

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

904 CRIMINAL WRIT PETITION NO. 261 OF 2019

Aqueela Bano w/o Afsar Pathan
Age : 43 Yrs., Occ. Service,
R/o : H.No. 1-17-98, Noor Colony,
Opposite Head Post Office,
Aurangabad, Tq. and Dist. :
Aurangabad.

.... **PETITIONER**

VERSUS

1. The State of Maharashtra
Through the Police Station
In-charge, Police Station,
City Chowk, Aurangabad.
2. Khan Khudbunnisa w/o
Mahemood-Ur-Raheman
Khan Siddiqui, Age : 63 Yrs.,
Occ. Retired, R/o : Nawabpura,
Aurangabad, Tq. and Dist. :
Aurangabad.

.... **RESPONDENTS**

.....
Mr. C.R.Thorat, Advocate for Petitioner.

Mr. A.P.Basarkar, A.P.P. for R – 1.

Mr.A.N.Sabnis h/f Mr.A.M.Karad, Advocate for R – 2.

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CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 06/08/2019

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JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent heard finally at the stage of admission.

2. By this petition filed under Articles 226 and 227 of Constitution of India, the petitioner – original complainant has challenged the order dated 30/10/2018 passed by learned Ad-hoc District Judge – 2 and Additional Sessions Judge, Aurangabad in Criminal Revision Petition No. 233/2018.

3. Heard learned counsel for petitioner - original complainant, respondent No. 2 and learned A.P.P. for respondent No. 1 – State. Perused the impugned order.

4. Before adverting to deal with the submissions advanced, it is useful to refer few facts leading to filing of this petition. The petitioner-complainant has lodged complaint against respondent No. 2 and two other accused persons with police station City Chowk,

Aurangabad alleging therein that the accused persons have mis-used her signature obtained on blank cheques and withdrawal slips and secured loan to the tune of Rs. 1,50,000/- in her name as well as in the name of other teachers working in the school by misusing the documents in similar manner. It is alleged that in the year 1999 the petitioner joined the employment as Assistant Teacher in a school run by Talak Education Society of which accused Nos. 1 and 2 are Chairman and Secretary respectively. Accused No. 3 alleged to be the Headmaster of said school. In the complaint filed, the complainant has alleged that they were paid less salary than what was credited in their respective bank accounts. The accused have cheated them and committed the act of breach of trust by misusing the documents such as signed blank cheques/withdrawal slips and other documents. So also accused have secured loan of Rs. 1,50,000/- each from bank and other financial institutions in the name of petitioner and other Assistant Teachers working in that school. On the basis of complaint lodged, the offence u/s 420,406 r/w 34 of Indian

Penal Code came to be registered against the accused vide Crime No. I-68/2007 with police station City Chowk, Aurangabad. On completion of investigation, the charge sheet came to be filed in the Court of J.M.F.C., Aurangabad. After filing of charge sheet, same is registered as R.C.C.No. 679/2008.

5. At the instance of petitioner-complainant the State Government appointed Mr. N.S.Ghanekar, Advocate to act as special Public Prosecutor to conduct the proceeding. Later-on said Advocate expressed his inability to conduct the proceeding. In view of the inability expressed by special Public Prosecutor appointed in the case, the petitioner moved an application before the learned Magistrate to conduct the prosecution through pleader engaged by the petitioner. The application was made as contemplated under sub section (2) of section 302 of Code of Criminal Procedure. The Advocate representing the accused opposed the application with contention that the applicants are protracting the hearing of the case under the guise of application

made. By order dated 17/07/2018 passed in the matter, learned Magistrate allowed the application and permitted petitioner-complainant to conduct proceeding through her pleader. Being aggrieved, respondent No. 2 preferred revision petition before the Sessions Court, Aurangabad. By the impugned order dated 30/10/2018, the learned Additional Sessions Judge, Aurangabad pleased to allow the revision petition and set aside the order passed by learned Magistrate. Being aggrieved the petitioner-complainant has preferred this Writ Petition.

6. In brief, it is the contention of learned counsel for petitioner that the impugned order is per-se illegal, arbitrary and not sustainable in law. By referring to overall facts of the case, learned counsel submits that the order passed by learned Magistrate suffers from no illegality, impropriety or jurisdictional error so as to call for interference in exercise of revisional jurisdiction. It is submitted that the order passed by learned Magistrate was well within the scope of exercise of powers vested with the Court

under sub section (2) of section 302 of Code of Criminal Procedure. It is submitted that the Apex Court has consistently ruled that in exercise of authority vested under sub section (2) of section 302 of Code of Criminal Procedure, the Magistrate is competent to allow the person to conduct the prosecution personally or by a pleader. In support of the submission, learned counsel has referred and relied the decision of Apex Court in the case of ***Shiv Kumar V/s Hukam Chand and another reported in (1999) 7 SCC 467*** and ***Dhariwal Industries Ltd. V/s Kishore Wadhwani and others reported in AIR 2016 Supreme Court 4369.***

7. On the other hand, learned counsel for respondent No. 2 supported the impugned order. It is contended that the order passed by learned Additional Sessions Judge is legal, proper and suffers from no jurisdictional error so as to call for interference in exercise of writ jurisdiction under Articles 226 and 227 of Constitution of India.

