

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.469 OF 2022

Harji Somji Patel
versus
Sameer Amirhamja Bagwan and another

Petitioner

Respondents

Mr.Umesh Mankapure with Rui Darawala, Advocate for petitioner.
Mr.Ngesh Y.Chavan, Advocate for respondent no.1.
Mr.A.D.Kamkhedkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 13th June 2022

PC :

1. The petitioner is original complainant in S.S.C.No.1251 of 2016. The complaint was filed for offence under Section 138 of Negotiable Instruments Act.

2. The petitioner is aggrieved by the order dated 3rd September 2021 passed by learned Judicial Magistrate, First Class, Miraj rejecting application under Section 311 of Code of Criminal Procedure.

3. Learned advocate for petitioner submits that petitioner filed affidavit of evidence with all original documents except notice dated 18th May 2016. He was under impression that original office copy was filed along with Exhibit-3. However, it was xerox copy of the demand notice. Since it was xerox copy, it was not exhibited during examination-in-chief. The advocate for respondent-accused during the cross-examination of the complainant did not raise specific question about sending of notice nor objected as the notice being

photocopy of notice. The accused in his statement u/s.313 of Cr.PC did not state that notice was never sent to him nor denied the contents of notice or signature on receipt of RPAD letter. The accused did not examine himself or rebutted the presumption under Section 139 of Negotiable Instruments Act. The case of posted for arguments. Thereafter the advocate for complainant came to know that notice dated 18th May 2016 was not exhibited and produced photocopy of notice instead of original office copy. The petitioner had moved an application under Section 311 of Cr.PC. and to cure the defect. The said application was rejected by order dated 3rd September 2021. The petitioner filed revision application before Sessions Court, which was rejected by order dated 1st December 2021. It is further submitted that Courts did not consider scope of Section 311 of Cr.PC. It was an inadvertent mistake not to produce original copy of notice. The photocopy was resembling like original document. After realizing that original was not produced or exhibited in evidence, the application was made u/s.311 of Cr.PC. Such application could be made at any time before conclusion of trial. Reliance is placed on the decision of this Court in case of **Jagdale Mirch Masala Products (India) Vs. Kamal Foods and another¹**.

4. Learned advocate for the respondent-complainant submitted that affidavit-in-evidence of complainant was recorded. He was cross-examined. The statement of accused was recorded u/s.313 of Cr.PC. At this stage the complainant preferred application u/s.311 of Cr.PC. Sufficient opportunity was available to the complainant to rectify the mistake, if any. At this stage the complainant is trying fill up the lacuna by recalling the witness/complainant by exercising

1 (2010)4-Mah.L.J.-619

powers u/s.311 of Cr.PC. That cannot be permitted. The case was due for judgment after arguments were heard. He relied upon decisions in case of **Vijay Haribhau Kindarle Vs. Ramdas Mahadeorao Gaidhane²** and **Nayna Rajan Guhagarkar Vs. The State of Maharashtra³**.

5. The petitioner has initiated the proceedings u/s.138 of Negotiable Instruments Act. The affidavit-in-evidence of the complainant was submitted on 21st July 2017. Oral examination-in-chief of the complainant was recorded on 24th January 2020. The complainant did not cure the defect which is the subject matter of this petition. The complainant was cross-examined at the instance of accused. The cross-examination was completed on 28th February 2020. The statement of accused was recorded u/s.313 of Cr.PC on 29th January 2021. Arguments of both the sides were heard. Thereafter the complainant preferred application u/s.311 of Cr.PC vide Exhibit-50 on 3rd April 2021. The accused filed his say and opposed the application contending that application is not maintainable. Sufficient opportunity was given to the complainant. After the affidavit of evidence/examination-in-chief was submitted, opportunity was given to the complainant before recording his cross-examination and his evidence was recorded on 20th January 2020 he was cross-examined. In his cross-examination the defence has brought admissions on record and case was due for judgment. The application has been preferred to fill up the lacuna in the evidence of complainant. Learned Magistrate by order dated 3rd September 2021 rejected the application. It was observed that it was incumbent upon the complainant to prove notice in evidence. Despite having liberty,

2 2012-ALL.M.R.(Cri.)-1207

3 Criminal Writ Petition No.1658 of 2021, decided on 13-7-2021

the complainant failed to produce and exhibit the office copy of demand notice. The witness cannot be recalled after having opportunity and failing to prove the notice. The petitioner then preferred revision application before Sessions Court which has been rejected by order dated 1st December 2021. Learned Sessions Judge has taken into consideration submissions of both the sides, judgments relied upon by the parties and observed that recalling of witness cannot be routinely permitted. Despite having opportunity, party failed to produce evidence on record and was not diligent about it. The case was finally argued and it was posted for judgment. At that stage the application u/s.311 of Cr.PC was filed. The Court also observed that impugned order is interlocutory and the revision application was not maintainable.

6. In the case of Jagdale Mirch Masala Products (India) Vs. Kamal Foods and another (supra), this Court had observed that powers u/s.311 were not only for the benefit of accused but for the benefit of prosecution also. Administration of justice could not be permitted to be frustrated on hyper technicalities. The application for permission to file additional affidavit in lieu of examination-in-chief was allowed. The factual aspect of the said decision appears to be that application for permission to file additional affidavit in lieu of examination-in-chief was filed. Copies of documents were already filed along with complaint and application for permission to produce original of the said document was already allowed. Merely because the documents could not be produced in the affidavit in lieu of examination-in-chief could not be the ground for rejecting application.

7. In the case of Vijay Haribhau Kindarle Vs. Ramdas Mahadeorao Gaidhane (supra) it was observed that complainant failed to prove dishonour notice in his examination-in-chief. Therefore, application for additional examination-in-chief was filed to prove a fact. Such application cannot be allowed. Section 311 of CrPC cannot be brought in aid to cure the failure of a party to prove a fact which refers to party witness, knowledge and memory. In the case of Nayna Rajan Guhagarkar Vs. The State of Maharashtra (supra), this Court had observed that Section 311 of CrPC can be invoked at any stage of enquiry or trial to examine any person if it is sufficient to the just decision of the case. However, the said power cannot be used to fill up lacuna in the prosecution evidence.

8. Considering the facts of the present case and the impugned orders passed by Courts below assigning reasons declining the relief to the petitioner, I do not see any reason to deviate from the view expressed by the Courts below. It is rightly observed that the application made at the belated stage cannot be entertained. It is apparent that complainant was trying to fill up the lacuna. The issue goes to the root of the matter. After the matter has reached at such a stage, the application preferred by the complainant in the facts of this case cannot be allowed. Hence, I pass following order :

ORDER

- (i) Writ Petition stands rejected and disposed of.

(PRAKASH D. NAIK, J.)