

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

Criminal Writ Petition No. 1621 of 2022

Sanjay S/o Kashinathrao Pathak
Aged : 52 years, Occ.: Service,
R/o Ramkrishna Nagar, Parbhani,
Tq. and Dist. Parbhani.

...Petitioner

Versus

The State of Maharashtra,
Through the Police Station Officer,
Purna Police Station, Dist. Parbhani.

...Respondent

...

Advocate for Petitioner : Mr. Mayure Pramod C.
APP for Respondent/State : Mr. P. N. Kutti

...

CORAM : KISHORE C. SANT, J.
DATE : 14th MARCH 2023.

Oral Judgment :

1. Rule. Rule made returnable forthwith by consent of the parties..
2. This Court while issuing notice dated 05.12.2022, kept the issue of maintainability open. Today, when the matter is called out at the beginning, the learned APP raised the point of maintainability and submitted that the present petition is not maintainable as proper

remedy of filing Revision is available to him. He relied upon a judgment reported in AIR 2013 (SC) 2248 in the case of **Mohit alias Sonu & Anr. Vs. State of U.P. & Anr.** The Hon'ble Apex Court has held that in the said case, the complainant ought to have challenged the order passed by the learned Sessions Court under Section 319 of the Code of Criminal Procedure. The Hon'ble Apex Court had further considered that when there is remedy of filing a Revision, then there should be a bar in invoking jurisdiction of the High Court and the inherent powers of the Court can be exercised only when there is no remedy provided in the Code of Criminal Procedure for redress of the grievance.

. Further it is held that inherent powers of the Court can not ordinarily be exercised when there is express prohibition in the Code. The Hon'ble Apex Court however remanded the matter for consideration on merit afresh after giving opportunity of hearing.

3. He relied upon the next latest judgment in Civil Appeal No.5784/2022. It is in respect of provisions of Section 151 of the Code of Civil Procedure ('CPC' for short). The Hon'ble Apex Court in

paragraph no.28 of the said judgment, has held that the inherent powers cannot override statutory prohibitions or create remedies which are not contemplated under the Code. Section 151 cannot be invoked as an alternative to filing fresh suits, appeals, revisions, or reviews.

. In paragraph no.33 of the said judgment, it is further held that the inherent powers under Section 151 of CPC can be exercised only where no remedy is provided for in any other provision of CPC.

4. As against, the learned Advocate for the petitioner relied upon the judgment in the case of **Dhariwal Tobacco Products Ltd. and others Vs. State of Maharashtra and another**, reported in (2009) AIR (SC) 1032. The Writ Petition is also maintainable and this Court can always use the powers under Section 482 of the Cr.PC. This Court is of the humble opinion that even in view of the judgment in case of **Pepsi Foods Ltd. vs. Special Judicial Magistrate**, the Hon'ble Apex Court has held that the remedy of the revision, application under Section 482 of Cr.PC. or the powers under Article 227 of the Constitution of India serves the same purpose and there is no much distinction. The powers available to the Court are the same under all these provisions. Secondly even if

revision is to be filed, it would lie before this Court only and not before any other Court. So the forum would not change. Thus, this Court can certainly entertain this Writ Petition.

5. In the petition, an order dated 31.10.2022 passed under Section 319 of IPC by the Court of learned Special Judge, Parbhani in Special (ACB) Case No.10/2018, is under challenge. The prosecution was launched against one Kankute for the charges under the Prevention of Corruption Act. One Vivekanand Bharti had lodged a complaint with the Anti-Corruption Bureau (ACB), Parbhani, wherein there is a specific allegation against accused Kankute that on 19.01.2018, when he had been to the office, he asked him about the sanction of bill, on which he stated to have demanded a bribe by saying 'Regular me hein woh karo'. The police recorded the statement. The complainant again gave an application on the same day with the ACB, Parbhani, wherein name of Kankute alone is mentioned. It is further seen that the statements of eye-witnesses one Rajkumar Godbole and Balaji Sonawane were also recorded on 23.01.2018. Though there is a reference of this present petitioner, there is nothing to indicate that he had taken a bribe or he

had any conversation in respect of the amount of the bribe to be paid to the accused. During the course of investigation, a statement of complainant was again recorded on 22.01.2018. In the said statement also, he stated that it is accused Kankute, who asked for the bribe. It has only come that the main accused stated that the present petitioner would point out deficiencies in the bills and will not pass the bills and therefore accused demanded money. Thus, these are the statements recorded by the prosecution.

6. After filing of the charge-sheet when the trial started, the complainant was being examined as PW-1, where for the first time, he stated that this petitioner asked him “Regular me hein woh karo”, meaning thereby he demanded money as usual. On this, the learned Judge asked a query to the learned APP, as to whether this petitioner is made as accused. The learned APP answered the query in negative and immediately on that the Court formed an opinion and made the petitioner as accused and issued summons. To appreciate the case it is necessary to reproduce the deposition of PW-1 with the order passed by the learned Special Judge, Parbhani.

"Deposition of witness No.1 for the prosecution

I do hereby on solemn affirmation state that

My name is : Adam Khan Walidat Khan Pathan
Age about : 49 years,
Occupation : Government Driver
Resident of : Darga road, Parbhani.