8. I have carefully considered the submissions advanced in the light of order under challenge. The perusal of application [Exh.30] dated 12/03/2018 moved by the petitioner-complainant before the learned Magistrate clearly spell out that the application has been filed to invoke the jurisdiction of learned Magistrate under sub section (2) of section 302 of Code of Criminal Procedure. Section 302 of Code of Criminal Procedure reads as under.

" 302. Permission to conduct prosecution – (1) Any Magistrate enquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission :

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

9. Thus, the bare perusal of sub section (2) of section 302 of Code of Criminal Procedure spell out that the powers are vested with the Magistrate to

allow any person to conduct the prosecution on his own or through pleader in a case triable by Magistrate.

10. The order dated 17/07/2018 passed by learned Magistrate reads as under.

" 1. The present application is filed by the informant seeking permission to appoint Advocate to conduct prosecution. The case is instituted upon police report. The informant is victim of alleged offence. Charge has been framed against accused No. 1 to 7 vide Exh. 42 for the offence punishable u/s 420 and 406 r/w section 34 of the Indian Penal Code. The informant has contended in this application that she wanted to prosecute the matter by appointing her Advocate as special prosecutor and taken steps accordingly. Thereby, Adv. N.S.Ghanekar has been appointed as special Prosecutor in this matter by the State Government. However, it is now contended by the informant that due to personal difficulties, Ld. Advocate Ghanekar would not be able to proceed with the matter. Therefore, the informant want to proceed with matter independently by engaging her Advocate. Hence, this application.

2. Accused has strongly opposed this application by filing his written say. It is contended by the accused that only A.P.P. can conduct prosecution and no private Advocate can be allowed for the

same. Accused further contended that this application is filed only with intention to prolong the matter and harass accused. Therefore, accused prayed to reject this application with cost.

*3. The informant has relief upon the Judgment of Hon'ble Apex Court in the case of **Dhariwal Industries Ltd. V/s Kishor Wadhwani**, (AIR 2016 SC 4369). In this case, it has been held by the Hon'ble Supreme Court that under section 302 of the Code of Criminal Procedure (herein after mentioned as "the Code"), any person can independently conduct prosecution either personally or through Advocate with permission of the Magistrate conducting trial.*

4. Admittedly, evidence of the informant is not recorded. As per provision laid down under section 302 of the Code, the Magistrate is empowered to permit any person to conduct proceeding either personally or by engaging Advocate. The Hon'ble Apex Court in above cited case has held that the Magistrate has power to grant permission to the complainant to conduct prosecution independently. Role of the informant or private party is limited before Sessions trial under section 301 of the Code, while provision laid down under section 302 of the Code is applicable to every stage.

5. Firstly, in any considered opinion, if the informant is permitted to conduct prosecution by appointing private Advocate, no prejudice is likely to be caused to the accused. As private

Advocate conducting prosecution has to conduct the prosecution under same provision and principles as available to conduct prosecution by A.P.P. Secondly, for enforcing belief of fair trial in the mind of the informant, he/she deserves to be represented by the Advocate of his/her choice. However, taking into consideration concern of accused regarding fair and speedy trial, the present application is liable to be allowed on condition that informant shall conduct proceeding expeditiously. Hence, following order.

ORDER

(i) Application is allowed.

(ii) The parties are hereby directed to proceed matter expeditiously."

11. Thus, the order passed by learned Magistrate spell out that same has been passed after the special prosecutor appointed in the matter expressed his inability to conduct the proceeding. On the face of order dated 17/07/2018 passed by learned Magistrate, there was no illegality, impropriety and jurisdictional error committed on the part of learned Magistrate so as to call for interference in exercise of revisional jurisdiction by learned Additional Sessions Judge. In that view, learned Additional Sessions

Judge has exceeded the jurisdiction vested in him u/s 397 of Code of Criminal Procedure to unnecessarily interfere with the order passed by learned Magistrate.

12. It appears from the impugned order that learned Additional Sessions Judge failed to make distinction between the powers vested with the Sessions Court u/s 301 of Code of Criminal Procedure and the powers vested with the Magistrate u/s 302 of Cr.P.C. in the matter of allowing the private party to conduct the prosecution. It appears that learned Additional Sessions Judge has wrongly treated the order dated 17/07/2018 passed by learned Magistrate as an order appointing special Public Prosecutor. As discussed, the application filed by the petitioner and the prayer made therein more than sufficient to infer that the application was made under sub section (2) of section 302 of Code of Criminal Procedure.

13. The reasons recorded by learned Additional Sessions Judge to set aside the order passed by Magistrate reads as under.

