

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.421 OF 2019
IN
CRIMINAL WRIT PETITION NO.380 OF 2017**

Gurram Narasimhaswami Siddidram,
Age 55 years, Occ.Business,
R/o.36/791, Adarsh Nagar,
Opp.Century Bazar, Worli, Mumbai-400030

Applicant

versus

1. Dr.G.Harikishan, Mumbai,
2. Bhoga Sahadev Gangadhar, Mumbai,
3. Yeligeti Rajkumar, Mumbai,
4. Tatikonda Bhumeswar, Mumbai,
5. Lekharaju Venkateshwara Rao, Mumbai,
6. Moola Sidda Reddy, Mumbai,
7. Pothu Gajaraj Rajaram, Mumbai,
8. Gajam Sudarshan V, Mumbai,
9. The State of Maharashtra

Respondents

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Order	:	7 th February 2020
Date of Pronouncing the Order	:	6 th July 2020

ORDER :

1. Heard both sides. The applicant seeks the following reliefs in this application :

(a) To review and recall the order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017, and to set aside

the orders of Magistrate granting bail to the accused persons in the instant case;

(b) To restore and rehear, if required, the Criminal Writ Petition No.380 of 2017, to set aside the orders of Magistrate granting bail to the accused persons in the instant case;

(c) To stay the proceedings in CC No.45/SW/2013 on the file of learned Metropolitan Magistrate, 30th Court, Kurla, Mumbai pending the final hearing and disposal of this Review Petition.

2. After hearing both sides, order was reserved on 7th February 2020. Due to situation of pandemic, Courts were not functioning on regular basis and the matter was not listed for pronouncement of judgment. Ultimately the application was listed for pronouncement of judgment through video conferencing.

3. The applicant had preferred Criminal Writ Petition No.380 of 2017 before this Court challenging order dated 3rd September 2016, passed below Bail Application of accused nos.1 to 7 at Exhibit-16 in CC No.45/SW/2013 granting bail to accused nos.1 to 7. The applicant had also challenged order dated 17th September 2016 passed below Bail Application of accused no.8 vide Exhibit-27 in CC No.45/SW/2013, granting bail to accused no.8 and the order dated 17th September 2016 passed by Metropolitan Magistrate, 61st Court, Kurla, Mumbai, rejecting application of the applicant dated 3rd September 2016 preferred vide Exhibit-25, praying that the accused be sent to judicial custody and to hear both sides on the bail application.

4. After hearing both the sides, by order dated 7th June 2019, Criminal Writ Petition No.381 of 2017 was dismissed. The said order

is sought to be reviewed/recalled by preferring the present application.

5. Learned advocate for the applicant submitted that this Court had mechanically adopted the erroneous reasoning and decision of Single Judge of Allahabad High Court in Vishwanath Jiloka and others Vs. First Munsif Lower Criminal Court (1989 Cri.L.J.-2082), while there is already a three Judge bench (Full Bench decision of the Allahabad High Court in Ranjit Singh and others Vs. State of U.P. and another- 2000-Cri.L.J.2738) showing that the Single Judge of Allahabad High Court is in error in interpreting the role of Section 87 of Cr.PC r/w Section 204 of Code of Criminal Procedure, 1973 (for short Cr.PC). There are already several judgments of other High Courts showing that the decision of the Allahabad High Court in Vishwanath Jiloka's case is erroneous. It is submitted that the ground for filing this review petition under Article 226 of Constitution of India r/w Section 482 of Cr.PC is supported from the law laid down in the judgment of the Hon'ble Supreme Court in the case of A.R.Antuley Vs. R.S.Nayak (1988)2-SCC-602. The decision of this Court is per in-curium for ignoring the statutory mandate under the amendments inserted and substituted by Act No.25 of 2005, S. 37(w.e.f.23-6-2006) and substituted by Act No.63 of 1980, S. 5(w.e.f.23-9-1980) in the statutory provisions of Section 437 of Cr.PC, 1973. It is submitted that the other decision which supports the filing of review petition is of the Division Bench of this Hon'ble Court in Bayer (India) Limited and others Vs. State of Maharashtra and others AIR-1995-BOM-290. It is submitted that paragraph 16, a review petition is justified on the ground that some vital material or some very basic aspect of law has escaped a consideration. It is

submitted that having issued process for offences which included non-bailable offences, the Magistrate knowingly ignored and neglected the statutory mandate under the amended provisions of Section 437 of Cr.PC and without giving opportunity of hearing either to the Public Prosecutor or the advocate for the complainant who was earlier granted permission to lead evidence in the present complaint case and knowing it to be contrary to the statutory mandate under the amendment act inserted by Act.25 of 2005, S.37 and without imposing any conditions as mandated under sub-Section (3) of Section 437 and knowing it to be contrary to the mandate under the amendment substituted by Act of 25 of 2005, S.37 and without recording any reasons or special reasons as mandated u/s 437(4) of Cr.PC and knowing it to be contrary to the amendment substituted by Act 63 of 1980, S.5(w.e.f.23-9-1980), the learned Magistrate granted bail to accused nos.1 to 7. This Court has erroneously relied upon the decision of the Allahabad High Court in Vishwanath Jiloka's case, which is evident from the reasoning in paragraphs 14, 15, 16 and 17 of the order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017.

