ABC 2016 (II) 358 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(V.K. Jadhav, J.)

Criminal Writ Petition No. 403 of 2015 with Criminal Writ Petition No. 404 of 2015 with Criminal Writ Petition No. 405 of 2015

Decided on 30 August, 2016

Aurangabad Bench

VITHHALRAO KONDIBA WAGHMARE & ORS. - Petitioner(s).

Versus

STATE OF MAHARASHTRA & ORS. - Respondent(s).

Law Covered:- *(A) Criminal Jurisprudence — Code of Criminal Procedure, 1973 — Section 399 — Suo-motto revisional jurisdiction —Exercising of — by Sessions Court — Non speaking order — effect of — Not clear from the impugned order — that the learned Judge has considered the revision preferred by the petitioner-accused on merits— Order quashed and set aside —Direction to the learned Sessions Judge— to give an opportunity of being heard to the petitioners -accused or their counsel— Petitions partly allowed. (Para 15 & 16)*

(B) Code of Criminal Procedure, 1973 — Section 399— Sessions Judge's powers of revision —(1) In any proceeding the record of which has been called for by himself — the Sessions Judge may exercise all — or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401—(2) Any proceeding commenced before a Sessions Judge by way of revision under sub-section (1) — the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding — & references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge —(3) Application for revision made before the Sessions Judge — the decision of the Sessions Judge thereon — shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court. (Para 10)

(C) Code of Criminal Procedure, 1973 — Section 401(2) — Revisional Power — Scope of — The High Court cannot pass any order to the prejudice of the accused — or other persons — unless that person has had an opportunity of being heard — either personally or by pleader — in his own defence — It is thus, incumbent upon, the

Sessions Judge — to hear the accused, if the Sessions Judge proposes to make any order adverse to the accused or other persons. (Para 10)

(D) Code of Criminal Procedure, 1973 — Section 399 — Sessions Judge's powers of revision — Scope of — Even the Sessions Judge is obliged to hear the accused or other person — if he proposes to make any order adverse to that person while exercising his revisional powers — Such person may be heard personally or through his lawyer — Bomab Rustom Irani Vs. State of Maharashtra — relied. (Para 13)

(E) Code of Criminal Procedure, 1973 — Section 399 & 401(2) — Powers under — Suo motto revision proceeding by Sessions Court — Held, it would be just and appropriate if the Sessions Court register the separate Suo Motto proceeding of the revision — alongwith the revision preferred by the accused — & also give notice of the said suo motto revision to the accused — or otherwise at the most the learned Sessions Judge may pass an order — in that event, bound to follow the provisions of Sub section (2) of Section 401 of the Code of Criminal Procedure. (Para 14)

Facts:- *On the basis of the complaint lodged by Respondent No.2 crime came to be registered for the offence punishable u/ss 498-A, 497, 328, 294, 292, 323, 504, 506, 509, 114, 109 r/w 34, IPC. The petitioners filed an application for discharge which was partly allowed and all the petitioners/ original accused were discharged. However, the learned Assistant Sessions Judge rejected the application so far as prayer claiming discharge for the offence punishable under Section 328 of the Indian Penal Code. Being aggrieved by the same, the petitioners-accused preferred two Criminal Revision Applications. The learned Sessions Judge set aside the order passed by the learned Assistant Sessions Judge and restored the application with a direction to decide the said application afresh by passing an appropriate order in accordance with law. Being aggrieved by the same, these two writ petitions were preferred before the Honourable High Court.*

It was submitted on behalf of the petitioners that the Sessions Judge exercised the revisional powers suo motto without giving an opportunity of hearing to the petitioners and the same amounts to violation of principles of natural justice. The honourable Bombay High Court set aside the order passed by the learned Sessions Judge with the direction to the learned Sessions Judge to give an opportunity of being heard to the petitioners-accused.

Law of relief:- ***In the suo motto revision proceeding Sessions Court has to give an opportunity of being heard to the petitioner or his counsel.***

Held:- The provisions of section 399 and 401 (2) of the Code of Criminal Procedure Code so far it is material while deciding the present writ petitions reads thus :-

399. Sessions Judge's powers of revision :-

(1) In the case of any proceeding the record of which has been called for by himself the Sessions Judge may exercise all or any if the powers which may be exercised by the High Court under sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

401. (1) .....

