

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1048 OF 2023
WITH
CRIMINAL APPLICATION NO.1052 OF 2023
WITH
CRIMINAL APPLICATION NO.1053 OF 2023
WITH
CRIMINAL APPLICATION NO.1336 OF 2023
WITH
CRIMINAL APPLICATION NO.1338 OF 2023

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Diipesh Lakshman Bhagtani ...Applicant

vs.

The State of Maharashtra and Anr. ...Respondents

Mr. Sahil Mahajan (through VC) a/w. Mr. Saurabh Godbole, for the Applicant.

Mrs. Geeta Mulekar, APP, for the Respondent/State.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 20, 2024

P.C.:

1. Heard the learned counsel for the parties.

2. The applicant is accused No. 2 in complaints being CC No. 6235/SS/2017, 7428/SS/2017, 6483/SS/2017, 410/SS/2018 and 409/SS/2018 lodged by respondent No. 2 for an offence punishable under section 138 read with 141 of the Negotiable Instruments Act, 1881. Accused No. 3 is the father of accused No. 2. Accused No. 3 is stated to be abroad.

3. The complainant preferred an application asserting that accused No. 3 is absconding and not traceable by police. Therefore, the trial be separated. By an order dated 31st December, 2022 the

learned Metropolitan Magistrate was persuaded to allow the application holding, inter alia, that accused No. 3 was not in India and the case was old one. There was no chance of accused No. 3 appearing in near future. Thus, the trial of accused No. 3 was ordered to be separated. Being aggrieved, accused No. 2 has preferred these applications.

4. The learned counsel for the applicant submitted that the learned Magistrate could not have separated the trial. Attention of the Court was invited to a judgment of the Delhi High Court in **Jitender Narottam Das Mehrotra and Others vs. State and Others**¹ wherein it was observed that splitting of trial against some of the accused and simultaneously continue with the proceedings of procuring the presence of remaining accused, is neither legally permissible nor congenial to the trial as it has to be intermittently subjected to fits and starts and the possibility of de novo trial, if even one of the accused appears at the fag end cannot be ruled out.

5. The crucial question is the prejudice likely to be caused to the applicant. Evidently, accused No. 3 was abroad. Non-bailable warrant was issued against accused No. 3. The learned Magistrate could have proceeded to issue proclamation against accused No. 3. However, to urge that the trial in complaint under section 138 read with 141 of the NI Act cannot be proceeded with when one of the

¹ 2003 (71) DRJ 43.

accused had absconded would defeat the very object of enacting the penal provision in the Act, 1881.

6. In a situation of this nature, where one of the accused is absconding and is beyond the reach of the Court, the learned Magistrate cannot be said to have committed any error in proceeding with the trial by separating the trial of the absconding accused.

7. Where one of the accused has made himself scarce, the Magistrate can justifiably resort to the power under section 317(2) of the Code of Criminal Procedure, 1973. It empowers the Judge or Magistrate to order that the case of an accused who is absconding may be taken up or tried separately. A Division Bench of Madras High Court in the case of **In Re : Duraisingam and Others, Accused**² traced the power to separate the trial to section 317(2) of the Code.

It was, inter alia, observed as under:-

5] It is true that Rr. 16, 17 and 20 of the Criminal Rules of Practice would not govern the facts of this case. The question whether S. 299(1) of the Criminal P.C. should be resorted to does not arise for consideration because the learned Sessions Judge can exercise the powers conferred on him by sub-section (2) of S. 317 of the Criminal P.C. Sub-section (2) of S. 317 gives power to every Judge and Magistrate to split up a case against an absconding accused if his personal attendance is necessary, but, notwithstanding that fact the accused has absconded and fails to participate in the enquiry or trial. The words 'if the accused in any such case is not represented by a pleader' occurring in sub-section (2)

2 1983 CRL.L.J. 1765.

does not mean that merely because an absconding accused is represented by a pleader, the trial against him cannot be spilt up if his personal attendance in court is necessary. As the second accused has made himself scarce, the Additional Sessions Judge is instructed to deal with the matter in accordance with sub-section (2) of S. 317 of the Criminal P.C. The reference will stand answered accordingly.

8. In any event, no prejudice is likely to be caused to the applicant as he will have full opportunity to defend himself at the trial.

Applications stand dismissed.

(N. J. JAMADAR, J.)