

HARINARAYAN G. BAJAJ  
v.  
STATE OF MAHARASHTRA & ORS.  
(Criminal Appeal No. 28 of 2010)

JANUARY 6, 2010

[V.S. SIRPURKAR AND DR. MUKUNDKAM  
SHARMA, JJ.]

*Code of Criminal Procedure, 1973 – s. 319(4)(a) and (b);  
244 – Criminal proceedings – New accused joined to the  
proceedings after charges framed against the original  
accused – Right of newly added accused for initiation of  
proceedings qua him from the stage of s. 244 and right to  
cross-examine the witnesses before framing of charges –  
Held: The whole inquiry in respect of the newly added accused  
should commence afresh from the stage of s. 244 – Such  
accused had the right to cross-examine the witnesses.*

*Words and Phrases: 'Commence afresh' and  
'Proceedings' – Meaning of, in the context of s. 319(4)(a)  
Cr.P.C.*

**In a criminal proceeding u/s. 406 r/w s. 114 IPC, after  
the charges were framed against respondent Nos. 2 to  
4, appellant filed an application u/s. 319 Cr.P.C.,  
requesting to array respondent No. 5 as a co-accused.  
The application was allowed. Respondent No. 5 filed an  
application seeking to commence the proceedings qua  
him, from the stage of inquiry i.e. from the stage of s. 244  
Cr.P.C. and to allow cross-examination of prosecution  
witnesses at the stage of evidence before charge.  
Application was allowed. Trial court also split the trial of  
respondent No. 5 from the trial of respondent Nos. 2 to  
4. The order as regards splitting of trial was quashed by  
High Court. Appellant's application, seeking quashing of**

A the order, whereby trial court had ordered de novo proceedings as against respondent No. 5 from the stage of inquiry, was rejected by High Court.

Dismissing the appeal, the Court

B HELD: 1.1. Section 319 Cr.P.C. suggests that there is no escape from commencing the proceedings afresh and also that the witnesses have to be re-heard. Clause (a) of Section 319 (4) is the basic provision and the use of the words 'proceedings' and the term 'commence afresh' has its own significance. If the plea that the newly joined accused has no right of cross-examination is accepted, it would mean that on being joined under Section 319 (1) Cr.P.C., the only step that would be required would be framing of charge against him. In that event, there would be a complete denial to such accused of an important right of cross-examination of the witnesses before the framing of the charge and it would only mean that such accused would remain a mute spectator till the framing of the charge. [Para 11] [179-E-H]

F 1.2. The Court would also give a meaningful interpretation to the word '*proceedings*' which has been deliberately used by the Legislature. The Legislature does not use the word '*trial*' which essentially begins after framing of the charge. If the legislature had intended that the newly joined accused should not get the right of cross-examining the witnesses examined before framing of the charge, it might have used the word 'trial'. The deliberate use of the word '*proceedings*' would then include not only the trial but also the inquiry which commences with Section 244 Cr.P.C. and ends with the framing of the charge under Section 246 Cr.P.C. [Para 12] [180-A-C]

H 1.3. The terminology '*commence afresh*' has also its

own force. It indicates that the whole inquiry which commences from Section 244 Cr.P.C. must begin afresh. The interpretation given to the word '*proceedings*' by the Court, is buttressed by the language of Section 319(b) Cr.P.C. The plain language takes back the whole proceedings to the stage of taking cognizance. Therefore, the language of Section 319 Cr.P.C. itself pushes the proceedings back to the stage of inquiry, once the order under Section 319 (1) Cr.P.C. is passed by the Court and a new accused is joined therein. [Para 12] [180-C-E]

1.4. If the interpretation that Section 319(4) does not require de novo inquiry, is to be accepted then a complainant, wherein it is a case of multiple accused, may mischievously join only few of them and after getting the charge framed, make an application under Section 319 Cr.P.C. to join some other accused persons who would then have no right of cross-examination of the witnesses and who would be required to be the mute spectators to the charge being framed against which they could have successfully resisted by cross-examining the witnesses. [Para 13] [180-E-G]