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. (Para 10)

I am fortified by the views expressed by this Court in a case Bomab Rustom Irani Vs. State of Maharashtra (supra) reported in 2007 (1) Bom Cri 656 relied upon by the learned counsel for the petitioner. In paragraph No.9 of this case, this Court has made following observations:-

9. It is clear from section 401(2) of the Code that the High Court cannot pass any order to the prejudice of the accused or other person in its revisional power unless that person has had an opportunity of being heard either personally or by pleader in his own defence. Section 399 refers to Sessions Judges powers of revision. Sub-section (2) thereof states that where any proceeding by way of revision

is commenced before a Sessions Judge, provisions of sub-section (2) of section 401 shall, so far as may be, apply to such proceeding and reference to High Court in the said sub -section shall be construed as reference to the Sessions Judge. Therefore, even the Sessions Judge is obliged to hear the accused or other person, if he proposes to make any order adverse to that person while exercising his revisional powers. Such person may be heard personally or through his lawyer. (Para 13)

By invoking the powers as provided under section 399 of the Code of Criminal Procedure, if the Sessions Court initiated suo motto revision proceeding, it would be just and appropriate if the Sessions Court register the separate Suo Motto proceeding of the revision alongwith the revision preferred by the accused and also give notice of the said suo motto revision to the accused or otherwise at the most the learned Sessions Judge may pass an order below Exh.1 of Criminal Revision Application already preferred by the accused persons before him, where the record and proceedings has been called, disclosing his intention to examine any other order passed by the Trial Court. The learned sessions Judge, in that event, bound to follow the provisions of Sub section (2) of Section 401 of the Code of Criminal Procedure. (Para 14)

It is not clear from the impugned common order passed by the learned Sessions Judge, Nanded that the learned Judge has considered the revision preferred by the petitioner-accused on merits. While exercising the suo-motto revisional jurisdiction, the learned Sessions Judge has merely observed that the trial is not properly regulated and irregularities are crept in the impugned order. The learned Sessions Judge, has, therefore, thought it fit to remand the matter to the learned Judge to re-appreciate the prosecution material and make out specific assertions as to exactly for what offences charges are to be framed and against which particular accused. (Para 15)

Counsel:- ***For Petitioner(s):*** *Mr D.M. Shinde, Advocate.*

For Respondent(s): *Miss R P Gour, APP & Mr S V Kale, Advocate.*

Cases Referred:-

1. *Bomb Rustom Irani Vs. State of Maharashtra and another; 2007 (1) Bom.C.R. (Cri) II. (Para 6)*

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2. *Criminal Revision Application No.94 of 2004 with Criminal Revision Application No.142 of 2004 Shaikh Madinabibi Mustafabhai Vs. State of Gujarat. (Para 6)*

3. *Balasaheb Keshav Thakre and ors. Vs. Kusumbai Manikrao Deshmukh and another reported in 2000 ALL MR (Cri) 662. (Para 6)*

JUDGMENT

V.K. JADHAV, J.: - 1. Rule. Rule made returnable forthwith. With the consent of learned counsel for respective parties, heard finally.

2. Being aggrieved and dissatisfied by the common Judgment and order passed in Criminal Revision Application No.91 of 2014 and Criminal Revision Application No.92 of 2014 by the learned Sessions Judge, Nanded dated 13.2.2015, the original accused in Sessions Case No.208 of 2013 has preferred these writ petitions.

3. Brief facts, giving rise to the present writ petitions, are as follows :-

a] On the basis of the complaint lodged by Respondent No.2 Priya Waghmare Crime bearing No.10/2012 came to be registered at Police Station, Bhagyanagar, District Nanded for the offence punishable under section 498-A, 497, 328, 294, 292, 323, 504, 506, 509, 114, 109 read withsection 34 of the Indian Penal Code. After due investigation, Police Station Bhagya Nagar has submitted charge sheet in the Court and the case is committed to the Sessions Court as offences alleged to have been committed by the petitioners/accused are triable exclusively by the Court of Sessions.

