

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.533 OF 2017

Jayesh Shah	...	Applicant
Vs.		
M/s. Visa Syndicates and others	...	Respondents

Mr. Jayesh Shah, Applicant in person.
Ms Rita Jain, APP for Respondent-State.

CORAM : R. G. KETKAR, J.
DATE : JULY 17, 2017

P.C. :

As the regular Court presided over by Hon'ble Mr. Justice A. K. Menon has passed "Not Before Me" order, the applicant has moved this Court as per the administrative order passed by the Hon'ble the Chief Justice.

2. Heard Mr. Shah, Applicant in person and Ms Jain, learned APP for respondent-State at length.

3. By this Application under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), applicant has challenged the orders dated 13.04.2017 passed by the learned Metropolitan Magistrate, 6th Court, Mazgaon at Sewree, Mumbai in - (i) applications below exhibit-15 in C.C.No.325/SW/2006 and C.C.No.326/SW/2006, (ii) application below exhibit-16 in C.C.No.327/SW/2006 as also (iii) application below exhibit-17 in C.C.No.328/SW/2006. By these orders, the learned Magistrate has rejected the applications below exhibits-15, 16 and 17 made by the applicant, hereinafter referred to as 'complainant', for filing examination in chief or evidence before charge by way of narrative in compliance of Section 275 (3) and 244 of Cr.P.C. and / or by way of oral direct evidence in the form of deposition in compliance of Section 60 of

the Indian Evidence Act, 1872 (for short 'Evidence Act') and / or affidavit in compliance of Section 296 of Cr.P.C.

4. In support of this Application, Mr. Shah submitted that there are as many as 3125 documents. In order to reduce trial Court's effective time consumption period for completion of trial as 12 years have already passed, applicant may be permitted to file examination-in-chief or evidence before charge by way of narrative as per Section 275(3) of Cr.P.C. In the alternative, complainant may be permitted to file affidavit in compliance of Section 296 of Cr.P.C. He invited my attention to the provisions of the Evidence Act, and in particular Sections 3, 5 to 55, 60 and 65-B as also provisions of Cr.P.C. and in particular, Sections 244, 275 and 296. He also relied upon the decision of the Apex Court in the case of *State of Maharashtra Vs. Dr. Praful B. Desai*, (2003) 4 SCC 601, and in particular, the following passage:

“Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that that this would violate the right of the Accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. To this method there is however a draw back. As the witness is now in Court there may be difficulties if he commits contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of Court and perjury are also punishable.”

5. I have considered the submissions advanced by Mr. Shah. I have also

perused the material on record and in particular the impugned orders. Sections 275 and 296 of Cr.P.C. read thus,

“Record in warrant-cases. - (1) In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf:

Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that, the evidence could not be taken down by himself for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

296. Evidence of formal character on affidavit. - (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.”

6. A perusal of Section 275, and in particular sub-section (3) shows that in all warrant-cases tried before a Magistrate, evidence shall ordinarily be taken down in the form of a narrative, but the Magistrate may, in his discretion take down, or cause to be taken down, any part of such evidence in the form of question and answer. A perusal of above Section clearly shows that various modes are prescribed for recording evidence. Under sub-section (1), Magistrate may take down the evidence in writing either by himself or by his dictation in open Court

or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf. Proviso thereto lays down that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence. Sub-section (2) requires Magistrate to record a certificate that, the evidence could not be taken down by himself for the reasons referred to in sub-section (1). A perusal of sub-section (3) shows that ordinarily such evidence shall be taken down in the form of a narrative; but discretion is conferred upon the Magistrate to take down, or cause to be taken down, any part of such evidence in the form of question and answer.

7. Mr. Shah submitted that Section 275(3) mandatorily requires the Magistrate to take down the evidence in the form of a narrative. I do not find any merit in this submission. A party cannot, as a matter of right, claim that the evidence has to be recorded in the form of a narrative. A perusal of Section 275 clearly indicates that discretion is conferred upon the learned Magistrate to follow any mode prescribed thereunder for recording the evidence.

8. This brings me to reliance placed by Mr. Shah on Section 296 of Cr.P.C. A perusal of Section 296, extracted hereinabove, shows that evidence of any person whose evidence is of a **formal character** may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under the Code. Mr. Shah gave emphasis on the words “subject to all such exceptions”. It is not in dispute that applicant is the complainant in complaints instituted under Section 420 read with Section 34 Indian Penal Code, 1860 (for short 'I.P.C.'). In view thereof, it cannot be said that the evidence of the

applicant, being the complainant, is of a formal character.

9. Mr. Shah relied upon the decision of the Apex Court in the case of **Dr. Praful B. Desai** (*supra*). I have already extracted the passage on which Mr. Shah has relied. The Apex Court was considering the submission that recording of evidence by video-conferencing would violate the right of the accused to have the evidence recorded by the Magistrate or under his dictation in open Court. It is in that context, the Apex Court observed that by advancement of science and technology, it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. In view thereof, the decision of the Apex Court is not applicable to the present case. Hence, Application fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)

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