

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.624 OF 2016
ALONG WITH
CRIMINAL WRIT PETITION NO.625 OF 2016

Faaiz Anwar Qureshi		Petitioner
V/s.		
State of Maharashtra & Anr.		Respondents

Mr. Vikas Singh a/w. Mr. Ravi Dwivedi for the Petitioner.

Mrs. V.R. Bhonsale, A.P.P., for Respondent No.1-State
in Cr. W.P./624/2016.

Mrs. A.S. Pai, A.P.P., for Respondent No.1-State in Cr.
W.P./625/2016.

Mr. P.A. Sarwankar a/w. Mr. S.K. Dubey for Respondent
No.2.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 18TH FEBRUARY 2016.

P.C. :

1. These Writ Petitions have been preferred by the Original Accused challenging the order passed by the Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai on 21st January 2016, thereby refusing to issue witness summons to the Defence Witness by name Atit Jaideo.

2. The submission of learned counsel for the Petitioner is that, the proceedings before the Trial Court pertains to the prosecution of the

Petitioner under Section 138 of Negotiable Instruments Act. As per Section 139 of Negotiable Instruments Act, the burden lies on the Accused to rebut the presumption, which is raised under the said section. For rebutting this presumption, the evidence of the Defence Witness is very much essential. It is urged that the Promissory Notes relied upon by Respondent No.1-Complainant in the case were fraudulently obtained by him and the Petitioner wants to establish the said fact. The evidence of this witness Atit Jaideo is, therefore, necessary to substantiate the defence raised by the Petitioner. It is urged that though the name of this witness is not coming on record in the testimony of any of the witnesses, including the Complainant or even in the statement of the Petitioner-Accused under Section 313 of Cr.P.C., the suggestions to the effect that the Promissory Notes were fraudulently obtained were given to Respondent No.1 and that is the very defence of the Petitioner. Therefore, according to learned counsel for the Petitioner, the Petitioner needs to be given an opportunity to substantiate his contention.

3. The reliance is placed on the provisions of Section 254(2) of Cr.P.C., which enables the Court to take all the evidence, which Defence wants to lead, after the statement of the Accused is recorded under Section 313 of Cr.P.C. Further reliance is placed on the Judgment of the Apex Court in ***Kalyani Baskar Vs. M.S. Sampooram***, 2007 (2) SCC 258, wherein it was held that “*the Appellant-Accused cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the Defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure*

justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them”.

4. According to learned counsel for the Petitioner, if the opportunity is given to the Petitioner to examine this witness, no prejudice is likely to be caused to Respondent No.1, as Respondent No.1 will be getting an opportunity to cross-examine this witness and hence, according to learned counsel for the Petitioner, the impugned order passed by the Trial Court refusing to issue witness summons to this witness is required to be quashed and set aside.

5. Per contra, learned counsel for Respondent No.1 has supported the impugned order of the Trial Court and in my considered opinion, rightly so. It is true that the burden to rebut presumption raised under Section 139 of Negotiable Instruments Act lies on the Accused and, therefore, the law expects that fair opportunity should be given to him to substantiate his defence on the test of preponderance of probabilities and, as observed by the Apex Court, in order to ensure fair trial, fair and proper opportunity is to be given to the Accused. However, at the same time, the Accused is also expected to be diligent and careful to ensure that the trial proceeds in a fair manner.

6. In the instant case, it is admitted position that the case was filed before the Trial Court in the year 2005. Since then, for about four years, Respondent No.1-Complainant was being cross-examined on behalf of the Petitioner. Thereafter, the statement of the Petitioner was recorded under Section 313 of Cr.P.C. Then on the application given by him, one more witness by name Shariq Minhaj is also examined. At none of these

stages the Petitioner has applied to the Court for issuing witness summons to this Atit Jaideo. Surprisingly and pertinently, there is no reference to the name of this witness in the entire cross-examination of Respondent No.1, which, as stated above, was conducted for a period of four years. Even in his statement recorded under Section 313 of Cr.P.C., the Petitioner has not referred to this witness in the answers given by him. Moreover, when the earlier application was filed for examination of the Defence Witness Shariq Minhaj, there was no reference or any prayer to examine this witness. The order passed therein has reached upto the High Court, but, during that period also, there was no such request for examining some additional witness. Only after the said witness was examined and, according to learned counsel for Respondent No.1, that witness has not supported the Petitioner, this application is filed for examination of the witness Atit Jaideo.

7. Moreover, perusal of the entire application filed before the Trial Court reveals that there is not a whisper as to the relevancy of the evidence of this witness. Application is conspicuously silent as to on which point the Petitioner wants to examine the said witness. Therefore, without making out any relevancy or explaining as to why the evidence of this witness is essential for the Petitioner to substantiate his defence, a completely vague application is given and, as stated above, the relevancy of the evidence of this witness was not pointed out at any earlier stage also, when the matter was pending before the Trial Court for a period of not less than ten years. In such situation, allowing the Petitioner to lead the evidence of this witness, whose relevancy is not explained, is as good as not extending a fair trial to Respondent No.1. It is expected that the trial should be fair not only to the Accused but also to the Complainant, who is

fighting the legal battle for not less than ten years to vindicate his right. Here in the case, the Petitioner has not at all been diligent and Respondent No.1 should not suffer for the same.

8. Moreover, it is also pertinent to note that there is counter complaint filed by the Petitioner against Respondent No.1. In that case also, he has filed application for examination of this witness Atit Jaideo. The said application was dismissed, but the Petitioner has not challenged the said order, thereby indicating that the Petitioner is not finding the evidence of this witness relevant.

9. In such situation, on this count also, the impugned order passed by the Trial Court, which gives sufficient and elaborate reasons for rejection of the application filed by the Petitioner for issuing witness summons to this witness, cannot be called as improper or illegal, much less, perverse so as to warrant interference in this writ jurisdiction. Therefore, the Writ Petition stands dismissed.

10. At this stage, a request is made by the learned counsel for the Petitioner for staying execution of this order. The said request is rejected.

[DR. SHALINI PHANSALKAR-JOSHI, J.]