

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2323 OF 2016

Mr. Nusli N. Wadia. ... Petitioner.
Versus
Phiroze Dastur & anr. ... Respondents.

Mr. A.H.H. Ponda a/w. Mr. Abhay Jadeja a/w. Mr. Varun Satya i/b.
Crawford Bayley & Co., advocate for petitioner.

Ms. Charmaine Bocarro a/w. Ms. Swati Pandit i/b. M/s. Mulla &
Mulla & GraiGie Blunt & Carde, advocate for respondent No. 1.

Ms. A.T. Jhaveri, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : AUGUST 4 2016

P.C.:

1 Heard the learned Counsel for the Petitioner, learned Counsel
for the respondent and the learned APP for State.

2 The Petitioner herein who happens to be the original
complainant in C.C. No. 147/S/1993 questions the correctness and
validity of the order dated 14/6/2016 passed by the learned
Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai. The learned

Metropolitan Magistrate while deciding the application filed by the complainant under Section 319 of the Code of Criminal Procedure, 1973 requesting the Court to add Mr. Kamal Morarka, Mr. Vijay Kalantri, Mr. Deepak Neogi and Mr. Anthony Jesudasan as accused, has issued show cause notice to the proposed accused in the following words :

“4. As stated supra in the present case the proposed accused are not accused since inception. Hence as per the observation of the Hon'ble Supreme Court in a case of **Jogendra Yadav v/s. State of Bihar in Cr. Appl. No. 342 of 2012** it is just and proper to issue notice to the proposed accused that why they should not be added in the present case as accused. Hence, issue notice to the proposed accused on P.F. Returnable on 05/07/2016. The complainant is here by directed to collect the notice for its execution if he desires so.”

3 It appears that the learned Metropolitan Magistrate has placed implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **Jogendra Yadav & ors v/s. State of Bihar & anr. in Criminal Appeal No. 343 of 2012.**

4 The Learned Counsel for the petitioner herein submits that the learned Metropolitan Magistrate ought not to have issued show cause notice to the accused, calling upon him to answer as to why they should not be arraigned as accused, since section 319 of the Code of Criminal Procedure, 1973 contemplate issuance of summons or warrants. The Statute does not contemplate issuance of a show cause notice to the accused as the accused has no locus at that stage.

5 Section 319 of the Code of Criminal Procedure, 1973 contemplates as follows :

Section 319 Cr.P.C..Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

- (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
- (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

6 The provisions laid down in the Statute mandate the Court to proceed against such person for the offence which he appears to have committed. Needless to say that the proposed accused is to be arraigned as an accused on the basis of the evidence recorded at the time of trial. Section 319 sub-clause (4) makes it amply clear that the case may proceed against the proposed accused as if he had been an accused person when the court took cognisance of the offence at the stage of commencement of the trial. It is clear that it would be on the basis of evidence that the Magistrate arrived at a conclusion and is prima facie satisfied that the proposed accused needs to be tried alongwith the other accused persons against whom the trial had already commenced. In such a situation, there would be no occasion for calling upon the accused to explain as to why he should not be made an accused. In the case of **Jogendra Yadav & ors(cited supra)**, the Hon'ble Apex Court was considering the issue as to

whether the accused arraigned by virtue of Section 319 of the Code of Criminal Procedure, would be entitled to be discharged by the same Court.

7 The observations of the Hon'ble Apex Court in the case of **Jogendra Yadav (cited supra)** are as follows :

“An accused since inception is not necessarily heard before he is added as an accused. **However, a person who is added as an accused under Section 319 of the Code of Criminal Procedure is necessarily heard before being so added.**”

The learned Magistrate has relied upon these observations while passing the impugned order.

8 In the same Judgment, the Hon'ble Apex Court relying upon an earlier Judgment of the Constitution Bench decision in **Hardeep Singh v/s. State of Punjab and ors. reported (2014) 3 SCC 92** has held that-

“The standard of proof employed for summoning a person as an accused under Section 319 of the Cr. P.C., is higher than the standard of proof employed for framing a charge against an accused. The Court observed for the purpose of Section 319 of the Cr. P.C., that “what is, therefore, necessary for the Court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to the conviction of a person sought to be added as the accused in the case.””

It is further observed by the Hon'ble Apex Court that-

“The exercise of the power under Section 319 of the Cr. P.C., must be placed on a higher pedestal. Needless to say the accused summoned under Section 319 of the Cr. P.C., are entitled to invoke remedy under law against an illegal or improper exercise of the power under Section 319, but cannot have the effect of the order undone by seeking a discharge under Section 227 of the Cr. P.C. If allowed to, such an action of discharge would not be in accordance with the purpose of the Cr.P.C in enacting Section 319 which empowers the Court to summon a person for being tried along with the other accused where it appears from the evidence that he has committed an offence.”

9 What is emphasised by the Hon'ble Apex Court is that summons is issued to the proposed accused. A summons cannot be said to be equivalent to show cause notice. Issuing of summons would amount to taking of cognisance and then summoning the persons to be tried alongwith the original accused.

10 The meaning of the words “Summon” and “Summons” as per the Black's Law Dictionary is as follows :

“Summon means to command (a persons) by service of a summons to appear in court and the meaning of summons is – formerly, a writ directing a sheriff to summon a defendant to appear in court.”