6. It is further submitted that the judgment of Vishwanath Jiloka is erroneous for several reasons. The said decision claims untenable connection of Section 204 to 167 of Cr.PC and connection of Section 204, 87 and 88 of Cr.PC. It is submitted that the view that provisions of Section 204(5) Cr.PC are for enabling the Magistrate to invoke the provisions of Section 87 of Cr.PC to issue warrant even in summons cases is confirmed by Three Judge Bench decision of Allahabad High Court in Ranjit Singh and others Vs. State of U.P. and another. Learned counsel relied upon the observations in paragraph 21 of the

said decision. It is submitted that in view of the decision of the Full Bench, the view of the learned Single Judge of Allahabad High Court was erroneous. It is submitted that the learned Single Judge of Allahabad High Court has failed to notice that in a warrant case with non-bailable offences that commenced on a complaint, upon reaching the stage of issue of process u/s 204 Cr.P.C, there is no need for the Magistrate to take the help of Section 87 of Cr.P.C to issue warrant because Section 204(1)(b) Cr.P.C itself allows the Magistrate to issue warrant in such a situation. The Allahabad High Court in the decision in the case of Vishwanath Jiloka has also committed error while interpreting Section 88 and observing that when the personal attendance of the accused in a criminal case has not been exempted or when a warrant is issued to the accused in a complaint case u/s 204(1)(b) and the accused after being served with summons or warrant or having come to know of the same, appears before the Magistrate, it is not at all legal for the Magistrate to take him into custody and then grant judicial remand necessitating a bail application and a bail order u/s 437 of Cr.P.C when a person appears or is brought before a Magistrate or a Court in response of summons or warrant, the proper procedure to be followed is laid down in Section 88 of Cr.P.C, In case of breach of bonds furnished u/s 88 of Cr.P.C, action can be taken for enforcing the bonds and for arrest under Section 89 of Cr.P.C. It is submitted that the Court had misread the provisions of Section 204 and Section 437 of Cr.P.C. It is submitted that Section 204(1)(b) concerns accused persons in warrant case and permits the Magistrate to use his discretion that he may issue a warrant or if he thinks fit a summons for causing the accused to be brought or to appear. If the Magistrate issues summons in a warrant case, it does not turn the warrant case into a

summons case, because the prescribed procedure and the provisions to conduct the trial of warrant is different from the prescribed procedure to conduct trial of summons case. Sections 87 and 88 concerns any persons which would mean not only accused but would also include the witness or any other person required to appear to assist the Court.

7. Learned advocate for the applicant relied upon decision of the Gujarat High Court which according to him was delivered in case of Whether Vs. State and reported in Indian Kanoon. On perusal of the copy supplied by learned counsel for applicant it appears that it was delivered in the case of Sachchidanand Paramhansa Vedantcharya Vs. State of Gujarat. It is submitted that in the said decision it was observed that Section 204 and Section 87 of Cr.PC operate in a different field and in different eventuality. Section 87 confers independent and separate power upon the learned Magistrate to issue warrant in certain circumstances. The said provision would be applicable in summons case. Considering Section 204 of Cr.PC, the learned Magistrate has to issue summons for the attendance of the accused in a summons case. However, in a summons case the Magistrate may issue warrant in lieu of or in addition to summons subject to fulfilling the requirement of Section 87 of Cr.PC. Otherwise in a summons case while exercising powers u/s 204 of Cr.PC, the Magistrate is not empowered and has no jurisdiction to issue warrant and therefore in sub-Section (5) of Section 204 of Cr.PC, it is provided that nothing in Section 204 of Cr.PC shall be deemed to affect the provisions of Section 87 of Cr.PC. Therefore, what is provided under sub-Section (5) of Section 204 of Cr.Pc is conferring additional powers upon the Magistrate to issue warrant even in

summons cases in the circumstances as provided u/s 87 of Cr.PC by providing reasons in writing.

