

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 1380 OF 2017

HSBC PI Holdings (Mauritius) Limited

....Petitioner

Vs.

The State of Maharashtra and others

... Respondents

Mr. Mahesh Jethmalani senior counsel a/w
Mr. Pranav Badheka a/w Ms. Priyanka Shetty a/w Ms. Gurjan Mangla
a/w Ms. Uttara Srinivasan i/b AZB and Partners Advocate for Petitioner
Mr. Vikram Chaudhri, senior Advocate a/w Mr. Sujay Kantawala, Mr.
M. K. Kochrekar, Mr. H. K. Sudhakaran, Mr. Yogesh Rohira i/b
M/s. HKS Legal for Respondent Nos. 2 to 5.
Mr. S. R. Agarkar APP for the State.

CORAM: SMT.SADHANA S.JADHAV, J.

DATED : 13th APRIL, 2017.

P.C.

- 1) Heard.
- 2) Rule. Rule made returnable forthwith with the consent of the parties.
- 3) Petitioner being aggrieved by the order dated 05/10/2016 passed by Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, has

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approached this Court under Article 227 of the Constitution of India and under section 482 of Code of Criminal Procedure, 1973. The operative part of the impugned order is as follows:

- “1. *Application is rejected.*
2. *The accused have no right to make submission to oppose protest petition and support final report. But at the same time, they have liberty to assist public prosecutor.*
3. *The application is disposed off accordingly”.*

4) The petitioner herein happens to be informant in crime no. 198 of 2013 registered at D. N. Nagar Police Station for offence punishable under sections 419, 420, 467, 468, 120 (B) of the Indian Penal Code. Investigation was conducted by the Economic Offences Wing (E.O.W.) and it was renumbered as crime no. 37 of 2013. Investigating agency had informed the original complainant about the closure report.

5) The complainant had filed a Protest Petition in the said proceedings and had brought to the notice of the learned Trial Court that investigating agency has not carried out a fair investigation and therefore, he is constrained to file a

protest petition and bring certain aspects to the notice of the learned Court. It appears from the recitals of the Protest Petition that the complainant had reiterated the factual aspects of the case as was stated in the F.I.R. The complainant had further contended that the investigating agency had called for several documents from the complainant and the same were given to him. It is also contended that on 24/05/2013, investigating agency had called the complainant for certain clarifications which were submitted. The said clarifications also formed part of the closure report.

6) It appears that the complainant had brought to the notice of the investigating agency, the subsequent events which had taken place after the registration of the F.I.R. rather even after the closure report was filed. In the course of the proceedings, accused had filed an application before the learned Magistrate seeking permission to make submissions to oppose Protest Petition filed by the complainant and to make submissions to support the acceptance of closure report. It was the contention of the accused that 'C' summary report filed by the E.O.W. was the conclusion drawn by the investigating agency after conducting a fair investigation. Accused had relied upon several

judgments of the Hon'ble Apex Court on the right to be heard by the learned Trial Court.

7) The learned Addl. Chief Metropolitan Magistrate 47th Court Esplanade Mumbai had decided the application on 05/10/2016 and had arrived at a conclusion that the accused would not have a right of audience but would have a right to assist the prosecution. Hence, this petition.

8) In fact, there is no statutory provision which would contemplate that accused can be heard by the Court at the time of accepting or rejecting closure report filed by the investigating agency. The learned Magistrate has also considered that accused had no right of audience, however, in the absence of any statutory provision, by placing implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **Shiv Kumar V/s. Hukam Chand and another [(1997) 7 Supreme Court Cases 467]** wherein the accused were given an opportunity to exercise their so called right to assist the prosecution. The learned Magistrate has permitted the accused to assist the prosecution.

9) The learned senior counsel for the respondents submits that it would be in the interest of justice that accused needs to be heard as the complainant has relied upon certain instances which have occurred after filing of the closure report and the said instances are the decisions of this court in Arbitration Proceedings and other proceedings. According to the learned senior counsel for the respondents, the said judgments are subjudiced before the Hon'ble Apex Court and Special Leave Petitions are allowed. The learned senior counsel for respondents fairly admits that pendency of a petition before the Higher Court would not *ipso facto* mean that orders are stayed. As far as the right to assist the prosecution is concerned, according to the learned counsel, if an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge, A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and

subjected his role strictly to the instructions given by the Public Prosecutor.counsel, the Hon'ble Apex Court in the case of **Shiv Kumar V/s. Hukam Chand and another [Cited Supra]** has observed as follows:

“If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge, A private counsel, if allowed frees hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor”.

