

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

CRIMINAL WRIT PETITION NO. 3086 OF 2022

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|------------------------------------|----------------|
| 1. Mr. Shivanand Bhoja Shetty | |
| 2. Mr. Ashwin Shivanand Shetty | |
| 3. Mr. Balkrishna Bhoja Shetty | |
| 4. Mrs. Priya Rahul Bhawe | ...Petitioners |
| Versus | |
| 1. Vipin Bhimraj Shah | |
| 2. M/s. SHIRT COMPANY (India) Ltd. | |
| 3. Mr. Himanshu Basantlal Garja | |
| 4. The State of Maharashtra | ...Respondents |

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Ms. Kirtimala Kamble Advocate for the Petitioner.

Mr. Jahangir Khajotia i/by Ms. Minal Shashikant Parab for Respondent No.1.

Mr. Rahul Gaikwad a/w Ms. Nikita Abhyankar a/w Mr. Aman Jhawai i/by Gravitas Legal advocate for Respondent No.2.

Mr. S. R. Agarkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 7th SEPTEMBER, 2022

PC :

1. The petitioners have challenged order dated 01.08.2022 passed by Additional Sessions Judge, Mumbai in Revision Application No. 126 of 2022 and order dated 02.02.2022 passed by Learned Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai rejecting application (Exhibit-144) preferred by petitioners under Section 254(2) of Cr.P.C. in C.C. No. 1282/SS/2018.

2. The petitioners are prosecuted for offence punishable under Section 138 of Negotiable Instruments Act. Plea of the accused was recorded. Trial proceeded. Affidavit of examination in chief of the complainant was filed on 20.06.2018. The complainant was cross-examined on 30.08.2019, 13.09.2019m 27.08.2021 and 28.08.2021. Further examination in chief of the complainant was recorded in accordance with Section 311 of Cr.P.C. on 13.09.2019. Cross-examination was also conducted on 13.09.2019, 26.11.2021, 06.12.2021 and 18.12.2021. Evidence of witness No.2 for complainant was recorded on 03.09.2021 and he was also cross-examined on the same day. Statement of the accused were recorded under Section 313 of Cr.P.C. Defence made application for issuance of summons. The application on behalf of accused Nos. 1 to 5 was made for issuing two defence witnesses on 07.09.2021. DW-1 Ashwin Upadhyay was examined on behalf of the accused. He has examined in chief was recorded and he was cross-examined. Examination in chief of DW-2 on behalf of the accused was recorded and he was cross-examined on 23.12.2021.

3. Application on behalf of accused Nos. 1 to 5 was made for issuing summons to DW-3 M/s. Religare Finvest Ltd. on

20.01.2022 on ground that witness is required to be examined for giving evidence and proving documents of the three foreclosure statements dated 31.07.2017 issued by M/s. Religare Finvest Ltd. at serial No.11 of the list of documents filed in the case vide Exhibit-78 and regarding payment of two months EMI installment of Rs.65,58,339/- by RTGS on 28.07.2017 by M/s. Shirt Company (India)Pvt. Ltd. (accused No.1) to Ms. Religare Finvest Ltd., as per statement of utilisation of amount at serial No.12 of the list of documents filed in the case.

4. The aforesaid application was opposed by complainant on the ground that the advocate on behalf of accused No.1 cant file any application as interim resolution professional or IRP Mr. Anuj Bajpai appointed invoking Section 25 of the Insolvency Bankruptcy code, 2016. The advocate appearing for accused No.1 has not produced any Vakalatnama authorizing him to appear on behalf of IRP. The application on behalf of accused No.1 is not maintainable. Summons cannot be issued directly against the company as it is an artificial entity under the law. No reasons are mentioned by accused for examining the said witness. The examination of said witness does not have

bearing on the present case. The accused No.1 to 5 had filed application for examining only two witnesses namely (1) General Manager Credit Department New India Co-operative Bank Ltd. and (2) M/s. Suvishwa Valuers and Consultants Pvt. Ltd. as defence witness on 07.09.2021. The application was allowed. The accused Nos. 1 to 5 have examined those two witnesses. The accused cannot reopen the defence witness by filing the present application. Accused had earlier filed application vide exhibit-134 to examine ROC. In the said application, they did not mention the name of the present witness. The accused are filing application repeatedly for examining defense witnesses. There is four and half month delay in filing the present application from the date of application dated 07.09.2021.

