

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

CRIMINAL WRIT PETITION NO.1467 OF 2018

Nandlal s/o Bansilal Darak,
Age: 55 years, Occu. Contractor,
R/o Shiregaon, Tq. Gangapur,
Dist. Aurangabad.

... **PETITIONER**

Versus

1. Shri Anil Motilal Nimbhore,
Age: 50 years, Occu. Service,
R/o Plot No.16/C-1, Town Centre,
Cidco, Aurangabad.

2. The Police Inspector,
Jawaharnagar Police Station,
Aurangabad.

... **RESPONDENTS**

...
Advocate for Petitioner : Mr. Shinde Chandrakant K.
Advocate for Respondent No.1 : Mr. P.G. Gaikwad h/f. M.R. Jadhav
A.P.P. for Respondent No.2/State : Mr. S.B. Joshi
...

CORAM : MANGESH S. PATIL, J.
DATE : 11.09.2019

ORAL JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned advocate Mr. P.G. Gaikwad holding for advocate Mr. M.R. Jadhav waives service for respondent no.1. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The only point that is being raised in this petition is as to whether the provisions of Sub-section 2 of Section 204 of the Cr.P.C. is directory or mandatory. The learned Magistrate rejected the application preferred by the respondent-accused for recalling of process by holding that the provision is only directory. The revision preferred by the respondent-accused was allowed by the learned Additional Sessions Judge by the impugned judgment and order. Hence this petition.

3. The learned advocate for the petitioner submits that this Court in the case of **Shashi Nair V/s. R.C. Mehta and Ors.; 1982 (1) BCR 358** held the provision to be directory. Though this Court in a subsequent matter in case of **Bhiku Yeshwant Dhangat V/s. Baban Maruti Barate and Ors.; 2001 Cri.L.J. 295** held otherwise to the effect that the provision was mandatory and not directory, in another matter in case of **Pramila Mahesh Shah V/s. Employees State Insurance Corporation; 2002 Cri.LJ 2454 (Bom)**, by referring to the earlier decision in the case of **Shashi Nair** and **Bhiku Dhangat** (supra) it was observed that the decision in the case of **Shashi Nair** (supra) was not brought to the notice of Court while deciding the matter in case of **Bhiku Dhangat** (supra) and therefore the latter judgment was *per incuriam*. Ignoring such specific decision pointing out that the decision in the

case of **Bhiku Dhangat** (supra) was *per incuriam* and although all these decisions were brought to the notice of the learned Additional Sessions Judge, without looking in to it the learned Judge has cursorily held that the decision cited on behalf of the respondent-accused were applicable and the one cited on behalf of the petitioner-complainant were not applicable. The observations and the conclusions are perverse and arbitrary. The impugned order therefore be quashed and set aside and the one passed by the Magistrate be restored.

4. The learned advocate for the petitioner further points out that no sooner the respondent-accused had raised an objection by filing his application (Exhibit-29), simultaneously the petitioner had furnished a list of witnesses. Since the matter was at a preliminary stage and the list of witness was immediately provided to the respondent-accused he was not likely to be put to any prejudice and therefore this being a procedural aspect, the lapse ought to have been ignored and was rightly done so by the Magistrate.

5. Lastly, the learned advocate for the petitioner would point that in yet another decision of the coordinate Bench of this Court in case of **Vashu Gokaldas Kukreja V/s. Meena Vashu Kukreja and Anr.; 2004 ALL.M.R. (Cri.) 1719**, after considering all the aforementioned decisions this Court has held the provision to be directory and the same view may be concurred.

6. The learned advocate for the respondent submits that the decision in the case of **Pramila Mahesh Shah** (supra) was rendered by relying upon the decision of the Supreme Court in the case of **Noor Khan V/s. State of Rajasthan; 1964 AIR (Supreme Court) 286** which does not make specific observation that a provision similar to the present one existing in the predecessor Code of the Criminal Procedure was directory. The learned advocate would thereafter submit that the decision in the case of **Bhiku Dhangat** (supra) has subsequently been followed by this Court in the case of **Sanyogita Shivnath Nandedkar V/s. Suprabha Rajendra Jundhare; 2005 1 Bom CR (Cri.)186**.