1.5. Before summoning the accused under Section 319(1) Cr.P.C., there is no requirement of allowing such accused person to cross-examine the witnesses. That stage comes only after an accused is summoned under sub-Section (1). Therefore, it would be a case where the newly added accused who has not had the advantage of hearing the evidence would be put to prejudice because firstly, he has not heard the evidence and secondly, he cannot even cross-examine those witnesses in the warrant trial based on a private complaint. [Para 14] [180-G-H; 181-A-B]

2.1. Right to cross-examine the witnesses who are examined before framing of the charge is a very precious

A right because it is only by cross-examination that the accused can show to the court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him. [Para 16] [181-D-F]

*Ajoy Kumar Ghose v. State of Jharkhand* 2009 (4) SCR 515, relied on.

D 2.2. Under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr. P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence. [Para 17] [182-B-C]

*Shashi Kant Singh v. Tarkeshwar Singh and Anr.* 2002 (5) SCC 738, relied on.

F *Rakesh v. State of Haryana* 2001 (6) SCC 248, distinguished.

G *R.S. Nayak v. A.R. Antulay* 1986 (2) SCC 716; *Michael Machado v. Central Bureau of Investigation* 2000 (3) SCC 263; *Ram Gopal and Anr. v. State* 1999 CrLJ 1865, referred to.

**Case Law Reference:**

	2009 ( 4 ) SCR 515	Relied on.	Para 16
H	2002 (5) SCC 738	Relied on.	Para 17

2001 (6) SCC 248	Distinguished.	Para 19	A
1999 CrL.J. 1865	Referred to.	Para 20	
1986 (2) SCC 716	Referred to.	Para 21	
2000 (3) SCC 262	Referred to.	Para 22	B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 28 of 2010.

From the Judgment & Order dated 5.6.2008 of the High Court of Bombay in Criminal Application No. 1455 of 2008. C

Shekhar Naphade, Gaurav Goel (for E.C. Agrawala), Sanjay V. Kharde, Asha G. Nair, A.H.H. Ponda, Girish B. Kedia, Rakhi Ray, S.S. Ray, Bina Gupta for the appearing parties. D

The Judgment of the Court was delivered by

**V.S. SIRPURKAR, J. 1.** Leave granted.

2. Interpretation of Section 319 of the Code of Criminal Procedure (hereinafter called "Cr.P.C." for short) and, more particularly, Sub-Section (4) thereof has fallen for consideration in this appeal. E

3. *The factual scenario:* A complaint was filed against three accused persons, being respondent Nos. 2, 3 and 4 herein for offence under Section 406 read with Section 114 of the Indian Penal Code (for short 'IPC') in the Court of the Metropolitan Magistrate. We need not go into the facts stated in the said complaint in view of the narrow question which falls for consideration in this appeal. The Trial Court took the cognizance of the offences on 03.04.1998 and issued process against respondent Nos. 2 to 4. The Trial Court proceeded to examine the witnesses before framing the charge. Number of revisions including the discharge application were filed by the accused and the trial went on up to 15.09.2005 when the F G H

- A Bombay High Court expedited the trial. On 13.06.2006, the cross-examination of the first witness of the prosecution at the stage of evidence before charge was completed by the Advocate of the accused persons. This cross-examination ran into 115 pages. Since the matter could not be finished up to the date fixed by the Bombay High Court, it was extended up to 30.06.2006 for completion of trial. The time was further extended till December, 2006 and further up to 31.05.2007. In the meantime, the second witness was cross-examined which cross-examination consisted of 148 pages. Likewise, third witness of the prosecution was also examined on 11.05.2007. The Trial Court discharged Shri Pramod Banka and Smt. Rani V. Agrawal and framed charges against the third respondent herein. The time was again extended by the High Court till 31.12.2007. This was challenged by way of the revision by the appellant, which was allowed. The third respondent also filed a revision which was dismissed by the High Court and the High Court directed the Trial Court to frame charge against respondent No. 2 to 4 also under the provisions of Sections 403, 409 read with Section 34, IPC. Ultimately, the charges came to be framed against respondent Nos. 2 to 4 on 28.11.2007.

