

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

**REVISION APPLICATION NO. 165 OF 2017**

M. H. Patel

Age 62 years, Occ. : Business

2201, Kingston Palace,

Chincholi Bunder Road,

Malad (W) Mumbai 400064

...Applicant

Vs.

1) Virendra Babubhai Dalal,

Aged 68 years,

Occ.: C. A., Flat No. 1003,

Kingston Palace,

Chincholi Bunder Road,

Malad (west), Mumbai – 400064

**(Dead and revision is dismissed**

**against Respondent No. 1 as per present Order)**

2. Narendra Ramgopal Seksaria

Aged 64 years,

Occ.: C.A; Flat No. 902

Kingston Palace,

Chincholi Bunder Road,

Malad (west) Mumbai – 400064.

3. The State of Maharashtra

...Respondents

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|---------------------------------------------------------|-----------------------------------|
| Mr. M. H. Patel                                         | Applicant in-person               |
| Mr. Prithviraj S. Gole i/by Ms.<br>Divya A. Pawar Patil | Advocate for the Respondent No. 2 |
| Mr. A. D. Kamkhedkar                                    | APP for the Respondent-State      |

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CORAM : S. M. MODAK, J.

DATE : 02<sup>nd</sup> APRIL 2024

**JUDGMENT :-**

1. The issue involved in this revision is whether “*the rule of denovo trial is applicable to verification recorded and whether the order of remand is proper or not*”.
2. Heard the Petitioner in-person who is granted certificate by the Office to plead his case individually and also heard learned Advocate for Respondent No. 2.
3. Petitioner submitted that Respondent No. 1 has expired. After taking instructions, learned Advocate for Respondent No. 2 submitted that Respondent No. 1 has expired. The acts alleged to be committed by him jointly are personal in nature. In view of that revision stands dismissed against Respondent No. 1.
4. There is a private complaint filed by the Applicant before the Court of the Additional Chief Metropolitan Magistrate Borivali. The offences are under Sections 182, 211, 500 read with 34 and 120-B of the Indian Penal Code.
5. Learned Magistrate has recorded the **verification** of the

Applicant-Complainant on **26/03/2008** (at page no. 24). He was pleased to **call report** under Section 202 of the Criminal Procedure Code on **02/04/2008**. The report was also submitted by **Malad Police Station**, Mumbai dated 15/05/2008. They have narrated the nature of the dispute among the Parties and then opined that cognizable offence is not disclosed (at page no. 28).

#### Orders passed by trial Magistrate

6. There were two orders which passed by trial Magistrate. One after another. **They are as follows:-**

- a) The Order dated **22/01/2010** (at page no. 29) wherein the **complaint was dismissed** under Section 203 of the Criminal Procedure Code. The predominant reason was the report given by the Police that “**no offence is disclosed**”.
- b) Order dated **18/06/2011** (at page no. 39) by which **process was issued** for the offence punishable under Section 500 read with 34 of the Indian Penal Code against both the accused persons.

#### Two Revisions

7. There were two revisions filed before the Court of the Additional Sessions Judge. They are :--

- (a) **Criminal Revision Application No. 29 of 2010** filed by the

Complainant. The order of dismissal of the complaint was challenged. The following order was passed on 26/07/2010 :-

- (i) Impugned Order set aside and
- (ii) learned Magistrate was asked to consider it afresh.

(b) **Criminal Revision No. 54 of 2012** it was filed by present Respondent-original accused. Therein the Order of the issuance of the process was challenged. The learned Additional Sessions Judge was pleased to :-

- (i) set aside the Order of the issuance of the process and
- (ii) was pleased to remand the matter back to the trial Magistrate for recording fresh verification and statement of the witnesses, if any and to pass reasoned order (at page no. 56).

The legality of the said order is challenged by the Applicant-Complainant.

#### Reasoning

8. Learned Additional Sessions Judge passed this order predominantly for two reasons:-

- a) The offence under Section 500 read with 34 of the Indian Penal Code is to be tried summarily and after the first Order was set aside by the Sessions Court on 26/07/2010, **thereafter fresh**

**verification was not recorded** and according to him, it is required.

- b) Because the provisions of Section 326 of the Criminal Procedure Code contemplates the situation wherein the evidence is recorded by one Judge and proceedings are taken over by another Judge **where there is no need to conduct the trial *de novo***. According to him, this principle is not applicable to **summary trial** as contemplated under Section 326 (3) of the Criminal Procedure Code. He mean to say if Judge trying case summarily has recorded some evidence and if he transferred, then new Judge has to proceed with the matter since beginning. The reason is quoted in para no. 10. **The first revisional Court opines :-**

*“no fresh verification is required”, witnesses not examined and there is no reference to the material relied upon by the Complainant”.*

Submission by both the sides

9. Learned Additional Sessions Judge set aside the Order for the reason that no fresh verification was recorded. Whereas according to the Applicant-Complainant, the provisions for summary trial are not applicable to an offence under Section 500 of the Indian Penal Code. Punishment prescribed for the offence under Section 500 of the Indian

Penal Code, the punishment is up to 2 years or with fine or both.