b] The petitioners have filed an application Exh.55 in the said Sessions Case 208 of 2013 for discharge. The learned Assistant Sessions Judge, Nanded by order dated 14.3.2014 below Exh.55 in Sessions Case No.208 of 2013 partly allowed the said application and all the petitioners/original accused were discharged for the offences punishable under sections 109, 114,294 and Section 497 of the Indian Penal Code. Except the petitioner-accused No.1 Kailashchandra s/o Vitthal Waghmare all the accused are also discharged for the offence punishable under section 292 of the Indian Penal Code. However, the learned Assistant Sessions Judge, Nanded has rejected the application so far as prayer claiming discharge for the offence punishable under Section 328 of the Indian Penal Code. Being aggrieved by the same, the petitioners-accused preferred two Criminal Revision Applications bearing No.91 of 2014 and 92 of 2014 respectively. The learned

Sessions Judge, Nanded by his common Judgment and order dated 13.2.2015 in the aforesaid Criminal Revision Applications set aside the order passed by the learned Assistant Sessions Judge below Exh.55 in Sessions Case No.208 of 2003 and restored the application Exh.55 with a direction to decide the said application afresh by passing an appropriate order in accordance with law in the light of the discussion made in the Judgment. Being aggrieved by the same, these two writ petitions have been preferred.

4. The learned counsel for the petitioners submits that, the Assistant Sessions Judge, Nanded has discharged the petitioner/ accused for the offence punishable under Section 109, 114, 294 and 497of the Indian Penal Code and also discharged all the accused for the offence punishable undersection 292 of the Indian Penal Code except the petitioner-accused No.1 Kailashchandra. However, the learned Assistant Sessions Judge has rejected the prayer to the extent seeking discharge for the offence punishable under section 328 of the Indian Penal Code. Being aggrieved by the said order to the extent of rejection of prayer seeking discharge for the offence punishable under Section 328 of the Indian Penal Code, the petitioners/original accused have preferred the said Criminal Revision Applications and also the petitioner-original accused Kailashchandra preferred Criminal Revision Application alongwith them to the extent of rejection of his prayer seeking discharge for the offence punishable under section 292 of Indian Penal Code. The learned counsel submits that, the State has not preferred any Criminal Revision Application against the order passed by the learned Assistant Sessions Judge, Nanded below Exh.55 in Sessions Case No.208 of 2013.

5. The learned counsel further submits that, the Sessions Judge, Nanded while deciding said criminal revision application Nos.91 of 2014 and 92 of 2014 has exercised the revisional power suo motto to the extent of the order passed by the learned Assistant Sessions Judge below Exh.55 discharging the petitioners-original accused for the offences punishable under section 109, 114, 294 and 497 of the Indian Penal Code. The learned counsel submits that, the Sessions Judge, Nanded has exercised the revisional powers suo motto without giving an opportunity of hearing to the petitioners and the same amounts to violation of principles of natural justice. The learned counsel submits that, the Sessions Judge has not followed the provisions of Section 399 (1) and Section 401 sub-section (2) of the Criminal Procedure code. The learned counsel submits that, the

petitioners came to know for the first time after going through the order passed by the learned Sessions Judge in those Criminal Revision Applications that the learned Sessions Judge by exercising the revisional power suo-motto set aside the order passed by the Assistant Sessions Judge, Nanded below Exh.55 to the extent of discharge of the present petitioners-original accused for having committed an offence punishable under Section 109, 114, 294, 497 of the Indian Penal Code. The learned Sessions Judge, Nanded has not issued notice to the petitioners before exercising suo motto revisional jurisdiction. The learned counsel submits that, in view of the provisions of sub-section (2) of Section 401 no order shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. The learned Sessions Judge has exceeded the jurisdiction and failed to follow the principles of natural justice.

6. The learned counsel for the petitioners in order to substantiate his contentions placed his reliance on the following judgments :-

I. Bomb Rustom Irani Vs. State of Maharashtra and another reported in 2007 (1) Bom.C.R. (Cri) II. Criminal Revision Application No.94 of 2004 with Criminal Revision Application No.142 of 2004 Shaikh Madinabibi Mustafabhai Vs. State of Gujarat.

III.Balasaheb Keshav Thakre and ors. Vs. Kusumbai Manikrao Deshmukh and another reported in 2000 ALL MR (Cri) 662.