5. The learned Metropolitan Magistrate by order dated 02.02.2022 rejected the said application. The learned Metropolitan Magistrate while rejecting the said application had observed that the material and important witness to the fact in issue are required to be called for examination before the Court. In the present case M/s. Religare Finvest Ltd. is not witness to the fact in issue. It is the case under Section 138 of the Negotiable Instruments Act. This is not

relevant witness to the case in hand.

6. The petitioners challenged the said order by preferring Criminal Revision Application No. 126 of 2022. The Revision Application was rejected by Sessions Court, Mumbai vide order dated 01.08.2022.

7. The impugned order dated 02.02.2022 passed by Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai and order dated 01.08.2022 passed by Sessions Court, provides reasons for rejection.

8. Learned advocate for the petitioners submitted that the impugned orders are contrary to law. Both the Courts have committed an error in rejecting the application for issuance of summons to examine defence witness. The petitioners have established that they had no prior acquaintance with the complainant and even the cheques in issue were not handed over by petitioners to the complainant. The petitioners are required to establish the fact that in order to avail transfer of loan with top-up loan facility from M/s. Religare Finvest Ltd. to M/s. New India Co-operative Bank Ltd. as the complainant has denied the

same in his cross-examination. The petitioners submitted additional written statements at the time of recording statements under Section 313 of Cr.P.C. and examined two defence witnesses and proved that the New India Co-operative Bank had considered the proposal of the accused No.1 company and obtained the title search report dated 22.06.2017 from M/s. Legaleye Associates and the Valuation Certificate dated 23.06.2017. The petitioners are required to prove the documents of three foreclosure statements dated 31.07.2017 of M/s. Religare Finvest Ltd., and the payment of two months EMIs on 28.07.2017. It is to be proved that the complainant had facilitated the creditors on 28.07.2017 vide transferring the disputed amount in the account of accused company without any agreement or writing between complainant and accused. This could be established by examining defence witness from M/s. Religare Finvest Ltd. The petitioners are not vicariously liable for the accused No.1 company as the funds provided by the complainant have been utilised for the accused No.1 company without knowledge and consent of the petitioners. There is no legally enforceable debt or liability for which the disputed cheques were issued. The learned Sessions Judge and the learned Metropolitan Magistrate ignored the

aforesaid aspects. The petitioners had not closed their side of evidence by filing any closure pursis and they were entitled for filing application under Section 254(2) of Cr.P.C. The accused are entitled for fair trial and put forth their evidence by examining defence witnesses.

9. Learned advocate for the petitioners had relied upon the following decisions:-

- (a) Ronald Wood Mathams and Others Vs. State of West Bengal¹.
- (b) M. Saravanan Vs. S. Murugesan delivered by Madras High Court on 04.09.2019.
- (c) Arun Sheshkaran Kochar Vs. Sunil Fulchandji Bharut².
- (d) Babubhai @ Irfan S/o. A. Habib @ Bababhai Sheikh Vs. State of Maharashtra³.
- (e) T. N. Janardhanan Pillal Vs. State⁴.
- (f) Shri Vardachari S.o Rangachari Vs. State of Maharashtra delivered by this Court at Nagpur Bench on 21.07.2021.
- (g) Madhu Limaye Vs. State of Maharashtra⁵.
- (h) Hasmukh J. Jhaveri Vs. Shella Dadlani delivered by this Court in Criminal Revision Application No. 667 of 1979 on 19.09.1980.
- (i) P. Mohanraj & Ors. Vs. M/s. Shah Brothers Ispat Pvt. Ltd.⁶

