

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1523 OF 2016

1. M. Anwar Khan s/o. M. Gesudaraz Khan, Age Major, Occu. Business, R/o. H.No.17-3-474/1, behind Yakut Mahal, Theater Yakutpura, Hyderabad (A.P.).

....Petitioner.

Versus

1. Sayed Kaliuddin Nehri s/o. Syed Moinudin Nehari, Age 56 years, Occu. Pensioner, R/o. Polt No. 57 Shah Nagpur, Opp: patel Lawns Beed by pass road, Aurangabad.

....Respondent.

Mr. M.B. Sandanshiv, Advocate for petitioner.

Mr. A.D. Kasliwal, Advocate for respondent.

CORAM : T.V. NALAWADE, J.
DATED : 3rd February, 2017.

ORAL JUDGMENT :

1) Rule. Rule made returnable forthwith. By consent, heard both the sides for final hearing.

2) The proceeding is filed to challenge the order made by the learned Judicial Magistrate, First Class, Aurangabad on Exhs.97 and 98 in S.C.C. No. 3220/2012. The applications were filed by the present petitioner, accused for recalling complainant for cross examination and for giving permission to the accused to lead defence evidence. By giving reasons that accused was

not cooperating and the stage of final argument was reached, the learned J.M.F.C. has rejected both the applications.

3) The learned counsel for respondent, complainant drew attention of this Court to various circumstances and the relevant dates. It appears that the cheque was issued in the year 2012, complaint was filed in the year 2012 and the evidence affidavit was filed on 13.12.2013. As the accused stopped turning up, first no cross order was made by the learned J.M.F.C. Even after that the accused did not turn up and so, the order of N.B.W. was made. Then the accused appeared and order of N.B.W. was cancelled. In statement under section 313 of Cr.P.C., the accused expressed willingness to examine witness in defence evidence. The defence evidence was not lead and then the order of closing defence evidence was passed by the learned J.M.F.C. Then the matter was kept for final argument and then aforesaid applications came to be filed.

4) Aforesaid circumstances do show that the accused was not cooperating and he was trying to protract the decision of the case. But, that does not mean that criminal case can be decided without giving opportunity to the accused to contest the matter. If the accused is not cooperating even in bailable

offences case, his bail can be cancelled and he can be kept behind bars. If he is not appointing any advocate, some other advocate can be appointed as amicus curie and the matter can be conducted. These are the steps which the Magistrate can take when the accused is not cooperating. But, the order like no cross, decision as ex parte, in criminal case is not expected. Even the evidence of prosecution witness need to be given in the presence of the accused. This did not happen in the present matter.

5) The learned counsel for complainant submitted that complainant is harassed much due to conduct of the accused and the complainant was required to spend even on the present proceeding. It is true that the matter filed in the year 2012 could not be decided due to the conduct of the accused for about four years. The cheque amount is of Rs. 7.9 lakh. In view of these circumstances, this Court holds that opportunity can be granted to the accused to lead evidence and to cross examine the complainant, subject to payment of cost of Rs.50,000/- by him. The amount of Rs.50,000/- is to be deposited in the Court of J.M.F.C. prior to 24.2.2017. So, the following order.

ORDER

Petition is allowed. Order made by the learned

J.M.F.C., Aurangabad on Exhs. 97 and 98 in SCC No. 3220/12 is hereby set aside. The two applications are allowed. The present petitioner to pay of cost of Rs.50,000/- (Rupees fifty thousand) which is to be deposited in the Court of J.M.F.C. prior to 24.2.2017. The amount is to be paid to the complainant. If amount is not deposited, it will be open to the Magistrate to cancel the bail and put the accused behind bars though the case involves bailable offence. If the accused does not appoint any advocate, some advocate can be appointed as amicus curie and the matter is to be tried as per observations made by this Court. Parties are to appear before the Magistrate on 24.2.2017.

Rule is made absolute in aforesaid terms.

[T.V. NALAWADE, J.]

ssc/