

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.1320 OF 2016**

Shri Kashinath Rambhau Borhade ... Petitioner

Vs

M/s.Bhandari Associates & Ors. ... Respondents

**With  
CRIMINAL WRIT PETITION NO.3078 OF 2014**

Shri Kashinath Rambhau Borhade ... Petitioner

Vs

M/s.Bhandari Associates & Ors. ... Respondents

Mr.Uday Warunjikar for the Petitioner in both WPs

Mr.S.S. Kulkarni, for Resp. Nos.1, 2 & 3

Ms.Veera Shinde, APP, for the Respondent – State

**CORAM: Mrs.MRIDULA BHATKAR, J.**

**DATED: FEBRUARY 22, 2019**

**P.C.:**

1. Upon urgent mentioning, taken on Production Board.
2. Writ Petition No.1320 of 2016 challenges the order dated 10.2.2016 below exhibits 190 and 191 in RCC No.177 of 1998 passed by the learned JMFC, Anti Corruption, Pune for witness

summons and production of documents. Writ Petition No.3078 of 2014 challenges the order of the Sessions Court rejecting the application below exhibit 176 in RCC No.177 of 1998 seeking permission for issuance of witness summons.

3. The respondents are facing charges under sections 406, 418, 420, 465 r/w section 34 of the Indian Penal Code. As per the case of the complainant, the respondents as per the agreements dated 2.12.1992 and 24.11.1994 promised to give 1 shop admeasuring 512 sq.ft and godown No.4 admeasuring 200 sq.ft at the time of registration of the said agreements on 30.3.1996, changed the signature of the witnesses; fabricated the agreements which were entered by the petitioner/complainant in belief that these are the same agreements executed earlier i.e., in 1992 and 1994. The evidence of this witness was closed in the year 2011 and thereafter, the complainant moved application for examining one architect, who had acted as Court Commissioner in the civil suit filed by the complainant against the respondents. He also wants to bring the report of the Court Commissioner on record. He also wants to examine some Corporation official on the basis of the RTI report on the shop/godown in the sanctioned plan submitted to

the Corporation. Both the applications were rejected by the trial Court mainly on the ground that the applications were moved at a late stage; the case is pending since last 18 years; and also the names of the witnesses and the documents were not included in the complaint.

4. Mr. Warunjikar, learned Counsel appearing for the petitioner in both the petitions, submitted that these two witnesses on the point of correct area are important and the complainant had knowledge of the existence of the documents i.e., report of the Court Commissioner by one Mr. Bhavkar and the knowledge of the area as per the sanction plan of the Corporation through RTI communication, which he obtained 15 years after filing of the complaint and, therefore, these witness summons are to be issued and the documents are to be allowed to be exhibited.

5. Per contra, Mr. Kulkarni, while opposing these petitions vehemently, submitted that Shri N.K. Bhavkar was appointed as a Court Commissioner in the civil Court proceedings which were filed by the complainant against the respondents. According to him, such Court Commissioner cannot be called as a witness in the criminal trial when the said report is yet to be proved and

accepted in the civil proceedings. He has submitted that there is no provision in Code of Criminal Procedure like Order 26 in the Code of Civil Procedure. The learned Counsel has further submitted that the application moved by the complainant earlier for production of the report of the Court Commissioner was rejected by the learned JMFC and the said order was confirmed by the learned Sessions Judge. However, the said order was not challenged by the complainant before the High Court and, therefore, the said order of the Sessions Judge holds the field and the said document should not be allowed to be produced. The learned Counsel has further submitted that the original respondent is dead and behind his back, some legal heirs are brought on record as respondents. He submitted that the trial is old and pending and hence, it is to be rejected.

6. Perused the record placed before this Court. It is admitted that neither the names of the witnesses nor the documents which are to be brought on record are mentioned in the complaint. However, it is a fact that information about the documents and about the witnesses was received by the complainant after filing of the complaint as these are the subsequent developments. What is

the actual area of the shop and the godowns and whether a promise was given by the respondents of a bigger area and it is a different shop than shop No.3, is the crux of the matter. To prove these facts, the burden entirely lies on the complainant. The fact of the actual area can be proved only through a person who has actually measured the area and as per the case of the complainant, Mr.Bhavkar, one of the spot panchas, may be in the capacity of Court Commissioner before the criminal Court. In dual status – one as a witness and also as the person who has acted as Court Commissioner under Order 26 of the Code of Civil Procedure can be called in the criminal trial if the two parallel proceedings are going on under Civil court and in Criminal Court. Similarly, the evidence on the point of variance in the actual area given and the area which was sanctioned or promised also required to be proved to prove the charges and therefore, these witnesses are necessary witnesses though the evidence of the complainant and his witnesses is over and he submitted that purshis for closure of his evidence. There is no bar for the trial Court to allow the evidence of the complainant if it is required to find out the truth.

7. The complainant may fail or succeed in proving the charges and that is the subject matter of appreciation of evidence by the trial Court. However, this evidence is necessary and hence, Rule is made absolute on the following terms:

- i) Petition is allowed subject to payment of costs of Rs.2,000/- which shall be paid on or before 28.2.2019.
- ii) The witnesses are allowed and the documents are to be proved as per the rules of Evidence Act;
- iii) The parties shall appear before the trial Court on 28.2.2019 as the matter is scheduled on the said date.
- iv) The trial Court is directed to expedite the matter and conclude it within six months from 28.2.2019 as the matter is very old.
- v) The parties shall cooperate in expeditious disposal of the case before the trial Court.

8. Writ Petitions are disposed of accordingly.

**(MRIDULA BHATKAR, J.)**