8. Learned counsel for applicant also relied upon the decision of Delhi High Court in the case of Sudhir Nathani Vs. CBI 2003(3)-JCC-1883. In the said decision it was observed that exercise of option by the Court u/s 204 Cr.PC to procure the presence of the accused even though summons in a non-bailable case does not curtail or take away the powers of the Court to consider the question of grant or refusal of bail under the provisions of Section 437 of Cr.PC. Section 204 Cr.PC does not render the Court empowered to take cognizance functionis officio so far its powers to consider the question of grant or refusal of bail on the premise of Section 437 Cr.PC is concerned.

9. It is submitted that the order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017 is per incurium and in accordance with law laid down by 7 Judge Bench decision of Hon'ble Supreme Court in the case of A.R.Antuley Vs. R.S.Nayak, this review petition has to be entertained. Since the Court has ignored the statutory mandate under the amendments which were inserted as stated hereinabove, the decision becomes per incurium and therefore the review petition be entertained and the impugned order be set aside. In the said decision the Supreme Court has observed in paragraph 4.1 that per incurium are those decisions given in ignorance or forgetfulness of some inconsistent statutory provisions or some authority binding on the Court concerned so that in such cases some part of decision or some step in the reasoning on which it is based is found, on that count to be demonstrably wrong. If a decision is given per incurium, the Court can ignore it. The applicant is deprived of his fundamental right to equality guaranteed

under Article 14 of the Constitution of India.

10. It is submitted that this Court has ignored several decisions placed for consideration while arguing Criminal Writ Petition No.380 of 2017. It is submitted that the ratio laid down in *Vimladevi Vs. State of Bihar* (1994)2-SCC-8, *DK.RajPandhare Vs. State of Maharashtra* 2005(6)-Bom.C.R.-288, *Hanuman s/o Vishwanath Nihare Vs. State of Maharashtra and others* 2001(5)-Bom-C.R.-879, *Shivkumar Vs. Hukamchand and another* (1999)7-SCC-467, *Ram Govind Upadhyay Vs. Sudarshan Singh and others* decided by Supreme Court, *Shaizad Hasan Khan Vs. Ishtiyak Hasan Khan* 1987(2)-SCC-684 decided by Supreme Court were not considered in proper perspectives. It is submitted that the question of law whether it is permissible for the Magistrate to grant bail to the accused persons facing non-bailable offences without hearing the Public Prosecutor, as required under fourth proviso to sub-section (1) of Section 437 of Cr.PC or the complainant who has been authorized by the Magistrate to conduct the proceedings of the complaint case remain without any judicial pronouncement and it has resulted in grave miscarriage of justice in the instant case. The learned Magistrate has ignored the decision of the Supreme Court in *Shivkumar Vs. Hukamchand and another* (supra) where it is made clear that any Magistrate conducting a trial is empowered under Section 302 of Cr.PC to authorize the complainant or his advocate to conduct the trial. By order dated 2nd April 2014, the complainant was authorized to conduct the trial and accordingly the advocate for the complainant did conduct the proceedings u/s 200 of Cr.PC and evidence has been recorded on the basis of which the Magistrate decided and issued process u/s 204 of Cr.PC, however, the

complainant's advocate or the Public Prosecutor were not heard. In the application it has been contended by the applicant that this Court had avoided and omitted to decide this important question of law in the order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017 which has resulted in grave miscarriage of justice.

11. In addition to the oral submissions, learned advocate for the applicant has also tendered the written submissions. The oral submissions were reiterated in the written submissions.

12. Learned advocate for respondent nos.1 to 7 submitted that the review petition is devoid of merits. This Court while dismissing Criminal Writ Petition No.380 of 2017 had dealt with all the issues and by passing a well reasoned order, the petition was dismissed. The question of reviewing the same issues does not arise. There is delay in preferring the application for review. The order passed by this Court is exhaustive dealing with all the issues raised by the applicant in the criminal writ petition. All the legal submissions advanced by the learned advocate for the applicant/petitioner were dealt with by this Court. The decisions were analyzed. The facts were taken into consideration and by assigning detailed reasons, the petition was dismissed. The judicial pronouncements relied upon by the counsel for the petitioner were referred to and the ratios laid down in the said decisions were analyzed and by assigning the reasons, the petition was dismissed. The interpretation of the learned counsel for the petitioner is contrary to the provisions of law. Although it is contended by learned advocate for the applicant that the decision in the case of Vishwanath Jiloka, he could not point out any decision overruling the said judgment rendered by the Single

Judge of Allahabad High Court. It is submitted that apart from the ratio laid down in the said decision, this Court has considered the factual matrix and the provisions of law and has declined to entertain the previous petition preferred by the applicant. In spite of giving opportunity to the petitioner/applicant while adjudicating the criminal writ petition preferred by him, the petitioner has used the language which is contemptuous in the present application. The applicant has no regard for the Court and he is trying to interfere in the administration of justice by using the derogatory words. Learned counsel for the respondent pointed out the averments in ground no. (ii) on page 22 of the present application wherein it is stated as follows :

“It is apparent on the face of the judgment and order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017, that the order dated June 7, 2019 has been passed knowingly that it is contrary to the statutory mandate under the amendments inserted and substituted by Act XXV of 2005, Section 37(w.e.f.23-6-2006)....”

