

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 146 OF 2017

MR. SANTOSH CHANDRAKANT PARAB., ... Petitioner

Versus

**MR. ULHAS VISHNU DHARGALKAR AND
ANR.,** ... Respondents

Mr. Vivek Angelo Rodrigues, Advocate appearing under Legal Aid Scheme for the petitioner.

Coram:- C. V. BHADANG, J.

Date:- 6th September 2017

P.C.

The petitioner is an accused in a complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act, for short).

2. The case of the first respondent is that the petitioner had purchased laterite stones from the first respondent in two lots. Initially, the petitioner is alleged to have approached the first respondent in May, 2014, for purchase of 11 trips of laterite stones on credit. The petitioner had agreed to make payment of Rs.88,000/- within 15 days. The laterite stones were accordingly supplied. According to the first respondent, the petitioner approached him for the second time in June, 2014, again for purchase of 6 trips of laterite stones worth Rs.48,000/-, against which the petitioner passed a cheque, which got dishonoured,

which led the first respondent to file the complaint.

3. The first respondent led his evidence, after which, statement of the petitioner was recorded under Section 313 of the Code of Criminal Procedure (Code, for short), in which the petitioner did not dispute that there was an oral agreement on the second occasion in which the petitioner had agreed to purchase 6 trips of laterite stones worth Rs.48,000/-. The petitioner claimed that the said amount is paid in cash to the first respondent. Not only that the petitioner also examined himself and one more witness in his defence and the matter was fixed for arguments. It is at this stage that the petitioner filed an application under Section 311 of the Code, for recall of the complainant and other witnesses. There were two grounds pressed in support of the prayer for recall. Firstly, it was contended that the Advocate, who was entrusted with the matter, did not cross-examine the complainant on material aspects and several material questions were not put to the complainant in the cross-examination, so as to bring out the truth. Secondly, it was contended that when the petitioner engaged another Advocate, there were certain documents disclosed, which are relevant to establish the defence of the petitioner. The petitioner also contended that his previous Advocate was never instructed to admit that there was an oral agreement between the petitioner and the first respondent for supply of 6 trips of laterite stones.

4. The learned Magistrate, by an order dated 03/03/2017, dismissed the application inter alia after noticing the judgment of the Supreme Court in the case of STATE NCT OF DELHI, VS. SHIV KUMAR YADAV AND ANOTHER; (2016)2 SCC 402. The petitioner challenged the same before the learned Sessions Judge in Criminal Revision Application No.31/2017, which was dismissed on 03/07/2017. This is how, the petitioner is before this Court.

5. I have heard Shri Rodrigues, the learned Counsel for the petitioner and perused the impugned order passed by the learned Magistrate and the judgment of the learned Sessions Judge.

6. It is contended by Shri Rodrigues, the learned Counsel for the petitioner that when the petitioner engaged another Advocate, it was realised that the first respondent/ complainant was not cross-examined on several material aspects of the matter. It is also contended that the petitioner never instructed his earlier Counsel that there was an oral agreement, under which the petitioner had agreed to purchase 6 trips of laterite stones. It is submitted that the powers under Section 311 of the Code are wide and the Court can recall any witness at any stage of the trial, if it is necessary for the just decision of the case.

7. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out.

8. In so far as the first ground about earlier Counsel having not properly conducted the case and of not having cross-examined the first respondent appropriately, the same has rightly not been accepted by the Courts below. The Supreme Court in the case of SHIV KUMAR YADAV (supra), has held thus in para 15 of the judgment :

"15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prima object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end the principle that a retrial must follow on every change of a counsel, can have serious consequences or conduct of trials and the criminal justice system. The witness cannot be expected to have the hardship of appearing in court repeatedly, particularly

in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination."

9. Thus, merely on an allegation that the earlier Counsel has not appropriately conducted the case or failed to appropriately cross-examine the first respondent, the prayer for recall cannot be granted.

10. Even in so far as the ground that the affidavit in evidence of the petitioner was not properly drafted and the petitioner had never instructed the Counsel to say that there was an oral agreement for purchase of 6 trips of laterite stones, the Courts below have found and to my mind rightly so, that in the affidavit, there is a clear recital that the contents of the same were explained to the petitioner in vernacular (Konkani). Not only that, in the statement under Section 313 of the Code, the petitioner has stated that he has paid an amount of Rs.48,000/- to the first respondent in cash. Thus, even during the course of recording of statement under Section 313 of the Code, the petitioner never raised a plea that there was no oral agreement as such. The application was filed at the stage when the matter was fixed for final arguments. On carefully going through the impugned orders, I do not find that they suffer from any

infirmity, so as to require interference. The petition is without any merit and is accordingly dismissed.

11. Needless to mention that the learned Magistrate shall decide the complaint on its own merits, without being influenced by any of the observations made herein.

C. V. BHADANG, J.

SMA