

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

WRIT PETITION NO.3301 OF 2017

Yogya Propbuild Pvt. Ltd. & Ors.

... Petitioners.

V/s.

The State of Maharashtra & Anr.

... Respondents

Mr. Rajeev Ravi for the Petitioners.

Mr. Mukesh Pabari for Respondent No.2.

Mr. S.S. Hulke, APP for the Respondent State.

CORAM : A.S.GADKARI, J.

DATE : 25th SEPTEMBER 2018

P.C.:

1. By the present petition under Article 227 of the Constitution of India, the petitioners, original accused, in C.C.No.2062/SS/2012 pending on the file of learned Metropolitan Magistrate, 63rd Court, Andheri, Mumbai under Section 138 of the Negotiable Instruments Act, 1881 by impugning Orders, dated 12.11.2014 passed below Exh.30 for substitution of the authorized representative dated

12.10.2015 passed below Exh.38, permitting to substitute the witness/authorized representative to file his affidavit of evidence in lieu of examination-in-chief afresh and dated 12.04.2017 passed below Exh.40, rejecting the application of the petitioners, for direction to recall the earlier witness namely Kapil Agarwal respectively by the the learned Magistrate.

2. The record indicates that, the afore-stated complaint was filed by the authorized representative of Respondent No.2 company namely Kapil Agarwal. He has also filed an affidavit of evidence in lieu of examination-in-chief and the documents mentioned in the said affidavit were exhibited at his instance. The said witness was cross examined by the petitioners on 22.05.2014 and his further cross examination was deferred till 19.07.2014.

The record further indicates that, the said witness namely Kapil Agarwal resigned from the employment of Respondent No.2 company on 30.05.2014 and therefore, Respondent No.2 filed an application below Exh.30 for substitution of their authorized representative and Power of Attorney holder. The said application was filed by the new Power of Attorney holder/authorized representative namely Naresh Kadmawala. The petitioners opposed the said application by filing

their say dated 22.08.2014. The Trial Court by the impugned order dated 12.11.2014 passed below Exh.30 was pleased to allow the said application and permitted substitution of authorized representative of the complainant/Respondent No.2. In pursuance of the said order dated 12.11.2014, Naresh Kadmawala filed his affidavit of evidence in lieu of examination-in-chief on 12.10.2015. The Trial Court by the impugned order dated 12.10.2015 was pleased to take the said affidavit of evidence in lieu-of-examination in chief on record. Mr. Naresh Kadmawala has admitted the contents of the said affidavit as true and correct. The Trial Court in the said impugned order dated 12.10.2015 has observed that, the documents mentioned in the said affidavit are already exhibited, and therefore, at the request of the accused-person, the case for cross examination was deferred till the next date.

3. The petitioners thereafter filed an application below Exh.40 for recalling of the earlier witness namely Kapil Agarwal as his cross examination was partly conducted by them. Respondent No.2 opposed the said application on the ground that, by an order dated 12.11.2014 the said witness namely Kapil Agarwal was discharged and new person namely Naresh Kadmawala has been substituted in

the present case and therefore recalling of the said witness is not necessary. The Trial Court by its impugned Order dated 12.04.2017 was pleased to reject the said application filed below Exh.40. In the said impugned order, the Trial Court has observed that, the complainant is a company and can be represented by any person. That the complainant has tendered fresh affidavit of examination-in-chief by substituting their representative. The Trial Court has further observed that, although there is no separate order, but it is implied effect of allowing substitution in favour of the complainant. It is to be noted here that, once the substitution is allowed by the said Court, it is implied that, the earlier representative of the complainant and his affidavit of evidence has been discharged.

4. During the course of the arguments before this Court, the learned counsel appearing for the Respondent No.2 fairly submitted that, as per the law, the substituted representative namely Naresh Kadmawala is required to admit the documents mentioned in his affidavit of evidence, and therefore, the order dated 12.10.2015 passed below Exh.38 needs to be set aside and the new representative of Respondent No.2 company namely Naresh Kadmawala be directed to enter into witness box and admit the

documents mentioned in his affidavit of evidence dated 12.10.2015. In view thereof, the impugned order dated 12.10.2015 is quashed and set aside and the said witness Naresh Kadmawala is permitted to admit the documents mentioned in his affidavit of evidence in lieu of examination-in-chief dated 12.10.2015.

It is needless to mention that, the petitioners are at liberty to cross examine the said witness afresh as the earlier witness namely Mr. Kapil Agarwal has been substituted by new witness namely Mr. Naresh Kadmawala. The affidavit of evidence of Kapil Agarwal and his cross examination conducted by the petitioners on 22.05.2014 does not remain on record being non-est and the Trial Court is now precluded from taking into consideration the said evidence.

5. As far as the Orders dated 12.11.2014 passed below Exh.30 and 12.04.2017 passed below Exh.40 are concerned, in view of the setting aside of Order dated 12.10.2015 and permitting the petitioners to cross examine the said witness afresh, the said orders need not be interfered with, as the substitution of the said witness namely Naresh Kadmawala has been allowed and he has been permitted to admit the documents mentioned in his affidavit of evidence in lieu of examination-in-chief as noted hereinabove.

6. In view of the above, the petition is partly allowed.
7. No order as to costs.

(A.S.GADKARI, J.)