

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1552 OF 2022

Fulabai w/o Bhausahab Bansude

Petitioner

Versus

The State of Maharashtra & others

Respondents

Mr. Rajendra Deshmukh, Senior Counsel instructed by Mr. Devang Deshmukh, Advocate for the petitioner.

Mrs. Geeta Deshpande, APP for the State.

Mr. Deepak Bansude, party-in-person.

CORAM : R. M. JOSHI, J.

RESERVED ON : 26th OCTOBER, 2023.

PRONOUNCED ON : 3rd NOVEMBER, 2023.

ORDER

1. This petition filed under Article 227 of Constitution of Indian and Section 482 of Code of Criminal Procedure takes exception to the order dated 29th September, 2022 passed in Criminal Revision Application No. 54/2022 by Additional Sessions Judge, Latur whereby order passed below Exhibit 94 in RCC No. 76/2016 forbidding accused No. 1 from representing co-accused as lawyer came to be set aside.

2. Petitioner is the original complainant at whose instance First Information Report bearing No. 166/2015 came to be registered against accused persons for the offence punishable under Sections 406, 420, 465, 467, 471, 468, 201 read with Section 34 of Indian Penal Code. The allegation against the accused is that in order to usurp the properties of late Bhausahab, bogus document of will is prepared by them. When the proceedings of RCC No. 766/2016 commenced, one of the accused i.e. Deepak Bansode who is an advocate by profession, has caused his appearance on behalf of the co-accused. Prosecution therefore filed application Exhibit 94 raising objection to appearance of co-accused in the capacity of lawyer to represent other accused. Learned Judicial Magistrate First class passed order dated 29th June, 2022 prohibiting the accused Deepak Bansode to represent co-accused as lawyer for them. The said order was successfully challenged by accused before the Revisional Court.

3. Learned counsel for the petitioner/original complainant submits that the right of representation by a lawyer is not unfettered or unqualified right and though Section 30 of Advocates Act permits a lawyer to cause appearance in any criminal proceeding as of right, in view of settled position by the judgment of this Court in case of

Emperor vs. Dadu Rama Surde, **AIR 1939 Bombay 150**, where the Court is of the view that when embarrassment is likely to be caused to the trial by appearance of the advocate, he can be debarred from representing the accused in such proceeding. To support his contention, he also placed reliance on the judgment of Gujrath High Court and Andhra Pradesh Court in following cases :

- i) Gohel Himatsingh Lakhaji
LAWS (GJH)-1965-3-8
- ii) Public Prosecutor, Andhra Pradesh vs. Kothakapu Etreddy
Venkata Reddy and others
AIR 1961 Andhra Pradesh 105

4. Learned counsel for the accused submitted that it is a right of the accused to get represented by a lawyer of his choice. Such right is created in their favour in order to ensure that the principles of natural justice are met with and that there is no scope to claim that the lawyer has not represented the accused properly in any criminal proceeding. It is submitted that the learned Revisional Court has rightly passed order with observations that the order passed by the Magistrate is pre-mature as no occasion arose for the Trial Court to ascertain whether any embarrassment is caused to the Court or a prejudice is likely to be caused to the accused by them

being represented by the co-accused in the capacity of an advocate. It is also submitted that in any case, in view of Section 2(g) of Code of Criminal Procedure, a pleader includes any person appointed with the permission of the Court. Thus, it is his contention that the co-accused cannot be excluded from the said definition. Thus, in his view, there is no reason or justification for causing interference in the impugned order.

5. Section 30 of the Advocates Act provides for the right of advocate to practise in any courts including the Supreme Court. Similarly, it is settled preposition of law that the accused is entitled to get represented by a lawyer of his choice in a criminal proceeding. However, such right is not unfettered or unqualified nor can it be claimed as a absolute right without any restriction. The Division Bench of this Court way back in the year 1939 in case of Emperor vs. Dadu Rama Surde(supra) has decided the question as to whether the Court has jurisdiction to forbid an advocate to appear in a case involves the consideration of conflicting principles. While deciding the said issue, the Court has taken into consideration entitlement of accused to select advocate whom he desires to appear for him and certainly the prosecution cannot fetter that choice merely by serving

a subpoena on the advocate to appear as a witness. It is further observed that on the other hand the Court is bound to see that due administration of justice is not in any way embarrassed. It is thus held that if the Court comes to the conclusion that the trial will be embarrassed by appearance of an advocate who is called as a witness by the other side, and if, notwithstanding the Court's expression of its opinion, the advocate refuses to withdraw, such Court has inherent jurisdiction to require the advocate to withdraw. Thus, order passed by the learned Magistrate cannot be said to be without any jurisdiction. It is always open for the Court to forbid appearance of a lawyer in case if it is likely to cause embarrassment to the Court or even is prejudicial to the interest of the accused.

6. The question that arises in this case is that as to whether on representation by an accused who is an advocate by profession of co-accused by itself would be treated as embarrassment of trial at the threshold and whether such representation can be forbidden. Judgment of Division Bench of this Court clearly indicates that it is within the right of the Court if it comes to the conclusion that trial would embarrass by appearance of an advocate, to exercise inherent jurisdiction requiring the advocate to withdraw.

7. Thus, before actual commencement of the trial, it would not be open for the Magistrate to presume that embarrassment would be caused by appearance of the advocate who has been accused in the case. The right of accused to choose an advocate whom he desires to appear for him is integral part of his right to defend and in the interest of natural justice an accused must be given such option to defend himself in a criminal trial by any lawyer. Such right cannot be taken away on presumption and assumption. The right of the Court is recognised for withdrawal of appearance of an advocate only in case where the trial is embarrassed by his appearance. The observations of the Division Bench of this Court came in the light of the fact that the advocate appearing in the said case was called as a witness and hence it was observed that a advocate cannot cross-examine himself nor can he address to the Court as to the credibility of his own testimony and the Court may then feel that justice will not be done if the advocate continues to appear. It is in these facts and circumstances of the case it was observed that if the court comes to the conclusion that trial will be embarrassed by appearance of an advocate, his prohibition is permitted. The Division Bench has also observed that the prosecution in such case must establish to the

satisfaction of the Court that the trial will be materially embarrassed if the advocate continues to appear for defence. Application Exhibit 94 filed before the Trial court does not make out any such case to prohibit appearance of co-accused as an advocate to represent other accused. The learned Revisional Court has rightly taken into consideration the said aspect of the matter and has set aside the order passed by the learned Magistrate.

8. Though the petition must fail however, a clarification needs to be given that rejection of this petition shall not be taken as unfettered right of the co-accused to represent other accused in capacity of lawyer. The order passed by Magistrate is not upheld only for the reason that it is premature. Needless to say that it is always open for the learned Trial Court to exercise its inherent jurisdiction to require the advocate to withdraw if it comes to the conclusion that the trial is embarrassed by appearance of the advocate. With these observations, petition is dismissed.

(R. M. JOSHI)
Judge