

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 560 OF 2019**

Nusli Neville Wadia,
an adult, Indian Inhabitant,
residing at Beach House, Prabhadevi,
Mumbai – 400 025

...Applicant

Versus

1. Phiroze J. Dastur,
Managing Editor, Daily Publications,
Daily Printing & Allied Enterprises Pvt.Ltd.,
Rahimtoola House, Homji Street,
Fort, Mumbai 400 001

2. Kamal Morarka,
an adult, Indian Inhabitant,
having his office at B-228,
Okhla Industrial Area, Phase-I,
New Delhi – 110 020

3. Vijay Kalantri,
an adult, Indian Inhabitant,
having his office at
6th Floor, New Excelsior Building,
A.K. Nayank Marg, For,
Mumbai – 400 001

4. Antony Jesudasan,
an adult, Indian Inhabitant,
having his office at
Shakti Kiran Building,
Delhi – 110 032

5. The State of Maharashtra,
through the Public Prosecutor,
having his office at P.W.D. Building,
M. G. Road, Mumbai – 400 001

...Respondents

Mr.Aabad H. Ponda a/w Mr. Varun Satiya and Mr. Arun Unnikrishnan
i/b Crawford Bayley & Co. for the Applicant

Mr. Mangesh Bhole i/b M/s. Mulla & Mulla & Craigie Blunt & Caroe for
the Respondent No. 1

Mr. Satish Maneshinde, Sr. Advocate i/b Ms. Namita Maneshinde for the
Respondent Nos. 2 and 3

Mr. Sanjay Balakrishnan for the Respondent No. 4

Ms. Veera Shinde, A.P.P for the Respondent No. 5

CORAM : REVATI MOHITE DERE, J.
FRIDAY, 22nd NOVEMBER 2019

ORAL JUDGMENT :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith, with the consent of
the parties and is taken up for final disposal. Respondents waive service
through their respective counsel.

3 By this application, the applicant has impugned two orders i.e-

(i) the order dated 19/3/2019 passed by the learned Metropolitan
Magistrate, 23rd Court, Esplanade, Mumbai, below Exhibit 1, by which the
evidence of the complainant (applicant) was closed and the matter was

listed for recording the statement of the accused under Section 313 Criminal Procedure Code (`Cr.P.C'), and

(ii) the order dated 5/4/2019 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, below Exhibit 56, by which the applicant's application under Section 311 Cr.P.C, to recall the witness (applicant) was dismissed.

4 Learned counsel for the applicant submits that at no point of time, the applicant (original complainant) tried to delay the hearing of the case. He submits that the applicant could not remain present on the dates given by trial Court on account of his health and due to other unforeseen circumstances, which took place in March and April 2019. Learned counsel for the applicant has filed an affidavit of the applicant, setting out the reasons why he could not remain present. He submits that even when the applications for exemption/adjournment were filed by the learned counsel for the applicant on behalf of the applicant, the reasons have been spelt out in the said applications except in the applications filed in March and April. He submits that the applicant is the person who has been defamed and as such, his evidence is crucial to the said case. He submits that the applicant is ready to remain present before the trial Court on 30th November 2019 and is ready to cooperate with the trial Court in the recording of his evidence.

5 Learned counsel appearing for the respective respondents (Nos. 1 to 4) oppose the application. They submit that despite the case having been expedited by the High Court, the applicant sought adjournments on several dates. Learned counsel for the respondent No.1 submits that the case is pending since 1993 as against accused No. 1 and as such the right of the accused for a speedy trial is defeated. Learned counsel for the respondents 3 relied on the judgment of the Apex Court in the case of ***Swapan Kumar Chatterjee vs. Central Bureau of Investigation***¹.

6 Perused the papers. On 17/8/1993, four articles were published in the newspaper namely, “The Daily”. Since according to the applicant, the said articles were defamatory, scandalous, malicious and libelous in nature, intended to cause damage to the applicant’s family, the applicant filed a criminal complaint in the Court of the learned Metropolitan Magistrate, 23rd Court, Esplanade (C.C. No. 147/S/1993) alleging offences punishable under Sections 500 r/w Sections 34, 114 and 501 of the Indian Penal Code (‘IPC’) as against Rajiv Bajaj (Editor), Mohanan Nair (the Printer and Publisher of the newspaper ‘The Daily’) and respondent No.1- Firoz Dastur (Managing Editor of the tabloid of the said newspaper). It

1 Criminal Appeal No. 15 of 2019 decided on 4/1/2019

appears that the learned Magistrate dismissed the complaint, as the applicant had failed to appear before the trial Court and acquitted the aforesaid three accused.

7 Being aggrieved by the order of dismissal of the complaint and acquittal of the accused vide order dated 10/2/2000, the applicant (original complainant) filed Criminal Appeal No. 143/2000 in this Court. This Court (Coram : Abhay M. Thipsay, J.) vide judgment and order dated 23/9/2015 allowed the said appeal and quashed and set-aside the impugned order dated 10/2/2000 and remitted the matter back to the Magistrate with a direction to proceed with the complaint in accordance with law. The trial was expedited and was to be completed within one year from the date of receipt of the record and proceedings by the Magistrate.

