

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

CRIMINAL WRIT PETITION NO. 948 OF 2015

Bhaskar s/o Pundlik Vairal

Age : 50 Yrs., Occ. Service,

R/o : Diggi, Tq. : Omerga,

Dist.: Osmanabad.

.... PETITIONER

V E R S U S

The State of Maharashtra

.... RESPONDENT

.....

Mr. V.R.Dhorde, Advocate for Petitioner.

Mr. A.S.Shinde, A.P.P. for Respondent – State.

.....

CORAM : V.M.DESHPANDE, J.

DATE OF JUDGMENT : 7th AUGUST, 2015

.....

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally by the consent of the learned counsel for the parties.

2. Leave is granted to the petitioner to correct exhibit numbers i.e. in stead of Exh. 36, it should be Exh. 38.

3. Special Case under the provisions of the Prevention of Corruption Act is going-on in the Court of the learned Special Judge, Omerga. Said case is registered as Special [ACB] Case No. 2/2012.

During trial, on 15/06/2015, since the counsel holding the brief of the accused/petitioner was required to leave the town, application for adjournment was moved, in which prayer was made for 15 days time for cross examination of the witness. Said application is at Exh. 50. It was moved by Mr. O.P.Lomate, junior counsel. Mr. P.M.Nalegaonkar, learned counsel was in-charge of the brief of the accused/petitioner. Learned Special Judge rejected the said application for adjournment.

4. During the evidence on 15/06/2015, learned A.P.P., in-charge of the brief, submitted that the witness in the witness box be declared as hostile. Prayer made on behalf of learned A.P.P. was granted by the learned trial Court and learned A.P.P. was permitted to cross examine the

said witness. Accordingly, said witness was cross examined by the learned A.P.P. After the completion of cross examination by the learned A.P.P., learned Judge of the Court below observed that though Mr. O.P.Lomate has filed Vakalatnama on behalf of accused/petitioner, when called, he is not taking cross examination and, therefore, learned Judge has observed that there is no cross examination of the said witness on behalf of accused/petitioner and kept the matter for further evidence on 10/08/2015.

5. In the present Writ Petition, order passed by the learned Special Judge, Omerga on 15/06/2015 below Exh. 50 in Special [ACB] Case No. 2/2012 rejecting the application for adjournment and directing to proceed the matter by observing 'no cross' on behalf of accused/petitioner in respect of the witness is questioned.

6. Heard Mr. V.R.Dhorde, learned Counsel for the petitioner and Mr. A.S.Shinde, learned A.P.P. for respondent – State.

7. Learned counsel for the accused/petitioner

submitted that the observations made by the learned Special Judge while rejecting the application [Exh.50] are contrary to record. He invited my attention to the 'Roznama' of Special [ACB] Case No. 2/2012, which is filed on record at 'EXH. A'. Learned counsel submitted that the learned Judge has shown undue haste in the matter and thereby has denied the opportunity to the petitioner to defend himself adequately. He submitted that Mr. P.M.Nalegaonkar, learned counsel, who was in-charge of the brief, was required to go out of station. He submitted that Mr. O.P.Lomate is junior counsel, who has filed Vakalatnama for the accused/petitioner. He submitted that for fair trial, opportunity should be given to the accused/person to cross examine the said witness.

8. Learned A.P.P. submitted that since Mr. O.P.Lomate has signed Vakalatnama for and on behalf of the accused/petitioner, it was his duty to cross examine the said witness available in the witness box. He submitted that, thus the opportunity was given to the accused/petitioner, however, he himself has failed to avail the same.

Learned A.P.P., however, fairly submitted that the observations made by the learned Special Judge while

rejecting the application for adjournment on 15/06/2015 rejecting the application [Exh.50], *prima facie*, appears to be contrary to the 'Roznama' of Special [ACB] Case No. 2/2012. He, therefore, submitted that this Court should pass appropriate order.

9. Learned Special Judge while rejecting the application [Exh.50] on 15/06/2015 has observed that whenever Mr. P.M.Nalegaonkar was not able to attend the Court, this witness remained absent for one or the other reason. He observed that the Examination-in-chief of said witness was commenced on 19/03/2015 and on that date also, Advocate for the accused was absent and after recording some evidence, said witness complained of illness and sought adjournment.

10. 'Roznama' of Special [ACB] Case No. 2/2012 is filed at Exh. 'A'. It shows that the process of recording of the evidence of prosecution witnesses commenced on 05/01/2015. On the said date, evidence of P.W. 1 was recorded. On 06/01/2015, evidence of P.W. 2 was recorded. Similarly, on 07/01/2015, next two witnesses

were examined. On 08/01/2015, witness No. 5 for the prosecution was examined. From 05/01/2015 to 08/01/2015, 'Roznama' shows that the counsel for accused/petitioner was present.