Learned counsel further pointed out the averments in paragraph (iv) of the application at page 27 wherein it is stated that “this Hon’ble Court avoided and omitted to decide this important question of law in the orders dated June 7, 2019 dismissing Criminal Writ Petition No.380 of 2017 and it has resulted in grave miscarriage of justice. The words “knowingly, omitted and avoided” are derogatory and objectionable. It is casting aspersions on the Court and hence stringent action be initiated against the applicant.

13. It is submitted that the submissions of the learned counsel for the applicant are his interpretations. The law laid down in several

decisions is very clear. Learned counsel for applicant has misconstrued the provisions of law and has adopted the interpretation which suits him. It is further submitted that in the present case the private complaint was preferred by the applicants. Process was issued. Pursuant to issuance of summons, the respondents-accused had appeared before the Court of law and they had applied for bail and the learned Magistrate granted bail to them. The question of applying the stringent conditions incorporated under Section 437 of Cr.PC or giving hearing to complainant and public prosecutor does not arise. The said provisions are not applicable in the present case. The procedure incorporated under Section 204 of Cr.PC and Section 88 of Cr.PC will have to be taken into consideration and therefore the judgments relied upon by the learned counsel for the applicant are wholly inapplicable in the present case.

14. Learned counsel for the respondents further submitted that first of all the review application itself is not maintainable in law. The Court after hearing both the sides, considered the factual aspects of the matter, relying on the decisions placed for consideration by both the sides, assigned the reasons and had passed the order dismissing the criminal writ petition. Such an order cannot be recalled in view of Section 362 of Cr.P.C. The order passed by this Court had attained finality and it cannot be reviewed in view of the restrictions incorporated u/s 362 of Cr.P.C. No case is made out to recall or review the earlier order passed by this Court. There is no question of holding that the decision of this Court is per in-curium and therefore the application be dismissed. Learned counsel relied upon the decision of the Supreme Court in the case of Atul Shukla Vs. State of

Madhya Pradesh and another delivered in Criminal Appeal Nos.837 of 2019 in SLP (Cri.)No.1166 of 2019 decided on 6th May 2019. Learned advocate for respondent no.8 adopted the submissions of counsel for respondent nos.1 to 7.

15. In rejoinder the learned counsel for applicant contended that action can be initiated under Section 192 of IPC and surprisingly under Section 219 of IPC.

16. The factual matrix is incorporated in the order dismissing Writ Petition No.380 of 2017, dated 7th June 2019 and hence the same are not repeated herein.

17. The applicant had preferred Criminal Writ Petition No.380 of 2017¹ challenging the aforesaid orders passed by the learned Metropolitan Magistrate. The applicant had raised several contentions challenging the said orders. Reliance was placed on several decisions. On hearing both the sides and after considering the decisions cited by both the sides, by assigning details reasons, this Court by order dated 7th June 2019 dismissed Criminal Writ Petition No.380 of 2017.

18. The primary contention of the applicant is that the review application or the application for recall of the order passed by this Court on 7th June 2019 is maintainable. The said order is per incurium. It is per incurium since this Court had not taken into consideration the amended provision of Section 437 of Cr.P.C. The other contention of the applicant is that the judgment referred to and relied upon by this Court in the case of Vishwanath Jaloka is erroneous in view of several other decisions including the decision of

the Full Bench of Allahabad High Court. Thirdly it is contended that this Court has not considered the issue relating to non affording the hearing to the complainant or public prosecutor at the time of granting bail to the respondents-accused.

19. While adjudicating Criminal Writ petition, the decision in the case of Vishwanath Jiloka was relied upon by the learned counsel for respondents. It was open to the counsel for the applicant to agitate at that point of time that the said decision is erroneous and/or it is contrary to the provisions of law. The decisions relied upon by the learned counsel for the applicant delivered by Gujarat High Court in the case of Swamy Sachchidanand Paramhansa referred to by learned counsel for applicant as Whether Vs. State (supra), the Full Bench decision of the Allahabad High Court in the case of Ranjitsingh Vs. State of Uttar Pradesh (supra) and the decision of Delhi High Court in the case of Sudhir Nathani Vs. CBI (supra) were relied upon by the applicant for the first time while arguing the review application. The question of reviewing the said order does not arise. The contention of the applicant is that the full bench decision of Allahabad High Court has overruled the decision of the Single Judge of the Allahabad High Court in the case of Vishwanath Jiloka is devoid of substance. The said decision was not referred to and it is not overruled. It is the interpretation of the learned counsel for the applicant that in view of the observations of the full bench of Allahabad High Court, the decision of the Single Judge stands overruled. Apart from that, the decision of the full bench of the Allahabad High Court was delivered in completely different context. The learned counsel for the applicant has also urged that several decisions relied upon by him while adjudicating this petition were

