

IN THE HIGH COURT OF BOMBAY AT GOA PANAJI

CRIMINAL WRIT PETITION NO.37 OF 2016

Mr. Nurullah Veljee
R/O Flat No.701, "C" Wing,
Rizvi Towers,
St. Inez, Panaji, Goa.

.... Petitioner

V e r s u s

Mr. Farid Veljee,
Major, married,
Businessman, Indian National,
R/o, Karimabad Co-op Housing
Society Ltd.,
Campal, Panaji-Goa.

..... Respondent

Shri S.D. Lotlikar, Senior Advocate with Adv. S. M. Singbal for the
Petitioner.

Shri Ulhas Bharne, Advocate for the Respondent.

**CORAM: C. V. BHADANG, J.
RESERVED ON: 1ST APRIL, 2016.
PRONOUNCED ON : 7TH APRIL, 2016.**

ORDER:

By this petition, the petitioner, who is the original accused is challenging the order dated 27/1/2016 passed by the learned Judicial Magistrate First Class at Panaji in Criminal Case No. OA/435/2010/B. By the impugned order, the application filed by the petitioner purportedly under section 311 of Cr.P.C. for summoning Mr. Victor Rego as a

witness, in defence, has been rejected.

2. The brief facts are that the respondent has filed a complaint under section 138 of the Negotiable Instruments Act against the petitioner which is pending before the learned Magistrate. In that case, the statement of the petitioner under section 313 of Cr.P.C. was recorded on 17/10/2014. Earlier, by an application dated 19/6/2015, (Exhibit D-108), the petitioner had sought witness summons to three witnesses. After examination of two out of them, the petitioner was directed to give justification for calling the witnesses as named in the statement under section 313 of Cr.P.C. The petitioner accordingly filed application (D-116) seeking issuance of summonses to four more witnesses. In the statement under section 313 of Cr.P.C., the petitioner had set out names of seven witnesses to be examined in defence, which included Mr. Kannubhai Patel and his wife. It appears that after the examination of Advocate M. Teles (DW.3), the petitioner was directed to justify the need for examination of the witnesses, as named in the statement under section 313 of Cr.P.C. At that time, the learned Magistrate found that the names of Mr. Raju Naik and Nitin Rawal were not cited in the statement under section 313 of Cr.P.C. The learned Magistrate then found that this was only an attempt to delay the trial. Hence the Magistrate partly allowed the prayer by permitting examination of Mr. Kannubhai Patel and Mrs. Naina Patel, whose names were mentioned in the statement under section 313 of Cr.P.C. Being

aggrieved by the refusal to summon Mr. Raju alias Prasad Naik and Mr. Nitin Rawal, the petitioner had approached this Court in Criminal Writ Petition No.141 of 2015, which was dismissed on 4/12/2015.

3. It is thereafter that the petitioner had filed yet another application under section 311 of Cr.P.C. for examination of Mr. Victor Rego on the ground that he is an eye witness, relating to the money lending transactions indulged into by the respondent till "the alleged execution of the last document using force and undue influence." The reason for not summoning this witness earlier, is that the petitioner had a reasonable apprehension, on account of the conduct of the respondent, that Mr. Victor Rego will not tell the truth and disclose the correct factual information. According to the petitioner, Mr. Victor Rego on his own approached the petitioner, a week before filing of the application, informing the petitioner that the said witness was misguided by the respondent and now he is ready to tell the truth.

4. The learned Magistrate by the order dated 27/1/2016 has dismissed the application. This petition is filed challenging the said order.

5. I have heard the learned Senior Counsel for the petitioner and the learned counsel appearing for the respondent.

6. On behalf of the petitioner, reliance is placed on the decision of the Hon'ble Supreme Court in the case of "**Natasha Singh Vs. Central Bureau of Investigation**", reported in (2013) 5 Supreme Court Cases 741. It is submitted that at the stage of consideration of an application under section 311, only admissibility/relevancy of the evidence of witness is to be considered and not its likely probative value. It is contended that the evidence of any such witness, sought to be examined, cannot be prejudged. It is submitted that the evidence of Mr. Victor Rego would be necessary, for just decision of the case and the petitioner has also properly explained the reason as to why the witness was not summoned earlier. He, therefore, submitted that the impugned order be set aside permitting examination of Mr. Victor Rego.

7. On the contrary, it is submitted by the learned counsel for the respondent that this is only an attempt to prolong the trial which is pending from the year 2010. It is submitted that a similar request in respect of two other witness who were also sought to be examined, claiming, that they are eye witnesses has been rejected and affirmed by this Court in Criminal Writ Petition No.141 of 2015. The learned counsel submits that the evidence of the said witness would not be relevant for just decision of the case, as has been rightly found by the learned Magistrate, particularly when, Mr. Teles (DW.3) has already been examined on the letter of temporary possession (Exhibit C-66). The learned counsel has placed reliance on the decision of the Hon'ble

Apex Court in the case of **"AG v. Shiv Kumar Yadav and anr."** reported in (2015) (3) ABR (Cri) 513. It is submitted that the powers under section 311 are to be sparingly exercised.

8. I have considered the rival submissions and perused the impugned order.

9. The petitioner is seeking to call Mr. Victor Rego as a witness on the ground that he is an eye witness to certain transactions. This is sought to be done with reference to the provisions of section 311 of Cr.P.C. Under the said section, the Court can summon and/or recall or re-examine any witness if the evidence of such a witness appears to be "essential to the just decision of the case". It can thus be seen that the sine qua non for exercise of the said power is that if the Court finds that the evidence of any such person/witness is essential to the just decision of the case. This would evidently depend upon the facts and circumstances of each case. The discretion in this regard being a judicious one has to be exercised on the facts and circumstances of each case.

10. Turning to the present case, the only reason for examination is that the said witness was an eye witness to certain transactions. The petitioner had earlier sought examination of two other witnesses being Raju Naik and Mr. Nitin Rawal for similar reason, which

prayer has been declined. It is true that the name of Mr. Victor Rego is mentioned in the statement under section 313 Cr.P.C. by the petitioner as one of the witnesses proposed to be examined in defence. However, this can be one of the circumstance and cannot be decisive of the matter. It has to be independently shown that the evidence of the witness is necessary for just decision of the case. This being the basic requirement, the prayer cannot be granted only because the name of the witness figures in the statement under section 313 of Cr.P.C. The learned Magistrate has found that Mr. Victor Rego has only signed the letter of temporary possession (Exhibit C-66), as a witness before the Notary, Mr. Teles (Exhibit DW.3), who has already been examined. The Magistrate has found that for proving the said document, the examination of the witness is not necessary and has further found that the signature of the said witness on the aforesaid document (Exhibit C-66) is not disputed by the respondent. The learned Magistrate as such, has found that the examination of the witness is not necessary for fair trial and in arriving at a just decision in the matter. Even in the case of **Natasha Singh (supra)**, the Hon'ble Apex Court has inter alia held in para 20 of the judgment that the Court in such case must examine whether said additional evidence is necessary to facilitate a just and proper decision of the case. In the case of **Natasha Singh**, a hand writing expert was sought to be examined. It was held that it is only admissibility of the opinion of the hand writing expert which can be considered at the stage of section 311 of Cr.P.C. and not whether it

would be conclusive. As noticed earlier, the learned magistrate has found and to my mind rightly so that the evidence of the witness cannot be said to be necessary for the just decision of the case and as such, no interference is called for in the impugned order.

11. In the result, the petition is hereby dismissed.

C. V. BHADANG, J.

ap/-