

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 179 OF 2016

Dr. Anil s/o Omprakash Bhutada,
Age: 40 years, Occ: Medical Practice,
R/o. Dr. Reddy Hospital, Ambejogai,
Tal. Ambejogai, Dist. Beed.

...PETITIONER

VERSUS

1. The State of Maharashtra,
through the Secretary,
Health Department,
Mantralaya, Mumbai-32.

2. The Civil Surgeon,
Beed, Dist. Beed.

...RESPONDENTS

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Mr. R.R. Mantri, Advocate h/f Mr. R. R. Sancheti, Advocate for
petitioner
Mr. A. R. Kale, A.P.P. for respondents

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CORAM : N.W. SAMBRE, J.

Date : 13th June, 2016

ORDER :

This petition is by the petitioner-accused seeking quashing
and setting aside the proceedings initiated against him vide R.C.C.
No. 222 of 2012 and order dated 29/01/2016, passed by the learned

Additional Sessions Judge, Ambajogai, Dist. Beed in Criminal Revision No. 28 of 2014, refusing to discharge present petitioner-accused from the said criminal case.

2. The facts as are necessary for deciding the present writ petition are as under:

The petitioner claimed to have completed his M.B.B.S. in 1998 and D.G.O. in 2001, as such the petitioner is Gynecologist within the meaning of Section 2 (f) of the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter shall be referred as "The Act of 1994" for the sake of brevity). It is the case of the present petitioner that he is attached with Reddy Hospital, Ambajogai.

3. According to him, Dr. Karnavat and his wife Mrs. Surekha are running Shivam Sonography Centre at Ambajogai, and authority under the Act who inspected the centre on 18/11/2011, noted that patient by name Renuka Ingle was examined by said centre, in relation to her form 'F' under the Rules framed under the above referred Act, particularly Rule 9 is not complied. Sonography machine, as such was seized alongwith certain record which

includes referral forms, consent forms, U.S.G. report files for the month of September and October, 2011, 'F' form register for September, 2011 and Registration Certificate and show cause notice was issued to said Dr. Karnavat and his wife. While responding to the show cause notice, said Dr. Karnavat has denied the contents thereof i.e. show cause issued by Civil Surgeon, District Hospital, Beed, however, Medical Superintendent, Rural Hospital, Dhanora, Tal. Ambajogai, Dist. Beed, Dr. Dileep Kashinath Saundale initiated proceedings against the said Dr. Karnavat pursuant to the provisions of Section 9 (4) of the Act of 1994.

4. As the said complaint case was filed pursuant to the provisions of the Act and Rules framed thereunder, in view of the provisions of the Section 200 (a) of the Code of Criminal Procedure, learned Judicial Magistrate First Class, Ambajogai posted the matter for hearing on 27/11/2012. Learned Magistrate, by an order dated 27/11/2012, has issued process against Dr. Mr. & Mrs. Karnavat i.e. accused No. 1 and 2 pursuant to the provisions of Section 204 (1)(a) of the Code of Criminal Procedure for violating the provisions of Rules framed under the Act of 1994, as offence punishable under Section 25 of the Act of 1994.

5. It is the case of the petitioner that learned Magistrate issued show cause notice, calling upon him as to why he should not be impleaded as an accused pursuant to the provisions of Section 319 of the Code of Criminal Procedure. Learned Magistrate then passed an order on 18/03/2014 impleading the present petitioner as an accused No. 3.

6. Against the said order, revision was preferred before learned Sessions Judge, Ambajogai vide Criminal Revision No. 28 of 2014, claiming therein that the order dated 18/03/2014 impleading him as an accused and order dated 10/02/2014 issuing show cause notice be quashed and set aside. The said revision, being revision No. 28 of 2014 came to be dismissed by judgment and order dated 29/01/2016. As such present writ petition seeking quashing of the proceedings and also the order impleading as an accused.

