

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1031 OF 2020

Devendra Suresh Bhalerao,
Age 50 years, Occupation Service
As Naib Tahsildar, Jalgaon
At Present Posted At Chalisgaon
Dist. Jalgaon.

...Petitioner.

VERSUS

The State of Maharashtra.

...Respondent.

.....
Advocate for Petitioner : Mr. S. S. Jadhav.
APP for Respondent-State : Mr. A. M. Phule.
.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 27-10-2020.

JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent, heard finally.
2. Present petition has been filed to challenge the order passed by learned Special Judge, Jalgaon/ Additional Sessions Judge, Jalgaon on 17-12-2019 thereby allowing application Exhibit 28 filed by the prosecution under Section 319 of the Code of Criminal Procedure to summon the present petitioner as an accused.
3. Heard learned Advocate Mr. S. S. Jadhav for petitioner and

learned APP Mr. A. M. Phule for respondent-State.

4. It has been vehemently submitted on behalf of the petitioner that, one Rajendra Raghunath Wagh is prosecuted in special Case No.20 of 2016 on the complaint filed by one Aatish Eknath Chaudhary for the offence punishable under Section 7 of the Prevention of Corruption Act. The testimony of P.W.1 Aatish was under recording and after substantial part of the examination-in-chief was recorded, application was filed at Exhibit 28 on behalf of the State that said accused against whom the charge is framed had in fact demanded the said amount for the petitioner. It was submitted in the application that, since the present petitioner was also party to demand an acceptance of the bribe, he is required to be summoned as an accused by exercising power under Section 319 of the Code of Criminal Procedure. The learned Special judge after hearing learned Additional Public Prosecutor and learned Advocate for accused Wagh allowed the said application. However, learned Special Judge failed to consider the ratio laid down in case of *Dilawar Singh v. Parvinder Singh @ Iqbal Singh and Anr.*, reported in 2006 All MR (Criminal) 278(S.C.), wherein it has been held that,

“A Special Judge while trying an offence under Prevention of Corruption Act, cannot summon another person and proceed against

him in the purported exercise of power under Section 319 of Code of Criminal Procedure, if no sanction has been granted by appropriate authority for prosecution of such person as the existence of a sanction is sine qua non for taking cognizance of the offence qua that person.”

5. The learned Advocate appearing for the petitioner further submitted that, on this count the impugned order below Exhibit 28 is patently illegal. There was absolutely no evidence against the present petitioner and, therefore, he prayed for setting aside the said order.

6. The learned Additional Public Prosecutor supported the reasons given by the learned Special Judge especially the fact that there is conversation between accused Wagh and Naib Tahsildar and failure on the part of the investigating officer to include the petitioner as accused should not be taken otherwise to the prosecution case. There is evidence against the present petitioner to show that he was also the party to demand an acceptance of the bribe.

7. The present petitioner is the Naib Tahsidlar. Perusal of the complaint filed by Aatish Eknath Chaudhary would show that, he had not filed the complaint against the present petitioner. In his testimony he has stated that, after the post trap panchanama when

he and panch No.1 went to the office of accused Wagh, at that time Wagh demanded amount of Rs.15000/-. He thereafter says that, Wagh had introduced present petitioner to him and then present petitioner asked him to come on Thursday. He thereafter says that, the said conversation was recorded on the recording machine which was provided by the Anti Corruption Bureau. He further states that, when he again visited the Tahsil office on 28-01-2016 along with panch No.1, he had put on the voice recorder. He states that, after he met the petitioner, petitioner had demanded amount of Rs.8000/- to him. On the basis of this part of the evidence, the prosecution had filed the application Exhibit 28 under Section 319 of Code of Criminal Procedure which is then allowed by the learned Special Judge.

8. At the outset, the prosecution has not stated that in spite of that evidence coming against the petitioner, why he was not made as an accused and why sanction was not obtained to prosecute the present petitioner. Further it appears that, the learned special Judge had not taken into consideration the ratio laid down in case of *Dilawar Singh (Supra)* wherein it has been further observed that,

“The contention raised by learned counsel for the respondent that a Court takes cognizance of an offence and not of an offender holds

good when a Magistrate takes cognizance of an offence under Section 190 of Cr.P.C.”

However, further observations are important that,

“The Prevention of Corruption Act is a special statute and as the preamble shows this Act has been enacted to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith..... Therefore the provision of Section 19 of the Act will have an overwriting effect over the general provisions contained in Section 190 or 319 of Code of Criminal Procedure. A Special Judge while trying an offence under the Prevention of Corruption Act, 1988, cannot summon another person and proceed against him in the purported exercise of power under Section 319 Cr.P.C. if no sanction has been granted by the appropriate authority for prosecution of such a person as the existence of a sanction is sine qua non for taking cognizance of the offence qua that person.”

9. Here in this case, the prosecution in application Exhibit 28 has not come with a case that, sanction was already obtained against the present petitioner yet the investigating officer had not filed charge-sheet against him. The fact remains that no sanction has been obtained till the presentation of the charge-sheet before the Special Court in the said case against the present petitioner, and therefore, the learned Special Judge ought not to have tried to exercise his powers under Section 319 of Code of Criminal Procedure

against present petitioner. The order passed below Exhibit 28 is therefore patently illegal, and therefore, deserves to be set aside.

10. Another fact that is further required to be noted is that in the order itself the learned Special Judge has stated that the investigating authority is directed to conduct further investigation as per Section 173 (8) of Code of Criminal Procedure. This is also patently illegal for the simple reason that the learned Special Judge is equivalent to a Magistrate and he has already taken cognizance of the offence. The entire material was already placed before the concerned Court when charge-sheet was filed under Section 173 of Code of Criminal Procedure. No such direction was given by the concerned Court before taking cognizance. Trial proceeded by framing charge against the accused against whom sanction was obtained. The testimony which is recorded up till now was also not sufficient to give directions under Section 173 (8) of Code of Criminal Procedure for further investigation. Already all the facts were in fact present before the investigating officer. He has not carried out any such investigation and now after taking cognizance of the offence, the facts are not going to change. Therefore, the remedy was certainly not available against the present petitioner

under Section 319 of the Code of Criminal Procedure. Learned Special Judge who is a Magistrate under Prevention of Corruption Act cannot mingle provisions under Section 319 of the Code of Criminal Procedure with provisions under Section 173 (8) of the Code of Criminal Procedure. Hence, the powers of this Court under Article 227 of the Constitution of India deserves to be exercised in this case. Writ petition therefore stands allowed. The order passed by the learned Additional Sessions Judge, Jalgaon, below Exhibit 28, in Sessions Case No.20 of 2016, dated 17-12-2019 stands set aside, the said application stands rejected. Petition is disposed of accordingly. Rule is made absolute in above terms.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.