8 It appears that the applicant, along with two others, had also filed a Suit bearing No. 3942 of 1993, in this Court, in view of the publication dated 17/8/1993 and sought damages and other reliefs in the said Suit. It appears that Rajiv Bajaj, the Editor of the Tabloid, 'The Daily' tendered his unconditional apology to the applicant and stated that he would divulge all information with respect to the publication of four defamatory articles. Pursuant thereto, the applicant withdrew the complaint *qua* Rajiv

Bajaj (original accused No. 2 in the complaint) on 15th December 2015. It appears that even original accused No. 3-Mohanan Nair was dropped, as he could not be served. Thereafter, Rajiv Bajaj deposed in the said complaint as applicant's witness. The said evidence commenced on 25th January 2016. It appears that pursuant to the examination-in-chief of Rajiv Bajaj, the applicant filed an application under Section 319 Cr.P.C to implead Kamal Morarka, Vijay Kalantri, Deepak Neogi and Anthony Jesudasan, as accused in the said complaint. After the said persons were summoned, their pleas were recorded on 2/5/2017. It appears that during the pendency of the said complaint, Deepak Neogi expired and as such, the complaint against him abated. Subsequently, again from 19/6/2017, the examination-in-chief and cross-examination, the re-examination of Rajiv Bajaj continued and on 15/3/2018 his evidence was closed. The matter was, thereafter, adjourned to 27/3/2018 for examination-in-chief of the applicant.

9 On 27/3/2018, the applicant, aged 75 years was present before the learned Magistrate for recording of his examination-in-chief, however, due to paucity of time, his examination-in-chief could not be conducted and the matter was adjourned to 7/5/2018. It appears that on 7/5/2018, respondent No. 2 and 3's Advocate sought time, which was granted by the learned Magistrate and the matter was adjourned to 31/5/2018. On

31/5/2018, the applicant's Advocate filed an application seeking adjournment on account of applicant's personal difficulty, as the applicant was travelling. The said application was allowed and the matter was adjourned to 19/6/2018. On 19/6/2018, the applicant failed to remain present on account of his health and hence, the application filed by the applicant on the said ground was allowed and the matter was adjourned to 30/7/2018. On 30/7/2018, the applicant again did not remain present before the learned Magistrate due to some personal difficulty. It appears that the said application for adjournment was not allowed. However, the Magistrate adjourned the case to 12/10/2018. Again on 12/10/2018, the applicant did not remain present on account of his health and hence, an application for adjournment was filed. The learned Magistrate allowed the said application and asked the applicant to remain present on 15/11/2018. On 15/11/2018, Magistrate was not available for judicial work and accordingly, the matter was adjourned to 20/12/2018. On 20/12/2018, the Advocate for the applicant again filed an application for adjournment on the ground that the applicant was not keeping good health. The said application was allowed and the applicant was directed to appear on 30/1/2019. Again on 30/1/2019, the applicant filed an application for adjournment on the ground that the applicant was not keeping good health, which application was allowed and the matter was listed on 19/3/2019. On 19/3/2019, an

adjournment application was again filed by the applicant's Advocate citing personal difficulty, as he was not in the Country. The said application was not allowed by the Magistrate and the learned Magistrate closed the examination-in-chief of the applicant vide order dated 19/3/2019. Pursuant thereto, the Advocate for the applicant filed an application under Section 311 Cr.P.C on 4/4/2019 and sought recalling of the witness (applicant), in the interest of justice. The said application also was dismissed by the learned Magistrate and the learned Magistrate proceeded to record the statement of the accused under Section 313 Cr.PC.

10 Being aggrieved by both the orders dated 19/3/2019 closing the evidence of the complainant as well as the order dated 4/4/2019 rejecting the application filed by the applicant for recall of the witness, the aforesaid application has been filed in this Court.

11 In the affidavit filed by the applicant in this Court, it is stated that on 19/3/2019, the applicant could not remain present due to an emergency in the family around 11/3/2019, inasmuch as, the applicant's son was detained in Japan in connection with some offence. The applicant in the said affidavit has stated that he was in Japan from 11/3/2019 to 23/3/2019 in connection with the detention of his son in Japan and hence,

he could not inform his Advocate and Solicitors about the same, since it was a personal matter. The applicant has now undertaken to remain present before the learned Magistrate on 30/11/2019 as well as on the dates given by the trial Court for recording of his evidence and to cooperate with the conduct of the trial. It appears that the applicant, aged 75 years could not remain present on the dates mentioned hereinabove, as he was not well and on the last two dates, as his son was detained in Japan.

12 The judgment relied upon by the learned counsel for the respondent in ***Swapan Kumar Chatterjee vs. Central Bureau of Investigation (supra)***, would not apply to the facts of the present case. It cannot be forgotten that the applicant is the original complainant who has filed proceedings as against the respondents. Similarly, it cannot be forgotten that the accused also has a right to expeditious disposal of their case.

13 Considering the statement made by the learned counsel for the applicant, on instructions of the applicant, that he will remain present before the Court on 30/11/2019 and thereafter on the dates given by the trial Court, application is disposed of on the following terms and conditions :

ORDER

- (i) Application is allowed;

- (ii) The impugned orders dated 19th March 2019 and 5th April 2019 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai below Exhibit 1 and Exhibit 56 respectively, in Criminal Complaint No. 147/SS/1993 are quashed and set-aside;

- (iii) The applicant to remain present before the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai on 30th November 2019 at 11:00 a.m, after which, the learned Magistrate shall give the dates convenient to him, for recording of the evidence of the applicant;

- (iv) The applicant to remain present before the learned Magistrate on the dates given by the trial Court for recording of his evidence and to cooperate with the conduct of the trial;

- (v) The applicant to pay the cost of Rs. 2,00,000/- to the Society for the Rehabilitation of the Crippled Children (SRCC) Centre for

Child Development, Mumbai, within one week from today. The copy of the receipt showing payment, to be tendered before the trial Court on 30th November 2019;

(vi) Rule is made absolute on the aforesaid terms. The application is disposed of accordingly.

14 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.