

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

**CRIMINAL WRIT PETITION NO. 2395 OF 2019
WITH
CRIMINAL WRIT PETITION NO. 2396 OF 2019**

Raymond Apparel Limited
Through CA Gautam Rohidekar ...Petitioner

Versus

Shankardev Commercial Pvt. Ltd. and Ors. ...Respondents

Ms. Rececca Gonsalves, Advocate for Petitioner in both Petitions.

Mr. Ateet Mhambrey a/w Mr. Kajal Solanki i/by Mr. Manoj Mhambray,
Advocate for Respondents in both Petitions.

Mr. A.R. Patil, APP for Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 18th JULY, 2022.

P.C. :-

1. The Petitioner in Criminal Writ Petition No.2395 of 2019 pertains to C.C. No.736/SS/2017 pending before the Court of Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai for an offence under Section 138 r/w Section 141 of Negotiable Instruments Act, 1881 (for short 'N.I. Act'). The Respondent Nos. 1 to 3 are the Accused in the said complaint. The Petitioner is the complainant. The Petitioner challenges the order dated 28th December, 2018 passed by learned Magistrate rejecting the Application filed by the Petitioner/complainant seeking to examine (1) Nitin Khedekar, (2) Alok Saboo as witnesses on behalf of the

SUNNY
ANKUSHRAO
THOTE

Digitally signed
by SUNNY
ANKUSHRAO
THOTE
Date:
2023.06.05
19:45:03 +0530

Petitioner. As well as the order dated 13th February, 2019 passed by Sessions Court rejecting Criminal Revision Application No. 162 of 2019 filed by the Petitioner challenging order dated 28th December, 2018.

2. Criminal Writ Petition No.2396 of 2019 pertains to C.C. No. 777/SS/2017 pending before the Court of learned Metropolitan Magistrate 33rd Court, Ballard Pier, Mumbai. The complaint is filed for offence under Section 138 of N.I. Act. The Respondent Nos. 1 to 3 are the Accused in the said complaint. The Petitioner challenges order dated 28th December, 2018 passed by Metropolitan Magistrate 33rd Court, Ballard Pier, Mumbai rejecting the application preferred by the Petitioner/complainant to examine Alok Saboo as witness and the order dated 13th February, 2019 passed by Sessions Court Mumbai rejected rejecting Criminal Revision Application No.163 of 2019 filed by the Petitioner challenging order dated 28th December, 2018.

3. The Petitioner in both Petitions is company incorporated under the provisions of the Companies Act. The Petitioner is engaged in the business of manufacturing, marketing and selling readymade garments. Respondent No.1 is a Private Limited Company. The Respondent Nos.2 and 3 are the Managing Director

and Director of Respondent No.1 Company.

4. C.C. No.736/SS/2017 relates to cheque issued by the Accused bearing no.040729 dated 25th November, 2016. The said cheque was dishonored on 29th November, 2016. Examination-in-Chief of the complainant was tendered by way of affidavit on 18th June, 2018. The witness was cross-examined by the Accused. On 28th December, 2018 the Advocate for the complainant filed an application to examine Nitin Khedekar and Alok Saboo. The said application was rejected vide order dated 28th December, 2018. The revision application preferred challenging the said order was rejected by the learned Sessions Judge vide order dated 13th February, 2019. Similarly, C.C. No.777/SS/2017 relates to cheque dated 15th November, 2016 bearing no. 040726 it was dishonored vide bank memo dated 19th February, 2016 with remarks insufficient funds. The evidence of complainant was recorded. The complainant preferred an application for witness summons to witness Alok Saboo. The said application was rejected by order dated 28th December, 2018. The revision application challenging the aforesaid order was also rejected vide order dated 13th February, 2019. The complaint was thereafter adjourned for recording statement under Section 313 of Cr.P.C.

5. Learned Advocate for the Petitioner submitted that the learned Magistrate and learned Sessions Judge has committed an error in rejecting the application for witness summons. As per Section 311 of Cr.P.C. the Court is empowered at any stage of any inquiry, trial or other proceedings to examine any person whose evidence is essential for a just decision of a case. The evidence of Alok Saboo and Nitin Khedekar is essential for a just decision of C.C. No.736/SS/2017. After examining CW-1, the complainant had sought to examine Alok Saboo the authorized agency of complainant. Role of the witness has been mentioned in Paragraph Nos. 5 and 8 of the complain in C.C. No.736/SS/2017. Alok Saboo had been following with the Accused for the payment of outstanding amount and had sent them and e-mail dated 19th November, 2016 informing them about depositing the cheque. The statutory demand notice was sent to Accused and they had called Alok Saboo assuring him that they making the payment of outstanding amount in installments. Alok Saboo was authorized agent of the complainant who had been dealing with the Accused regarding the payment of outstanding amount for which the cheque in question had been received. Nitin Khedekar was working in the account department of complainant. He had given instructions to the Advocate for drafting the complaint. The

