nsc.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.4265 OF 2017

Lokmangal Constructions Ltd and Ors. ...Petitioners
Versus
Tarujyot Investments Ltd and Anr. ...Respondents

Mr.Shirish Gupte, Senior Counsel a/w Mr.U.R.Agandsurve, for the Petitioners.

Mr.Hrishikesh Mundargi, for the Respondent No.1.

Mr.H.J.Dedhia, A.P.P for the Respondent No.2-State.

CORAM : REVATI MOHITE DERE, J.

DATE : 22nd JANUARY, 2018

P.C. :

1. Heard learned counsel for the parties.

2. By this petition, the petitioners have impugned the order dated 16th September, 2017, passed by the learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai, by which the petitioners' application for recall of the complainant (PW 1) under Section 311 of the Code of Criminal Procedure, came to be rejected.

3. Learned Senior Counsel for the petitioners submits that the petitioners had given the cheque in question as a security, and as such there was no liability to make payment to the respondent no.1. He submitted that the petitioners intend to cross examine the complainant (PW 1) only in respect to the Income Tax Returns submitted by the complainant, for the Assessment Years 2011 – 2012 and 2013 – 2014, for a just decision of the case. Learned Senior Counsel relied on the Judgment of the Apex Court in the case of ***Mohanlal Shamji Soni v/s Union of India and Another***[1]**,** in support of his submission. He submitted that Section 311 Cr.PC confers wide power on the Court to summon witness/witnesses or examine any person in attendance, though not summoned as a witness or recall and re-examine any person already examined, for a just decision of the case. He submitted that the petitioners be permitted to cross examine the complainant (PW 1), only on the Income Tax Returns of 2 years, for a just decision of the case.

4. Mr.Mundargi, learned counsel for the Respondent No.1 opposed the petition. He submitted that no interference was warranted in

1 1991 Supp (1) SCC 271

the impugned order. He submitted that earlier the petitioners had earlier filed an application in the Court of the learned Magistrate under Section 245(2) of Code of Criminal Procedure and had sought issuance of summons to the Income Tax Officer, for production of Income Tax Returns of the respondent no.1 (complainant) for the Assessment Years, 2011 – 2012 and 2013 – 2014. He submitted that the said application was filed, when the matter was kept for final arguments and that the same was rejected by the learned Magistrate. He submitted that the complainant (PW 1) had in his evidence brought on record the Income Tax Returns for the Assessment Years 2011 – 2012 and 2013 – 2014; and the said documents were exhibited. He submitted that it was always open for the petitioners to cross examine the complainant on the said documents, however, they chose not to do so. He further submitted that the application filed by the petitioners for issuance of summons to the Income Tax Officer was filed under Section 254(2) of Code of Criminal Procedure and that the order passed thereon, rejecting the said application has been confirmed right upto the Apex Court. He further submitted that after rejection of the said application by the Apex Court, the petitioners has now filed the present application and has indirectly sought the very same reliefs, by seeking to recall PW 1 for cross examination, on the point of Income Tax Returns.

5. Perused the papers including the impugned order. Respondent No.1 had filed a complaint under Section 138 of the Negotiable Instruments Act, as against the petitioners in the Court of the learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai. The complainant examined 3 witnesses in support of his case. Thereafter, the petitioners' statement was recorded under Section 313 of Code of Criminal Procedure and one defence witness was examined. Thereafter, the matter was posted for arguments when an application (Exhibit – 104) was filed under Section 254(2) Cr.PC seeking issuance of summons to the Income Tax Officer (Circle – 8, Ahmedabad) for production of Income-Tax Returns of the respondent no.1, for the Assessment Years 2011 – 2012 and 2013 – 2014. The said application was rejected by the trial Court vide order dated 26th July, 2016. The said order was challenged by the petitioners in Revision and the Revisional Court after hearing the parties was pleased to reject the Revision Application vide order dated 27th October, 2016. Being aggrieved by the said orders, the petitioners challenged the order of the trial Court and the Sessions Court in Writ Petition, being Writ Petition No.4215 of 2016

and this Court (Coram:Smt.R.P.SondurBaldota, J.) vide order dated 30th January, 2017 was pleased to dismiss the said petition. Paragraph 5 of the said order reads as under:-

> *"5. Admittedly the petitioners have not laid any foundation for this defence while the evidence was being recorded during trial. In that circumstance the petitioners could not have filed the application at Ex.104. In any case the reflection of the liability in the Income Tax Returns of the respondents would only be one of the circumstances relating to the matter and existence of the liability is not wholly dependent thereon. Hence no interference is called for with the impugned orders. The petition is dismissed."*

Subsequently, the said order was confirmed by the Apex Court vide order dated 7th April, 2017. Thereafter, the petitioners' again filed an application on 26th April, 2017 under Section 311 Cr.PC and sought to recall PW 1 for further cross examination, on the Income Tax returns of 2 years. The said application was resisted by the respondent no.1. The learned Magistrate vide order 16th September, 2017, was pleased to reject the said application (Exhibit – 127) in S.C.C.No.1230 of 2013.

6. Admittedly, the matter was posted for final arguments when the petitioners filed the first application, under Section 254(2) Cr.PC, for issuance of witness summons to the Income Tax Officer (Circle – 8, Ahmedabad). The said application was rejected by the trial Court and right upto the Apex Court. Thereafter, the aforesaid application being (Exhibit – 127) was filed by the petitioners for recall of PW 1 for further cross, on the Income-Tax returns of 2 years. Admittedly, the complainant had placed on record the Income Tax Returns for the Assessment Years 2011 – 2012 and 2013 – 2014 and the same have also been exhibited. The said application seeks almost similar reliefs as sought in the earlier application wherein, the prayer for issuance of witness summons to the Income Tax Officer was rejected. This Court in paragraph 5 of the order dated 30th January, 2017 passed in Writ Petition No.4215 of 2016 had observed that the petitioners have not laid any foundation for this defence while the evidence was being recorded during trial. Since the Income Tax Returns have already been exhibited, whether or not the liability is disclosed in the Income Tax Returns or not, is a matter which will be reflected in the Income Tax Returns. The said application was admittedly filed when the matter was fixed for final arguments. It appears that the application is filed only to

delay the case.

7. In the facts of this case, no interference is warranted in the impugned order dated 16th September, 2017, passed by the learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai.

8. Accordingly, the petition is dismissed and disposed of as such. The trial is at its fag end and is pending for arguments since June, 2016. Hence, the learned Judge shall dispose of the case, as expeditiously as possible and in any event within 2 months from the date of receipt of this order.

9. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.