not considered in proper perspective. The ratio laid down in the said decisions was over looked. From the contents of order dated 7th June 2019 it is apparent that this Court has taken into consideration the decisions relied upon by the advocate for applicant, such as Vimladevi Vs. State of Bihar, D.K.Rajepandhare Vs. State of Maharashtra, Hanuman Vishwanath Nihare Vs. State of Maharashtra and others, State of Maharashtra Vs. Podia @ Phaujidas Sonabhai, Ram Govind Upadhyay Vs. Sudarshan Singh and others and Shahazad Hasan Khan Vs. Ishtiyak Hasan Khan and another. The facts of the said cases and the ratio laid down in the said decisions was analyzed and it was observed that the said decisions are not applicable in the facts of the present case. Thus, the said decisions cannot be reconsidered again. If the applicant is aggrieved by the order passed by this Court, the remedy is available in law could have been exhausted by him and not to prefer a review petition. This Court has indeed made reference to the decision of the Single Judge of Allahabad High Court in the case of Vishwanath Jiloka and others in paragraph 14 of the order dated 7th June 2019. However, in paragraph 15 of the said order this Court has analyzed the facts of the present case, and then referred to the provisions of Section 88 of Cr.PC and it was observed that there is no infirmity in the order of the Trial Court below. Thus, the order dated 7th June 2019 was based on the analysis of the factual matrix of the present case, and the provisions of Sections 87 and 88 of Cr.PC.

20. The grievance of the applicant is that the point relating to the hearing to be given to the complainant/public prosecutor at the time of granting bail to the respondent-accused was not dealt with by this Court while dismissing the writ petition. In paragraph 13 of the

order dated 7th June 2019 it was stated that the grievance of the complainant was that he was not heard before passing the order granting bail and that the statutory provisions of Section 437 of Cr.P.C has not been complied by the Trial Court. It is also observed that the complainant and his advocate were present in the Court on 3rd September 2016 and on the same day application Exhibit-25 was preferred. There was no provision in law for entertaining application Exhibit-25. The Court took cognizance of the complaint and issued process u/s 204 of Cr.P.C. The summons was served on the accused. They appeared before the Court and showed their willingness to execute bail bond of their appearance. The summons was issued for their appearance before the Court. While preferring application for bail, the grounds raised therein enumerated their availability and willingness to execute bail bond. Thus there was no illegality of the order passed by learned Magistrate in granting bail and order rejecting application Exhibit-25. From the contents of application preferred by the applicant vide Exhibit-25, it is apparent that the accused had appeared before the Court pursuant to issuance of process. The accused applied for bail. The applicant had prayed that accused be remanded to judicial custody. The counsel for complainant requested that the procedure laid down u/s 437 Cr.P.C may be followed and also mentioned that there is well settled law laid down by the Hon'ble Supreme Court in respect of non-bailable offences which in the present case is applicable as the offences are under Sections 406, 408, 468, 420, 120-B of IPC. However, the Court directed the counsel for the complainant to file application on that day itself. Thus, it is apparent that at the time when the accused had applied for bail, the counsel for the complainant-applicant was present in the Court. He also agitated that the procedure u/s 437 of

Cr.PC be applied. However, the learned Magistrate was pleased to grant bail to the accused. The application vide Exhibit-25 was subsequently rejected. The complainant had filed written notes of arguments in support of the application Exhibit-25. If the prosecutor was not present, considering the fact that the accused had appeared pursuant to the issuance of process, it was not necessary for the Magistrate to wait till the prosecutor arrives and thus the order granting bail passed by the Magistrate cannot be termed as contrary to the provisions of law. The counsel for the applicant had vehemently agitated that Section 437 should have not been resorted to by the learned Magistrate. The order was passed without giving hearing to the complainant or the public prosecutor. The order was passed without assigning any reasons and that the order was passed without imposing any conditions. Section 437(1) reads as follows :

“When bail may be taken in case of non bailable offence:-

(1) When any person accused of, or suspected of, the commission of any non bailable offence is arrested or detained without warrant by an officer in-charge of a Police Station or appears or is brought before a Court other than the High Court or the Court of Sessions, he may be released on bail.