relevant facts are within the knowledge of the said witness. In the list of witness appended to the complaint filed by the Petitioner reference was made to “any other witness with the leave of this Court”. The complainant at the time of filing the complaint included in the list of witnesses “any other witness with the leave of this Court.” Merely on the ground that their names do not find in the list of witnesses, the complainant cannot be prevented from examining them. Especially since their evidence is essential in the interest of justice. There was no delay on the part of complainant in preferring the application for examining witnesses. It was filed on the same day when the cross-examination of first witness was included. The trial Court has admitted that Alok Saboo and Nitin Khedekar were concerned with the Petitioner. The examination of said witnesses would not cause any prejudice to the Accused. The Accused were aware of existence of Alok Saboo having dealt with him prior to filing of complaint. The order dated 28th December, 2018 does not mention any valid reason for rejecting the application filed by Petitioner. The impugned order cannot be permitted as interlocutory and amenable to revisional jurisdiction. Alok Saboo is required to be examined in C.C. No. 777/SS/2017 for the same reasons stated hereinabove.

6. Learned Advocate for Respondent Nos. 1 to 3 submitted that the learned Magistrate has rightly rejected the application preferred by the complainant. The name of the witness was not mentioned in the list of witnesses. The complainant is trying to fill up lacuna by examining the said witnesses. The application for issuing the summons to witness was preferred after the examination of complainant was concluded. Having realized the defence of the Accused, the complainant preferred an application for issuing summons to new witness. Powers Section 311 of Cr.P.C. cannot be invoked to fill up lacuna. There is no reason to interfere in the impugned orders passed by the Court below. The learned Sessions Judge had rightly observed that the order passed by learned Magistrate is interlocutory in nature. Reliance is placed on decision of the Allahabad High Court in the case of *Bheem Singh V/s State of U.P. passed in Criminal Application No.22902 of 2021 dated 18th January, 2022*.

7. The Supreme Court in several decisions has dealt with the scope of Section 311 of Cr.P.C. and observed that the object of Section 311 is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts to arrive at just decision of the

case. Powers must be exercised judiciously and not capriciously or arbitrarily. If the evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court summons and examine or recall and re-examine any such person. The object of Section 311 of Cr.P.C. imposes a duty on the Court to determine the truth and to render a just decision.

8. Learned Magistrate while rejecting the application for witness summons has observed that the name of the witness was not mentioned in the list of witnesses of the complaint. Although the person is having concern with company the application was filed without any purpose. It appears that only after the name of the witness in of the cross the application was referred application was preferred. From the tenor of the impugned order passed by learned Magistrate, it is apparent that the Court has accepted the fact that the witness was concerned with the case. The application was preferred after cross-examination of complainant was over. It is but natural that the application could be preferred after the evidence of witness sought to be examined is concluded and no adverse inference could be drawn against the complainant on that count. For the just decision of the case and bring the truth of record and in the interest of justice it would be essential to permit

the complainant to examine those witnesses.

9. Hence, I pass the following order;

ORDER

i. Criminal Writ Petition Nos.2395 of 2019 and 2396 of 2019 are allowed and disposed off;

ii. Order dated 28th December, 2018 passed by the learned Metropolitan Magistrate 33rd Court, Ballard Pier, Mumbai in C.C. No.736/SS/2017, rejecting application for issue of witness summons to witnesses mentioned in the application and order dated 13th February, 2019 passed by Additional Sessions Judge, Greater Bombay in Criminal Revision Application No.162 of 2019 are quashed and set aside.

iii. Order dated 28th December, 2018 passed by learned Metropolitan Magistrate 33rd Court, Ballard Pier, Mumbai in C.C. No.777/SS/2017, rejecting application for issuing witness summons to the witnesses mentioned in the application and order dated 13th February, 2019 passed by Additional Sessions Judge, Greater Bombay in Criminal Revision Application No.163 of 2019 are quashed and set aside.

iv. The application preferred by Petitioner for issuing witness summons in both the complaints are allowed. The trial Court shall issue summons to witness mentioned in application preferred in both the cases and permit the Petitioner to examine witnesses mentioned in respective application and proceed with cases in accordance with law.

[PRAKASH D. NAIK, J.]