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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 285 OF 2015

Sarang s/o Jayant Deshpande,
Age: 41 years, Occu: Service,
R/o H. No. 5200, Nangare-Galli,
Nr. Cit Police Station, A'nagar

..PETITIONER

VERSUS

1. The State of Maharashtra
2. Sau. Usha Jayant Pardeshi,
Age: 51 years, Occu: Service,
R/o. Durale Building,
Sarjepura, Ahmednagar

..RESPONDENTS

Mr S. M. Kulkarni, Advocate for petitioner;
Ms R. P. Gaur, Addl. Public Prosecutor for respondent No. 1;
Mr Mazhar A. Jahagirdar, Advocate for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 15th April, 2016

ORAL ORDER :

In Summary Trial Case No. 2621 of 2012, pending on the file of learned Judicial Magistrate First Class, Ahmednagar, the complainant's witness Chandrashekhar Deshpande was examined on 15th July, 2013 and thereafter, matter was fixed for recording of evidence of the complainant. It is at that point of time, application Exh. 44, styling under Section 311 of Code of Criminal Procedure for recalling the said witness Chandrashekhar came to be filed.

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2. The cause cited for filing of the said application is permission produce acknowledgment executed by the respondent No. 2–accused in favour of complainant acknowledging a receipt of cheque of Rs. 5,00,000/-.

3. The said application came to be rejected by the learned Judicial Magistrate First Class, Ahmednagar, vide his order dated 20th August, 2013, which was further confirmed by the learned Additional Sessions Judge, Ahmednagar, vide order dated 28th January, 2015 passed in Criminal Revision No. 158 of 2013 . As such, present writ petition.

4. Mr Kulkarni, learned Counsel appearing on behalf of the petitioner would urge that, the application under Section 311 of Code of Criminal Procedure came to be moved on the very same day on which evidence of complainant's witness was concluded i.e. on 15th July, 2013. He would then submit that there was not intention on the part of the present petitioner–complainant to delay the proceedings or to take any disadvantage of the situation. According to him, the provisions of Section 311 of Code of Criminal Procedure are discretionary one and discretion should have been exercised by the learned Court in the above referred background.

5. While opposing the application, Mr Jahagirdar, learned Counsel appearing on behalf of respondent No. 2–accused would submit that both the Courts below have concurrently held that the application under Section 311 of Code of Criminal Procedure need not be granted by recalling of

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witness Chandrashekhar. According to him, if same is permitted, it will amount to permitting the complainant to fill in lacunas. He would then submit that the law warrants that, such document should have been filed at the beginning of the trial.

6. Having considered the rival submissions of the respective parties, it is required to be noted that the application Exh. 44 filed under Section 311 of Code of Criminal Procedure came to be moved on 15th July, 2013, the date on which the evidence of witness Chandrashekhar was concluded. As such, this Court does not notice delay on the part of the petitioner-complainant in moving application under Section 311 of Code of Criminal Procedure. It is required to be noted that the document, as is sought to be placed on record, goes to the root of the matter i.e. alleged acknowledgment executed by the accused in favour of the complainant. The said witness Chandrashekhar appears to be the witness to the said acknowledgment and as such, his evidence appears to be necessary for just decision, as provided in the provisions under Section 311 of Code of Criminal Procedure.

7. In any case, it cannot be inferred from the record that there was any intention on the part of the present petitioner-complainant to fill in lacunas, particularly when the application under Section 311 of Code of Criminal Procedure came to be moved then and there on very same day of the conclusion of evidence of witness Chandrashekhar.

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8. For the above referred reasons, in my opinion, the order passed by the learned Judicial Magistrate First Class, Ahmednagar below Exh. 57 is not sustainable.

9. Hence, writ petition is allowed.

10. The order passed by the learned Judicial Magistrate First Class, Ahmednagar on 20th August, 2013, in Summary Trial Case No. 2621 of 2012 and the order passed by the learned Additional Sessions Judge, Ahmednagar on 28th January, 2015 in Criminal Revision No. 158 of 2013, which are impugned, are hereby set aside, subject to payment of costs of Rs. 10,000/- (Rs. Ten Thousand) to be deposited by the present petitioner before the learned trial Court within a period of two weeks from today, to which the present respondent No. 2-accused will be entitled. Application Exh. 44 moved under Section 311 of Code of Criminal Procedure is allowed.

(N.W. SAMBRE, J.)

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