

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 687 OF 2015

Usman Raza Fatmi. ... Applicant.
Versus
Faiz Anwar Quereshi & ors. ... Respondents.

WITH
CRIMINAL APPLICATION NO. 733 OF 2015

Mansi K. Shah. ... Applicant.
Versus
Faiz Anwar Quereshi & ors. ... Respondents.

Mr. P.A. Sarwankar a/w. Mr. S.K. Dubey i/b. Sarwankar & Co.,
advocate for Applicants.

Mr. Vikas Singh a/w. Mr. Ravi Dwivedi, advocate for respondent No.
1.

Mrs. A. A. Mane, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : SEPTEMBER 28, 2015

P.C.:

1 Heard the learned Counsel for the applicants, the learned
counsel for the respondent No. 1 and the learned APP for State.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The applicants herein question the correctness and validity of the order dated 29/6/2015 passed by the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai, thereby allowing the application filed by the original complainant to summon one Shariq Minhaz as a witness in respect of a dispute over the expenses incurred by the complainant in producing a film, in C.C. No. 23/SW/2011 and C.C. No. 25/SW/2011 respectively. The learned Counsel for the applicants submits that the complainant had filed several reports to the police station against the present accused right from March, 2005. That in August, 2006 the complainant herein had filed a complaint before the Metropolitan Magistrate, 22nd Court, Andheri alleging therein that the applicants herein had committed offences under Section 387, 420, 403, 406, 410, 411, 414, 465, 468, 471, 474, 503, 506, 107, 120(B) read with Section 34 of the Indian Penal code.

4 The complainant had alleged in the said complaint that the complainant is producer of film and has produced Hindi film “Chand Bujh Gaya”. The production of the said film has commenced in August, 2002. The said film was produced by him in partnership with Usmaan Raza Fatmi i.e. the present applicant in APL 687/15. It is alleged that it was agreed between them that the Petitioner would get an agreed percentage of profit and loss share ratio of 60:40 between the complainant and the accused.

5 It is alleged that in the course of shooting of the said film, the complainant had incurred several expenses. The said expenses were incurred from account of F.A. Picture International, which happens to be the proprietary concern of the complainant. The accused was to contribute his share of finance to the extent of 40%.

6 It was further agreed that the distributorship of the said film was to be given to the accused for a consideration of Rs. 40 Lakhs

and an earnest amount of Rs. 5,000/- was received. It appears that there was some understanding between the parties. It is alleged that the complainant had handed over certain blank undated cheques to the accused. It is stated that the contents of the cheques were not filled in by him and it was mutually agreed between the parties that the said cheques would not be presented for encashment.

7 The complainant has alleged that despite the said agreement, certain cheques were presented for encashment and therefore, the complainant had requested the accused not to present the remainder cheques and had asked the accused to return the said cheques to him. The accused had not returned the said cheques to the complainant. The complainant has given details of the cheques, which were in the custody of the accused. The complainant had apprehension that the accused may hand over the said cheques to Arun Gawli and therefore, the complainant lodged a complaint at Oshiwara police station on 23rd March 2005. A similar report was filed at Byculla

Police Station also on the same day and copy of the said reports were forwarded to the Then Additional Commissioner of Police.

8 The complainant had also informed Standard Chartered Bank at Lokhandwala Branch and had directed the bank to “stop payment”. The complainant had taken all necessary steps including issuance of a public notice in Free Press Journal that he had handed over cheques to the accused which were lying in his custody. He has also informed the accused about the same. According to the complainant, the accused had made every efforts to utilise and encash the said cheques. One of the cheque was dishonoured and the accused had initiated the proceedings against the complainant under Section 138 of the N.I. Act. The said case is pending.

9 The complainant had then filed a report to Oshiwara Police Station on 23/6/2006 and had requested the police to hake necessary action. No action was taken. The complainant was therefore, constrained to file a complaint.

10 Learned Counsel for the applicants submits that some time in the year 2011, the verification statement was recorded and the learned Magistrate after recording his substantive satisfaction had issued process against the accused for offence punishable under Section 387, 420, 403, 406, 410, 411, 414, 465, 468, 471, 474, 503, 506, 107, 120(B) read with Section 34 of the Indian Penal Code. The complainant had examined himself as a witness. The complainant was cross-examined at length. The learned Counsel for the applicants submits that the substantive evidence of the complainant is inconsistent with the complaint filed before the Magistrate. It is also alleged that in the police report as well as in the complaint, there is no reference to any person called Shariq Minhaz and therefore, the application filed by the complainant seeking liberty to examine Shariq Minhaz as a witness was not maintainable and the learned Magistrate without appreciating the fact that there is no reference to this person either in police report or in the complaint, has allowed the application seeking issuance of summons to the witness called Shariq

Minhaz. The said order is being challenged under Section 482 of the Code of Criminal Procedure, 1973.

