

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

916 CRIMINAL WRIT PETITION NO. 1069 OF 2018

1. Amol Pralhad Bharati,
Age : 40 years, Occu.: Service,
2. Kapil Shiv Bharati,
Age : 42 years, Occu.: Service,
3. Pralhad Onkar Bharati,
Age : 65 years, Occu.: Agriculture,
4. Avinash Pralhad Bharati,
Age : 36 years, Occu.: Agriculture,

All R/o.: Village-Ranzani,
Post : Chonda, Tq. Taloda,
District : Nandurbar.

.. Petitioners
(Orig. accused in
RCC No.93 of 2012)

Vs.

1. The State of Maharashtra
2. Deepak Himmat Bharati,
Age : 42 years, Occu.: Agriculture,
3. Anil @ Yogesh Daryav Bharati,
Age : 38 years, Occu.: Service,
4. Daryav Bharat Bharati (Dead)
5. Manoj Himmat Bharti,
Age : 38 years, Occu.: Service,

Respondent Nos. 2, 3 and 5

R/o.: Bakri Galli, Village-Ranzani,

Post- Chinoda, Taluka : Taloda,

District : Nandurbar.

... Respondents
(Res.Nos. 2,3 &5
Ori. Accused in
Sessions Case
No.38 of 2012)

...

Advocate for Petitioners : Mr. P. S. Shendurnikar

APP for Respondent-State : Mr. S. B. Joshi

...

CORAM : SANGITRAO S. PATIL, J.

DATE : AUGUST 10, 2018

ORAL JUDGMENT

The petitioners who were accused in Regular Criminal Case No. 93 of 2012 pending before the learned Judicial Magistrate, First Class, Taloda, have challenged the order dated 22.09.2016 passed by the learned Additional Sessions Judge, Shahada and the consequential order dated dated 04.08.2017 passed by the learned Judicial Magistrate, First Class, Taloda, whereby the said case has been ordered to be committed to the Court of Session vide Section 323 of the Code of Criminal Procedure ("the Code", for short).

2. The accused in Sessions Case No. 38 of 2012 filed an application before the learned Additional Sessions Judge, Shahada stating therein that Regular Criminal Case No. 93 of 2012 arising out of the same incident (i.e. a counter case), is pending in the Court of Judicial Magistrate, First Class, at Taloda. Therefore, the accused requested that Regular Criminal Case No. 93 of 2012 may be transferred from the Court of Judicial Magistrate, First Class, at Taloda to the Court of the Additional Sessions Judge, at Shahada.

3. The learned Additional Sessions Judge, Shahada passed the following order on that application :

" Perused the application and the say filed by the A.P.P. Heard learned counsel for Applicant / Accused. After going through the certified copies of RCC No.93/12 it is clear that, present case arises from the same incident and cross case is pending before J.M.F.C. Court. Hence, considering the

submission made, the application is allowed. Call the R & P of R.C.C. No. 93/12 from Taloda Court and the same be tried along with this case".

4. After the order dated 22.09.2016 was communicated to the learned Judicial Magistrate First Class, Taloda, he passed the following order:

"In view of letter of Hon'ble Sessions Court Shahada at Exh.42 and detail order passed thereon this case needs to be committed to Hon'ble Sessions Court Shahada as per Section 323 of Cr.P.C. Thus, issue s/s to all accused to remain present before the court on the fixed date personally, so that the case could be committed immediately".

5. The learned counsel for the petitioners submits that the Additional Sessions Judge had no jurisdiction to pass an order calling for the Record and Proceedings of Regular Criminal Case No. 93 of 2012 for being tried with Sessions Case No. 38 of 2012. He then submits that it was for the learned Magistrate to consider the facts of the case pending

before the Sessions Court as well as that of the case pending before him to verify as to whether both the cases are counter cases arising out of the same incident and then to pass an order of committal under Section 323 of the Code. However, in the present case, the learned Judicial Magistrate, First Class did not exercise the jurisdiction vested in him. He did not at all peruse the papers of the Sessions Case and only in compliance of the order of the Sessions Court, committed it vide Section 323 of the Code. He submits that the source of the order passed by the learned Magistrate is not legal and proper. He, therefore, prays that the impugned orders may be quashed and set aside.

6. The learned APP accepts the legal position that the learned Additional Sessions Judge had no jurisdiction to call for the Record and Proceedings of the Regular Criminal Case No. 93 of 2012 at his own and instead, he should have directed the accused

to approach the learned Judicial Magistrate, First Class, seeking committal of the case by making an application to that effect.

