

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.658 OF 2020

M/S.NUPUR DESIGN STUDIO AND ANR.)...PETITIONERS

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.Rahul Hande, Advocate for the Petitioner.

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

CORAM : A. M. BADAR, J.

DATE : 5th MARCH 2020

P.C. :

1 This is a petition by accused persons filed during trial of the offence punishable under Section 138 of the Negotiable Instruments Act. By this petition, they are challenging the order dated 11th November 2019 passed by the learned trial Magistrate, Mazgaon (Sewri) Court No.20, Mumbai in Case No.2001691/SS/2018 thereby allowing the application under Section 311 of the Code of Criminal Procedure (hereinafter

referred to as the Cr.P.C. for the sake of brevity) filed by the original complainant for recalling Prosecution Witness No.1 (PW1) Jayant Jethalal Mehta, who happens to be the Power of Attorney holder of the original complainant, for bringing on record the new Power of Attorney executed by the original complainant.

2 Heard the learned counsel appearing for petitioners/ accused persons. He argued that evidence of the complainant was already over and statement of accused persons under Section 313 of the Cr.P.C. was already recorded. The accused persons had already closed their defence and by allowing the application under Section 311 of the Cr.P.C., the learned trial court has permitted the complainant to fill in the lacuna in the prosecution case.

3 I have considered the submissions so advanced and perused the application for recall of PW1 Jayant Jethalal Mehta, reply filed to that application as well as the impugned order passed on the said application Exhibit 29.

4 What amounts to lacuna by prosecution case has been explained by the Hon'ble Apex Court in the matter of **Rajendraprasad vs. Narcotic Cell**¹. It is held by the Hon'ble Apex Court that a “lacuna” in the prosecution case is not to be equated with the fall out of an oversight committed by the Public Prosecutor during the trial either in producing relevant material or in eliciting relevant answers from witnesses. Laches or mistakes during conducting of a case, as held by the Hon'ble Supreme Court, cannot be understood as a “lacuna” which the court cannot fill up. “Lacuna” must be understood as an inherent weakness in the case of prosecution or latent wedge in the matrix of the prosecution case. However, an oversight in management of the prosecution by the learned Public Prosecutor cannot be treated as a “lacuna”.

5 On this backdrop, it is averred thus in paragraphs 3, 4 and 5 of the application under Section 311 of the Cr.P.C. :

1 (1996) 6 SCC 110

“3 That it is matter of record for the reasons mentioned therein, that Complainant had already executed Power of Attorney in favour of Mr.Jayant Jethalal Mehta – P.W. -1 which was duly signed and executed before Notary Public (hereinafter for the sake of brevity referred to as, “Said Power of Attorney”). That the same is already taken on record of this Hon’ble Court and has been exhibited.”

“4 That it appears that although it was duly signed and executed before Notary Public, purely due to oversight and inadvertence, the details pertaining to execution of said Power of Attorney was not entered into Notarial Register of the Notary who had duly notarized the said Power of Attorney.

That Complainant do hereby confirms, admits and acknowledges the contents of the said Power of Attorney, genuineness, authenticity as well as execution thereof and submit that the contents thereof are true and correct and the powers given thereof are very much in force, valid, subsisting and binding. That Complainant does hereby ratifies, confirms and accepts whatsoever his said Attorney has done in pursuance to said Power of Attorney.”

“5 That Complainant has by way of abundant precaution in order to remove any ambiguity, doubts (if any) of whatsoever nature which may arise in respect of genuineness, authenticity, execution thereof in respect of the said Power of Attorney in furtherance as well as in continuation of the said Power of Attorney, has decided to once again appoint, nominate, constitute and appoint Mr. Jayant Jethalal Mehta – P.W. - 1 to be his true and lawful Attorney.”

It is, thus, clear from the application under Section 311 of the Cr.P.C. that formal defects in the power of attorney were sought to be rectified by giving fresh power of attorney to the concerned person i.e. PW1 Jayant Jethalal Mehta.

6 Purpose of adjudication is to bring finality to the litigation. Formal defects are always permitted to be cured by taking appropriate steps. What is sought to be rectified by moving an application under Section 311 of the Cr.P.C. is only a formal defect.

7 In this view of the matter, no infirmity can be found in the impugned order. The petition is devoid of merits, and therefore, the same is dismissed.

(A. M. BADAR, J.)

Arti V.
Khatate

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V. Khatate
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