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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 4328 OF 2021
ALONGWITH
CRIMINAL WRIT PETITION NO. 4339 OF 2021

Devyani Annand Sarnaik

...Petitioner

Versus

1. The State of Maharashtra

2. Aditya Birla Finance Limited

...Respondents

Mr. Rishi Bhuta a/w Mr. Manish Bohra i/b A.S.Khan & Assoc. for the
Petitioner.

Mr. Samsher Garud, Mr. Lalit Katariya, Ms. Ashrita Chinderkar i/b
Katariya & Associates for the Respondent No.2.

Mr. A.R.Patil, A.P.P for the Respondent No.1-State.

CORAM : REVATI MOHITE DERE, J.
DATE : 25th MARCH, 2022

P.C. :

1. Heard learned Counsel for the parties.

2. Rule. Rule is made returnable forthwith with the consent of
the parties in both the aforesaid petitions and the said petitions are taken up
for final disposal.

3. By these petitions, the petitioner has impugned the order dated 23rd January, 2020, passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, below Exhibit – 32 in C.C.No. 3407/SS/2015 and Exhibit-37 in C.C.No. 3408/SS/2015.

4. Perused the papers. The respondent No.2 had filed two separate complaints under Section 138 of the Negotiable Instruments Act as against the petitioner in the Court of the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai. The learned Judge was pleased to issue process as against the petitioner, alleging an offence punishable under Section 138 of the Negotiable Instruments Act, pursuant to which, the petitioner appeared before the trial Court. The petitioners' plea was also recorded in both the cases. Thereafter, the respondent No.2 filed his affidavit of evidence, after which, the respondent No.2 was cross-examined. Thereafter, the respondent No.2 filed an application (Exhibit-32 in C.C.No. 3407/SS/2015 and Exh.37 in C.C.No.3408/SS/2015) and sought permission to re-examine respondent No.2's witness i.e. Rajendra Pednekar. Prayer clause (a) of the said applications filed by the respondent No.2 reads thus;

“(a) This Hon’ble Court be pleased to allow the complainant to re-examine the complainant/PW-1.”

5. The said applications were opposed to by the petitioner in both the petitions, by filing their reply. The learned Judge vide order dated 23rd January, 2020, rejected the prayer of the petitioners' seeking re-examination of the complainant's witness No.1, however, by using its discretion permitted recall of the said witness under Section 311 of the Cr.P.C. The said order reads thus;

“(1) The prayer clause ‘a’ regarding re-examination of CW No. 1 is rejected.

(2) But using discretion of this Court u/sec.311 of Cr.P.C., the witness CW No.1 – Rajendra Pednekar is recalled and permission is granted to the complainant for filing additional evidence affidavit of the witness regarding the documents and explanations of those documents mentioned by the complainant in the application.”

6. Admittedly, the prayer of the respondent No.2 in the application was for re-examination of the witness and not for recall of the said witness (CW No.1-Rajendra Pednekar) under Section 311 of the Cr.P.C. The prayer for re-examination of the complainant's witness was opposed to by the petitioner by filing its reply. The learned Judge rightly observed in the impugned order that the scope of re-examination was very limited and would arise only if there was any ambiguity in the examination-in-chief, and as such, rejected the respondent No.2's application seeking re-examination. However, the learned Judge by using his discretion permitted recall of CW No.1 – Rajendra Pednekar under

Section 311 of the Cr.P.C.

7. Admittedly, there was no such prayer in the application (Exhibit-32 in C.C.No. 3407/SS/2015 and Exhibit-37 in C.C.No.3408/SS/2015) seeking recall of the witness. Nor any application was filed under Section 311 of the Cr.P.C. In the absence of an application under Section 311 of the Cr.P.C., the petitioner had no opportunity to deal with the same. Thus, the petitioner has been prejudiced by the said order, i.e. clause No.2 of the order passed below Exhibit-32 in C.C.No. 3407/SS/2015 and Exhibit-37 in C.C.No. 3408/SS/2015, seeking recall of CW1.

8. Accordingly, clause (2) of the impugned orders passed below Exhibit-32 in C.C.Nos.3407/SS/2015 and Exhibit-37 in C.C.No. 3508/SS/2015 are quashed and set aside. Needless to state, it is always open for the respondent No.2 to file an appropriate application under Section 311 of the Cr.P.C. for recall of the witness, in accordance with law. If such an application is filed, the learned Judge to pass appropriate orders after hearing all parties on its own merits, in accordance with law.

9. Rule is made absolute on the aforesaid terms. The petitions are accordingly disposed of.
10. Since the case is of 2015, the trial is expedited.
11. All parties to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.