

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.5042 OF 2019

WAHEGURU COAL PRIVATE LIMITED & ANR.)...PETITIONERS

V/s.

**SHREE DURGA IRON AND STEEL CO. LTD.)
AND ANR.)...RESPONDENTS**

Mr.Yashpal Thakur, Advocate for the Petitioner.

Mr.Jatin Shah a/w. Ms.Snehankita Munj and Ms.Zarna Shah,
Advocate for Respondent No.1.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 14th OCTOBER 2019

ORAL JUDGMENT :

1 Heard. Rule. Heard forthwith by consent of parties.

2 By this petition, the petitioners/original accused in a
complaint for the offence punishable under Section 138 of the
Negotiable Instruments Act are challenging the order dated 15th

April 2019 passed by the learned Metropolitan Magistrate, 63rd Court, Andheri, Mumbai, thereby rejecting their application Exhibit 107 for recalling PW1 Pawankumar Agarwal for cross-examination.

3 Heard the learned counsel appearing for the petitioners/original accused. He drew my attention to the reply given by the petitioners/original accused to the statutory notice, whereby Memorandum of Understanding came to be denied as a fabricated document by the petitioners/original accused. My attention is also drawn to statement in respect of Confirmation of Accounts. The learned counsel for the petitioners/original accused submitted that signatures on these documents, so far as petitioners/original accused are concerned, are totally forged and fabricated. However, this aspect could not be brought on record during cross-examination of the complainant/PW1 Pawankumar Agarwal. The learned counsel argued that entries in the Confirmation of Accounts as well as contents of the Memorandum of Understanding sought to be relied by the respondent

no.1/original complainant are fabricated and false and these aspects are required to be brought on record by further cross-examination of the complainant/PW1 Pawankumar Agarwal. However, in submission of the learned counsel for the petitioners/original accused, the learned trial court has failed to appreciate the scope of Section 311 of the Code of Criminal Procedure and it only got swayed by the so called delay and rejection of an application under Section 91 of the Code of Criminal Procedure, which was confirmed by the Sessions court.

4 As against this, the learned counsel appearing for the respondent no.1/original complainant argued that on 17th November 2015, the complaint was filed, and thereafter on 16th July 2016, evidence on affidavit came to be tendered before the learned trial Magistrate. Thereafter, atleast on six occasions, PW1 Pawankumar Agarwal was cross-examined by battery of lawyers engaged by the accused persons. Even PW1 Pawankumar Agarwal was recalled once, at the instance of the accused. My attention is drawn to the cross-examination of PW1 Pawankumar Agarwal and

it is sought to be demonstrated that he was thoroughly cross-examined on the Memorandum of Understanding as well as statement of Confirmation of Accounts. With this, the learned counsel for the respondent no.1/original complainant submitted that as the application depicts systematic delay of the trial by the accused persons, the same was rightly rejected by the learned trial Magistrate.

5 I have considered the submissions so advanced and perused the material relied by the parties. Section 311 of the Code of Criminal Procedure reads thus :

“311 Power to summon material witness, or examine person present - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

It is, thus, seen that object of this section is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or by leaving ambiguity in the statement of witnesses examined by the parties. This section is intended to bring finality to the litigation. The learned trial court is required to focus its attention on the aspect as to whether evidence which is sought to be brought on record is essential for the just decision of the case. If this criteria is fulfilled, then application for recall of witness moved by taking resort to the provisions of Section 311 of the Code of Criminal Procedure needs to be allowed by the learned trial court. Viewed from this angle, the impugned order is bereft of consideration on this aspect. The learned trial court considered the progress of the trial and its order rejecting the application under Section 91 of the Code of Criminal Procedure moved by the accused, which was confirmed by the learned Sessions court. With such observation, the learned trial court was pleased to reject the application under Section 311 of the Code of Criminal Procedure moved by the petitioners/original accused.

6 I have perused signature of representative of the petitioners/original accused on the Memorandum of Understanding as well as on statement in respect of Confirmation of Accounts. I have also perused signature of petitioner no.2 Devender Singh Bhatia appearing on the Vakalatnama as well as on the affidavit made in support of this petition. Without making any factual comments on these signatures, it needs to be mentioned here that in the light of pleadings made in the application under Section 311 of the Code of Criminal Procedure, which are in respect of alleged forged documents and alleged bogus entries in the statement of Confirmation of Accounts, I am of the considered opinion that PW1 Pawankumar Agarwal needs to be recalled for just decision of the matter. The impugned order cannot be sustained in the light of the fact that the learned trial Magistrate has not considered whether recall of the witness is necessary for bringing the material on record which would lead to just decision of the case.

7 The learned counsel for the petitioners/original accused undertakes that he would not seek any adjournment for cross-examination of PW1 Pawankumar Agarwal and he would finish the cross-examination in time bound manner. Therefore, the order :

ORDER

- i) The petition is allowed by making the Rule absolute in terms of Prayer Clause (b).

- ii) The learned counsel for the respondent no.1 undertakes to keep PW1 Pawankumar Agarwal present before the learned trial Magistrate on 16th October 2019 and the learned counsel for the petitioners/original accused undertakes to cross-examine the said witness on the very same day, subject to convenience of the learned trial Magistrate.

- iii) The learned counsel for the petitioners/original accused shall not seek adjournment for cross-examination of PW1 Pawankumar Agarwal.
- iv) The petition is disposed off accordingly.

(A. M. BADAR, J.)