

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 141 OF 2015

MR.NURULLAH VELJEE.

... Petitioner

Versus

MR.FARID VELJEE.

... Respondent

Mr. S.M. Singbal, Advocate for the Petitioner.

Mr. Santosh Hari Bharne, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.

DATE: 4th DECEMBER, 2015

ORAL ORDER:

Heard Mr. Singbal, the learned Counsel for the petitioner and Mr. Bharne, the learned Counsel for the respondent.

2. By this petition, the petitioner is challenging the order dated 11.09.2015, passed by the learned Judicial Magistrate First Class, Panaji in Criminal Case No. 435/OA/2010/B. By the impugned order, the application filed by the petitioner, to summon some of the defence witnesses, has been rejected.

3. The brief facts are that the respondent had filed a complaint under Section 138 of the Negotiable Instruments Act (N.I. Act, for short) against the petitioner, which is pending before the learned Judicial Magistrate First Class, Panaji. On 01.09.2015, the petitioner filed an application to summon the following witnesses to be examined as defence witnesses :-

1. Mr. Kannubhai Patel,
2. Mrs. Naina Patel,
3. Mr. Raju alias Prasad Naik (wrongly mentioned as Raju Amonkar) and
4. Mr. Nitin Rawl.

4. It was contended that the aforesaid witness nos. 1 and 2, hold 20% of the undivided share in the property better known as Predio Urbano Comquintal Ou Casa Morada Sobradata and that, they are parties to the M.O.U. It was contended that the Special Civil Suit No. 127/2008/A was filed by Mrs. Naina Patel for temporary injunction, wherein the prayer for temporary injunction was dismissed. However, status quo was continued at the instance

of the petitioner, till such date during which the alleged letter of possession was signed under misrepresentation and duress.

5. Insofar as witness nos. 3 and 4 are concerned, it is alleged that they were present at the time when the alleged incident took place. It is contended that the witness no. 3 being an eye witness is a relevant witness. The name of the witness no. 4 was not mentioned in the statement under Section 313 of Cr.P.C. out of sheer inadvertence.

6. The application was opposed on behalf of the respondent.

7. The learned Magistrate found that the matter has to be tried as a summary case. The complaint was filed in the year 2010 and has been pending for more than five years. It was further found that the statement of the petitioner under Section 313 of Cr.P.C. was recorded on 17.10.2014. On 19.06.2015, the petitioner filed an application (Exhibit D-108), seeking issuance of summons to three witnesses. After examining two witnesses out

of them, the petitioner was directed to give justification for calling the two witnesses named in the statement under Section 313 of Cr.P.C. Accordingly, the petitioner filed the present application (Exhibit D-116), seeking issuance of summons to four more witnesses. The learned Magistrate further found that in the statement under Section 313 of Cr.P.C., the petitioner has given the names of seven witnesses to be examined in defence, namely, (1) Amin Ladakh, (2) Mr. Kannubhai Patel, (3) Mrs. Kannubhai Patel, (4) Raju Amonkar, (5) Victor Rego, (6) Advocate M. Telles and (7) wife of the respondent. However, subsequently, by virtue of application at Exhibit-108, issuance of summons was sought only against three witnesses. The prayer to issue summons to the wife of the respondent was declined earlier. It was further found that after the evidence of Advocate M. Telles (DW-3) was recorded, the petitioner was directed to file an application, justifying the need for examination of such witnesses as mentioned in the statement under Section 313 of Cr.P.C. The learned Magistrate found that, the names of Mr. Raju Naik and Mr. Nitin Rawl were not cited in the said statement under Section 313 of Cr.P.C. The learned Magistrate further found that this is only an

attempt to delay the trial. However, ultimately finding that the burden is on the petitioner to rebut the presumption and the fact that the names of witness nos. 1 and 2 above, namely, Mr. Kannubhai Patel and Mrs. Naina Patel were mentioned in the statement under Section 313 of Cr.P.C., the application was allowed partly to the extent of issuing summons to these witnesses.

8. Thus, the petitioner is only aggrieved by part of the order, refusing to summon the witness nos. 3 and 4, namely, Mr. Raju alias Prasad Naik and Mr. Nitin Rawl.