7. The learned counsel for respondent no.2-original complainant submits that, in view of the provisions of Section 399 (1) of the Code of Criminal Procedure Code, in any proceedings the record of which has been called by the Sessions Judge himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401 of the Code of Criminal Procedure. The Sessions Judge may not be entitled to invoke revisional jurisdiction if it otherwise comes to its knowledge but revisional jurisdiction of the Sessions Judge is extended to any proceeding, the record of which has been called for by himself. Phraseology "Record of which has been called for by himself" as used in Section 399 of Code of Criminal Procedure is not restricted only to those cases in which suo-motto revision petition is entertained by the Court of Session. It would also cover the case, where, in context of any other proceeding, including revision petition

initiated by any one of the accused of which the record is called. The learned counsel submits that, the Sessions Judge after perusal of the record called at the instance of the accused may be on some other point when notice the illegality apparent on the face of record while discharging the petitioner-accused under the other charges levelled against them, suo motto revised the said order and further directed the Trial Court to hear and decide the application Exh.55 afresh. There is no illegality as such in the impugned order and writ petitions are devoid of any merits.

8. I have also heard the learned APP for the State.

9. Main grievance of the petitioner is that, the learned Sessions Judge, Nanded while exercising revisional powers suo-motto has not given an opportunity of being heard to the petitioners-original accused. The learned Sessions Judge, Nanded has observed that, the prosecution has not preferred any revision against the order so far as discharging the accused from certain offences is concerned and further observed that the Sessions Judge may suo-motto examine the legality, propriety and regularity of the proceeding. In paragraph no.40 of the Judgment, the learned Sessions Judge has observed that it has become necessary to exercise the powers of suo-motto revision because the learned Judge of the Trial Court has committed certain mistakes. The learned counsel submits that the Sessions Judge while writing the judgment in the Criminal Revision No.91/2014 and 92/2014 decided to exercise the revisional jurisdiction suo-motto with regard to discharge of the petitioner-accused persons by the trial court under some offences and passed the impugned order to the prejudice of the petitioners-accused without affording an opportunity of being heard to them.

10. The provisions of section 399 and 401 (2) of the Code of Criminal Procedure Code so far it is material while deciding the present writ petitions reads thus :-

399. Sessions Judge's powers of revision :-

(1) In the case of any proceeding the record of which has been called for by himself the Sessions Judge may exercise all or any if the powers which may be exercised by the High Court under sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-

sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

401. (1) .....

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) .....

(4) .....

(5). .....

11. It is clear from the provisions of Section 401(2) of the Code of Criminal Procedure that, the High Court cannot pass any order to the prejudice of the accused or other persons unless that person has had an opportunity of being heard either personally or by pleader in his own defence. In view of the provisions of sub-section (2) of Section 399 wherein proceedings by way of revision is commenced before the Sessions Judge, the provisions of sub-section (2) of Section 401 shall, so far as may be applied to such proceedings. It is thus, incumbent upon, the Sessions Judge to hear the accused, if the Sessions Judge proposes to make any order adverse to the accused or other persons.

12. In the instant case, the learned Assistant Sessions Judge has discharged the petitioners-accused under some of the charges levelled against them and rejected their application for discharge in respect of remaining charges. Being aggrieved by the order of rejection of the application of discharge in respect of some of the offences, the petitioner-original accused approached to the Sessions Judge. The learned Sessions Judge, Nanded while examining the record and proceedings in the said revision, if noticed any illegality, even in the order of discharge passed by the trial court, under the provisions of section 399 the Sessions Judge, may exercise all or any of the powers which may be exercised by the High Court under section 401.

However, the Sessions Judge, if proposes to deal with the said order of the trial court in respect of discharge of the petitioner-accused under some of the offences, suo-motto, the Sessions Judge should have registered a revision titling it as Suo-motto Revision and ought to have given an opportunity of being heard to the petitioners-original accused. Only after the judgment is delivered in Criminal Revision No.91/2014 & 92/2014, the petitioner-original accused came to know that even the learned Sessions Judge has examined the order passed by the Trial Court about their discharge under some of the offences and set aside the said order by directing the trial court to hear the application Exh.55 entirely afresh. This order is certainly passed to the prejudice of the petitioner-accused without giving them an opportunity of being heard either personally or by pleader in their defence.