7. Heard Mr. Mantri, learned Counsel for the petitioner. He would submit that in the present case, original accused Mr and Mrs. Karnavat carried out sonography of the patient Renuka Manoj Ingale. He would then submit that, on 18/10/2011, sonography centre of the other co-accused namely, Shivam Sonograpghy was

raided and notice was issued to Mr. and Mrs Karnavat (Dr. Ms. Pagariya) on 19/12/2011. He would submit that, while giving explanation to show cause notice, name of present petitioner was mentioned by Dr. Surekha Pagariya, co-accused claiming that said patient was referred by present petitioner to the said doctor. He would then submit that there are no allegations what so ever against present petitioner in the complaint filed by appropriate authority before learned Magistrate being R.C.C. No. 222 of 2012. He would then urge that in view of above, the petitioner ought not to have been ordered to be an accused in the crime in question, particularly when the powers under Section 319 of the Code of Criminal Procedure cannot be exercised as the Act of 1994 and Rules framed thereunder do not recognise any such procedure. He would then submit that, the complaint as against present petitioner as such renders incompetent and hence, present petition needs to be allowed.

8. He would then invite attention of this Court to the provisions of the Act of 1994 and the Rules framed thereunder, so as to canvass that the Act does not mandate the present petitioner to comply with the provisions, as he has not committed any offence within the

meaning of provisions of Rule 9, Sub-rule 4 and Section 25 of the Act of 1994. According to him, referral communication which is alleged to have been issued by the petitioner, was never issued by him and such documents, cannot be formed to be a basis for impleading him as an accused. Mr Mantri would then submit that in absence of any obligations under the statute, the proceedings in question initiated against the petitioner, needs to be quashed and set aside. He would then urge that the respective orders of impleading the petitioner as an accused, issuance of process against him and order passed by learned Additional Sessions Judge in revision, in terms of Act of 1994 and Rules framed thereunder, do not speak of commission of any offence. He would then rely upon judgment of the Apex Court in the matter of **Hardeep Singh Vs. State of Punjab & ors. reported in AIR 2014 S.C. 1400**, particularly the observations made in paragraph Nos. 48, 49, 50, 53, 69, 70, 71 and 77, so as to submit that the proceedings in question are not tenable against him, as provisions of Section 319 of the Code of Criminal Procedure cannot be invoked against him in a complaint case. In addition, he would rely upon paragraph Nos. 20, 21, 25, 31, 33 and 35 of the judgment of the Division Bench in the matter of **Dr. Paayal Shreekant Chobe Vs. State of Maharashtra &**

ors. delivered in Writ Petition No. 250 of 2015, so as to canvass that in view of absence of any obligations under the Act of 1994, the very proceedings against the present petitioner, are not maintainable and he be discharged.

9. Mr Mantri would then submit that the charge is framed as against other co-accused and till date, charge is not framed against the petitioner herein.

10. While countering above referred submissions, learned A.P.P. would strenuously urge that the proceedings initiated against the present petitioner, pursuant to the Act of 1994, are very much maintainable. Learned A.P.P. initially has invited my attention to the role attributed to the present petitioner, particularly the communication dated 10/09/2011 issued under his signature, referring the said patient Renuka Manoj Ingale for pelvic sonography, to rule out retained bits of incomplete abortion. Learned A.P.P. would then submit that the said communication is intentionally suppressed by the petitioner from this Court, so as to misdirect the Court in the matter of role attributed to and played by him in commission of the crime. He would then submit that admittedly, present petitioner is a Gynecologist within the meaning of

Section 2(f) of the Act of 1994 and the fact remains that perusal of communication dated 10/09/2011, referred above, speaks of carrying out the abortion of the patient namely, Renuka Manoj Ingale by him as he had referred the said patient for sonography, so as to rule out retained bits of incomplete abortion. According to learned A.P.P., the fact that the patient had undergone abortion could be inferred from the contents of the said letter and coupled with the background that the patient Renuka Manoj Ingale was having five years old daughter, prompts the inference that abortion was of a female fetus and the same was illegal. Learned A.P.P., then would urge that the very commission of offence in question, is because of the conduct of present petitioner, as available evidence takes to the only conclusion that he has carried out abortion of the patient. He would then submit that this Court should not go into probabilities of the case of the petitioner as Section 319 of the Code of Criminal Procedure as is invoked against him, is based on sufficient evidence and appropriate material as was brought on record. Learned A.P.P. then submits that the offence alleged as against the present petitioner is an offence against the society, having far reaching effect of adverse impact, hence the petition at this stage does not call for any interference and deserves to be dismissed.

11. The above submissions of the respective Counsel have prompted me to scan the judgment of the Apex Court as cited by Mr. Mantri, learned Counsel for the petitioner in the matter of Hardeep Singh (*supra*), so as to understand the scope of Section 319 of the Code of Criminal Procedure and applicability of the same to the present case.