On 08/01/2015, learned Judge issued witness summons to P.W. 6 Balu Gaikwad. Next 'Roznama' is of 27/01/2015. Said 'Roznama' also shows that witness summons was issued to witness Balu Gaikwad. The matter was then kept on 25/02/2015. 'Roznama' dated 25/02/2015 shows that the defence counsel was present, however, application [Exh.36] was moved by witness Balu Gaikwad due to his illness. Said application was granted by the learned trial Court. Thus, it is clear that on 25/02/2015, defence counsel was present and the application was moved by the witness himself on account of his illness and it was granted by the trial Court. The matter was then taken on 12/03/2015. On the said date also, learned defence counsel was present before the Court and it appears that application [Exh.37] was moved by witness Balu Gaikwad for adjournment. Said application, it appears, was rejected by the learned trial Court and the learned trial Court in order to secure the presence of said witness Balu Gaikwad, issued

bailable warrant against him and the matter was kept on 19/03/2015.

On 19/03/2015, learned A.P.P. and learned defence counsel were present. Evidence of witness Balu Gaikwad was commenced. It is at Exh. 38. Recording of the evidence of witness Balu Gaikwad remain to be completed and, therefore, the matter was kept on 20/03/2015. On 20/03/2015 also, defence counsel was present. However, Examination-in-Chief of P.W. 6 Balu Gaikwad was recorded and the matter was kept on 04/04/2015 for further Examination-in-Chief. On 04/04/2015 also, defence counsel was present and on that date application [Exh.46] was moved by the witness for adjournment due to his relative's marriage. Said application was rejected by the learned trial Court and fresh bailable warrant was issued against said witness and the matter was kept on 02/05/2015. On 02/05/2015, learned Judge presiding the Court was on leave. Then the matter was kept on 15/06/2015. 'Roznama' of 15/06/2015 shows that on the said date, learned defence counsel's junior Advocate was present. On the said date, application [Exh.50] was moved by the learned counsel in-charge of the brief through his junior Advocate for

adjournment, which was rejected.

From the aforesaid chronology of the events, it is crystal clear that right from 05/01/2015 to 15/06/2015, learned defence counsel was present through out and at no point of time the trial was adjourned on behalf of the accused/petitioner by citing the reasons for and on behalf of the counsel in-charge of the brief.

11. Order sheet dated 15/06/2015 shows that defence counsel's junior Advocate was present. That clearly shows that Mr.O.P.Lomate is junior Advocate of Mr. P.M.Nalegaonkar.

Learned Judge of the court below ought to have seen that conducting the Special Case under the provisions of Prevention of Corruption Act is skilled job. It is quite possible that the junior Advocate may not have acquired sufficient skill on that date so as to enable him to take cross examination of the said witness. Therefore, if any application for adjournment is moved by such junior Advocate on account of the absence of the counsel in-charge of the brief, normally, learned Judge in command of the Sessions trial ought to have considered the said application favourably,

especially when the record of the case shows that on previous occasions, at no point of time, any adjournment was sought by the learned counsel in-charge of the brief.

12. Further, the observations made by the learned trial Court that when the Examination-in-chief of P.W. 6 Balu Gaikwad was commenced on 19/03/2015, that day the defence counsel was absent, is contrary to record. Learned Judge himself has signed the order sheet dated 19/03/2015. That shows the presence of the learned counsel. In spite of that, for the reasons best known to the learned Judge of the Court below, he has observed that on 19/03/2015, Advocate for the accused was absent.

13. The chronology of the aforesaid events shows that the rejection of the application for adjournment [Exh.50] at the hands of the learned Special Judge, Omerga has resulted into mis-carriage of justice, especially when he has fixed the matter for recording of the evidence of another prosecution witness by observing 'no cross' for P.W. 6 Balu Gaikwad. Learned Judge of the Court below, in my view, has denied fair opportunity to the accused/petitioner to

defend himself properly. Such mis-carriage of justice needs to be set right by this Court. That leads me to pass the following order.

ORDER

- [I] Present Criminal Writ Petition is allowed.
- [II] Order passed by the learned Special Judge, Omerga dated 15/06/2015 below Exh. 50 in Special [ACB] Case No. 2/2012 is hereby quashed and set aside.
- [III] Observations of the learned Special Judge, Omerga in Special [ACB] Case No. 2/2012 regarding 'no cross' on behalf of the accused/petitioner in respect of P.W. 6 Balu Gaikwad are hereby set aside.
- [IV] Learned Special Judge, Omerga is directed to afford opportunity to the accused/petitioner to cross examine P.W. 6 Balu Gaikwad by taking appropriate steps for procuring his presence.
- [V] Till the opportunity to cross examine P.W. 6 Balu Gaikwad is given to the

defence, the trial shall not proceed further.

[VI] Rule is made absolute in above terms.

[V.M.DESHPANDE, J.]

KNP/Cr. W.P. 948.2015 - [J]