While dismissing the petition it is already observed in paragraph 15 that the question of taking accused into custody or applying rigors of Section 437 does not arise since the Trial Court took cognizance of the complaint and issued process. If it is not necessary to invoke Section 437 of Cr.PC, the question of implementing the proviso to Section 437 as amended does not arise. Hence, the question of giving hearing to the complainant or the public prosecutor or

imposing the conditions enumerated therein does not arise. 'C' summary was applied by Police to the complaint. Thereafter evidence was lead by complainant and process was issued. There was no question of any investigation thereafter by police or subjecting the accused to custody. In a complaint case, when cognizance has been taken, no investigation is required and it is the complainant who has to prove his case on the basis of evidence, which he or she may adduce by examining witnesses and such witness may be cross examined by defence.

21. While deciding the previous petition it was observed that the Court was dealing with a private complaint where the process was issued vide Section 204 of Cr.P.C and reference was made to Section 88 of Cr.P.C. It was also observed that where parties appear before the Court in a private complaint, the Court resorts to Section 88 of Cr.P.C and they are required to furnish bond with or without securities for appearance or on future dates. The submission that the amended provisions of Section 437 have to be invoked, as contended by applicant, is devoid of merits. Thus, the question of reconsidering or reviewing the view is not warranted.

22. The Hon'ble Supreme Court in the case of A.R.Antuley (supra) considered power of review, nature and scope and whether the Court can review its directions if they result in deprivation of fundamental rights of a citizen and whether the Supreme Court can issue writ of Certiorari to quash judicial order passed by another Bench and whether a larger bench can overrule or recall a decision of a smaller bench. It was also observed that the Court also explained as to which are per in-curium decisions. In the case of Bayer India Limited

and others Vs. State of Maharashtra (supra), the Division Bench of this Court had reviewed its earlier decision after the matter was remanded by the Hon'ble Supreme Court for reconsideration. In the decision in the case of Swamy Sacchidananda Parmahansa Vedantacharaya Vs. State of Gujarat, the Gujarat High Court had dealt with an application under Article 227 of Constitution of India wherein the accused had challenged the order of arrest warrant passed by the learned Magistrate. The facts of that case would indicate that private complaint was filed before the Court of JMFC for offences under Sections 302, 114 of IPC and under the provisions of Arms Act and SC and ST (Prevention of Atrocities) Act. The learned Magistrate recorded statement of complainant on verification. Inquiry was ordered u/s 202 of Cr.P.C. Witnesses were examined. The complaint was dismissed u/s 203 of Cr.P.C. The dismissal order was challenged by preferring revision application before the High Court. The High Court allowed the review application by setting aside the order of dismissal insofar as it pertained to the petitioner/original accused no.1 and directed the Magistrate to issue process u/s 204 of Cr.P.C against the petitioner for the offence u/s 302 of IPC and the Arms Act and directed the Trial Court to proceed in accordance with law. The accused then approached the Hon'ble Supreme Court challenging the order of High Court. The Supreme Court dismissed the appeal preferred by the accused. The learned JMFC then issued process u/s 204 of Cr.P.C and directed issuance of the warrant against the petitioner. The said warrant was issued by the learned JMFC was challenged by the petitioner before the High Court. The contention of the petitioner before the High Court was that the learned Magistrate ought not to have issued non-bailable warrant without there being any just or

proper cause. It was also contended that prior to issuance of non-bailable warrant, no summons was issued by the petitioner-accused. Reliance was placed on the decision of Supreme Court in the case of Indermohan Goswami and another Vs. State of Uttaranchal. It was contended on behalf of the petitioner-accused that on conjoint reading of Section 204 r/w Section 187 of Cr.P.C, the Court is justified in issuance of non-bailable warrant. There was no such eventuality in the said case. The petitioner's submission was that the provision of Section 204 of Cr.P.C is required to be read along with S.187 of Cr.P.C and unless the condition as provided u/s 87 of Cr.P.C are satisfied and unless the reasons as provided u/s 87 of Cr.P.C are recorded, the Magistrate cannot issue non bailable warrant while issuing the process in exercise of powers u/s 204 of Cr.P.C. The Gujarat High Court, however, observed that S.204 Cr.P.C and S.87 of Cr.P.C are operating in a different field and in different eventualities. Section 87 of Cr.P.C confers independent and separate power upon the Magistrate to issue warrant in certain circumstances in a case where the Magistrate is of the opinion that the accused either before the issuance of summons or after the issuance of same but before the time fixed for his appearance has absconded or will not obey the summons or when it has been found by the learned Magistrate that the accused person has failed to appear despite the service of summons and no reasonable excuse is offered for such failure. Therefore the power conferred upon the Magistrate u/s 87 of Cr.P.C is to issue a warrant in addition to summons. Therefore, Section 87 of Cr.P.C would be applicable in the summons cases. Considering Section 204 of Cr.P.C, the learned Magistrate has to only issue summonses for the attendances of accused in a summons case. However, in a summons case, the Magistrate may issue the warrant