12. It is also required to be ascertained, whether Act of 1994 and Rules framed thereunder, obligates the present petitioner to perform himself in accordance with the provisions of the said Act and Rules, even though he is not operating any registered clinic or sonography centre.

13. So as to understand the scheme of the Act, it is required to first dwelt upon the object, with which the Act of 1994 is incorporated. The Act of 1994 was enacted by the Parliament so as to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or

sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act of 1994 also prohibits the advertisement of the pre-natal diagnostic techniques for detection or determination of sex or for regulation of such techniques for the purpose of detection of specific genetic abnormalities or disorders. The permitting use of such techniques only under certain conditions is an important object that is sought to be achieved and such object is sought to be achieved by ordering registration of the institutions and to punish violators. The Act of 1994 then underwent amendment vide amendment Act No. 14 of 2003 for taking care, certain inadequate and practical difficulties in the administration of the Act of 1994.

14. Sections 27 and 28 of the PCPNDT Act read thus :

"27. Offence to be cognizable, non-bailable and non-compoundable. — Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

28. Cognizance of offences. — (1) No Court shall take cognizance of an offence under this Act except on a complaint made by -

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.

Explanation. — For the purpose of this clause, "person" includes a social organisation.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person. "

15. The above referred Sections provide for the offences under the said Act be cognizable, non-bailable and non-compoundable and the manner and the mode in which cognizance of offences thereunder can be taken recourse to.

16. In the above referred background, if the issue that is sought to be canvassed by Mr. Mantri, learned Counsel for the petitioner is to be evaluated, the factual matrix of which this Court should take note of is Dr. Dileep Saundale, Medical Superintendent, Rural Hospital,

Dhanora, Tal. Ambajogai, Dist. Beed filed complaint case before the Magistrate, pursuant to the provisions of Section 28 of PCPNDT Act against Dr. Anand Karnavat and Dr. Surekha Pagariya claiming contravention of the provisions of the said Act. The allegations in the complaint against both these accused are that Dr. Pagariya runs sonography centre, which is operated by Dr. Karnavat. In the matter of patient Renuka Ingale, who is already having daughter of about more than 6 years, was referred by the present petitioner for the purpose of ruling out retained endometrial cavity, as a consequence of incomplete abortion. So far as the said patient is concerned, the last menstrual period information in the prescribed form and other mandatory information was not filled in and as such, violation of Rule 9(4), 10(1A) and Section 4(3) of the PCPNDT Act was alleged. The Magistrate, pursuant to the complaint in the above referred background, issued process against both these doctors on 27th November, 2012, pursuant to the provisions of Sections 200 of the Criminal Procedure Code. The Magistrate noted that, since the complaint is filed by public servant, in exercise of powers/duty conferred on him, without recording verification and evidence, he proceeded to issue process.

17. It is subsequent to the order of the issuance of process, a show cause notice was issued to the present petitioner on 10th February, 2014 (Exh. 26), calling upon him to explain as to why recourse cannot be taken to Section 319 of the Code of Criminal Procedure i.e. why the petitioner be not proceeded against in the complaint by adding him, as he appears to be guilty of an offence under PCPNDT Act and vide order dated 18th March, 2014, he was added as an accused, which was subject matter of challenge in Criminal Revision Application No. 28 of 2014, before the learned Sessions Judge, Ambajogai, who has dismissed the revision on 29th January, 2016.

18. Mr. Mantri, learned Counsel for the petitioner made three fold contentions as are recorded herein above. So far as his contention that though the petitioner was put to notice, as to why he should not be added as an accused, no opportunity was given to him to put forth represent his case and as such, the order under Section 318 of the Code of Criminal Procedure is vitiated is concerned, in my opinion, the said submissions are required to be rejected for the reason that upon plain reading of Section 319 of the Code of Criminal Procedure, it does not contemplate any show cause notice

or opportunity of hearing to an accused. What is contemplated in sub-section (1) of Section 319 of the Code of Criminal Procedure is that, if during the course of any inquiry or trial of an offence, it appears from the evidence that a person who is not an accused, has committed an offence for which such person could be tried together with the accused, the Court has power to proceed against such person.

19. In my opinion, by adding such person as an accused, none of his rights are curtailed but for setting criminal law in motion, as enough material could be noticed against him. Section is quite clear that the Court, based on evidence, noted during enquiry or trial, can proceed to add an accused who could be tried. As such, the said contention of the petitioner, seeking right of hearing, in my opinion, is liable to be rejected. Apart from above, upon plain reading of Section 319 of the Code of Criminal Procedure, the element of opportunity of hearing either in the form of personal hearing or show cause notice, cannot be read out or inferred in the scheme of Section 319 of the Act. As such, the said contention of the learned Counsel for the petitioner is required to be rejected.

