

IN THE COURT OF METROPOLITAN MAGISTRATE
20TH COURT, MAZGAON, MUMBAI

C.C. No. 11871/SS/2019

ORDER BELOW EXH. 43

The accused has presented this application seeking prayer to discard evidence affidavit of Pankaj Goshar CW 3 which is filed on record on 04.03.2023.

2 The accused has stated that the list of witnesses does not indicate reference of this witness. The complainant has not sought prior permission to examine him. Hence, this application.

3 The complainant has opposed the claim as per the reply Exh. 44. It is contended that :- the application has been presented to protract the trial. The Constituted Attorney of the complainant has already been examined. The stage is for recording further evidence of the complainant. In support, the complainant has every rights to examine end number of witnesses. The witness and the complainant stay together in a joint family. The witness is the son of the complainant. The witness is aware of the facts with reference to the dispute in question. No prejudice would be caused to the accused if this application is allowed. Rather, substantial facts can be placed on record if the witness is examined.

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The points for determination alongwith my findings are as under....

Sr. No.	Points	Findings
1	Whether the complainant can be permitted to rely upon the evidence affidavit of Pankaj CW3 as part of her evidence ?	In the affirmative
2	Whether the evidence affidavit of Pankaj CW3 is required to be discarded, as prayed ?	In the negative
3	What order ?	As per final order

REASONS

AS TO POINT NOS. 1 AND 2 :-

4 Learned advocate representing the accused has submitted that :- Section 204 of the Code of Criminal Procedure (Code) mandates that no summons shall be issued against the accused **until a list of prosecution witness has been filed**. Every summons issued under said provision shall be accompanied by copy of such complaint. Herein, the list of witnesses do not indicate reference of Pankaj CW3. The complainant has not submitted separate list of witnesses indicating his name as the cited witness. The complainant has not obtained prior permission to examine said witness. Therefore, the evidence affidavit is required to be discarded. In support, he has relied upon the case law, **State of Bombay Vs. Janardhan and Ors**, (Bombay High Court) (Law finder Doc Id # 302659).

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5 Learned advocate representing the complainant has submitted that :- The complainant has yet not completed her part of evidence. The witness is her son and does have necessary knowledge pertaining to the dispute in question. The complainant is an old age lady and the witness is staying with her. The accused cannot object such exercise on part of the complainant to file evidence affidavit of her witness. The complainant is at liberty to examine her witness in support of her case. In support, he has relied upon the case law **Dineshsingh Bhimsingh Vs. Vinod Shobhraj Gajaria and ors**, Writ Petition no. 11185 of 2022, dated 25.01.2023, Bombay High Court.

6 The complaint is in respect of section 138 of the Negotiable Instruments Act. It has been filed by the Special Power of Attorney Gautam CW1 on behalf of an old age lady i.e. the complainant. It has been registered as summons case. Pankaj CW3 has claimed to have participated in the transaction as the son of the complainant. Pankaj CW 3 has stated that the complainant has been suffering from physical ailments and now she is not able to depose before the court. The contentions of Pankaj CW 3 are part of further judicial scrutiny. The complainant has mentioned in the witness list that she may be permitted to examine additional witnesses, if any. True, the complainant has not sought prior permission to examine Pankaj CW 3. The complainant has mentioned the reasons for ~~cross~~[✓] examination of Pankaj CW 3. Consequently, the complainant has sought the requisite permission to examine said witness.

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7 The complainant has not closed her side of evidence. Now, she has proposed to examine her son Pankaj CW 3. The complainant has submitted the medical certificate in support of her claim that she is facing physical ailments. Pankaj CW 3 has claimed to have acquaintance with signatures of the complainant and Gautam CW1. He has further claimed regarding acquaintance of the existence of related facts with the transaction. He has further narrated necessary facts with regard to health condition of the complainant. Therefore, the complainant can be permitted to examine Pankaj CW3 considering the cumulative analysis of sections 5 to 16 and 45 to 50 of the Indian Evidence Act, Sections 254, 262 of the Code with reference to section 145 of the Negotiable Instruments Act.

8 In case of State of Bombay..... (cited supra) the complainant therein was permitted to examine additional witnesses to prove that subsequent to the date of the second bigamous marriage, a child was born to the second wife. In said background, it has been held that the court should not give permission to add names to the witness list vide section 204 (1)(A) r/w 252 of the Code. If it is going to prejudice the case of the accused or if it is not in the interest of justice and in proper cases if an application is made, the complainant may be permitted to add names to the list given by him u/sec. 204 (1)(A) of the Code. Herein, the accused has moved this application to discard the evidence affidavit of the witness. The complainant has replied it in detail stating therein the need to examine said witness. The accused would be having an opportunity to cross examine said witness. Hence, as noted earlier, the witness is relevant for effective adjudication of the



cause. Therefore, with the greatest respects to the observations laid down in the case law State of Bombay.... (cited supra) I am of the humblest opinion that the fact of the present case are slightly different.

9 Hence, permission can be granted to the complainant in view of her reply to examine the witness. Consequently, the prayer to discard the evidence affidavit is unjust. Accordingly, point no. 1 is answered in the affirmative and point no. 2 is answered in the negative. In result, following order is passed.

ORDER

1 The prayer to discard the evidence affidavit of Pankaj CW 3 is hereby *rejected*.

2 The complainant is permitted to examine Pankaj CW 3 in view of section 254 of the Code of Criminal Procedure r/w section 145 of the Negotiable Instruments Act in view of the reply Exh.44.

3 The accused is at liberty to cross examine Pankaj CW3.

4 Both sides to note.



Date : 27.09.2023

(V.B. Gulve-Patil)
Metropolitan Magistrate,
20th Court, Mazgaon, Mumbai.