1 AIR 1954 SC 455 (Vo. 41, C.N. 108)

2 2011 ALL MR (Cri.) 2838

3 2011 ALL MR (Cri.) 3700

4 1991 STPL(LE-Crim) 11135 KER

5 AIR 1978 SC 47

6 2021 (2) Bom.C.R.(Cri.) 24

10. Learned advocate for respondents submitted that the application was denied on merits. Learned Magistrate and learned Sessions Judge had rightly rejected the application. The defence witness proposed to be examined by accused is not material and connected with the present case. The contents of the application to examine the DW-3 is afterthought. The case relates to the dishonour of cheque. The accused are delaying the proceedings. The defence had preferred application for issuing summons to two witnesses which was allowed. The said witnesses were examined and cross-examined. In the said application there was no reference to DW-3 after recording evidence of DW-1 and DW-2 application was preferred. Learned Metropolitan Magistrate and learned Sessions Judge has assigned reasons for rejecting the application. The proposed witness has not connection with the fact in issue which relates to the dishonour of cheque.

11. The prosecution relates to the offence under Section 138 of Negotiable Instruments Act. The complainant examined witnesses. They were cross-examined by accused. Statement of accused was recorded under Section 313 of Cr.P.C. The application for issuance of summons to

defence witnesses was preferred by accused on 07.09.2021. the said application does not refer to M/s. Religare Finvest Ltd. It is not clear as to why and how the defence find it necessary to prefer the subsequent application for issuing summons to said witness on 20.01.2022. The Criminal Revision Application No. 126 of 2022 was preferred by accused Nos. 1 to 5. The present petition was preferred by accused No.2 to 5. One of the ground urged in this application is that the petitioners (accused Nos.2 to 5) are not vicariously responsible and the cheques was issued by accused No.1 without their consent. Learned Metropolitan Magistrate while rejecting the application vide order dated 02.02.2022 has observed that the witness is not relevant to the present case. The ground urged in the application for issuing summons is for giving evidence and proving documents of three foreclosure statements on 31.07.2017 issued by M/s. Religare Finvest Ltd. at serial No. 11 of the list of documents filed in the case at exhibit-78 and regarding payment of two months EMI installment by RTGS on 28.07.2017 by accused No.1 to Ms. Religare Finvest Ltd. Thus the accused were aware about the said aspects and inspite that the application was made for issuing summons to the said witness after examining

DW-1 and DW-2. Prima facie, the accused are trying to connect the transaction in questions to extraneous transaction which cannot be linked to the present case. The Sessions Court while rejecting the application has observed that the defence had examined two witnesses and thereafter, the impugned application was filed. The additional evidence of complainant was recorded on several dates. Statement of accused was recorded under Section 313 of Cr.P.C. on 07.09.2021. Record disclosed that the defence witnesses were examined up to 13.12.2021. The accused have shown only three witness in earlier application. Even that time they were knowing about the proposed witness and even then in the previous application new witness was not cited for examination. It is true that when some facts was disclosed from the complainant the accused would get opportunity to lead his defence to that effect. However, earlier he has filed application and examined two witnesses i.e. after additional evidence of complainant. The accused intends to call witness from M/s. Religare Finvest Ltd. and wants to prove foreclosure statements. In the cross-examination of PW-1 the accused have given suggestion for foreclosure statement of M/s. Religare Finvest Ltd. It means this fact was known to the

accused. On perusal of pleadings, cross-examination of PW-1, the witness from M/s. Religare Finvest Ltd., is not found relevant. The decision of trial Court does not require interference in revisional jurisdiction. The Revision Application has been rejected on merits by assigning reasons. In concluding paragraph the learned Sessions Judge has observed that application stands rejected on merits as well as under Section 397(2) of Cr.P.C. Since the entire order is based on reasons for rejection on merits, assuming that revision was maintainable. The impugned order does not required interference. This Court has examined the issue and in the facts of this case I find that application for issuing summons to DW-3 cannot be granted.

12. I do not find any reason to interfere in the impugned orders passed by learned Metropolitan Magistrate as well as learned Sessions Judge. Learned Advocate for the petitioner has relied upon the several decisions. Law is well settled. In the present case, the Court below has rightly rejected the application for defence witness. The said witness has not relevance to the fact of the case. The application was made belatedly. The contents of application are afterthought. Hence I pass the following order:-

ORDER

(i) Criminal Writ Petition No. 3086 of 2022 stands rejected and disposed off.

(PRAKASH D. NAIK, J.)