4. At this stage, on 15.12.2007, the appellant herein filed an application under Section 319 Cr.P.C. requesting to array respondent No.5 herein as a co-accused in the said proceedings. On 31.12.2007, this application was allowed and the summons was issued to the 5th respondent, Creative Garments Ltd. a company incorporated under the Companies Act through its Managing Director.

5. On 03.01.2008, the 5th respondent preferred an application to the Trial Court to commence the proceedings qua the 5th respondent from the stage of inquiry i.e. from the stage of Section 244, Cr.P.C. and to allow the cross-examination of the witnesses of the prosecution at the stage of evidence before charge. On 22.02.2008, this application came to be allowed.

However, the Trial Court split the trial of respondent No.5 and the other respondent Nos. 2 to 4. Respondent Nos. 2 to 4 challenged the order dated 22.02.2008 splitting the trial. That order was quashed by the High Court by an order dated 31.03.2008. Further, an application came to be made by respondents on 15.04.2008 seeking the clarification of the High Court's order which clarification was given by the High Court on 23.04.2008 holding that the order was restricted only to the aspect of splitting of trial and not to any other matter.

6. The appellant also filed a criminal application on 30.04.2008 seeking the quashing of the order dated 22.02.2008 by which the Trial Court had ordered the *de novo* proceedings as against respondent No.5 from the stage of inquiry. Further, a direction was sought to straightaway frame charge against respondent No.5 for the same offence with which respondent Nos. 2 to 4 were charged. The High Court, however, rejected this application by the complainant (appellant herein) and held that there could be no dispute that the Court must commence *de novo* proceedings against respondent No. 5 and it further observed that mere delay which might be caused to the complaint would be of no consequence.

7. Shri Naphade, learned Senior Counsel appearing on behalf of the complainant-appellant urges that the High Court has erred in confirming the order of the Trial Court permitting the *de novo* proceedings against respondent No.5 in the sense that it allowed the further cross-examination of the witnesses who were already examined before framing the charge. Contention by learned Senior Counsel is that there would be no question of such a permission of the cross-examination of the witnesses who were examined before framing of the charge since firstly, the charge against the other accused persons has already been framed and secondly, there is no such right of cross-examination under Section 244, 245 and 246, Cr.P.C. The Counsel argues that the term '*evidence*' as mentioned in Section 244, Cr.P.C. does not necessarily include the cross-

- A examination of the witnesses who were examined at that stage. The further contention of the counsel is that Section 319 (4), Cr.P.C. does not require a *de novo* inquiry as has been ordered by the Trial Court and affirmed by the High Court. Reliance was placed on *Rakesh v. State of Haryana* [2001 (6) SCC 248], *Ram Gopal & Anr. V. State of U.P.* [1999 Cr. L.J. 1865] and *Michael Machado v. Central Bureau of Investigation* [2000 (3) SCC 262].

8. As against this, Shri Ponda, learned Counsel appearing on behalf of the respondent accused urged that the analysis of Section 319 Cr.P.C. itself would show that there has to be *de novo* inquiry in the sense that the newly joined accused in such a trial must be given a right to cross-examine the witnesses who were examined prior to the framing of charge. He pointed out that if the interpretation as canvassed by the appellant is given, then there is a likelihood of the complainant taking advantage of his own wrong and such an interpretation would give rise to a mischief.

9. Learned counsel pointed out that the rulings pointed out by the appellant were not applicable to the controversy. Learned Counsel also urged that the use of the word '*evidence*' in Sections 244, 245, 246, Cr.P.C. supports that the accused under those Sections have the right of cross-examination and, more particularly, if such a right is not spelt out from the language, then it would only mean that the accused in the warrant trial based on the complaint case would have to helplessly watch the charge being framed. This is all the more true, according to learned Counsel, in a case where accused has been joined under Section 319, Cr.P.C. On these rival contentions, it is to be seen whether the Trial Court and the High Court were right in ordering a *de novo* inquiry.