7. There is no dispute that when there are counter cases arising out of the same incident i.e. one is pending before the Court of Session, which is triable by the Court of Session and another before the Judicial Magistrate, First Class, since it is not triable by the Court of Session, in order to avoid conflicting decisions, both the cases should be assigned to the Sessions Court for being tried in quick succession. Here reference may be made to the judgment in the case of **Anil Bhaskar Sonavane Vs. The State of Maharashtra, 1976(78)BOMLR325**, wherein it has been held in para 9 of the judgment as under :-

“Under Section 323 two, contingencies might arise. When the charge is laid before the Magistrate in the form of a police report or otherwise, the offence disclosed may be exclusively triable by the Court of Session. When evidence is led it might

transpire that the offence is exclusively triable by the Court of Session and the Magistrate has no option in that case but to commit the case for trial to the Court of Session. There may be another eventuality, where the offence will be triable by him and not exclusively by the Court of Session. However, in the circumstances, as we have detailed above, in the present case cross complaints arise out of the same incident and it is desirable in view of the principle laid down by this Court that the two cases ought to be tried in quick succession by the same presiding Judge. If one of them is exclusively triable by the Court of Session, the Magistrate undoubtedly has no right to try that case, and Court of Sessions can try a case relating to any offence under the Penal Code as provided in Section 26 of the Code. The High Court and the Court of Session have been authorised to try any offence under the Indian Penal Code. In these circumstances, the Magistrate who is unable to try the other case must direct that the cross case arising out of the same incident requires

to be tried by the same Court in view of the principle laid down by the case law of this Court and the compliance with that principle is possible if the other case, which is triable by him, is also committed to the Court of Session for trial along with the other case already committed".

8. Section 323 of the Code reads as under :

"Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed : If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained"

From the wording of Section 323 of the Code, it is clear that it is for the learned Magistrate to consider, whether the case before him is required to be tried by the Court of Session. Therefore, in the matter of cross cases, it would be necessary for the

learned Magistrate to call for the copies of the charge-sheet in respect of the Sessions Case to verify, whether the said Sessions Case is arising out of the same incident out of which the case pending before him, has arisen and then, if he finds that the case pending before him is a counter case, he has to commit it under Section 323 of the Code. In the present case, no such exercise was done by the learned Magistrate.

9. It was beyond the scope of powers of the learned Additional Session Judge to call for Record and Proceedings of Regular Criminal Case No. 93 of 2012 from the Court of the learned Judicial Magistrate, First Class, for being tried with Sessions Case No.38 of 2012. The learned Additional Sessions Judge could have directed the accused to approach the learned Magistrate with appropriate application along with the copies of charge-sheet of the Sessions case and satisfy the learned Magistrate

that the Sessions Case is arising out of the same incident, which has given rise to the case pending before the learned Magistrate. The learned Magistrate simply seems to have complied with the order passed by the learned Additional Sessions Judge, which order was not at all legal and proper. Consequently, both the orders are liable to be quashed and set aside.

10. Before parting with the order, it may be noted that certain instances have come across relating to counter cases where the parties applied before the Sessions Court for transfer of the case under Section 408 of the Code and the Sessions Court also passed the order transferring such cases from the Court of Judicial Magistrate, First Class to the Court of Session. As per Section 193 of the Code, except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence

as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code. If the Sessions Court passed an order for transfer of a criminal case pending before the Judicial Magistrate, First Class, for being tried before the Court of Session, there would be a bar for taking cognizance under Section 193 of the Code, since that case is not committed by the learned Magistrate. Such practice is highly deprecated and it should be stopped.

11. As stated above, the impugned orders are not legal, proper and sustainable. They are liable to be quashed and set aside. If the accused in Sessions Case No. 38 of 2012 intend to get committed in Regular Criminal Case No. 93 of 2012 before the Court of Sessions, on the say that it is a counter case and needs to be tried by the same learned Judge in quick succession, they would be at liberty to approach the learned Magistrate for necessary relief by filing

appropriate application along with the copies of the charge-sheet and other papers of the Sessions Case No. 38 of 2012. If such an application is filed, the learned Magistrate would decide it on its own merits considering the facts of both the cases and take appropriate decision as to whether the case pending before him needs to be committed under Section 323 of the Code for being tried by the Sessions Court with Sessions Case No. 38 of 2012. With these observations, I pass the following order:

- (A) The Writ Petition is allowed.
- (B) The impugned orders dated 22.09.2016 and 04.08.2017 are quashed and set aside.
- (C) The accused in Sessions Case No. 38 of 2012 would be at liberty to approach the learned Judicial Magistrate, First Class, Taloda, for committal of the Regular Criminal Case No.93 of 2012 vide Section 323 of the Code,

by filing an appropriate application with the copies of the charge-sheet of Sessions Case No. 38 of 2012.

(D) The Writ Petition is accordingly disposed of.

[**SANGITRAO S. PATIL, J.**]

vsm/-