in lieu of or in addition to summons subject to fulfilling of the requirement of Section 87 of Cr.P.C. Otherwise in a summons case while exercising powers u/s 204 of Cr.P.C the Magistrate is not empowered and has no jurisdiction to issue warrant. Therefore, in sub-section (5) of Section 204 of Cr.P.C, it is provided that nothing in Section 204 of Cr.P.C shall be deemed to affect the provisions of Section 87 of Cr.P.C. Therefore, what is provided under sub-section (5) of Section 204 of Cr.P.C is conferring additional powers upon the Magistrate to issue warrant even in summons cases in the circumstances as provided u/s 87 of Cr.P.C by recording reasons in writing. Therefore on fair reading of Section 204 of Cr.P.C r/w Section 87 of Cr.P.C, Section 87 of Cr.P.C r/w sub-section (5) of Section 204 of Cr.P.C, is to be read with respect to the summons cases. However, the learned Magistrate has power to issue warrant in warrant cases considering the facts of the case. It is pertinent to note that the accused therein were charged for offences u/s 302 of IPC. In the present case, however, the issue was that process was issued for the offences by the learned Magistrate. It is not the case that the warrant was issued. The question was whether the accused could be resorted to under the provisions of S.437 or they could be remanded to custody as contended by the learned counsel for complainant before the Trial Court. Assuming that S.87 relating to summons cases, the facts still remain that the process was issued against accused and the Court was pleased to issue summons against them for their appearance. It is already observed while disposing of the writ petition that the Court was required to resort to Section 88 of Cr.P.C and not to any other provisions of law. Thus, the Gujarat High Court was dealing with a situation which was different than which is involved in the present case. In the Full Bench decision of

Allahabad High Court, the issue was whether the accused can be heard at the time of the protest petition. The substantial issue in the petition before the Full Bench was whether a Magistrate before rejecting a final report filed by the investigating officer has to hear the accused on his appearing voluntarily or after notice irrespective of the fact whether or not the informant is proposed to be heard with or without a protest petition challenging the final report. The Court then analyzed the procedure contemplated under the Cr.PC for dealing with the issuance of process, the procedure followed in trial of summons cases and warrant cases etc. Learned counsel for applicant had stressed upon the observations in para 21 of the said decision wherein it was observed that it is the common knowledge that in Cr.PC, there is only one section of issuing process against accused by a Magistrate and that is section 204 which empowers the Magistrate who takes cognizance of an offence to issue summons in a summons case, a warrant in warrant case, but only a list of witnesses is forwarded under section 1 of Cr.PC and if such summons or warrant is issued in a complaint case, it shall be accompanied by copy of such complaint and if relevant law requires under its provisions that process fees or other fees are payable, processes shall not be issued unless the said fee is paid within reasonable time which may be allowed by the Magistrate. Sub-section (5) of Section 204 of Cr.PC protects the right of Magistrate who act u/s 87 of Cr.PC entitling him to issue warrant even in cases where summons for appearance may be issued after recording reasons for such an action. Thus, the Full Bench was not dealing with the situation as arisen in the present case. It also cannot be said that the decision of Vishwanath Jaloka has been overruled by the Full Bench of Allahabad High Court.

23. In the decision of Delhi High Court relied upon by the counsel for the applicant, in the case of Sudhir Nathani Vs. CBI (supra), the question which arose for consideration is whether Court after having exercised discretion to issue summons while taking cognizance u/s 204 of Cr.P.C, in a warrant case, can enter into the domain of nature of offence other than those for which there is prohibition for granting bail under the provisions of Section 437 Cr.PC and thereby sent the accused to judicial custody by rejecting the bail application. The facts of the said case would indicate that the matter was investigated by DRI and criminal case was filed before the Magistrate against several accused including the petitioner. The petitioner therein remained in custody for about 125 days in the said case. Parallel investigation was also conducted by CBI on account of criminal liability of forgery of documents and the offences punishable u/s.120-B, 420, 468, 471, 511 of IPC and Section 13(2) r/w S.13(1)(d) of PC Act. After completing the investigation, CBI filed charge sheet against the petitioner in the Court of learned Special Judge. However, during the investigation by CBI, the petitioner was not arrested who joined the investigation regularly. Admittedly, the offences were non-bailable and case was a warrant case. The Court while taking cognizance u/s 190 of Cr.PC exercised discretion of issuing summons for appearance instead of warrant as provided u/s 204 of Cr.P.C. Section 204 provides discretion to issue summons instead of warrant in warrant case by taking cognizance. The petitioner appeared and moved an application for grant of bail on account of offences being non-bailable and according to him he was not required to do so because the Court once having exercised the option of issuing summons had he was required to furnish the bond as per Section 88

