

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

CRIMINAL WRIT PETITION NO.1983 OF 2019

Abdul Wasim S/o Abdul Salim
Age 50 years, Occu:Business,
Proprietor of Gujrath Freat Carier
R/o Kagjipura, Taluka Khultabad
District Aurangabad

.. PETITIONER
[ORIGINAL ACCUSED]

Versus

Mahboob Miya Khan S/o Miya Khan
Age 50 years, Occu : Business,
R/o Kagjipura, Taluka Khultabad
District Aurangabad
At present House No.4-18-57,
Lane No.3, Smashan Maroti Road
Kailash Nagar, Aurangabad.

.. RESPONDENT
[ORIGINAL COMPLAINANT]

...

Shri S.S.Bora, Advocate for petitioner
Shri S.A.Gaikwad, Advocate for respondent

...

CORAM : MANGESH S. PATIL, J.
DATE : 18.02.2021

ORAL JUDGMENT :-

Heard.

2] Rule. The rule is made returnable forthwith. With consent of both sides, matter is heard finally at the stage of admission.

3] The petitioner is the accused in a case going on before the learned J.M.F.C. under Section 138 of the Negotiable Instruments Act. By the impugned order the learned Magistrate rejected his application (Exh.58) seeking a witness to be called in defence.

4] The learned advocate for the petitioner submits that a right of the petitioner is being thwarted. An innocuous request to call a witness has been turned down. It would cause serious prejudice to him. The learned advocate would further point out that from time to time the matter was adjourned because of genuine reasons. His learned advocate because of some bereavement in the family could not turn up when the witness was present. The petitioner cannot be made to suffer because of such personal difficulty of his advocate. The learned Magistrate ignored all these fact situations and has rejected the application illegally.

5] The learned advocate for the respondent complainant takes me through the record and points out as to how at every stage the petitioner has been remiss in prosecuting the matter before the trial Court. He would point out that the petitioner was loath in conducting cross examination of the respondent complainant and order was passed that there would be no cross examination of the complainant on his behalf. An opportunity was thereafter extended to him to cross examine the witness. After the evidence of the respondent complainant was concluded the petitioner took time to lead evidence in defence. The defence witness was present on 3 occasions but he failed to conduct his examination.

6] The learned advocate would further point out that even the petitioner is not punctual and *bona fide* in making the request which he is now making by way of this Petition. Simultaneously, while filing this Writ Petition, the petitioner also applied for transfer of the trial to a different Magistrate. His request was rejected by learned Sessions Judge. He conveniently omitted to disclose this state of affair in this petition and considering his such conduct, the Writ Petition be dismissed.

7] I have carefully gone through the papers. Obviously the conduct of the petitioner speaks in volumes about his reluctance in going ahead with the trial. It does appear that he has also indulged in hide and seek in as much as simultaneously with this Writ Petition he applied even for transfer of the trial to a different Magistrate, in all probability being aggrieved and dissatisfied by the self same order which is under challenge in this Writ Petition.

8] Be that as it may, the date on which the adjournment was sought, but was refused, his learned advocate was unable to remain present because of bereavement in his family and subsequent rites to be performed. It is trite that a party cannot be allowed to suffer because of an error or lapse on the part of Court official.

9] Considering the fact that it is a criminal trial, where the petitioner is an accused and it is his right to defend himself in appropriate manner coupled with his conduct discussed hereinabove, the interest of justice would be met by allowing him to call the witness by imposing certain costs. The learned Magistrate has shut the doors of justice abruptly. In my considered view, it would be appropriate to allow the Writ Petition by imposing heavy costs to the

petitioner putting him to certain conditions to enable the trial Court to conclude it within stipulated time.

10] The Writ Petition is allowed. The impugned order is quashed and set aside subject to the petitioner paying costs of Rs.10,000/- to the respondent to be deposited in the trial Court within 2 weeks. On such costs being deposited, the petitioner's application shall stand allowed. However, it is made clear that the petitioner shall cooperate the trial Court in conducting the trial and shall not seek any adjournment.

11] The Rule is accordingly made absolute.

[MANGESH S. PATIL, J.]

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