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

CRIMINAL WRIT PETITION NO.592 OF 2015

Pandit Dindayal Nagari Sahkari
Patpedhi Maryadit, Shahada,
Branch at Shahada, Dist. Nandurbar,
Through its Recovery Officer,
Shri Sanjay Motilal Bafna,
Age : 32 years, Occu. Service as
Recovery Officer of Pandit Dindayal
Nagari Sahkari Patpedhi Maryadit,
Shahada, Branch at Shahada,
Dist. Nandurbar

..PETITIONER

VERSUS

Ravindra Govindlal Wani,
Age : 48 Years, Occu. Business,
R/o "Annapurna Provision",
Sonar Galli, Shahada,
Dist. Nandurbar

..RESPONDENT

Mr A.P. Bhandari, Advocate for petitioner

CORAM : N.W. SAMBRE, J.

DATE : 29th April, 2016

ORAL ORDER :

Heard Mr Bhandari, learned Counsel appearing on behalf of the petitioner – complainant.

2. The petitioner has questioned the legality and validity of the order dated 20th March, 2015, passed by Judicial Magistrate First Class, Shahada, below Exh.130, in STCC No.1345 of 2004. Exh.130 in the said case is an application moved by the petitioner – complainant under

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section 311 of the Code of Criminal Procedure (for short "Code" praying before the Court below to re-call Sanjay Motilal Bafna, a witness authorized to depose on behalf of the complainant.

3. Few facts as are necessary for deciding the petition are as under :-

4. The petitioner, a registered credit co-operative society initiated proceedings under section 138 of the Negotiable Instruments Act on or about 20th October, 2004 claiming that a cheque for amount of Rs.99,370/- towards satisfaction of debt was dishonoured and as such the respondent has committed an offence punishable under section 138 of the Negotiable Instruments Act.

5. In the said complaint application (Exh.130) under section 311 of the Code came to be moved, stating that some of the important documents which were already filed by the complainant on record, viz. postal acknowledgment, resolution authorizing the filing of complaint, loan account extract of the accused, the khatavani of loan account had remained to be exhibited by proving the contents thereof. Hence, the petitioner – complainant prayed that its witness Sanjay Bafna be re-called. The said application came to be rejected by a detailed reasoned order passed by the learned Judicial Magistrate First Class, Shahada on 20th March, 2015. Thus, the present petition.

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6. Mr Bhandari, learned Counsel appearing on behalf of the petitioner would urge that the powers under section 311 of the Code are discretionary in nature. He would then urge that such discretion is required to be exercised so as to meet the ends of justice and in a reasonable manner. He would then submit that the documents which were already produced on record need to be exhibited and as such, no prejudice will be caused to the other side and the respondent - accused will not be taken by surprise, in case an opportunity is granted, as accused will always have right of cross-examination. As such, by relying upon the judgment of the Apex Court in the matter of **Mannan Sk & ors. vs. State of West Bengal & anr.**, reported in **2014 AIR (SCW) 4372**, he prays for quashing of the order.

7. From the observations made by the learned Court below and having regard to the submissions made on behalf of the petitioner, I have analyzed the material as is placed on record. It is observed by the learned Trial Court that the list of documents Exh.35 was filed and Exh.3 is the list of documents which was filed with the complaint. It is claimed that the second set of documents was filed along with Exh.35 again on 5th August, 2005 and the evidence on affidavit of witness Sanjay Bafna was filed on 6th April, 2005. As such, it could be inferred that the second set of evidence that is placed on record on 5th August, 2005 was subsequent to the filing of evidence of witness Sanjay. It is then observed by the learned by the learned Court below had granted the similar prayer, i.e. re-opening of the evidence of the complainant after the defence evidence was closed, so as

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to bring on record the evidence in support of the hand-writing. It is for the third time now, the petitioner – complainant wants to re-call his witness by citing the reason of missing exhibition of the documents by oversight.

8. It is required to be noted that the provisions of section 311 of the Code cannot be taken recourse to for the purpose of filling in the lacunae. The conduct of the petitioner, as is apparent from the record, is that the complaint came to be filed in 2004 and in 2016 when it was posted for arguments, the petitioner is trying to re-call his witness, pursuant to the provisions of section 311 of the Code. It is to be noted that the law contemplates that the best of the evidence should be permitted to be brought on record before the Court to prove a fact or a point in issue. To find out the truth and render a just decision, the necessary remedy is provided under section 311 of the Code. However, the same cannot be permitted to be mis-utilized by the party, so as to fill in lacunae or cover up short-falls.

9. It is to be noted in the present case that the petitioner was well within knowledge that he had filed the second set of documents vide Exh.35 after the examination-in-chief of his witness. Thereafter he had re-called his witness under section 311 of the Code, which prayer was granted. It is when the matter has reached at the stage of final arguments, that too after a period of about more than eleven years, the petitioner is trying to take the benefit under section 311 of the Code, which *prima facie* appears to be with an intention to fill in the lacunae, which is not permissible.

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10. In the above background, in my opinion, no case for interference is made out. The rejection of application (Exh. 130) appears to be just and proper. In view thereof, Criminal Writ Petition fails and stands rejected.

(N.W. SAMBRE, J.)

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