

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.601 OF 2022

GIFT 365 IN and another	Applicants
versus	
State of Maharashtra and another	Respondents

AND

CRIMINAL APPLICATION NO.604 OF 2022

GIFT 365 IN and another	Applicants
versus	
State of Maharashtra and another	Respondents

Mr.Jatin P. Shah with Ms.Snehankita Munj and Ms.Shraddha Kamble,
Advocates for applicants in both applications.

Mr.A.S.Pal with Mr.Gobinda C. Mohanty i/by M/s.Mohanty &
Associates, Advocate for respondent no.2.

M.Arfa Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 17th June 2022

PC :

1. The applicants are aggrieved by order dated 22nd March 2022 passed below Exhibit-36 by learned Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai in CC No.604/SS/2019 and CC No.3402/SS/2018 passed below Exhibit Nos.43 and 44.

2. The applicants are prosecuted for the offence under Section 138 of Negotiable Instruments Act. Respondent no.2 is the complainant. Private complaints were filed through constituted attorney Mr.Yogesh Agarwal. The complaints were registered as 604/SS/2019 and CC No.3402/SS/2018. The constituted attorney

of respondent no.2 (CW-1) adduced his evidence by way of examination-in-chief and produced certain documents. The said witness was cross-examined on 17th September 2021. In the cross-examination the witness stated that he has transferred the amount to the accused. Navrang Enterprises has two accounts. The amount was transferred in bank account of accused by Tamilnadu Mercantile Bank. He is ready to produce bank statement from 20th August 2016 till 22nd August 2017 of Tamilnadu Mercantile Bank. The case was adjourned to 22nd October 2021 for recording statement of accused u/s.313 of Code of Criminal Procedure (`Cr.PC.`). The case was then adjourned to 28th October 2021 at the instance of complainant. Respondent no.2 filed application on 28th October 2021 bearing title as application for filing documents on record in compliance with cross-examination. The application was marked as Exhibit-29. It was prayed that original documents and bank statements be taken on record. The Court passed order “call the say of accused under Section 294 of Cr.PC”. Production of documents was allowed. The advocate for applicants made an endorsement that documents are verified and the contents are admitted. The Trial Court on the same day i.e. 28th October 2021 exhibited documents in the list and marked them as Exhibits. The respondent no.2 filed pursis closing evidence. Statement of accused was recorded under Section 313 Cr.PC. The applicants preferred application for recall of witness under Section 311 of Cr.PC. The applicants also preferred application for de-exhibiting documents. The learned Magistrate by common order dated 22nd March 2022 rejected the application.

3. Learned advocate for applicants in both these applications submitted that the disputed documents do not find reference in the

statutory notice, complaint, affidavit of evidence or the cross-examination. There was no explanation for not filing documents on record earlier. The cross-examination of the witness is just and necessary. In the event cross-examination is not allowed, there would be reason to believe that documents would continue to remain unchallenged, which would result in injustice. Merely on account of endorsement of advocate on the documents, the applicants shall not be deprived of their right to cross-examination. The complainant during cross-examination showed willingness to produce bank statement from 20th August 2016 till 22nd August 2017 of Tamilnadu Mercantile Bank. However, under the guise of same, filed documents covering other period. The order for exhibiting documents was obtained by misleading the Court. The witness is required to be confronted. There are several entries in bank statement. Witness has to be cross examined in respect to documents. The order rejecting application for recall of witness is contrary to law.

4. Learned advocate for the respondents submitted that application u/s.311 of Cr.PC is misconceived. It is not maintainable. The matter was fixed for final arguments. The documents at Exhibits-31 to 33 are exhibited as the advocate for accused admitted the documents vide Section 294 of Cr.PC. Learned Magistrate has assigned reasons for disallowing the application. The documents at Exhibits-31 to 33 are exhibited on the basis of endorsement that documents and contents are admitted. In the cross-examination of CW-1, the advocate for accused sought various documents from witness, to which the witness had agreed to produce the documents and in compliance, with that documents were produced, say of accused was called. Documents were admitted. Court passed order

that documents be exhibited. Accused cannot be allowed to change his stand after change of advocate. The documents are already admitted by the advocate for accused. Reliance is placed on the decision of this Court in case of **Shaikh Farid Hussainsab Vs. The State of Maharashtra**¹, and **Shabbir Mohammad Vs. State of Rajasthan**² and **Ravinder Vs. State of Haryana**³.

5. The affidavit of evidence in lieu of examination-in-chief was filed before Trial Court in both the cases. The witness was cross-examined by the advocate for accused on 17th September 2021. In the cross-examination the witness has deposed that he is ready to produce bank statements from 20th August 2016 to 22nd August 2017 of Tamilnadu Mercantile Bank Limited. The application was preferred by complainant stating that documents are filed in compliance with cross-examination. This application was filed in CC No.3402/SS/2018. The production was allowed by Trial Court. The advocate for accused has endorsed on 28th October 2021 that documents produced and contents are admitted. Learned Magistrate then passed order that accused has admitted the documents. Hence it may be exhibited.

6. The cross-examination was concluded on 17th September 2021. The application for filing documents was made on 28th October 2021. On the same day advocate for accused put up endorsement on above, the production was allowed and all the documents were exhibited in C.C.No.3402/SS/2018 on 28th October 2021. The list of document included confirmation letter signed by accused. Original letter signed by accused. Bank statements from 1st January 2016 to 31st

1 1983-Cri..L.J.-487

2 1996-Cri.L.J.-2015

3 2011-Cri.L.J.-1705

December 2017; 16th October 2017; December-2017. There is reference to first two documents in evidence. The bank statements refers to several entries. These documents were not referred in complainant or evidence. The witness was cross-examined on limited aspect. Although documents were admitted, in the facts of this case prejudice would be caused to applicants if cross-examination sought is not allowed. The cross-examination does not indicate that witness was called upon to produce documents. The application preferred by CW-1 was for filing documents on record in compliance with cross-examination after cross-examination was concluded. Witness was not permitted to produce any documents on 17th September 2021 when the cross was over. The application preferred by CW-1 was not for admitting documents under Section 294 Cr.PC. However, the Court called say of accused under Section 294 of Cr.PC. Powers under Section 311 of Cr.PC can be exercised before concluding case for just decision. The decisions relied by respondents would not be impediment to grant relief in these proceedings.

7. Hence, the prayer of the applicant/accused for recalling the witness CW-1 for cross-examination can be allowed.

ORDER

- (i) Criminal Application No.601 of 2022 and Criminal Application No.604 of 2022 are allowed;
- (ii) Impugned order dated 22nd March 2022 passed by Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai in CC No.604/SS/2019 and CC No.3402/SS/2018 rejecting the applications for recalling CW-1 (C.A.of complainant) is set aside;
- (iii) CW-1 (attorney of complainant) recalled for the purpose of

cross-examination in CC No.604/2019 as well as CC No.3402/SS/2018 at the instance of applicant/accused;

(iv) CW-1 to remain present in the Trial Court on 16th July 2022.

The said witness is permitted to be cross-examined by the Advocate for the applicants qua documents brought on record by complainant;

(v) Both the applications stands disposed of.

(PRAKASH D. NAIK, J.)

MST