13. I am fortified by the views expressed by this Court in a case Bomab Rustom Irani Vs. State of Maharashtra (supra) reported in 2007 (1) Bom Cri 656 relied upon by the learned counsel for the petitioner. In paragraph No.9 of this case, this Court has made following observations:-

9. It is clear from section 401(2) of the Code that the High Court cannot pass any order to the prejudice of the accused or other person in its revisional power unless that person has had an opportunity of being heard either personally or by pleader in his own defence. Section 399 refers to Sessions Judges powers of revision. Sub-section (2) thereof states that where any proceeding by way of revision is commenced before a Sessions Judge, provisions of sub-section (2) of section 401 shall, so far as may be, apply to such proceeding and reference to High Court in the said sub-section shall be construed as reference to the Sessions Judge. Therefore, even the Sessions Judge is obliged to hear the accused or other person, if he proposes to make any order adverse to that person while exercising his revisional powers. Such person may be heard personally or through his lawyer.

14. By invoking the powers as provided under section 399 of the Code of Criminal Procedure, if the Sessions Court initiated suo motto revision proceeding, it would be just and appropriate if the Sessions Court register the separate Suo Motto proceeding of the revision alongwith the revision preferred by the accused and also give notice of the said suo motto revision to the accused or otherwise

at the most the learned Sessions Judge may pass an order below Exh.1 of Criminal Revision Application already preferred by the accused persons before him, where the record and proceedings has been called, disclosing his intention to examine any other order passed by the Trial Court. The learned sessions Judge, in that event, bound to follow the provisions of Sub section (2) of Section 401 of the Code of Criminal Procedure.

15. It is not clear from the impugned common order passed by the learned Sessions Judge, Nanded that the learned Judge has considered the revision preferred by the petitioner-accused on merits. While exercising the suo-motto revisional jurisdiction, the learned Sessions Judge has merely observed that the trial is not properly regulated and irregularities are crept in the impugned order. The learned Sessions Judge, has, therefore, thought it fit to remand the matter to the learned Judge to re-appreciate the prosecution material and make out specific assertions as to exactly for what offences charges are to be framed and against which particular accused.

16. In view of the above discussion, the impugned common order passed by the learned Sessions Judge, Nanded dated 13.2.2015 in Criminal Revision Application Nos. 91/2014 and 92/2014 is liable to be quashed and set aside with the direction to the learned Sessions Judge, Nanded to give an opportunity of being heard to the petitioners-accused or their counsel in the suo motto revision proceeding and pass an appropriate orders in accordance with the law. Hence, following order.

ORDER

I. Writ Petition Nos.403/2015, 404/2015 and 405/2015 are hereby partly allowed.

II. The common Judgment and order passed by the Sessions Judge, Nanded in Criminal Revision Application Nos.91/2014 and 92/2014 is hereby quashed and set aside.

III. The learned Sessions Judge, Nanded is hereby directed to hear the Criminal Revision Application No.91/2014 and 92/2014 and also the suo-motto Revision Proceeding, afresh, by giving an opportunity of being heard to the petitioners-accused persons either personally or through their counsel and pass an appropriate orders in accordance with law.

IV. Writ Petitions are accordingly disposed of. Rule is made absolute in above terms.

Result:- Petitions partly allowed.

ABC 2016 (II) 369 BOM

ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(Anuja Prabhudessai, J.)

Criminal Application No.547 of 2013 with Criminal Application No.781 of 2013 with Criminal Application No.1133 of 2012

Decided on 5 August, 2016

DARTONZINK & ANR. ***- Applicant(s).***

Versus

STATE OF MAHARASHTRA & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 482 — Indian Penal Code, 1860 — 406, 420 & 120 B r/w 34 — Issuance of process — Quashing of — The complaint does not contain any ingredient of Cheating, Criminal breach of trust or conspiracy — Held, Suffice it to say that mere breach of the contract cannot give rise to criminal prosecution as alleged — unless the averments in the complaint prima facie disclose essential ingredients of the offence — no averments to indicate that the accused had entered into an agreement with dishonest intention — Breach of terms of the agreement, if any, would at the most give rise to civil cause of action — Order of issuing process quashed & set aside. (Para 18)***

(B) Code of Criminal Procedure, 1973 — Sections 482 & 397(2) — Inherent power of the Court — Exercising of — Principles — (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party; — (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice; —(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code — Madhu Limaye Vs. The State of Maharashtra —relied. (Para 12)

(C) Code of Criminal Procedure, 1973 — Sections 482 & 397 (2) — Inherent powers of the High Court — Bar on — the High Court will have no power of revision in relation to any