

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2489 OF 2015

JITENDRA SATISH AVHAD & ORS.)...PETITIONERS

V/s.

VASANT SHANKAR KELKAR AND ANR.)...RESPONDENTS

Mr.S.M.Oak i/b. Mr.Sagar Joshi, Advocate for the Petitioners.

Mrs.M.R.Tidke, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 6th AUGUST 2015.

ORAL ORDER :

1 Heard Mr.S.M.Oak, the learned counsel for the petitioners.

2 The petitioners are the accused in the complaint case filed by respondent no.1 herein, which is pending before the Judicial Magistrate First Class, Thane. The case is in respect of an offence punishable under Section 431 of the Indian Penal Code (IPC) read with Section 34 thereof. I am informed that the

evidence before Charge is being adduced and respondent no.1 (hereinafter referred to as 'the complainant') has examined himself. On 30th January 2015, the complainant made an application praying that certain persons mentioned in the application be summoned as witnesses. The complainant mentioned that the said application could be granted by the court by exercising its power under Section 311 of the Code of Criminal Procedure (Code). The learned Magistrate, on the same day allowed the application and passed an order directing witness summonses to be issued to the witnesses mentioned in the said application. The petitioners are aggrieved by the said order issuing summonses to the witnesses and have therefore, approached this court by filing the present petition invoking the jurisdiction of this court under Article 227 of the Constitution of India.

3 The main contention of the learned counsel for the petitioners is that, the application of the complainant was decided without hearing the petitioners i.e. the accused persons. It is also

submitted that it was decided hurriedly and on the same day. It is also submitted that no reasons have been recorded by the learned Magistrate for allowing the said application. Reliance has been placed on a decision of this court in **Shri R.N.Kakkar vs. Shri Hanif Gafoor Naviwala & Others** reported in **1996(2) ALL MR 466.**

4 I have gone through the application made by the complainant, before the Magistrate, seeking witness summonses to be issued to the persons named in the application, a copy of which is annexed to the petition.

5 Though there has been a reference to the provisions of Section 311 of the Code in the application made by the complainant itself, I find the same uncalled for. Reference to sub-section (2) of Section 244 of the Code would have been more appropriate.

6 The contentions raised by the learned counsel for the petitioners flow from two beliefs. The first one is, that the impugned order could have been passed only under the provisions of Section 311 of the Code. This belief is, again, based on the belief that by virtue of the provisions of sub-section (2) of Section 204 of the Code, the complainant would not be entitled to examine witnesses, not mentioned in the list of witnesses, unless the court chooses to do so under the provisions of Section 311 of the Code. These beliefs, which form the basis of the contentions raised by the learned counsel, do not appear to be sound.

7 Sub-section (2) of Section 244 of the Code which applies to the instant case is worded in such a manner, so as to suggest that, the Magistrate has ordinarily to issue a summons to any of the witnesses, whom the prosecution / complainant wants to examine. A similar provision is found in sub-section (2) of Section 242 which relates to the trial of warrant cases instituted on a police report, and sub-section (2) of Section 254 which

relates to the trial of summons cases. None of these sections refers to sub-section (2) of Section 204 of the Code. The way sub-sections (2) of Section 244 and Section 254 are worded, it does not appear that the power to issue summonses is confined only to the witnesses named in the list, contemplated under sub-section (2) of Section 204 of the Code.

8 The powers conferred on a court by Section 311 of the Code are very wide. The words 'at any stage' or 'recall and re-examine' used in the said section are significant. The power under the said section can be exercised irrespective of the stage of the inquiry or trial. A witness can be interposed even during the evidence of the prosecution or of the defence is being adduced, should the conditions requisite for exercising the power be satisfied. Witnesses can be called or recalled or re-examined even after the final arguments in a trial are over. The width of the powers conferred by the said section is not required for summoning a witness named by the complainant when the complainant's evidence is being adduced. Rather, the provisions

of sub-sections (2) of Section 244 and Section 254 indicate that on an application of the complainant, made at the stage when the complainant's evidence is being adduced, has to be ordinarily allowed. As aforesaid, these sub-sections do not even make a reference to the provisions of sub-section (2) of Section 204 of the Code.

9 Sub-section (2) of Section 204 imposes a prohibition on issuing summons or warrant against an accused by way of process, until a list of prosecution witness has been filed and cannot be brought in picture for considering whether witness summonses should be issued on an application for the prosecution. Undoubtedly, the requirement that a list of prosecution witnesses should be filed before an accused is summoned, as imposed by the said sub-section, indicates the policy of the law that the accused should have an advance intimation as to, who would be the witnesses for the prosecution. However, it is not that there is a prohibition to examine the witnesses not named in the list of witnesses. Infact, it has been

held that there is no prohibition for the complainant, or the prosecution, to even furnish an additional list of witnesses. To obviate the possibility of prejudice being caused to the accused persons, on being taken by surprise, the court can, in a given case, grant, normal and reasonable time to the accused, so as to be ready for the cross-examination of such witnesses.

10 In the circumstances, it was not necessary for the Magistrate to have heard the petitioners i.e. the accused persons, before deciding, whether or not the witnesses whom the complainant wants to be examined, should be summoned. Once the complainant claimed that the evidence of the said witnesses was relevant and necessary for supporting his case, it would not be for the accused persons to say that the witnesses, whom the complainant wants to be examined, should not be summoned. There is, therefore, no substance in the contention that the impugned order is bad in law, by reason of it having been passed without giving an opportunity to the accused persons of being heard in the matter.

11 The only question that can be legitimately raised by an accused, when witnesses not mentioned in the list of witnesses are being summoned by the prosecution / complainant, is of prejudice. So far as the present case is concerned, it is at a preliminary stage, where the complainant's evidence, before charge is being adduced. There would be no question of the accused being prejudiced, by permitting the complainant to examine the witnesses in support of the allegations made in the complaint. As a matter of fact, not summoning the witnesses inspite of the complainant's application seeking to examine them, would have been unjust and improper.

12 It was also suggested, faintly, by the learned counsel for the petitioners that the evidence of the witnesses, who have been summoned, is not relevant. That would be an aspect to be considered by the Magistrate at an appropriate stage and that could not have been a ground to refuse to summon those

witnesses, when according to the complainant, their evidence would assist him in establishing his case.

13 It is not possible to hold that the Magistrate has committed an illegality by summoning the witnesses, as prayed for, by the complainant.

14 The jurisdiction conferred upon this court by Article 227 of the Constitution of India is meant to be exercised to keep the subordinate courts within the bounds of their authority. It cannot be said – in any case – that the impugned order has been passed by the Magistrate in excess of the authority vested in him by law.

As such, no interference is warranted.

15 The petition is rejected.

(ABHAY M. THIPSAY, J.)