

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.112 OF 2015
WITH
CRIMINAL APPLICATION NO.113 OF 2015**

Usman Raza Fatmi

...Applicant

Versus

Faiz Anwar Quereshi & Anr.

...Respondents.

.....

Mr. P.A. Sarwankar h/f M/s. Sarwankar & Co. for the
Applicant.

Mr. Nikas K. Singh i/b. Mr. Ravi Dwivedi for the Respondent
No.1

Mr. J.H. Ramugade, APP for the Respondent No.2-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 29th OCTOBER, 2015.

P. C. :

Heard the learned counsel for the Applicant and the
learned counsel for the Respondent No.1.

2. By this application, the original complainant has challenged
the order dated 23rd January, 2015 whereby the learned Magistrate has
allowed the Respondent No.1-accused to examine Mr. Shariq Minhaj as
a defence witness.

3. The Applicant herein had lodged a complaint under section 138 of the Negotiable Instruments Act alleging that the cheque issued by the Respondent No.1 -accused was dishonoured and that despite receipt of the statutory notice, the Respondent No.1-accused had not repaid the cheque amount.

4. Upon being served with summons the Respondent No.1-accused put in his appearance and had pleaded not guilty, hence, claimed to be tried. The Applicant -complainant had adduced the evidence and the statement of the Respondent No.1 was recorded under section 313 of the criminal procedure code. In statement recorded under section 313 of the Criminal Procedure Code, the Respondent No.1-accused had stated that he wanted to lead defence evidence. The Respondent No.1-accused by application dated 23rd January, 2015 had prayed to issue summons to Mr. Shariq Minhaj-witness. The Respondent No.1-accused had stated that said Mr. Shariq Minhaj was a middleman of compilation of film “Chand Bhuja Gaya” and was very conversant with the facts. The Applicant-complainant had contested the said application only on the ground that the Respondent No.1 had not made any reference of the said witness either in their reply to the notice, cross examination of the

complainant or in the statement under section 313 of the Criminal Procedure Code.

5. The learned Magistrate after hearing the learned counsel for the respective parties had allowed the application mainly on the ground that application under section 254 (2) of the Criminal Procedure Code empowers the Court to issue summons to the witness. The learned Magistrate has further held that the Respondent No.1-accused has contended that the witness is acquainted with the facts of the case and that the said statement cannot be discarded merely because the Respondent No.1-accused has not made reference to the said witness either in the notice or in the evidence. The learned Magistrate further held that the Applicant-complainant will have ample opportunities to cross-examine the witness. Being aggrieved by the said, the Applicant-complainant has preferred this application under section 482 of the Criminal Procedure Code.

6. The learned counsel for the Applicant-complainant has submitted that the Respondent No.1-accused had not preferred to introduce this witness either in the reply, evidence or in the statement recorded under section 313 of the Criminal Procedure Code and has now sought to introduce this witness. He has relied upon the decision

of this Court in the case of **M/s. Omega Petro Products Pvt. Ltd. & Anr. Vs. State of Maharashtra & Ors.**, wherein it has been held that sub section 2 of section 254 of the Criminal Procedure Code confers powers on the Magistrate to issue summons to any witness. It is further held that a Magistrate cannot for asking issue a witness summons on an application made by either the prosecution or by the accused and that the party applying for witness summons has to make out a case of issuance of a witness summons.

7. It is to be noted that in the present case it is not in dispute that the Respondent No.1-accused has filed a private complaint bearing C. C. No.23/SW/2011 against the Applicant-accused for the offences punishable under section 387, 420, 403, 406 and other provisions under the IPC. It is not in dispute that the complaint relates to the same transaction. In the said complaint the Respondent No.1-accused had alleged that he had handed over blank undated cheque to the Applicant-complainant and it was agreed between them that the same would not be presented for the encashment. The Respondent-accused had further alleged that the Applicant-complainant had misused the cheque. In the said C.C. No.23/SW/2011 the Respondent No.1-accused had sought to examine Mr. Shariq Minhaj- witness. The said

application was allowed by the learned Magistrate and that order was challenged before this Court in Criminal Application No.687 of 2015 and Criminal Application No.733 of 2015. Vide judgment dated 28th September, 2015 this Court had dismissed the said applications and held that no prejudice would be caused to the Applicant-complainant if Mr. Shariq Minhaj was examined.

8. Considering the facts of the case, it is therefore, evident that Mr. Shariq Minhaj- witness was a material witness, who was aware of the facts of the case and was allowed to be examined in the cross complaint filed by the Respondent No.1-accused against the Applicant-complainant. In these circumstances, no prejudice would be caused to the Applicant-complainant if said witness is examined as a defence witness.

9. I do not find any merit in the present applications, hence, the applications are dismissed. At this stage, the learned counsel for the Applicant-complainant prays for continuation of interim relief for a period of four weeks. The learned counsel for the Respondent No.1-accused opposed the prayer. The prayer is rejected.

(ANUJA PRABHUDESSAI, J.)