10. Both the sides have read over the provisions of **Section 326** of the Criminal Procedure Code. It is true the **sub-section 1 of Section 326**, lays down the principle in which cases *de novo* trial should not be conducted. Mean to say if evidence is recorded by one judge and he is transferred/ceases to exercise the jurisdiction, then successor judge may proceed further with the same evidence (in other words there is no need to record same evidence again). Whereas **sub section 3** is an exception to above principle. That is to say, if there is summary trial of an offence , there has to be *de novo* trial. Mean to say successor judge has to record evidence again and he cannot consider evidence recorded by the earlier judge.

#### Nature of offences to be tried summarily

11. The learned Additional Sessions Judge in para nos. 6 and 7 has given the reasons for his conclusion about necessity of fresh verification. **I have read it.** It is true that this provision has to be read along with the provisions of the Section 260 of the Criminal Procedure Code which empowers the Court to try the case summarily. One of the category of offence is laid down in clause (i). The provisions are :-

a) Offence not punishable **with death**,

- b) Offence not punishable with **imprisonment for life**,
- c) imprisonment for term **exceeding to two years**.

The offences having punishment as mentioned above cannot be tried summarily. In other words offence having less than two years punishment can be tried summarily.

**12.** For an offence under Section 500 of the Indian Penal Code, punishment is up to two years. Applicant invited my attention to the provisions of Section 262 (2) of the Code. For summary trial there cannot punishment exceeding three months.

Section 260 Vis-a-Vis. Section 262(2) of the Criminal Procedure Code

**13.** He wants to suggest that when the punishment is upto three months, such offence cannot be tried summarily and as such fresh verification is not required. **This analogy does not help him. Because if it is accepted, then there cannot be punishment more than 3 months. And if the test of punishment as laid down in section 262 of the Code is applied, then such offence has to be tried summarily and such fresh verification will be required.** Further more both the section operate in different field. Because for deciding which type of offences to be tried summarily, the **test is of punishment**. This test need to be satisfied at the beginning. Where as the **stage of imposing punishment** comes at a later stage. First provision

has the effect of determining the manner of recording of evidence. Whereas the latter provision deals with maximum punishment to be imposed when the offence is proved. So the the test of maximum sentence to be imposed cannot be considered for determining the manner of recording of evidence. Hence his arguments otherwise also cannot be accepted. **Both these provisions are operate in different fields.**

14. **So *prima-facie*, it satisfies the requirement of the Section 260 of the Criminal Procedure Code. So for an offence under section 500 of IPC, there cannot be summary trial.**

#### Stage of application of Section 326

15. However there is one issue which neither learned Additional Sessions Judge has dealt with nor the Parties before me have addressed this Court. The issue is the provisions of Section 326 of the Criminal Procedure Code will be applicable only when evidence is recorded in an inquiry or a trial. **Because the question whether successor Judge should consider that evidence or record fresh evidence will arise only when evidence is recorded.** The stage may be during an inquiry or during a trial.

16. Admittedly, in the case before learned Metropolitan Magistrate, the trial has not started **but stage is about issuance of the process.** So the question is whether the provisions of the Section 326 of the

Criminal Procedure Code will be applicable to verification recorded in an inquiry conducted under section 202 of the Code ? I do not find any reason given by the Revisional Court in the impugned Order. **So the issue is whether contingencies laid down under Section 326 of the Criminal Procedure Code has to be interpreted widely or in the strict sense.**

17. Though both the sides have relied upon few of the judgments, present contingency is not covered. Predominantly, they are on the issue of giving of reasons. In a judgment in case of **Nitinbhai Sevantilal and Anr. Vs. Manubhai Manjibhai Panchal and Anr.** in Criminal Appeal No. 1703 of 2011. Wherein the High Court of Gujarat has dealt with revision against the concurrent findings of the fact and conviction under Section 138 of the Negotiable Instruments Act. Para no. 5 mentions about factual aspect. Evidence was recorded by learned Metropolitan Magistrate and he was transferred and succeeded by another learned Metropolitan Magistrate. The Parties filed a pursis that evidence recorded earlier to be considered. On this background, there was conviction. In para no. 10 onwards, the Hon'ble Supreme Court interpreted the provisions of the Section 326 of the Code. In para no. 14, it is interpreted how the evidence is recorded in summary trial.