" The learned Advocate of respondent has argued that in view of Dhariwal's citation (cited supra), Magistrate has ample power to appoint special Prosecutor for the victim.

I am of view that section 301 or 302 of Cr.P.C. do not say about appointment of special Prosecutor. It is a prerogative of the State to appoint as special Prosecutor and not of the Magistrate.

Needless to say that appointment of private Advocate to assist learned Assistant public Prosecutor and appointment of private Advocate as special Prosecutor are tow different terms. In the first term, private party may appoint private Advocate with the permission of the Court to assist to A.P.P. for his grievance. His role is very limited. He can not be allowed to take over the control of prosecution by directly addressing the Court and he has to act under the direction of Assistant Public Prosecutor in-charge of the case.

While in second term, Magistrate can not appoint private Advocate as special Prosecutor in lieu of Assistant Public Prosecutor. In the present matter, the learned Magistrate has appointed special Prosecutor for the complainant/respondent as per her request. In the circumstances, the dictum laid down in the above citation would not be helpful to the respondent. The impugned order is against the provision of law and not sustainable in the given scenario, hence, I proceed to pass following order. "

14. The perusal of order quoted above passed by learned Additional Sessions Judge prima facie reveals

that the order has been passed under mis-conception that petitioner-complainant has filed application to appoint special Public Prosecutor. In fact, the application was presented to invoke jurisdiction under sub section (2) of section 302 of Cr.P.C. which empowers the Magistrate to allow any person to conduct prosecution personally or by a pleader. In this context, legal position has been quite settled by the Apex Court through various pronouncement made on this issue. It is consistently held that in a case to be tried by Sessions Court, the role of private counsel is limited and he has to act under the direction of Public Prosecutor. Whereas the role of private counsel engaged by the complainant or any aggrieved person under sub section (2) of section 302 of Code of Criminal Procedure is different under sub section (2) of section 302 of Code of Criminal Procedure the Magistrate can permit any person to conduct the prosecution personally or through pleader engaged. In this context, it is useful to refer the decision of Apex Court in the case of *Shivkumar V/s Hukam Chand and another* [supra], wherein the Apex court

has observed as under.

" 7. Section 302 of the Code has also some significance in this context and hence that is also extracted below.

302. Permission to conduct prosecution - (1) Any Magistrate enquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission :

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

8. It must be noted that the latter provision is intended only for Magistrate Courts. It enables the Magistrate to permit any person to conduct the prosecution. The only rider is that Magistrate can not give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a public Prosecutor.

9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on

his behalf in the Magistrate's Court. "

15. In the case of ***Dhariwal Industries Ltd. V/s Kishore Wadhwani and others*** [supra], the Apex Court has once again considered the scope of exercise of powers u/s 301 and 302 of Code of Criminal Procedure and held that the Magistrate can grant permission to a person to conduct prosecution independently either personally or through a pleader engaged by such person. On close analysis of section 301 and 302 of Cr.P.C., the Apex Court has observed as under.

"14. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in Shiv Kumar [supra], the Court was dealing with the ambit and sweep of Section 301 of Cr.P.C. and in that context observed that section 302 Cr.P.C. is intended only for the Magistrate's Court. In J.K.International [supra] from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is

open to the Court to consider his request. The Court has proceeded to state that the Court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion.

18. We have already explained the distinction between section 301 and 302 Cr.P.C. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as section 302 Cr.P.C. is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently. ”

16. Thus, in the light of discussion made above, the impugned order passed by learned Additional Sessions Judge deserves to be set aside. In absence of any illegality, impropriety, arbitrariness, jurisdictional error committed on the part of learned Magistrate in passing the order, the learned Additional Sessions Judge in exercise of revisional jurisdiction not expected to have interfered with the order passed by learned Magistrate. In that view, the impugned order deserves to be set aside as same being passed

by exceeding the revisional jurisdiction vested u/s 397 of Cr.P.C. Hence, the following order.

ORDER

[i] The Petition is allowed in terms of prayer clause 'B'.

[ii] The impugned order dated 30/10/2018 passed by Ad-hoc District Judge-2 and Additional Sessions Judge, Aurangabad in Criminal Revision Petition No. 233/2018 is set aside. The order passed by trial Court is restored and confirmed.

[iii] The parties are directed to appear before the trial Court on 21/08/2019. On appearance of parties, trial Court is directed to fix the date for recording of evidence. Trial Court is directed to expedite the hearing of the case and decide the case as expeditiously as possible and preferably within six months w.e.f. 21/08/2019.

[iv] The complainant/petitioner is directed to co-operate with the expeditious disposal of the case.

[v] In case the trial Court forms the opinion that hearing of the case is deliberately protracted at the instance of petitioner – complainant or the Advocate engaged on her behalf to conduct the case, the trial Court will be at liberty to direct the Public Prosecutor

to conduct the proceeding and conclude the trial.

[vi] Rule made absolute in above terms.

[V.L.ACHLIYA]
JUDGE

KNP.