of Cr.PC and even otherwise the petitioner should have been granted bail u/s 437 of Cr.PC as the offences were neither punishable for death nor imprisonment for life. In concluding paragraph the Court observed that Section 204 of Cr.PC provides for mode of procuring the attendance of the accused while taking cognizance of the offence. If it is a summons case, Magistrate shall always issue summons. If the investigating officer does not arrest the accused in a cognizable and non-bailable offence during investigation and the officer in-charge files the final report u/s 173 of Cr.PC without forwarding the accused in custody, the Court has discretion to procure his presence either through summons or through warrant. In both the eventualities the Court may ask the accused to seek bail or accused may move for grant of bail under the provisions of Section 437 of Cr.PC. The presence of the accused even through summons in non bailable case does not curtail or take away the power of the Court to consider question of grant or refusal of bail under the provisions of S.437 of Cr.PC. It is pertinent to note that the Delhi High Court was dealing with a situation where investigation was conducted by CBI. Without taking the accused in custody the investigation was completed and the report was filed u/s 173 of Cr.PC without forwarding the accused to custody. The Court took cognizance and issued summons. The Court while taking cognizance issued summons to the accused. It is in these circumstances the Court had dealt with the issue whether the accused can be subjected to custody in accordance with Section 437 of Cr.PC. In the present case, the question of filing report u/s 173 of Cr.PC did not arise. It was a private complaint in which summons was issued to the accused. In the said case also the accused was directed to be released on bail by the High Court. Although the bail was refused by the Special Court.

24. There is no reason to review or recall the order dated 7th June 2019 passed by this Court. Most of the decisions relied upon by the applicant with regards to the interpretation of Section 204, Section 87, Section 88 and Section 437 of Cr.PC were put forth for the first time. The applicant has interpreted the said provisions and tried to contend that the earlier order was erroneous. If the applicant is aggrieved by the order dated 7th June 2019, it is open for him to exercise the remedy available in law to challenge the said order. The question of reviewing or recalling the said order therefore does not arise. One of the contention as stated above was that there is no consideration for the issue relating to the not giving hearing to the complainant or the public prosecutor while granting bail. The issues raised by applicant were dealt with in the earlier decision, and now again clarified in this order. In the decision relied upon by learned counsel for respondent, the Hon'ble Supreme Court has dealt with effect of Section 362 of Cr.PC. The facts in the decision of Atul Shukla Vs. State of M.P. and another would indicate that the FIR was registered with the police station for the offences u/s 265 and 323 r/w S.34 of IPC. Upon investigation charge sheet was filed. The accused filed a petition u/s 482 of Cr.PC for quashing the FIR before the High Court. In the mean time, charges were framed against the accused. The High Court dismissed the petition u/s 482 of Cr.PC with observation that considering the circumstances the petition u/s 482 has no merit. The petitioner may challenge the framing of charge under appropriate provisions. After the above order the accused filed another petition u/s 482 of Cr.PC in which it was prayed that the Court may review, recall and modify the earlier order in the interest of justice. On the second petition the High Court

passed the impugned order recalling its earlier order. The submission of the appellant before the Supreme Court was that the High Court could not have entertained the subsequent petition u/s 482 for review or as the case may be for modification of its earlier order having regard to the specific bar contained in Section 362 of Cr.P.C. The Apex Court quoted Section 362 which provides as follows:-

“362. Court not to alter judgment :- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

The respondent had contended that the High Court had recorded that no offence u/s 364 was made out. The Hon'ble Supreme Court observed that the High Court while dismissing the petition u/s 482 observed that it would be open to the second respondent to pursue his remedies after framing of the charge. In view of the specific bar which is contained in Section 362, we are of the view that the impugned order of the High Court is unsustainable. Such an application for review or modification could not have been entertained. The order of the High Court was set aside. In the light of the aforesaid principles and the scope and object of Section 362 also, the petition was not maintainable in law.

25. Before concluding this order, it would be appropriate to refer to the averments made by the applicant in the application which are required to be condemned. On page 22 of the application it is averred that the order dated 7th June 2019 has been passed knowingly that it is contrary to statutory mandate under

amendments whereas on page 27 also it is contended by the applicant that the Court avoided and omitted to decide the important question of law in the order dated 7th June 2019 dismissing Criminal Writ Petition No.380 of 2017. Averments are not happily worded and are required to be condemned. For the reasons stated hereinabove, no case for reviewing or recalling the order dated 7th June 2019 is made out. Hence, I pass following order :

ORDER

1. Criminal Application No.421 of 2019 is rejected.

(PRAKASH D. NAIK, J.)

MST