Only substance of the evidence is to be recorded. On facts, Hon'ble Supreme Court concluded that earlier evidence ought not to have been considered. That is why the conviction was set aside. Now we need to see to what extent the ratio will be applicable in case before us.

### Facts

18. The verification of the Applicant/Complainant was recorded on 26/03/2008 (at page no. 24). This verification contains the allegation levelled by the complainant against the accused. This verification is nothing but the repetition of the allegations in the complaint. At that stage, the Court is not expected to conduct detail inquiry. The court has to satisfy itself as to whether the *prima facie* case is made out for issuance of process. Whereas giving of evidence has a different connotation. The purpose is to convince the Court about proof of commission of the offence. **Further more this verification cannot be treated as an evidence for the purposes of Section 326 of the Code. Because this verification is recorded in absence of the accused and it is not subjected to cross examination.**

19. There is one more reason why I do not agree with partial conclusion drawn by the first revisional court. Para no. 6 of the said order refers about “police report submitted by Malad police station.

There is reference of crime number 361/2006 under section 323, 324, 504, 506 of IPC". He further observed "*there is no reference of offence u/s 500 of IPC*". I have read that police report.

20. Learned Judge has not cared to peruse the said report minutely. But he just picked some reference and made observation about *de novo* trial. In fact the crime referred by learned judge is not crime of which private complaint is filed. But it is the crime registered against the present applicant.

21. Further more amongst those crimes, there is a punishment up to 3 years. And as such trial cannot be summarily. Such approach need to be deprecated. You must read the documents carefully. Unfortunately it has not happened in this matter.

### Conclusion

22. I do not think that the principle laid down in Section 326 (3) of the Code will be applicable to the case before learned Additional Chief Metropolitan Magistrate. This aspect is not considered by learned Additional Sessions Judge. So Order ought not to have been set aside just because fresh verification was not recorded.

### Non-examination of witnesses

23. There is one more reason for setting aside the impugned order. It is reflected in para no. 10 of the impugned Order. It says non-examination of the witness and no reference of the materials by the trial Magistrate.

### Judgments

24. Both the sides have relied upon the few of the judgments. The Applicant-Petitioner relied upon the following judgments:

- a) ***Bhushan Kumar and Anr. Vs. State (NCT of Delhi) and Anr.***  
in Criminal Appeal No. 612 of 2012 a/w 613 of 2012, dated 04/04/2012.
- b) Whereas the Respondents placed reliance on the observations in case of ***Lalankumar Singh and Others Vs. The State of Maharashtra***<sup>1</sup>.

I have read both the judgments.

### Police Case

25. It is true that the Hon'ble Supreme Court in case of ***Bhushan Kumar and Anr.*** (supra) has elaborately dealt with the necessity of the

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giving reasons while summoning the accused. **The ratio is “reasoning is not required”**. It is important to note that in the State cases, it was FIR registered with Police Station and then charge-sheet is filed and accused was summoned. There is basic difference in between the charge-sheet and the private complaint. In the charge-sheet, the Police always used to investigate, collect materials and then to file documents. Whereas in the private case, it is not the same position.

**26.** So when accused is summoned in the Police case, the Court is having lot of materials. Whereas in the private case, there is only averments in the complaint and supporting documents and verification.

#### Private Case

**27.** Whereas in **Lalankumar Singh and Others** (supra), it was a case for violation of the Drugs and Cosmetics Rules. There was prosecution before the Court of the Chief Judicial Magistrate and the accused was summoned. The grievance of the accused for summoning was rejected by the High Court and that is why they have approached the Hon’ble Supreme Court. The material observations finds place in para no. 38. It is reiterated as

*“The order of issuance of process is not an empty formality.*

*The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given while coming to the conclusion that there is a prima-facie case against the accused. No doubt, the order need not contain detailed reason”.*

Per In Curiam

28. The Applicant contends that when the Hon’ble Supreme Court dealt with case of the Lalankumar Singh and Others (supra), the Order passed by the Hon’ble Supreme Court in case of Bhushan Kumar and Anr.(supra) was not cited. Bhushan Kumar and Anr. was delivered on 04/04/2012. Whereas Lalankuamr Singh and Others (supra) is decided on 11/10/2022. Lalankuamr Singh and Others (supra) is decided by bench consist of two Judges. Whereas Bhushan Kumar and Anr. (supra) is also decided by two Judges bench.