10) Needless to reiterate that the Hon'ble Apex Court was considering the rights of a private counsel assisting the prosecution and that was at the stage of trial and not at the stage of hearing of Protest Petition pursuant to the filing of the 'C' summary report by the investigating agency.

11) The learned senior counsel for the respondents has further placed implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **Union of India and another V/s. W. N. Chadha [1993 Supp (4) Supreme Court Cases 260]**. The learned senior counsel has placed implicit reliance on paragraph 92 which reads thus:

“More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section [173\(2\)](#) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section [204](#) of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section [202](#) of the Code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would

like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances”.

12) Needless to say that observations of the Hon'ble Apex Court were in the facts of that case and moreover it was prior to the amendment under section 173 (2) (ii) where the complainant has right to be informed about the conclusion arrived at by the investigating agency and as consequence file a Protest Petition, if not satisfied.

13) It is pertinent to note that in para 96 of the same Judgment (*Cited Supra*), the Hon'ble Apex Court has circumscribed the stages at which the accused has a right to be heard after registration of the crime. In para 98, the Hon'ble Apex Court has further held that:

“If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and

self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary”.

14) It is therefore admitted position in Law that the accused would have no right to be heard as to whether he desires to be prosecuted or not unless the investigating agency arrives at a conclusion that he needs to be charge-sheeted.

15) According to the learned senior counsel for the respondents/accused, at the stage of hearing of a Protest Petition also, accused would still remain accused since the closure report is not yet accepted.

16) The learned senior counsel appearing for the petitioner submits that the court has not arrived at any conclusion as to whether 'C' summary report should be accepted or not and hence, the accused has no right to assist prosecution and it would be a combat between the aggrieved complainant and the investigating agency since the duty is cast upon the complainant to demonstrate before the Trial Court that the conclusion arrived at by the

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investigating agency is not a conclusion which is a result of fair and impartial investigation. The said submission has a foundation in the statutory provisions of Code of Criminal Procedure, 1973. This Court agrees with the view taken by the Single Bench of this Court [Aurangabad Bench] in the case of **Gopal Bhagwan Sonar V/s. State of Maharashtra and another [2013 ALL MR (Cri) 3993]** wherein it is observed that:

“In my opinion, the Respondent no. 2 had no locus-standi to participate in the proceedings that would take place before the Magistrate for deciding whether or not to accept 'B' summary report. The reason is obvious. It is well settled that until a formal accusation is levelled against an accused, or until a decision to proceed against him is taken, the accused would not have any say in the matter. It would not be for the accused to appear before the Court and contend that the proceedings against him should not be initiated, when the Court is yet undecided, as to whether such proceedings should be initiated or not. The reason why the first informant needs to be heard when 'B' summary report is filed, is obvious. It is because the report of the investigating agency is adverse to the claims and contentions of the first informant. Fairness, therefore, requires that he should be given an opportunity of being heard and to point out how the conclusion arrived at by the investigating agency is wrong.

The case of the accused at that stage, would be totally different. The investigating agency having already come to a conclusion, which is in his favour, the contest would be between the investigating agency and the first informant. It is the first informant who is aggrieved by the decision of the investigating agency and it is therefore that he is required to be heard before the conclusion arrived at by the investigating agency, is accepted. The accused is not at all aggrieved by the filing of a 'B' summary report. Therefore, there would be no parity between him and the first informant”.

17) In the present case, accused can have no right to assist the prosecution. Section 301 of the Code of Criminal Procedure, 1973 contemplates that the complainant has right to assist the prosecution. The only guarding factor is that private counsel engaged by the complainant is to assist the prosecution and not take over the prosecution. Lastly, the learned senior counsel for the respondents submits that as on today, by efflux of time i.e. from October 2016 to April 2017, order passed by the learned Trial Court has become infructuous in the sense that accused has already placed certain documents on record which are being relied upon by the prosecution as well. This submission

would be unfounded. It is the discretion of the Magistrate to arrive at a fair conclusion after hearing the Protest Petition as to whether the 'C' summary report is the conclusion which is drawn in a fair and impartial manner and in accordance with the factual aspects of the case and as contemplated by Code of Criminal Procedure, 1973.

18) In view of this, operative order granting permission to the accused to assist the prosecution is quashed and set aside. The learned Magistrate may decide the Protest Petition in accordance with Law. It is made clear that above observations are without prejudice to the rights of either parties.

19) Rule is made absolute in the above terms.

(SMT. SADHANA S. JADHAV, J.)