

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1765 of 2019

DEVIDAS BAPURAO PATOLE

VERSUS

KASHINATH TEJRAO MIRGE

...

Mr. Hemant Surve, Advocate for petitioner

Mr. P.F. Patni, Advocate for sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 24th NOVEMBER, 2020

ORDER :

1 Present writ petition has been filed by original complainant to challenge the order passed below Exh.48 in Regular Criminal Case No.1008 of 2013 by learned Judicial Magistrate First Class, Aurangabad (Court No. 13); whereby the application filed by him under Section 91 of Code of Criminal Procedure, 1973 came to be rejected.

2 Heard learned Advocate Mr. Hemant Surve for writ petitioner and learned Advocate Mr. P. F. Patni for respondent-original accused.

3 It has been vehemently submitted on behalf of petitioner that learned Trial Judge erred in not giving direction to the respondent to produce

the original sale-deed of House LIG No. C-67/8, CIDCO, Waluj, Aurangabad. That property was claimed to be purchased by the respondent and he had given a public notice to that effect in daily news paper on 11.07.2012. Complainant had never entered into such transaction. Complainant and his brother are the owners of the said property. When said public notice was issued, complainant had called upon the respondent to give a copy of the document; however, he has not supplied such copy. Complainant has no alternative but to seek orders from Court of Law to that extent.

4 Per contra, learned Advocate for respondent submitted that the application Exh.48 is misconceived. It could not have been maintainable under Section 91 of Code of Criminal Procedure against accused. Present respondent is accused in the said case. Learned Magistrate has rightly rejected the application.

5 At the outset, it is to be noted that in the said complaint, present respondent is an accused. Process for offence punishable under Section 420 read with Section 34 of Indian Penal Code has been issued against him. Complainant contends that public notice was given by accused that complainant and his brother have sold the said property to him. According to complainant, he had searched for sale-deed or entries thereof with Sub-Registrar's office; but, he could not get any entry to that effect nor any copy

of such document has been made available to him. Complainant has then filed present application under Section 91 of Code of Criminal Procedure for issuing directions to the accused to produce that document. Question is regarding the maintainability of the same. Whether accused can be asked to produce any document against his interest or would amount to his self-incrimination. Article 20 (3) of the Constitution of India protects an accused from being made witness against his own interest. The said provision runs thus,

“No person accused of any offence shall be compelled to be a witness against himself.”

5.1 The Full Court of Hon’ble Supreme Court in the famous case of ***M. P. Sharma And Others vs Satish Chandra [AIR 1954 SC 300]*** has widened the scope of words ‘*to be witness*’. It has been held that,

“A person can, "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like. "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt, Section 139 of the Evidence Act says that a person producing a document on summons is not, a, witness, but that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the

word "witness", which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so: procured is confined to what transpires at the trial in the court room. The phrase used in Article 20 (3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him".

5.2 Further, in ***The State Of Bombay vs Kathi Kalu Oghad And Others [AIR 1961 SC 1808]*** the Constitution Bench of Hon'ble Supreme Court has reiterated the said view and laid down that -

"The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not, "to be a witness". "To be a witness" means imparting knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said to be a witness, to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay or giving his

*opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in **Sharma's** case (1) that the prohibition in cl.(3) of Art. 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document, which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of s.139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession under power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents.*

----- For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a

'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot, change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression to be a witness".

6 No doubt, the point before Apex Court in **Kathi Kalu's** judgment was different, but the above observations are necessary to be kept in mind for consideration of the point whether such directions as prayed by the complainant can be granted. Here in this case, based upon the said fact about execution of a document, charge is levelled against accused. The said document is stated to be sale-deed. Certified copy of a sale-deed can be produced by complainant after getting it from the appropriate Government office. Another method that can be adopted it to call such officer as witness to produce that document. There is no such document produced on record that would show that efforts were made by the complainant to get certified copy. Complainant, therefore, cannot directly invoke the provisions under Section 91 of the Code.

7 The Division Bench of this Court in **Vinayak Purushottam Kalantre vs. Vikram Balwantrao Deshmukh and Ors [1979 Cri LJ 71]** held on

the point whether the provisions of Section 91 of the Code apply to the accused person and the Division Bench in terms held that in view of the judgment in *Shyamlal Mohanlal v/s. State of Gujarat [AIR 1965 SC 1251]* case, the provisions of Section 91 of the Code of Criminal Procedure, 1973 does not apply to the accused person. The decision in **Vinayak Kalantre's** case is then relied in *Manjula Ramlal Barot vs Iswarlal P. Barot And Ors. [2006 CRI LJ 3779]*.

8 Therefore, after taking into consideration the legal point, it can be reiterated that provisions of Section 91 of the Code cannot be pressed into service against accused. Another fact is also against the complainant that he can obtain certified copies or call the concerned official to bring the said document on record. When such way of leading evidence is available then also he cannot seek relief under Section 91 of the Code. The learned Magistrate has rightly rejected the application, though detail reasons are not given. No case is made for invoking constitutional powers of this Court under Article 227 of the Constitution of India. Writ petition stands dismissed. No order as to costs.

(Smt. Vibha Kankanwadi, J.)