

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

**CRIMINAL WRIT PETITION NO.2104 OF 2019
WITH
CRIMINAL WRIT PETITION NO.2105 OF 2019**

- 1] The Managing Director,
Bhuleshwar Sugar Works Ltd.,
R/o Gat No.181, Rise,
Tq. Purandar, Dist. Pune
Office: E12/4, MIDC, Jejuri,
Tq. Purandar, Dist. Pune-03
- 2] The Chairman and Managing Director,
Mr. Hanumant Dyanoba Bhagat,
Age: 53 years, Occ.:Business,
R/o. Gat No.181, Rise,
Tq. Purandar, Dist. Pune
Office : E12/4, MIDC, Jejuri,
Tq. Purandar, Dist. Pune-03

... PETITIONERS

VERSUS

- 1] N. R. Fabricators and Erectors,
Shri. N. R. Satpute (Director),
Age: 60 years, Occu.: Business,
R/o G-58, M.I.D.C., Ahmednagar
- 2] The State of Maharashtra

... RESPONDENTS

...
Mr. A. R. Borulkar, Advocate for petitioners.
Mr. B.V. Virdhe, APP for respondent No.2-State.
...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th January, 2020.

ORAL JUDGMENT :

. The issue in respect of both these writ petitions is common and therefore, both the writ petitions are proposed to be disposed of by this common judgment. At the outset, it is required to be impressed that it is a very small point and it had nothing to do with respondent No.1-original complainant when it was before the trial Court and therefore, it is not even necessary to issue notice to respondent No.1.

2. In both the petitions, the original accused persons have invoked the constitutional powers of this Court under Article 227 of the Constitution of India to challenge the order dated 20-11-2019 passed by learned Chief Judicial Magistrate, Ahmednagar. In one matter, it is Exhibit-187 in S.C.C. No.564 of 2016 and in another matter it is Exhibit-149 in S.C.C. No.569 of 2016. The petitioners are challenging the order passed by the learned revisional Court also, but since the petitions have been filed under Article 227 of the Constitution of India mainly challenging the order passed by the learned Chief Judicial Magistrate, the matters are to be considered from that angle.

3. The brief note of the factual matrix leading to the present petitions are that :-

The present petitioners are the original accused persons, who were facing trial for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 filed by present respondent No.1. The evidence of the complainant is over and in view of applications Exhibit-143 and Exhibit-105 in respective cases, the application was filed by the accused persons for issuing summons to the defence witnesses. They had given answer in the affirmative to the question that was asked to them in statement under Section 313 of the Code of Criminal Procedure that they want to examine witnesses. Accordingly, both the applications have been allowed by the learned Chief Judicial Magistrate and summons were directed to be issued to four witnesses. It appears that in S.C.C. No.564 of 2016, in spite of receiving the summons as per Exhibit-143, the witness at serial No.B. i.e. Branch Manager, Union Bank of India, Saswad Branch, Tq. Purandar, Dist. Pune remained absent and therefore, prayer was made for reissuing the summons. Interestingly, on application Exhibit-177, order of granting exemption has been passed when it was the application for re-issuance of summons. But thereafter, it appears that at Exhibit-181 in the said complaint, it was informed to the Court that in spite of serving the summons, time and again witness is not remaining present and therefore, warrant be issued. Accordingly, bailable warrant of Rs.10,000/- was

directed to be issued by learned Chief Judicial Magistrate on 24-09-2019. Thereafter, on 17-10-2019, at Exhibit-183, an application was filed by the present petitioners stating that in spite of serving theailable warrant, the witness is not present nor the report is filed and therefore, nonailable warrant be issued. Order was passed “last chance granted to the accused to examine witnesses. Re-issueailable warrant to be given by hand.” Thereafter, it appears that at Exhibit-187 and at Exhibit-149 in respective cases, similar application was filed stating that the order has been passed by the learned Magistrate later on and since the warrant was allowed to be taken by hand by the complainant, accused had contacted concerned clerk, but it was not handed over to him and therefore, request was made that the warrant be given in the hands of the accused. On both the applications, which was filed on 20-11-2019, similar order has been passed “Enough opportunity is given. Application is rejected.” These are the orders which are under challenge in these writ petitions.

4. As aforesaid, it is not even necessary to issue notice to respondent No.1-complainant, because the impugned order was not going to affect the complainant in any way.

5. Heard learned Advocate Mr. A.R. Borulkar for petitioners and learned APP Mr. B.V. Virdhe for respondent No.2-State.

6. Applications Exhibit-143 and Exhibit-105 in respective cases were allowed by the learned Chief Judicial Magistrate by giving a detailed order and accordingly witness summons were directed to be issued to four witnesses to be examined by the defence. When one of the witness was not remaining present and was not responding to the summons or the bailable warrant, then it was for the Court to consider the reason and get that summons/warrant executed so that the witness should remain present before the Court. Once it was considered that the examination of the said witness is necessary, then proper opportunity is required to be given. Even when the application Exhibit-183 in S.C.C. No.564 of 2016 was allowed, last chance was granted and as per the request of the accused, learned Magistrate had directed that the warrant be given by hand to the accused for its execution, of course through police. When this order was passed, it was even for the clerical staff working with the Court to prepare the warrant immediately and hand it over to the accused. When it was informed in Exhibit-187 and Exhibit-149 in respective cases by the accused that the enquiry was made with the concerned Court and demand was

made to give that warrant by hand to him, it has been avoided by the concerned clerk and therefore, the accused could not take it for execution. There appears to be no enquiry by the learned Chief Judicial Magistrate into the statement made in the application. On the contrary, the application itself has been rejected. It is to be noted that the order was passed on Exhibit-183 on 17-10-2019 and Exhibit-187 and Exhibit-149 was given on 20-11-2019, that means almost a month's time had gone and only because the warrant was not given by hand though ordered, the presence of the said witness could not be secured. When the Court passes such order regarding issuing summons to a witness and thereby securing the presence of the witness, then it should be insisted that the presence is secured by all permissible mode.

7. Further enquiry to the learned Advocate for the applicant reveals that on 03-12-2019, again an application was given for re-issuance of summons and the learned Chief Judicial Magistrate had allowed that application, but had not handed over the summons to the accused persons. It is also informed that the matters are now listed on 22-01-2020 for arguments. That means, learned Chief Judicial Magistrate is withheld the opportunity of the accused persons to secure the presence of the said

witness i.e. Manager of Union Bank of India. Though it was his own order, though he himself had permitted the accused to examine that witness in defence, in all this process, the accused had no hand to prolong the matter and therefore, the learned Chief Judicial Magistrate ought not to have taken away that right. It was even granted to the accused that the bailable warrant be taken by him and hand it over to the police for its execution. When such procedure is adopted, usually there was no hurdle for the learned Magistrate to hand over the bailable warrant to the accused. Under such circumstance, the powers of this Court under Article 227 of the Constitution of India are required to be exercised in the interest of justice and for execution of the orders those were passed by the learned Chief Judicial Magistrate. Hence, the following order :-

ORDER

- i) Both the writ petitions stand allowed.
- ii) Learned Chief Judicial Magistrate is directed to issue Bailable Warrant as per his order Exhibit-181 in S.C.C. No.564 of 2016 and give it by hand to the accused persons for its execution.

iii) Learned Magistrate to wait for its due execution and get the presence of the Manager Union Bank of India, Saswad Branch secured and then to proceed with the cases.

iv) It is clarified that once the presence of the Manager is secured in S.C.C. No.564 of 2016, he may be examined in S.C.C. No.569 of 2016 also.

[SMT. VIBHA KANKANWADI, J.]

SCM