11 Upon perusal of the substantive evidence of the complainant and the cross-examination by the accused, it is apparent that the averments made in the examination-in-chief have not been challenged in the cross-examination for e.g. in the examination-in-chief, the complainant had deposed that he had given some cheques to the accused as well as to Shariq Minhaz in the course of production of the film. In the cross-examination, the complainant had admitted as follows : “It is true to say that I have authorised film director Shariq Minhaz to sign letterhead of F.A. Picture International for film purpose. It is not true to say that the letterheads of F.A. Picture International used to be signed only by him, Usman Raza and Shariq Minhaz.”

12 The learned Counsel for the petitioner has drawn attention of this Court to the evidence of complainant before framing the charge.

In the cross-examination the complainant has further admitted the suggestion of the applicant as follows : “It is true to say that it is not mentioned in my complaint or/and in police complaint filed against the accused that I have given 4-5 signed cheques to the accused and Sharik Minhas, the director of the film, for some formalities to be performed in Censor Board, Calcutta in 2003 for release of the film.”

“It is true to say that it is not mentioned in the present complaint that I had given blank signed letterhead of FA Picture International to the accused and Sharik Minhas, the director of the film, for some formalities to be performed in Censor Board, Calcutta in 2003 for release of the film.”

13 The learned Counsel for the Applicants submits that despite the fact that the complainant has admitted that there is no reference to any person by name Shariq Minhaz in the complaint, it would be unjustified to call him as a witness. It is further submitted that the complainant has not made out a specific case for summoning witness

Shariq Minhaz and therefore, the said order has caused prejudice to the applicants.

14 This Court cannot be oblivious of the fact that the stage of the present proceedings is evidence before charge. The complainant had filed private complaint and onus lies upon the complainant to substantiate his allegations and the complainant would be at liberty to request the Court to summon any witness to substantiate his case. This is not a case arising out of section 154 of the Code of Criminal Procedure, 1973. In a case filed by the State, if the statement of a particular witness is not recorded under Section 161/162 of the Code of Criminal Procedure, 1973, then the prosecution or the accused may be at liberty to request the Court to call a particular witness to either substantiate a case or defend a case. In the present case, no prejudice will be caused to the accused in the eventuality that Shariq Minhaz would be called as a witness. The steps taken by the learned Magistrate is only in the interest of justice and to arrive at a substantive satisfaction as to whether a case is made out by the

complainant to frame charge against the accused. In any case, the accused would be at liberty to cross-examine the witness.

15 Section 244 of the Code of Criminal Procedure, 1973 reads as follows:

“244. Evidence for prosecution.

(1) When, in any warrant- case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.”

16 The Statute contemplates that the discretion lies exclusively with the Magistrate and that the powers of the Magistrate cannot be fettered either under Section 244 or 246(6) of the Code of Criminal Procedure, 1973. All that is accepted is that the Magistrate shall exercise the said discretion judiciously. In the present case, taking into

consideration the inconsistency in the complaint and the examination-in-chief and the lengthy cross-examination of the complainant, the Magistrate has rightly exercised the discretion of allowing the application seeking to examine Shariq Minhaz. Needless to say that the complainant has not given the exact details for the purpose of examination of Shariq Minhaz.

17 As far as the applicant in Criminal Application No. 733 of 2015 is concerned, the demand notice issued by her was placed on record. The complainant was questioned as to whether he had received the notice on 29th March, 2005 and he had stated that he had received the notice on 30th or 31st March, 2005. It appears from the record that the applicants herein have prosecuted the complainant under Section 138 of the N.I. Act. That necessary particulars which are required under Section 138 of the N.I. Act cannot be a matter of consideration in the present case where the applicants are being prosecuted for offence of cheating and breach of trust. It is clear that no prejudice would be

caused to the accused by examining Shariq Minhaz. Hence, the order passed by the learned Magistrate does not warrant any interference.

18 Hence, the Petition being sans merits stands dismissed. The rule is discharged.

(SMT. SADHANA S. JADHAV,J)

CERTIFICATE

**Certified to be true and correct copy of the original signed
Judgment/order.**