

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

915 CRIMINAL APPLICATION NO.1241 OF 2022

DR. JAGDISH SHAMRAO PATIL

VERSUS

VISHNU SADA MALI

...

Mr. A.N. Nagargoje, Advocate for the applicant

Mr. H.P. Randhir, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 29th JUNE, 2022

ORDER :

1 Present application has been filed invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 to challenge the order passed by learned Judicial Magistrate First Class, Dhule in Summary Trial Case No.156/2015 on 02.02.2022 thereby closing the side of the accused for further evidence.

2 Heard learned Advocate Mr. A.N. Nagargoje for the applicant and learned Advocate Mr. H.P. Randhir for the respondent.

3 The brief facts giving rise to the present application are that the

present respondent is the original complainant, who had filed the said case contending that the present applicant-original accused has committed offence punishable under Section 138 of the Negotiable Instruments Act. It can be seen from the record that has been produced in the form of photo copy by the applicant that after the process was issued applicant appeared, his plea has been recorded and the evidence has been led by the complainant in support of his complaint. Thereafter the statement of the accused under Section 313 of the Code of Criminal Procedure has been recorded and at Exh.49 an application was given by the applicant-accused for issuing witness summons to support his defence. In that list he had given in all six names to whom the witness summons was to be issued. The learned Judicial Magistrate First Class by order dated 12.06.2019 asked the learned Advocate for the accused to explain the relevancy in respect of witnesses and thereafter it appears that it was allowed and witness summons was directed to be issued. Witness No.5 Anil Uttamrao Borse is stated to be the son-in-law of the complainant. He was served with summons, however, he sought adjournment. Further, it appears that even after summons was served on the Postal Department, nobody appeared for two dates and then another application came to be filed at Exh.52 that fresh witness summons be issued to two of the witnesses from Exh.49. It was allowed. Thereafter on behalf of Postal Department affidavit came to be filed which was taken on record. Another application came to be

filed at Exh.56 in respect of one witness by name Advocate Manoj Patil, who could not be served. But it appears that certain steps were not taken or the matter was preponed to which the applicant was not aware. The learned Judicial Magistrate First Class had passed the order of closing the side of accused for evidence. That order came to be set aside by order on Exh.57. Again an application was given that summons be re-issued to those witnesses whose names were given at Exh.52. It was allowed. The same scenario continued on Exh.59 also and Exh.61 was once again given for re-issuance of summons. Even the show cause notice was given to Senior Police Inspector, Dondaicha Police Station vide Exh.60. Once again at Exh.65, as regards the bailable warrants are issued in view of application Exh.64, prayer was made that it be re-issued. On this application the learned Magistrate passed order that since last three years defence evidence is going on, many times summons were issued, but as a last chance that opportunity was given and asked the accused to bring the witnesses in Court at his own end. Thereafter affidavit came to be filed by the present applicant stating that he had taken the bailable warrant by hand and had given to the Police Station for its service. On 02.02.2022 taking into consideration the entire record the learned Magistrate observed that since many opportunities were given to the accused to bring the witnesses, yet, the matter is prolonging since three years, he closed the side of the accused for further evidence.

4 Learned Advocate appearing for the applicant submits that the applicant was not at fault when he had taken all the steps on the given dates. If the police and other machinery is not cooperating to him, the Magistrate ought to have used his powers to bring the witnesses before the Court. Hyper technical view ought not to have taken by the learned Magistrate, though much time has been consumed. It is not only because of the accused but it is the inaction on the part of the police officers to serve the summons/bailable warrants and, therefore, that order deserves to be quashed and a fair opportunity needs to be given to accused to defend his case.

5 Per contra, the learned Advocate appearing for the respondent-complainant strongly supported the reasons given by the learned Magistrate and submitted that the matter is pending since 2015. No doubt, in Covid period nobody could have done much when the Standard Operating Procedures were operated and the people were not attending the Courts. However, even after the Courts re-opened, no proper steps have been taken by the applicant. Further, why he wants to examine so many persons, is a question. He has not yet entered the witness box. Only from the suggestions those were given by him in the cross of the complainant it cannot be said that examination of all the witnesses is necessary. There is no merit in the present application.

6 At the outset, it has to be noted that an accused has every right to defend the case against him and a fair opportunity needs to be given to him to put forth his defence. At this stage, there is only cross-examination of the complainant, in which he says that the disputed cheque was given in respect of the transaction between the accused and the son-in-law of the complainant. Learned Advocate for the applicant has not supplied the copy of the statement of the accused under Section 313 of the Code of Criminal Procedure and, therefore, it cannot be confirmed that whether the same statement has been made by the accused in his statement under Section 313 of the Code of Criminal Procedure or not. But if we consider application Exh.49, he says that the said application has been given in support of his statement under Section 313 of the Code of Criminal Procedure. Witness No.1, as per list in Exh.49, is in respect of bank where complainant has account. In fact, this document is absolutely not necessary when it appears that the accused is admitting his signature on the cheque. Same is the case with witness No.2. Witness No.3 is the Bank Manager of the Bank of accused and the accused seeks entries from his account since 2001 – 2018. He can be said to be relevant witness. Witness No.4 is the Advocate, who was, in fact, engaged by complainant to issue notice dated 27.04.2012 to the accused and that is the contention of the accused that such Advocate had given. Complainant in his cross has denied this suggestion but if such notice could

have been received by the accused, then, he can be said to be a proper witness. There is no hurdle in calling witness Nos.3 and 4 in the list at Exh.49. Witness No.5 is the son-in-law of the complainant and as per accused, he had transaction with this person viz. Anil Uttamrao Borse. No doubt, it appears that he had appeared once and thereafter he did not, after seeking adjournment. But at Exh.52 his name was not taken by the accused himself. Another fact is that the accused has not yet entered the witness box and prior to that he cannot examine such witness. Sr. No.6 is the Postal Department witness but there is a pursis filed on behalf of the said department and in view of that pursis Exh.52 it is not necessary to allow the accused to call that person. Therefore, at the most an opportunity needs to be given to the applicant to examine witness Nos.3 and 4. Further, taking into consideration the fact that the matter is pending since long, a time bound programme will have to be given to the learned Magistrate. With these observations, following order is passed.

ORDER

- 1 Application stands partly allowed.
- 2 The order passed by the learned Judicial Magistrate First Class, Dhule below Exh.1 in Summary Trial Case No.156/2015 on 02.02.2022 is

hereby set aside, and the present applicant – original accused is allowed to lead evidence, however, it is to the extent of witness Nos.3 and 4, mentioned in application Exh.49, in the said case.

3 Learned Magistrate to issue summons to those witnesses and secure their presence within a period of 15 days from the next date before the Magistrate and the learned Magistrate should see that the presence of the witnesses is secured.

4 Learned Magistrate may ask a special Police Head Constable to be deputed for service of those summonses and in case of failure on the part of either by the police or by the witnesses concerned, the Magistrate should take stern action against them.

5 The evidence of the accused should be completed by the end of September, 2022. It is clarified that the learned Magistrate may allow accused to examine himself, if he desires. However, no more witnesses can be said to be relevant and to be allowed by the Magistrate.

6 The case should be decided by the end of November, 2022.

(Smt. Vibha Kankanwadi, J.)