29. On the point of judicial discipline, he relied upon the observations in case of Central board of Dawoodi Bohra Community and Ors. Vs. State of Maharashtra and Ors. in Writ Petition (Civil) No. 740 of 1986, dated 17/12/2004. He read the conclusion drawn in para

no. 12. It opines, the law laid down by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

30. I do not think there is need for this Court to go on with this controversy, because the facts in case of Bhushan Kumar and Anr. (supra) are different. It was the Police case and every materials were available before the Court. Whereas in Lalankuamr Singh and Others (supra) it was the case filed by the Drug Inspector. So also in this case, this is complaint filed by Applicant in-person. Here the Complainant has to prove his own case by producing the relevant materials and there is no investigation by the Police (though an inquiry under Section 202 of the Code).

### Conclusion

31. So I am on this view that learned Magistrate prior to passing an Order ought to have referred the materials in the said order. What he has stated, perused the verification statement. He has no where referred about the Police report submitted under Section 202 of the Criminal Procedure Code. If after referring it, he could have issued the process, it can be said to be an application of the judicial mind. However, it is absent. **So decision taken by learned Additional Judge about setting aside impugned Order cannot be faulted. There is only one**

modification, there is no need to record fresh verification.

### Permissibility of ground

32. One more contention is raised on behalf of the Applicant. The learned Additional Sessions Judge has given a findings about “fresh verification”, even though this ground is not taken in the revision filed by the Applicant. To buttress his submission, the Applicant relied upon the observations in case of *Mrs. Akella Lalitha Vs. Sri Konda Hanumantha Rao and Anr.* in Civil Appeal No. 6325-6326 of 2015. The material observations are in para nos. 15 and 16. The ratio is relief should not be granted until they are found in the pleadings. After perusing the memo of the revision, learned Advocate for the Respondent could not point out “absence of the fresh verification” was taken as ground. However, when the issue is about compliance of the legal provisions, strict rule of the pleading is not applicable. **This ground can be taken during arguments also. I am rejected the objections of the Applicant.**

### Summary

33. So matter needs to be remanded to the Court of the Additional Chief Metropolitan Magistrate. After remand, the learned Metropolitan may go through the verification which is already

recorded. If the Applicant is desirous of examining any witness prior to the issuance of the process, he can do so.

#### About Police report

**34.** Something is required to be said about the Police report. The Police report is on page no. 27, dated 15/05/2008. I have perused it. Even the Applicant has brought to my notice the opinion of the Police that **“no cognizable offence is disclosed”**. According to him, the offence under Section 500 of the Indian Penal Code is non cognizable. He is right. I am not going into an issue whether an inquiry under Section 202 of the Criminal Procedure Code is warranted in such case or not.

**35.** On this background liberty can be granted to the Applicant to point out to learned Magistrate that this report is silent on the aspect of the allegation made by him in the complaint for which he is asking for issuance of the process. The learned Metropolitan Magistrate may also verify about absence of any opinion by the Police about allegation in the complaint. If Police have not opined about those allegations, one can say that purpose of conduct an inquiry under Section 202 of the Code is not served. Learned Metropolitan Magistrate may overlook that report and then come to its own conclusion.

**36.** Hence the Order :-

## ORDER

- (i) Revision is dismissed.
- (ii) Let the Court of the Additional Chief Metropolitan Magistrate, 24<sup>th</sup> Court, Borivali to hear the Complainant and to take an appropriate decision about issuance of the process.
- (iii) Let the trial Magistrate to go on with the matter on the basis of the earlier verification and grant liberty to the Applicant to examine witnesses, if he wants prior to the issuance of the process.
- (iv) The Court of the Additional Chief Metropolitan Magistrate to pass an appropriate Order accordingly.
- (v) Let the Applicant to appear before the concerned Court on the date fixed by the Court. It is told that it is 19/04/2024.
- (vi) Let the Court of the Additional Chief Metropolitan Magistrate, 24<sup>th</sup> Court, Borivali is directed to decide the issue at the earliest not less than three months from 19/04/2024.
- (vii) Applicant to delete name of present Respondent No. 1 from array of accused.

**37.** Revision Application is disposed of.

**[S. M. MODAK, J.]**