20. So far as the next contention of the learned Counsel for the petitioner as regards bar under Section 28 of the PCPNDT Act is concerned, for buffering his argument, learned Counsel has relied upon the judgment of the Division Bench of this Court in Criminal Writ Petition No. 250 of 2015 (**Dr. Paayal w/o Shreekant Chobe Vs. The State of Maharashtra & ors.**), decided on 16th October, 2015. The Division Bench of this Court had an occasion to decide the competency of the officer designated by the State Government to prefer a complaint for the violation of provisions of PCPNDT Act and while doing so, in paragraph 30 of the said judgment, this Court has observed thus :

“30] This crystallized position makes it clear that, if the post of the District Civil Surgeon is available at Aurangabad then neither the Medical Superintendent affiliated to the Medical College at Aurangabad nor the Health Officer of the Aurangabad Municipal Corporation can act as an Appropriate Authority under the PCPNDT Act for Aurangabad. In this view of the matter it is not necessary for us to examine the merits of submission of Shri Salunke, the learned counsel for the petitioner that being in additional charge of the post of Medical Officer, Health, respondent No.3 Dr. Jayshree

Kulkarni cannot be an Appropriate Authority under the PCPNDT Act. Similarly, there is no merit in the contention of the learned counsel for the petitioner that without any powers, on 16-6-2012, Dr. Dimpal Pardesi and Ujjwala Bhamre and on 18-6-2012, they both alongwith Dr. Manisha Bondwe from respondent No.2 Corporation inspected her clinic. It is seen from the order dated 8-6-2012 of the District Collector, Aurangabad that he being an Appropriate Authority had authorized them to inspect various Genetic Clinics and Laboratories at Aurangabad. The notification appointing the Collector as an Appropriate Authority dated 9-5-2007 is at Record page 146. Rule 12 of the Rules framed under the PCPNDT Act empowers the Appropriate Authority to authorize any officer to conduct search and seizure.”

21. It is to be noted that the said judgment does not deal with the issue, whether Section 319 of the Code of Criminal Procedure could be invoked against the accused in a complaint preferred under Section 28 of the PCPNDT Act. In my opinion, the provisions of Section 28 of the PCPNDT Act are already looked into by the Division Bench of this Court and while doing so, it is also observed by this Court that it is not only competent person under PCPNDT Act, but an individual can also prefer a complaint. Appropriate

support to that effect can be drawn from the observations made in paragraph No. 21 of the said judgment, which read thus :

“21] Careful perusal of the provisions of Section 28 of the PCPNDT Act which deals with cognizance of offences under the said Act reveals that it prohibits initiation of prosecution for any offence under the said Act except on a complaint made by the Appropriate Authority concerned, or any officer authorized for the said purpose by the Central or State Government as the case may be or by any officer authorized for this purpose by the Appropriate Authority. No doubt apart from these persons, a private person can also institute prosecution under this Act after fulfilling the conditions prescribed by Section 28 of the said Act. Thus provision contained in Section 28(1) of the PCPNDT Act does not contemplate the lodging of a private criminal complaint for the offences under the said Act by any person other than the person empowered in the said Section. The bar for institution of prosecution is at the threshold itself and the Court taking cognizance of an offence punishable under the PCPNDT Act is duty bound to satisfy itself that the complaint is lodged by any of the Officer/person authorized to do so as per the provision of Section 28 of the PCPNDT Act. Provision of Section 28 of the PCPNDT Act mandates that the complaint for the offence punishable under the said Act can only be made by the Officers/persons authorized under the said

Section. In absence of such duly filed Criminal Complaint, the Court is not empowered to take cognizance of the alleged offences. So far as the instant case is concerned, respondent no.3 - Dr. Jayshree Kulkarni has lodged the private criminal complaint bearing R.C.C. No. 541/2013 purportedly acting as an Appropriate Authority being in-charge of the post of Medical Officer, Health with respondent no.2 - Aurangabad Municipal Corporation. At this juncture, it is apposite to quote relevant observation of the Hon'ble Apex Court in the case of **A.K. Roy & another (supra)**. While considering the provision of Section 20(1) of the Prevention of Food Adulteration Act 1954 dealing with cognizance and trial of offences under the said Act, it is held thus by the Hon'ble Apex Court :-