Section 319 of the Code of Criminal Procedure, 1973 also contemplates issuance of summons or a warrant.

11 The learned Counsel for the Petitioner submits that the Judgment of the Hon'ble Apex Court in the case of **Anju Choudhari v/s. State of Utter Pradesh and anr. reported in (2013) 6 SCC 384**

was not brought to the notice of the Hon'ble Apex Court at the time of hearing of **Jogendra Yadav's case (cited supra)**. The Hon'ble Apex Court in the case of **Anju Choudhari (cited supra)** had specifically framed a issue as to whether an accused is entitled to hearing pre-registration of FIR. The Hon'ble Apex Court has held as follows :

“Even in the cases where report under [Section 173\(2\)](#) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under [Section 319](#) can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law. .

12 The Hon'ble Apex Court in the case of **Jogendra Yadav (cited supra)** has not considered the ruling of the Hon'ble Apex Court in the case of **Anju Choudhary(cited supra)**. In the case of **Anju Choudhary (cited supra)**, the Hon'ble Apex Court had considered the ruling of the Hon'ble Apex Court in the case of **Samaj Parivartan Samuday v/s. State of Karnataka reporte in (2012) 7 SCC 407**, wherein the Hon'ble Apex Court had held that -

“It is only in those cases where the Court directs initiation of investigation by a specialised agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an **absolute rule of law** and is primarily a matter in the judicial discretion of the Court.”

13 The learned Counsel for the respondent No. 1 supports the order dated 14/6/2016 passed by the Learned Metropolitan Magistrate and vehemently submits that it is in the interest of justice that an accused needs to be necessarily heard before being arraigned as an accused. The learned Counsel has submitted that there are judgments passed by the Hon'ble Division Bench of this Court where there was challenge to the summons under Section 319 of the Code of Criminal Procedure, 1973 and that the Hon'ble Division Bench was pleased to remand the matter for reconsideration. However, as on today, the Judgment of the Hon'ble Apex Court in the case of **Hardeep Singh and Anju Choudhary (cited supra)** would be the law of land. Moreover, the mandate of the statute has to be followed in letter and spirit, as the intention of the legislature in enacting

Section 319 of the Code of Criminal Procedure, 1973, after accepting recommendation of the Law Commission is clear upon reading the provisions under Section 319 sub-clause 4 of the Code of Criminal Procedure, 1973.

14 In the case of **Hardeep Singh (cited supra)**, the Hon'ble Apex Court has considered the issue as to whether evidence used in Section 319 (1) of Cr. P.C. could only mean evidence tested by cross-examination or whether the Court can arraign an accused after recording of the examination-in-chief of the witness. The Hon'ble Apex Court has answered the issue as follows :

“Considering the fact that under [Section 319](#) Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under [Section 319\(4\)](#) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.”

It was further held that -

“The degree of satisfaction that will be required for summoning a person under [Section 319](#) Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused.”

15 The Judgment in the case of **Hardeep Singh (cited supra)** is a judgment by the larger bench of five judges. This Court cannot be oblivious of the fact that a person is arraigned as an accused under Section 319 of the Code of Criminal Procedure, 1973 at the stage of trial and not at the stage of enquiry. The purpose of the trial would be to hold a person liable on the basis of facts presented and evidence led to substantiate the charges. A summons is issued to a person under Section 319 of the Code of Criminal Procedure only after the Court is satisfied that the proposed accused deserves to be tried alongwith the original accused. At this juncture, there is no question of calling the proposed accused to show cause as to why he should

not be tried alongwith original accused persons. This Court also is of the opinion that proposed accused is not summoned only on the basis of the probability of his complicity, but on the basis of some evidence, which had surfaced in the course of the trial.

16 As far as the present case is concerned, it appears that the learned Magistrate was satisfied that the proposed accused needs to be summoned. However, relying upon an observation in the case of **Jogendra Yadav (cited supra)** the learned Magistrate appears to have issued show cause notice to the proposed accused, which is neither contemplated by the Statute nor could stand to reason in view of the Judgment of the Hon'ble Apex Court in the case **Hardeep Singh (cited supra)**. In fact, "evidence" as defined in the Indian Evidence act, 1872 would mean and include all statements, which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry. It is clarified by the Hon'ble Apex Court in the case of **Hardeep Singh (cited supra)** that at the stage of exercising powers under Section 319 of the Code of Criminal

Procedure, the concerned court shall rely upon examination-in-chief without waiting for the cross-examination.

17 The learned Counsel for the Petitioner has also placed reliance upon the 41st report of the Law Commission of India, which was submitted prior to amendment of the Code of Criminal Procedure, 1973. It appears that the legislature in its wisdom had accepted the recommendation of the Law Commission to amend Section 351 of the old Code of Criminal Procedure and accordingly Section 351 was amended and is to be read as section 319 of the Code of Criminal procedure, 1973.

18 In view of the above discussion, the order dated 14/6/2016 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai deserves to be quashed and set aside. There is no reason for issuing show cause notice to the proposed accused. The learned Magistrate is hereby directed to proceed with the application filed by the complainant, seeking the addition of accused in accordance with

law and in view of the judgment in the case of **Anju Choudhary and Hardeep Singh (Cited supra)**.

19 The Rule is made absolute in terms of prayer clause (a). The Petition is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)