

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.442 OF 2022

WITH

CRIMINAL APPLICATION NO.446 OF 2022

Wahid Gafarkhan Chauhan

.. Applicant

Versus

State of Maharashtra and Anr.

.. Respondents

.....

Mr.Jugal Kanani, Advocate for the Applicant.

Mr.A.R. Patil, APP for the Respondent No.1-State in APL 442 of 2022.

Mr.Arfa Sait,APP for the Respondent No.1-State in APL 446 of 2022.

Mr.Ajay Talreja, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK J.

DATED : JUNE 16, 2022.

P.C. :

The applicant in both these applications have challenged the order dated 23rd March, 2022, passed by learned Metropolitan Magistrate 48th Court, Andheri, Mumbai in C.C.No.4386/SS/2015 and CC No.4387/SS/2015.

2 Respondent no.2 filed a private complaints against the applicant and others. Complaint was filed for the offence punishable under Section 138 of Negotiable Instruments Act ("NI Act", for short).

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This order is corrected pursuant to the Speaking to the Minutes order dated 26.08.2022

The complaints were filed on 14th July, 2014. On 10th October, 2018, the respondent no.2 filed his examination-in-chief by way of affidavit of evidence along with list of documents.

3 On 30th August, 2021 and 16th September, 2021, the advocate for applicant conducted part cross-examination of respondent no.2.

4 On 1st January, 2022, pending cross-examination, the complainant filed an application to file additional affidavit in lieu of examination-in-chief to lead additional evidence, and to examine prosecution witness. On 24th January, 2022, the applicant filed reply.

5 The learned Magistrate proceeded to take on record additional affidavit of evidence, and, case was adjourned to 22nd March, 2022. Application was allowed on 23rd March, 2022, subject to cost of Rs.2000/-.

6 Learned advocate for the applicant submitted that the application preferred by the complainant was allowed without considering the reply of the accused. Trial Court committed error in law. Learned Magistrate has misinterpreted Section 311 of Cr.P.C.

The Court could have followed the order of examination of witnesses. The complainant could not have been permitted to file additional documents or further examination-in-chief before completion of his cross - examination. Learned counsel relied upon the decision of this Court in the case of *Santos Maria Teresa Pinto Ferriers Dos Vs. Union of India and Anr.*¹

7 Learned counsel for respondent no.2/complainant submitted that there is no error in impugned order. In paragraph 8 of the impugned order it is observed that permission can be granted for recall or re-examination of any witness at any stage of trial, if his evidence is necessary. In the case in hand, the complainant has not prayed for recall of any witness since cross-examination of the complainant was against prosecution and during the cross-examination, he intended to give additional documents and additional affidavit in relation of those documents. Reliance is placed on the decision of the Supreme Court in the case of *P. Chhaganlal Daga Vs. M. Sanjay Shaw*².

8 The applicant is tried for an offence punishable under Section 138 of NI Act. Respondent no.2 is the original complainant.

1 2012 SCC OnLine Bom 990

2 (2003) 11 SCC 486

Affidavit of evidence in chief of the complaint was filed before the trial Court when he was under cross-examination. During the cross examination, respondent no.2 filed additional affidavit of documents. The application of the complainant was opposed by the accused by filing say and preferred an application to file additional affidavit with documents. According to complainant, while filling the original affidavit of examination-in-chief, some original documents were not available with him, and, therefore, he could not file some original documents on record. He was not acquainted with law, and, therefore, he overlooked these omissions. Trial Court heard both the parties. By order dated 23rd March, 2022, the application preferred by the complainant was allowed. In the impugned order, the learned Magistrate has observed that the cross-examination of the complainant is in progress and during his cross-examination, he intends to file additional documents and additional affidavit in relations to those documents. The documents are relevant for case. The complainant was cross-examined by the accused. No prejudice will be caused to the accused if permission is granted to complainant to file additional affidavit along with additional documents. The advocate for the accused will get opportunity to cross-examine the witness in relation to documents produced subsequently.

9 In the case of Santos Maria Teresa Pinto Ferriers Dos Vs. Union of India and Anr. (Supra), this Court has referred to Section 138 of the Evidence Act, relating to order of examination viz. Examination-in-chief, cross-examination and re-examination. It was observed that the question of re-examination would arise after the witness has been cross-examined. It is not possible as to how re-examination of a witness can be taken before he has been cross-examined. If a witness is permitted to be re-examined before his cross-examination is completed, it would create complications. Even if an accused seek cross-examination of the witness before the examination-in-chief completed. There would be request by both the parties to permit cross-examination. In the case of P. Chhaganlal Daga Vs. M. Sanjay Shaw (Supra), it was observed that the High Court had erroneously interfered with the order of the Magistrate permitting complainant to produce documents at the end of trial.

10 It is pertinent to note that recording of evidence of the complainant was not closed. It was in progress. Before cross-examination could be completed, the complainant preferred an application for additional evidence. It was allowed. I do not find any infirmity in the order of the Court.

11 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Application Nos.442 of 2022 and 446 of 2022,
are rejected and stand disposed of.

(PRAKASH D. NAIK, J.)