7. The learned advocate for the respondent would further submit that it is the right of the accused to know which of the witnesses would be examined to substantiate the charge against him and such right cannot be trampled down by holding it to be merely a directory one. He would have been put to a serious prejudice if the non compliance of the provision is allowed to be ignored.

8. I have carefully gone through all the decisions including the impugned order passed by the learned Sessions Judge. It is pertinent to note that the decision in the case of **Shashi Nair** (supra) rendered in the year 1982

had laid down that Sub-section 2 of Section 204 of the Cr.P.C. is merely directory. The decision was subsequently followed in the case of **Pramila Mahesh Shah** (supra). In the meantime in the case of **Bhiku Dhangat** (supra) a coordinate bench of this Court had taken a contrary view in the year 2001, therefore it was observed by the brother Judge in the case of **Pramila Mahesh Shah** (supra) that the decision in the case of **Bhiku Dhangat** (supra) was *per incuriam* since the decision in the case of **Shashi Nair** (supra) was not brought to the notice of the Court. Interestingly, yet again in the case of **Vashu Gokaldas Kukreja** (supra) a coordinate bench of this Court had an occasion to examine the law and it was specifically observed that the decision in the case of **Bhiku Dhangat** (supra) was *per incuriam* as was held in the case of **Pramila Mahesh Shah** (supra). It is thus apparent that this Court has consistently held except the decision in the case of **Bhiku Dhangat** (supra) Sub-section 2 of Section 204 of the Cr.P.C. is merely directory and is not mandatory one.

9. True it is that in spite of such long series of decisions, the decision in the case of **Shashi Nair**, **Pramila Mahesh Shah** and **Vashu Gokaldas Kukreja** (supra) were not brought to the notice of this Court which decided the matter in case of **Sanyogita Shivrath Nandedkar** (supra) and only the decision in the case of **Bhiku Dhangat** (supra) was brought to its notice.

Naturally, relying upon the decision in the case of **Bhiku Dhangat** (supra) it was held in the case of **Sanyogita Shivnath Nandedkar** (supra) that Sub-section 2 of Section 204 of the Cr.P.C. was mandatory. In view of such sequence of events of different matters coming before this Court from time to time, it is apparent that the decision in the case of **Bhiku Dhangat** and **Sanyogita Shivnath Nandedkar** (supra) both are *per incuriam*.

10. Independently, if one scrutinizes the matter on merits, it appears that no sooner the respondent-accused had filed the application seeking to recall the process on the ground of want of compliance with Sub-section 2 of Section 204 of the Cr.P.C. the petitioner had tendered a list of witnesses. This being a procedural matter, everything would depend upon the facts as to whether non-compliance with such procedural aspect would have resulted in causing some prejudice to the accused. Once the list of witnesses was tendered no sooner he had submitted the application, since the matter was at a preliminary stage, the respondent-accused was made known as to who would be the witnesses examined against him. Thus there was no element of any prejudice being caused. He was not being taken by surprise. He had been informed names of the persons to be examined to establish the charge. Therefore though no fault can be found with him submitting the application (Exhibit-29) and insisting for compliance of Sub-section 2 of Section 204 of

the Cr.P.C., submission of the list of witnesses at that stage had avoided the possible prejudice. It is in view of such state of affairs, no fault can be found with the observations and the conclusions of the Magistrate in rejecting the application preferred by the respondent.

11. The learned Additional Sessions Judge apparently has abdicated the duty of examining the law and in one sentence has concluded that the observations in the decisions referred to by respondent-accused were applicable and the one cited on behalf of the petitioner were not. He having not gone through the judgments the order passed by him has resulted in miscarriage of justice. The impugned order is not sustainable in law and is liable to be quashed and set aside.

12. The Writ Petition is allowed. The impugned order passed by the learned Additional Sessions Judge is quashed and set aside and the one passed by the Magistrate is restored. The rule is accordingly made absolute.

[MANGESH S. PATIL, J.]