“ A careful analysis of the language of S.20(1) of the Act clearly shows that it inhibits institution of prosecutions for an offence under the Act except on fulfillment of one or the other or the two conditions. Either the prosecutions must be instituted by the Central Government or the State Government or a person authorised in that behalf by the Central Government or the State Government, or the prosecutions should be instituted with the written consent of any of the four specified categories of authorities or persons. If either of these two conditions is satisfied, there would be sufficient authority for the institution of such a prosecution for

an offence under the Act. The provision contained in S.20(1) of the Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of S. 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in S.20(1) "No prosecution for an offence under this Act .. shall be instituted except by or with the written consent of" plainly make the requirements of the section imperative. That conclusion of ours must necessarily follow from the well known rule of construction of inference to be drawn from the negative language used in a statute stated by Craies on Statute Law, 6th edn., p. 263 in his own terse language :

"If the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting S.20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise. ”

Keeping in mind this exposition of the Hon'ble Apex Court, it becomes clear that as Section 28 of the PCPNDT Act in terms provides for the category of persons who are empowered to institute the prosecution for the offences under the said Act, no person other than the one falling in the category of persons mentioned in Section 28 of the PCPNDT Act is empowered to institute the prosecution. The complaint for the offences under the PCPNDT Act as such can be filed only by the Appropriate Authority concerned or by any officer authorized for this purpose by the Central or the State Government as the case may be, or by the Appropriate Authority apart from a private person on giving notice of not less than 15 days in the prescribed manner to the Appropriate Authority. Unless and until the complaint for the offence punishable under the PCPNDT Act is

instituted by any of these Officers/persons, the Court is not empowered to take cognizance of the offence alleged in the said complaint. Any other officer howsoever high ranking he may be in the hierarchy cannot institute the prosecution for the offence punishable under the PCPNDT Act and complaint if any made by such unauthorised complainant cannot be validly entertained.”

22. The issue as regards invoking of Section 319 of the Code of Criminal Procedure qua a complaint case is concerned, the powers under Section 319, even can be applied to a complaint case and language employed in Sub-section 1 of Section 319 of the Code of Criminal Procedure is amply clear. The wording of Section 319 of the Code of Criminal Procedure speak “in the course of Inquiry into or trial of an offence”. The provisions of Section 190 or Section 201 and 203 of the Code of Criminal Procedure contemplate initial Inquiry into the matter. Appropriate support can be drawn from the judgment of this Court in the matter of **Hardeep Singh Vs. State of Punjab & ors.** and other companion matters reported in **AIR 2014 Supreme Court 1400**, wherein, in paragraph Nos. 49, 50, 51, 52 and 53, the Apex Court has observed thus :

“49. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 Cr.P.C. cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in Dharam Pal (CB). The dispute therein was resolved visualizing a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 Cr.P.C. is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 Cr.P.C. confers power of original jurisdiction upon the Sessions Court to add an accused once the case has been committed to it.

50. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material

that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as

explained herein above. “

“51. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 Cr.P.C. i.e. provisions of Sections 200, 201, 202, etc. Cr.P.C. applicable in the case of Complaint Cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint Cases is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872, (hereinafter referred to as the ‘Evidence Act’) comes before the court. There does not seem to be any restriction in the provisions of Section 319 Cr.P.C. so as to preclude such evidence as coming before the court in Complaint Cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the Court, such evidence can be used only to corroborate the evidence recorded during the trial for the purpose of Section 319 Cr.P.C., if so required.

52. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section

319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

53. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice.

Question No. (iii) : Whether the word “evidence” used in Section 319(1), Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial?”

54. To answer the questions and to resolve the

impediment that is being faced by the trial courts in exercising of powers under Section 319, Cr.P.C., the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that comes up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319, Cr.P.C. indicate that the material has to be “where.....it appears from the evidence” before the court.

55. Before we answer this issue, let us examine the meaning of the word 'evidence'. According to Section 3 of the Evidence Act, 'evidence' means and includes :

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced

for the inspection of the Court, such statements are called documentary evidence.

23. What could be summarized from the above observations of the Apex Court is, the powers under Section 319 are required to be exercised by the learned trial Court qua ordering impleadment of new accused based on the material noticed at the stage of recording of evidence after the trial has commenced. The evidence as is brought on record after commencement of trial should satisfy the learned Magistrate that there exists enough material and the scope to be inferred therefrom to form an opinion that the accused person needs to be impleaded.

