

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Writ Petition No. 2807 / 2019

Kedar Rayjirao Salunke

Age : 38 years, Occ.-Agriculturist,

Residing at Post-Dugaon,

Tal-Biloli, Dist.-Nanded.

.. Petitioner

Versus.

The State of Maharashtra

[Through the Shivajinagar Police Station,

Pune]

.. Respondent

Mr. Lokesh D. Zade, Advocate for the Petitioner.

Smt. S.V. Sonawane, APP for State.

CORAM : SANDEEP K. SHINDE J.

RESERVED ON : 2nd DECEMBER, 2021.

PRONOUNCED ON : 8th DECEMBER, 2021.

Judgment : -

1. Rule.
2. Rule made returnable forthwith. Heard finally with the consent of the parties.
3. This petition under Article 227 of the Constitution of India challenges the order dated 6th March, 2019 below Exhibit-47 passed by the Additional Chief Judicial Magistrate, First Class, Pune in Regular Criminal Case No. 3736/2015 by which the learned Magistrate shifted the forum of trial of the Petitioner-Accused, from the Court of Judicial Magistrate, First Class to the Court of Sessions, in wake of state amendment - Maharashtra Act of 40 of 2018.

Background facts :

4. Petitioner-Accused is being, prosecuted for the offences punishable under Section 353, 504, 506 (2) of the IPC in R.C.C. No. 3637/2015, which arose from Crime No. 232/2014

dated 6th December, 2014. The evidence in the trial was almost over and when the trial reached the stage of final arguments, by the Act of 40 of 2018; The Government of Maharashtra has changed the forum of Court trying the offences under Section 332, 353 of IPC from Magistrate of First Class to Court of Sessions. In effect the offence under Section 353 of IPC is classified as, cognizable, non-bailable, triable by Sessions and made punishable with imprisonment for five years or fine or both. Whereafter in view of the amendment, Prosecution moved an application under Section 323 of Cr.P.C. for committing the proceedings in the R.C.C. No. 3637/2015 to the Court of Sessions. The learned Magistrate committed the case to the Court of Sessions and directed Petitioner to remain present before the Sessions Court. This order is assailed in this petition.

5. Heard Counsel for the Petitioner and Prosecutor for the State.

6. Mr. Lokesh Zade appearing for the Petitioner, in all fairness submitted that in view of the judgment of the Apex Court in the case of **Ramesh Kumar Soni Vs. State of Madhya Pradesh, (2013) 14 SCC 696**; and the judgment of this Court in the case of **Shyamrao Vithoba Pillare Vs. State of Maharashtra, 2019 ALL MR Cri. 704**, petitioner shall submit himself to the jurisdiction of Court of Sessions at Pune. Yet, Mr. Zade, expressed his concern over and in respect of powers, of the Court under Section 326 of Cr.P.C., which empowers succeeding judge to record the evidence *de novo*. Mr. Zade, therefore submitted that, if evidence is recorded afresh, it may cause serious prejudice to the accused. Mr. Zade therefore argued that, let the Sessions Judge act on the evidence, recorded by the learned Chief Judicial Magistrate, for passing the order of, conviction or acquittal.

7. Ms. Sonawane, learned Public Prosecutor would submit that, under Section 326 of Cr.P.C., the succeeding Judge to whom the case has been committed is empowered to re-

summon, any such witnesses if the succeeding Judge is of the opinion that examination of any of the witnesses, whose evidence has already been recorded is necessary in the interest of justice. Learned APP would therefore rely on the proviso to Section 326(1) of the Cr.P.C. which reads as under;

“326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another-

(1) Whenever any ¹[Judge or Magistrate], after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another ¹[Judge or Magistrate] who has and who exercises such jurisdiction, the ¹[Judge or Magistrate] so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:

Provided that if the succeeding ¹[Judge or Magistrate] is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re- summon any such witness, and after such further examination, cross- examination and re- examination, if any, as he may permit, the witness shall be discharged.”

. Ms. Sonawane, learned APP, thus argued that statutory powers of the succeeding Judge under Section 326 of the Cr.P.C., cannot be ‘curtailed’ as suggested by Mr. Zade, learned Counsel for the petitioner.

8. I have carefully considered the submissions of Counsel for

the parties. It may be stated that in the case in hand the trial has reached the state of final argument. Undoubtedly, proviso to Section 326 empowers the succeeding Judge to re-summon the witnesses for their further examination, if he is of opinion that further examination is necessary in the interest of justice. It may, be stated that in the case of *Ramesh Kumar Soni* (supra), question that had arisen before the Apex Court was;

“Whether the cases pending before the Judicial Magistrate, First Class, in which evidence, partly or wholly has been recorded, and now have been committed to the Court of Sessions, are to be tried de-novo or should be remanded back to the Judicial Magistrate, First Class, for further trial ?”

The Apex Court, by referring to judgment in the case of **Nani Gopal Mitra Vs. State of Bihar AIR 1970 SC 1636**; held that;

“amendment relating to Procedure operated retrospectively, subject to the exception, that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying of new procedure”.

. However, these observations were made in context of facts in the judgment of the Full Bench of High Court of Madhya Pradesh, wherein it was held that, amended

provisions were in-applicable, to pending cases. The Apex Court thus held in Paragraph No. 21 in *Ramesh Kumar Soni* (supra) that,

“21. The upshot of the above discussion is that the view taken by the Full Bench holding the amended provision to be inapplicable to pending cases is not correct on principle. The decision rendered by the Full Bench would, therefore, stand overruled but only prospectively. We say so because the trial of the cases that were sent back from the Sessions Court to the Court of the Magistrate, First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us.”

9. Thus, terms of the provision, of Section 326 of the Cr.P.C. and the law enunciated by the Hon’ble Apex Court in the case of *Ramesh Kumar Soni* (supra), *Nani Gupta Mitra* (supra) I hold; ‘that if succeeding judge is of opinion, that, if procedure followed while conducting the trial was incorrect resulting into or causing prejudice to the rights of parties and/or when further examination of the witnesses, whose evidence has already been recorded is necessary in the interest of justice, he may re-summon them and examine such witnesses.”

10. That Petitioner has not pressed the relief in terms of

prayer clause 'a'; (i.e. change of Forum), but since has raised the issue relating to powers of succeeding judge to record *de novo* evidence, I have answered that point. In terms thereof, Petition is disposed of.

(SANDEEP K. SHINDE, J.)

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