10. The relevant part of Section 319, Cr.P.C. is as under 319 (1):

H "(1) Where, in the course of any inquiry into, or trial of,

an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) XXX XXX

(3) XXX XXX

(4) Where the Court proceeds against such person under sub-Section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard.

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which an inquiry or trial was commenced."

11. Even a glance at this Section suggests that there is no escape from commencing the proceedings afresh and also that the witnesses have to be re-heard. Clause (a) is the basic provision and the use of the words '*proceedings*' and the term '*commence afresh*' has its own significance. If we accept the contention of Shri Naphade that the newly joined accused has no right of cross-examination, it would mean that on being joined under Section 319 (1), Cr.P.C., the only step that would be required would be framing of charge against him. In that, there would be a complete denial to such accused of an important right of cross-examination of the witnesses before the framing of the charge. It would only then mean that such accused would remain a mute spectator till the framing of the charge.

A 12. We would also give a meaningful interpretation to the  
 word '*proceedings*' which has been deliberately used by the  
 Legislature. The Legislature does not use the word '*trial*' which  
 essentially begins after framing of the charge. If the Legislature  
 had intended that the newly joined accused should not get the  
 B right of cross-examining the witnesses examined before  
 framing of the charge, it might have used the word '*trial*'. The  
 deliberate use of the word '*proceedings*' would then include not  
 only the trial but also the inquiry which commences with Section  
 244, Cr.P.C. and ends with the framing of the charge under  
 C Section 246, Cr.P.C. The terminology '*commence afresh*' has  
 also its own force. It indicates that the whole inquiry which  
 commences from Section 244 Cr.P.C. must begin afresh. The  
 interpretation that we give to the words '*proceedings*' is  
 D buttressed by the language of 319 (b), Cr.P.C. The plain  
 language takes back the whole proceedings to the stage of  
 taking cognizance. If we accept the contention of the appellant  
 herein, then sub-clause (b) would be rendered otiose. We have,  
 therefore, no doubt that the language of Section 319, Cr.P.C.  
 itself pushes the proceedings back to the stage of inquiry, once  
 E the order under Section 319 (1) Cr. P.C. is passed by the Court  
 and a new accused is joined therein.

13. There is one more angle and that is the angle of  
 mischief. If the interpretation given by the appellant is to be  
 accepted then a complainant, wherein it is a case of multiple  
 F accused, may mischievously join only few of them and after  
 getting the charge framed, make an application under Section  
 319, Cr.P.C. to join some other accused persons who would  
 then have no right of cross-examination of the witnesses and  
 who would be required to be the mute spectators to the charge  
 G being framed against which they could have successfully  
 resisted by cross-examining the witnesses.

14. There is one more aspect that before summoning the  
 accused under Section 319 (1), Cr.P.C. there is no requirement  
 of allowing such accused person to cross-examine the  
 H

witnesses. That stage comes only after an accused is summoned under sub-Section (1). Therefore, it would be a case where the newly added accused who has not had the advantage of hearing the evidence would be put to prejudice because firstly, he has not heard the evidence and secondly, he cannot even cross-examine those witnesses in the warrant trial based on a private complaint.

15. This brings us to the question argued by Shri Naphade on the basic right of cross-examination to the accused in the proceedings under Section 244, Cr.P.C. In fact, in view of our interpretation of Section 319(4), it is really not necessary to go into that question. However, since the Learned Senior Counsel argues that there is no right at all to give opportunity of cross-examination to any accused whether brought before the Court initially or by way of Section 319(1), we proceed to consider the question.

16. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him. In *Ajoy Kumar Ghose v. State of Jharkhand* [Criminal Appeal No. 485 of 2009], one of us (V.S. Sirpurkar, J.) held that there is a right to the accused to cross-examine the witnesses examined before framing the charge and that the said right is extremely important. It is observed in para 25:

“the right of cross-examination is a very salutary right and the accused would have to be given an opportunity to

A cross-examine the witnesses who have been offered at the stage of Section 244 (1) Cr.P.C.”