24. From the above observations, it is aptly clear that it is only after recording the evidence during the conduct of trial in a complaint, the Court can take recourse to the provisions of Section 319 for ordering addition of an accused. In addition to above, the Apex Court, in the matter of ***Hardei Vs. State of U.P.*** reported in ***2016 Cr. L.J. 2255*** in paragraph No. 9, while dealing with the procedure to be adopted under Section 319, has observed thus :

“9. It is well accepted in criminal jurisprudence that F.I.R. may not contain all the details of the occurrence or even the names of all the accused. It is not expected to be an encyclopedia even of facts already known. There are varieties of crimes and by their very nature, details of some crimes can be unfolded only by a detailed and expert investigation. This is more true in crimes involving conspiracy, economic offences or cases not founded on eyewitnesses accounts. The fact that Police chose not to send up a suspect to face trial does not affect power of the trial court under Section 319 of the Cr.P.C. to summon such a person on account of evidence recorded during trial. This is the factual scenario in the case at hand also.”

25. In the case in hand, it could be noticed that same was initiated pursuant to the provisions of Chapter XV of the Code of Criminal Procedure by a public servant. In the said case, the trial is yet to be commenced. The trial Court has started recording the evidence before framing of charge. The Apex Court in paragraph-55 of the judgment in **Hardeep Sing** (supra) noted that the proceedings initiated under Chapter XV in the form of a complaint case, the material evidence in the form of document brought on record is not sufficient to infer the exercise of powers under Section 319 of the

Code of Criminal Procedure. What is observed by the Apex Court is that for the purpose of exercising the powers under the said Section, there should appear some evidence against a person not proceeded against and such evidence should be noticed during the course of the conduct of the trial while recording the evidence or thereafter. The stage of such proceedings for exercise of powers under Section 319 is not material. The Apex Court while dealing with the issue as regards the word 'evidence' has taken recourse to the provisions of Section 3 of the Evidence Act and based on the language employed has observed that it is exhaustive definition. The Apex Court then proceeded to record that it is only after the case reaches to the stage of inquiry or trial, the powers should be exercised under Section 319, that too based on the evidence adduced. The proceedings of the trial having reached at the stage of recording of evidence appears to be a matured stage at which the learned trial Court can exercise the powers under Section 319 as material in the form of evidence is available to draw decision to that effect.

The powers thereunder are required to be exercised if it is noticed that there is an erroneous omission of a person whose complicity could be judged and also with an object of doing complete

justice. Amongst other, one of the objects is to usher faith in judicial system. It is also observed that so far as the proceedings under Chapter XV of the Criminal Procedure Code initiated by a public servant against the accused persons is a category of trial which is distinct from the other trials. However, the powers under Section 319 are not immune to the proceedings under Chapter XV and could be exercised at the stage mentioned herein above.

26. What is noticed in the present case is the learned Magistrate by the order impugned has exercised the powers before recording of evidence in the matter has commenced, that too at pretrial stage.

27. The complaint under Chapter XV was moved on or about 26th November, 2012 and the Court ordered issuance of process as per Section 204 against accused Nos. 1 and 2 therein vide order dated 27th November, 2012. The present petitioner was put to notice by the Court as could be inferred from the record, that as to why he should not be added as an accused and he was ordered to be added as an accused on 18th March, 2014. While doing so, I hardly see any material on record to infer that before learned trial Court, the trial had commenced and during recording of evidence material has been noticed so as to order his impleadment.

28. It is then to be noted that the powers exercised by the Magistrate at a stage of framing of charge is not a issue which was gone into by the learned Sessions Judge while dealing with the revision of the petitioner and the learned Sessions Judge has proceeded to dismiss the revision without recording any finding on the said issue.

29. In the above referred background, as such, in my opinion, case for showing indulgence is made out. The order passed by the learned Magistrate directing impleadment of the present petitioner as an accused on 18th March, 2014, is hereby quashed and set aside.

30. The learned Magistrate is directed to proceed ahead with the matter pursuant to the scheme provided under Chapter XV of the Code of Criminal Procedure and other provisions therein, with liberty to pass a fresh order of ordering impleadment of the petitioner as an accused, in the light of the observations made herein above.

31. Criminal Writ Petition, as such, stands partly allowed in above terms.

[N.W. SAMBRE, J.]

Tupe/