

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

CRIMINAL WRIT PETITION NO. 1371 OF 2015

M/s. Global Exim

..Petitioner

v/s.

The State of Maharashtra & Ors.

..Respondents

Mr. Girish Agarwal for the Petitioner.

Mr. Raghavan Sarathy i/b. Thodiar Law Associates for the
Respondent nos.2 and 3.

Mr.J.H.Ramugade, APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 28th OCTOBER, 2015.

P.C.

1. Rule. Rule made returnable forthwith. With consent of parties
petition is taken up for hearing.

2. The petitioner challenges the order dated 24.3.2015 whereby
the learned Metropolitan Magistrate, Mazgaon, Mumbai allowed the
application at Exhibit 91 and 92 for recall of complainant for further
cross and allowed the accused to adduce further evidence. The
petitioner is the complainant in C.C.No. 2856/SS/2012 on the file of
the Metropolitan Magistrate's 56th Court, Mazgaon, Mumbai under

Section 138 of the Negotiable Instruments Act. The petitioner-complainant had claimed that the respondent no.2-accused had issued cheque dated 28.8.2011 for Rs.1,64,00,000/- towards discharge of debt and liability arising from agreement dated 23.8.2011. The said cheque was dishonoured with remark “account freezed”. Despite receipt of the statutory notice, the respondent no.2-accused did not repay the cheque amount. Hence the petitioner initiated proceedings under Section 138 of the Negotiable Instruments Act.

3. The respondent-accused pleaded not guilty and claimed to be tried. The complainant adduced his evidence and after recording the statement under Section 313 of Cr.P.C. the evidence of the accused came to be recorded. When the matter was at the stage of final hearing, the accused filed application dated 6.2.2014 at Exhibit 91 and 92. In both these application the accused claimed that at the time of cross examination of the accused, complainant sprung surprise by showing the document i.e. letter dated 22.5.2012 (Exh.29) purported to have been issued by the accused. It was stated

that the accused had only admitted his signature and not the contents. The accused further stated that the accused had come across additional documents having significant bearing on the case and that the accused is desirous of leading further evidence. Based on the aforesaid grounds, the accused by application at Exhibit 91 sought to recall the complainant for further cross examination. , while by application at Exh.92 sought leave to adduce further evidence.

4. The petitioner-complainant had contested both these applications mainly on the ground that the document i.e. letter dated 22.5.2012 was produced in the year 2012 and that the accused was only trying to prolong the case.

5. The learned trial Judge while allowing the application held that the complainant had not responded positively to some suggestions regarding e-mail dt. 21.5.2012 and has further not made any specific statement about letter date Exh.29. The learned Magistrate has held that while the said letter was first referred to in cross examination of

DW1, the accused had only admitted his signature and that now the accused wants to prove that the cheque was given as security. The learned Magistrate held that opportunity has to be given to the accused to rebut the presumption. Hence, allowed both these application and thus recalled the complainant for further cross examination and allowed the accused to adduce further evidence.

6. Section 311 Cr.P.C. confers wide powers on the Court to summons a material witness or to examine a person present at any stage of an enquiry or trial, or to summon any person as a witness or to recall and re-examine any person who has been examined, if his evidence appears to be essential for just decision of the case. These powers however are to be exercised judiciously.

7. The records in the present case reveal that the complaint under Section 138 was filed in May 2012. The evidence of the complainant had already commenced and the cross examination was concluded on 5.12.2012. The letter at Exhibit 29, which was allegedly spring by surprise, was produced on record on 21.8.2012.

Subsequently, the complainant as well as the accused have adduced evidence in support of their claim/defence. The accused had, in the cross examination admitted that the letter at Exhibit 29 bears his signature. It is also pertinent to note that this court, in order dated 4.8.2014 in Writ Petition No.1948 of 2014 arising from the said proceedings had not only made reference to the said letter, but had quoted the contents of the said letter. The respondent accused was therefore well aware of the contents of the letter at Exhibit 29 and as such the contention that the respondent was 'sprung by surprise' is devoid of any merits.

