3. Bar of limitation.- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act,-

(a) A suit is instituted,-

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off, or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in Court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.”

The above provision casts a mandatory duty on the part of the court to dismiss the matter if the same is barred by limitation. The provision has been held to be mandatory and before entertaining the matter, it is the duty of the Court to find out whether the same is within

limitation or not. It is in that context the Revisional Court found that the Trial Judge has failed to perform its duty by deferring the issue of limitation, instead of answering the same according to law. Not to decide the issue of limitation, but to defer was certainly an error of jurisdiction. Therefore, the Revisional Court entertained, corrected the said error and sent the matter back to Trial Judge.

The next contention raised by learned counsel for the petitioner is that the revision itself should not have been entertained at the behest of the proposed accused, because no order of process was issued. Even if this contention is taken seriously, the fact remains that the revisional power of the Chief Judicial Magistrate's Court is on an application of a party or suo moto it can be exercised in order to correct the jurisdictional error. Therefore, at the most, it should be said that the proposed accused by filing the revision before the Sessions Judge merely brought it to the notice of the Revisional Court that the Court has committed an error of jurisdiction. In that event, it cannot be said that the Revisional Court made any mistake in entertaining the revision.

The aspect about the participation of the proposed accused next needs consideration. In the case of **Nupur Talwar Vs. Central Bureau of Investigation & another** [(2013) 1 SCC (Cri) 689], the Apex Court held thus in para 43, the relevant portion of

which is quoted below:-

“43.
There may be a situation wherein the defence (s) raised by an accused is/are factually unassailable, and the same are also not controvertible, it would, demolish the foundation of the case raised by the prosecution. The Magistrate may examine such a defence even at the stage of taking cognizance and/or issuing process.”

The above dicta is obviously, in my opinion, *obiter*. But then the *obiter dicta* laid down by the Apex Court is binding on the courts.

In the light of the above, and particularly when the issue or limitation admittedly arose for consideration and in the wake of the fact that Section 3 ordains the Magistrate or a Trial Judge to first find out whether the matter is within limitation, I do not think that the Revisional Court committed any mistake in asking the Trial Court to re-consider the aspect of limitation in view of Section 3 of the Limitation Act.

Learned counsel for the petitioner relied on two decisions of Apex Court in the cases of [1] **Manharibhai Muljibhai Kakadia & another Vs. Shaileshbhai Mohanbhai Patel & others** [(2012) 10 SCC 517], and [2] **Sonu Gupta Vs. Deepak Gupta & others** [(2015) 3 SCC 424]. I have already stated that it is the trite law that the proposed accused does not have any locus standi to participate in the proceedings before the Magistrate. But then looking to the *obiter dicta* laid

down in the case of Nupur Talwar [cited supra], I do not find any fault with the learned Revisional Court in entertaining the Revision. Not only that, in the case of Manharibhai cited above by learned counsel for the petitioner, it has been categorically held by three Judges of the Supreme Court that though the accused does not have a right to participate before the Magistrate in a case where the complaint filed by the complainant was dismissed and the complainant filed a revision before the Sessions Judge, the accused did have a right before the Revisional Court. The Supreme Court further held that thereafter if the proceedings are sent by the Revisional Court to the Magistrate, then again the proposed accused will have no right to participate in the proceedings before the Magistrate. In the light of the above, I, therefore, hold that despite remand of the matter by the Revisional Court, now the accused will have no right to participate before the Trial Judge after remand.

In the result, Criminal Writ Petition No.963 of 2015 is rejected.

Judge

[hedau]