B 17. Therefore, the situation is clear that under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr. P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence. This Court has already held so in *Shashi Kant Singh v. Tarkeshwar Singh & Anr.* [2002 (5) SCC 738].

C 18. Though a feeble attempt was made to argue that in that ruling the Supreme Court had expressed, ‘*in short there has to be a de novo trial against him. The provision of de novo trial is mandatory*’ and therefore, it is only a ‘*trial*’ which has to be ordered and not the ‘*proceedings*’. The argument is absolutely incorrect because in *Shashi Kant Singh*’s case (cited supra), the Court was dealing with a warrant trial case, not based on a private complaint and, therefore, the Supreme Court used the words *de novo* trial. The High court has correctly appreciated this provision.

D 19. This takes us to the rulings cited which we must consider. In *Rakesh v. State of Haryana* this Court framed the question in paragraph 3 in the following words:

E “Whether the statement of a prosecution witness without the said witness having been cross-examined constitutes “evidence” within the meaning of Section 319, Cr.P.C.”

G It is in that behalf that the Court expressed:-

H “...the contention that the term ‘evidence’ as used in Section 319 Criminal Procedure Code would mean evidence which is tested by cross examination cannot be accepted”

The Court, however, immediately expressed that the question of discharging the evidence by cross-examination would arise only after the addition of the accused and that there was no question of cross-examining the witnesses prior to adding such person as accused. It was further said that the Section does not contemplate an additional stage of first summoning the person and giving him the opportunity to cross-examine the witness who has deposed against him and thereby testing whether such person to be added as accused or not. Once the Sessions Court records the statement of the witnesses, it would be part of the evidence. Therefore, it was in different factual situation that this Court had made those observations. We do not think that such observations can be taken advantage of. This is apart from the fact that the Court has specifically held that the interpretation of the evidence was only for the purpose of Section 319, Cr.P.C.

20. To the similar effect was the ruling relied upon by the appellant in *Ram Gopal & Anr. v. State* [1999 CrLJ 1865]. In fact *Ram Gopal's* case is also restricted to the interpretation of the word 'evidence' as is used under Section 319, Cr.P.C. Though there are some other observations in respect of Section 244, Cr. P.C., we do not think that the observations in paragraph 29 are correct. In fact the observations in paragraph 35 therein clarified the ratio of that decision. In that view, that judgment will be of no help.

21. Our attention was also invited to *R.S. Nayak v. A.R. Antulay* [1986 (2) SCC 716] paragraphs 45 and 46. We do not think that there is any need on our part to comment on this case, more particularly, to assess the scope of Sections 244 and 245, Cr. P.C. because if Section 319 (4) Cr.P.C. is interpreted in the manner that we have interpreted it, there would not be necessity of going into the scope of Section 244, Cr.P.C. as because of that interpretation all the proceedings would be relegated back and start afresh whereby there would be clear scope and right for the newly added accused to hear the

A evidence of witnesses examined before framing of charge and to cross-examine them.

B 22. A reference was also made to *Michael Machado v. Central Bureau of Investigation* [2000 (3) SCC 262]. However, in our opinion *Michael Machado's* case is not an authority on the true scope of Section 319 (4) Cr.P.C.

C 23. Shri Naphade also tried to suggest by taking us to the old Section 252, Cr.P.C. to suggest that there is no right of cross-examination. As we have already clarified, once we interpret the provisions of Section 319 (4), Cr.P.C. to mean that the proceedings have to go back and have to be commenced afresh and the witnesses have also to be re-heard, then the right of cross-examination would be innate and under the circumstances there would be no necessity of specifically  
D commenting upon the scope of Section 244, Cr.P.C.

E 24. In view of what we have held, we find that the High Court's judgment confirming the Trial Court's judgment is correct and we see no reason to interfere with the same. The appeal has no merits and is, therefore, dismissed.

K.K.T.

Appeal dismissed.