8. The respondent had stated that they had come across some additional records and documents having significant bearing on the trial. The respondents had therefore sought to cross examine PW1 and lead further evidence. It is pertinent to note that the application does not disclose any particulars of the records or the documents on which PW1 is sought to be cross examined. The application also does not disclose the nature of the evidence sought to be adduced. The respondents had annexed a copy of the e-mail dt. 21.5.2012 to

the application at Exhibit 92. The said e-mail was sent by Tejal Potadia from the gmail address of Hitesh Mota, global45a@yahoo.com to priyanka.stonemann@gmail.com with copy to Jagat Shah (R2).

9. The respondent has not given any reasons for not cross examining the PW1 on this e-mail. PW2 was cross examined on the e-mail ID of the complainant and he had specifically stated that the e-mail ID of the complainant is global302@yahoo.com and that “global45@yahoo.com” is not the email ID of Global Exim Ferns. With this unfavourable answer, the respondent accused had chosen not to cross examine him any further on the e-mail dt. 21.5.2012. In the absence of any reasons or sufficient grounds for not cross examining the witness and or not producing the documents at the earlier state, the respondent accused cannot now seek to recall PW1 or seek leave to adduce further evidence.

10. The document as stated earlier was produced on 21.8.2012. The complainant was examined on 27.2.2013 and the statement of

the respondent no.3-accused under Section 313 Cr.P.C. was recorded on 29.11.2013 and the case was adjourned for defence evidence on 20.12.2013. The case was adjourned on 20.12.2013 and 7.1.2014 as to the request of the respondent accused. The request for adjournment again on 17.1.2014 was resisted by the petitioner and the same came to be rejected by order dated 17.1.2014. The said order was challenged in Criminal Writ Petition 478 of 2014 and by order dated 17.2.2014, this court, in the interest of justice allowed the petition and thus permitted the respondent-accused to adduce evidence. Pursuant to the said order, cross of respondent was completed. In the course of the trial the respondent had also filed application for forwarding the cheques to the expert for examining age of the ink. The said application was allowed by the learned Magistrate and the petitioner-complainant challenged the order in Criminal Writ Petition No. 1948 of 2014, which was allowed by this court by order dated 4.8.2014, wherein as stated earlier, contents of the letter dated 22.5.2012 were reproduced. The aforesaid events reflect a total dismal conduct of the respondent-accused in delaying the trial and thus defeating the very object of summary trial.

11. It is not in dispute that the court has wide powers to recall a witness or to allow further evidence essential for just decision at any stage of the trial or proceeding. Needless to state, these powers have to be used judiciously and not arbitrarily. In the case of **Vijay Kumar vs. State of U.P & Anr. 2011(8) SCC 136** the Apex Court has held :

“There is no manner of doubt that the power under [Section 311](#) of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under [Section 311](#) should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judiciously, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be

exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case.”

12. In the instant case, the respondent-accused have not been able to satisfy that the evidence sought to be elucidated through cross examination of PW1 or the additional evidence sought to be adduced is germane to the issue involved in the case. On the contrary the conduct of the respondent-accused clearly demonstrates that every attempt has been made to protract the trial. The learned Magistrate was conscious of the fact that the accused had delayed the trial, nonetheless allowed the application on the ground that in the cross examination PW1 had not responded positively to some suggestions made as regards e-mail dated 21.5.2012. Needless to state that the witness could not have been recalled for ineffective cross examination. The application is nothing but abuse of process of court.

13. Under the circumstances, and for the reasons stated above, the impugned order cannot be sustained. Hence the appeal is allowed. The order dated 24.3.2015 passed below Exhibit 91 and 92 in

C.C.No.2856/SS/2012 by the Metropolitan Magistrate, 56th Court,
Mazgaon, is quashed and set aside.

(ANUJA PRABHUDESSAI, J.)