9. It is submitted by the learned Counsel for the petitioner that the name of the witness no. 3 was in fact mentioned in the statement under Section 313 of Cr.P.C., as one of the defence witness, though he was inadvertently named as Mr. Raju Amonkar. It is submitted that both these witnesses, Mr. Raju Naik and Mr. Nitin Rawl are material witnesses, as they were eye witnesses of the incident at the office of the petitioner.

The learned Counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of **T. Nagappa Vs. Y.R. Muralidhar, 2008 LawSuit(SC) 590** and in the case of **Natasha Singh Vs. C.B.I. (State), 2013 LawSuit(SC) 404** and the decision of this Court in Criminal Writ Petition No. 1735/2008, in the case of **Shri Yeshwant Sakharam Chavan Vs. Shri Ankush Tukaram Bhairavkar and Others**, decided on 16.03.2011.

10. On the contrary, it is submitted by the learned Counsel for the respondent that the petitioner is only trying to delay the trial and the filing of the instant application is only an attempt thereat. He submitted that looking to the limited scope of the trial under Section 138 of the N.I. Act, the alleged eye witnesses to the occurrence of some incident, cannot be said to be material witnesses. That apart, they were also not named in the statement under Section 313 of Cr.P.C. or in the evidence/deposition of the petitioner himself. It is submitted that thus, the application has rightly been dismissed.

11. I have considered the rival circumstances and the submissions made. It is a matter of record that the petitioner has examined himself, apart from three witnesses including Amin Ladakh (DW-2) and Kannubhai Patel (DW-4). The limited issued is only about the necessity to examine Mr. Raju Naik and Mr. Nitin Rawl. The reason as set out about the necessity to examine the said witnesses is that they are eye witnesses to some incident. It is trite, that the scope of the trial and the issue involved is essentially limited to the ingredients that are required to be proved in a prosecution under Section 138 of the N.I. Act. The said scope cannot be enlarged. Insofar as witness no. 3, Mr. Raju Naik is concerned, he was named, however, inadvertently he was named as Raju Amonkar. Insofar as witness no. 4, Mr. Nitin Rawl is concerned, his name does not figure in the statement under Section 313 of Cr.P.C., as one of the defence witness proposed to be examined. Be that as it may, even assuming that, the non mentioning of their names in the statement under Section 313 Cr.P.C., may not be decisive, the fact remains that the petitioner has to demonstrate that they are material witnesses in the context of the defence raised and their examination is necessary for the

just decision of the case. As noticed earlier, they are said to be eye witnesses to some incident. In this regard, it was not disputed, during the course of arguments at the Bar, that in his own evidence, the petitioner did not state that these two witnesses have witnessed occurrence of any such incident. Having carefully gone through the impugned order, and the submissions made, I do not find that a case for interference, in the exercise of extra ordinary jurisdiction of this Court is made out.

12. In the case of **T. Nagappa** (supra), the question was about the signature on the subject cheque, being referred for examination to the Forensic Science Laboratory in determining the age of the signature, as it was contended that the cheque was of the year 1999 and the complainant had filled such cheque by putting the date as 08.10.2004. It was held thus, in para 8 of the judgment:

"8. What should be the nature of evidence is not a matter which should be left only to the discretion of the Court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application

filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protracting the trial or summon witnesses whose evidence would not be at all relevant."

(Emphasis supplied)

13. In the case of **Natasha Singh** (supra), the trial was for the offences under the Indian Penal Code and under Prevention of Corruption Act, in which an application under Section 311 of Cr.P.C. was dismissed, holding that the witnesses sought to be examined were not necessary for arriving at a just decision of the case. In the particular facts of the case, it was held that, it was necessary to summon the witnesses by allowing the application.

Even the case of **Yeshwant Sakharam Chavan** (supra) turned on its own facts.

14. There cannot be any manner of dispute with the preposition that the petitioner/accused has to get a fair opportunity to defend the case. However, whether examination of particular witness is necessary, has to be demonstrated on the basis of the objective circumstances and the Court has to be satisfied that such examination is necessary in the interest of fair trial and just decision of the case. I do not find any need to interfere with the impugned order passed by the learned Magistrate in the exercise of the extra ordinary jurisdiction of this Court.

15. In the result, the petition is dismissed.

C. V. BHADANG, J.

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