Examination-in-chief

(By Mr. A.N. Giram, APP for the State)

1- I am working as a driver at Panchayat Samiti Purna. Accused is serving in our department as a Clerk. Incident was occurred on 19/01/2017. I submitted my overtime work bill for encashment in our office. Therefore, I met account officer Mr. Pathak. He asked me to do "Regular me hein woh karo" means he demanded me money. He told me "Regular me hein woh karo" means as usual demanded money for sanction of overtime and TA bill. I was to recover/obtained overtime bill of Rs.38,400/- for the period of total 9 months from September 2016 to May 2017.

2- Thereafter, I went to accused Rajendra Kankute for obtaining cheque of overtime work payment. Accused told me to give "Dedh". Witness volunteers that accused demanded 1500 rupees. At that I had no money therefore, I told accused that I would bring the money. Thereafter, on next date i.e. 20/01/2018 I went to ACB office as accused demanded bribe.

(At this juncture court made query to learned APP Shri Giram as the PW-1 informant stated on oath that accounts officer Shri Pathak demanded him money for encashment of

his overtime payment bill therefore, whether prosecution has made accounts officer Shri. Pathak as co-accused in reply the ld. APP answered the query in negations hence, accounts officer Shri Pathak made accused u/s 319 of IPC. Issue summons returnable on 11/11/2022.)

Signed

Date : 31.10.2022.

Special Judge, Parbhani."

7. The petitioner has challenged this order in this Writ Petition. Thus on going through the material produced by the prosecution alongwith the charge-sheet, it is clear that there is no whisper of any demand by the present petitioner at any point of time. Even the eye-witnesses do not say anything against the petitioner. On this, the learned Advocate submits that no case is made out to call for exercise of power under Section 319. He relied upon the judgment of the Hon'ble Apex Court is in the case of **Vikas Rathi Vs. The State of U.P. & Anr.** passed in Criminal Appeal No.644/2023. In the said case, the learned Sessions Judge had turned down the application under Section 319. A Revision Petition was therefore filed in the High Court. The High Court allowed the Revision Petition and set aside the order passed by the learned Sessions Judge and therefore an appeal was filed in the Hon'ble

Apex Court. The matter was remanded for fresh consideration to the High Court on the submission that only where strong and cogent evidence is available against a person from the evidence produced before the Court, which could lead to his conviction, that such a power could be exercised. It could not be exercised in a casual and cavalier manner. The Hon'ble Court considered the judgment is in the case of **Hardeep Singh and Ors. Vs. State of Punjab & Ors.**, reported in (2014) 3 SCC 92. Paragraph No. 105 and 106 of the said judgment are reproduced below.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as

exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under [Section 319](#) Cr.P.C.

Wherein it is held that the power under Section 319 is a discretionary and an extraordinary power, which needs to be exercised sparingly.

8. Next judgment he relied upon is in the case of **Periyasami and Others Vs. S. Nallasamy** reported in AIR (2019) SC 1426. In this judgment, the Hon'ble Apex Court considered the statements recorded under Section 161 of the Code during the course of investigation, wherein the complainant and his witnesses have not disclosed any other name except the persons named in the FIR. In absence of primary evidence, the Hon'ble Apex Court held that the exercise of power under Section 319 was uncalled for. The order passed by the High Court was set aside and the trial Court's order dismissing the application under Section 319 was restored.

9. The third judgment he relied upon is in the case of **Dilawar Singh**

Vs. Parvinder Singh @ Iqbal Singh and Another, reported AIR (2006) SC 389. Wherein again the trial Court had rejected an application on the ground that no sanction under Section 197 was obtained prior to making an application. The High Court by setting aside the order passed by the trial Court, had directed to issue summons to the appellant therein with the aid of Section 319. The Hon'ble Apex Court had set aside the order passed by the High Court.

. In the present case also, by placing reliance on the case of Dilawar Singh (supra), the learned Advocate submits that in this case, the offence is registered under Prevention of Corruption Act and the petitioner being a public servant, it was necessary in view of Section 19 of the PC. Act to obtain sanction prior to add him as accused and issuance of summons.

10. The learned APP for State, submits that the material which was pointed out by the learned Advocate for the petitioner is the only material on record except that there is no evidence or the statement of any of the witnesses showing involvement of this petitioner. He however submits that petitioner's name is mentioned by the witness in

their statements under Section 161 as he was the person who was concerned with the bill section. Though there is no allegation of demand from him in any of the statements, he submits however that in the evidence now the informant has mentioned the name of the petitioner and therefore trial Court is justified in passing the order.

11. Considering the submissions and the material, this Court finds that except the statements of three persons, there are statements of at least two eye-witnesses recorded under Section 161. None of them have said about any involvement of the present petitioner in the offence. Even the complainant has not made any allegation in the complaint as well as in his statement recorded by the police during the course of investigation. The name of the petitioner mentioned for the first time in the evidence of the complainant. Certainly this cannot be said to be a material/evidence appearing against the present petitioner. Secondly this Court also finds that in the submission of the learned Advocate that this being a case under P.C. Act and the petitioner being a public servant, he cannot be prosecuted without a valid sanction under Section 19 of the P.C. Act.

12. This Court therefore, comes to conclusion that on the basis of material available on record, no case is made out to issue summons against the petitioner with the aid of Section 319 of the Cr.PC. Secondly this Court finds that if at all he is to be added as the accused then certainly a sanction under Section 19 of the P. C. Act was necessary. Thus on both these counts, this Court finds that the impugned order deserves to be quashed and set aside. The Writ Petition is allowed and disposed off accordingly. Rule is made absolute in terms of prayer clause 'B'.

[KISHORE C. SANT, J.]

Najeeb.