

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

CRIMINAL WRIT PETITION NO. 3071 OF 2022

M/s. Silver & Rashi Constructions and Ors. ...Petitioners

Versus

The State of Maharashtra and Ors. ...Respondents

Mr. Harinath Sharma, Advocate for Petitioner.

Mr. Jatin Shah a/w Snehankita Munj a/w Tushar Patel, Shraddha Kamble, Advocate for Respondents No.2.

Mr. S.R. Agarkar, APP for Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 25th AUGUST, 2022.

P.C. :-

1. This is a Petition under Article 227 of the Constitution of India challenging order dated 17th May, 2022 passed by the learned Metropolitan Magistrate 56th Court, Sewree Mumbai in C.C. No.1233/SS/2021.

2. The Petitioner is the partnership firm. Petitioner Nos. 2 and 3 are its partners. The Respondent No.2 is the complainant.

3. The complaint was filed for an offence under Section 138 of Negotiable Instruments Act, 1881 (for short 'N.I. Act'). The complaint relates to loan provided by the complainant to the Accused. It is alleged that in discharge of liability towards

repayment of loan the Accused issued three cheques dated 29th January, 2021 and 3rd March, 2021 for total amount of Rs.14,50,000/-. The cheques were returned with remarks payment stopped by the drawer. Hence, complaint was filed. Process was issued.

4. The affidavit of examination-in-chief of complainant was taken on record. The complainant was cross-examined by the Accused. Subsequently, the Accused examined defence witness. He was cross-examined at the instance of complainant.

5. Application under Section 311 of Cr.P.C. was preferred by the complainant seeking permission to examine witness. The said application was preferred on 9th March, 2022. The application was opposed by the Accused by filing reply. The learned Magistrate vide order dated 17th May, 2022 allowed the said application.

6. Learned Advocate for the Petitioner submitted that, the learned Magistrate has committed an error in allowing the application preferred by the Petitioner. The application was preferred belatedly to fill up lacuna. The complainant was examined. Statement of the Accused was recorded under Section 313 of Cr.P.C. The defence witness was examined. Thereafter, the

application under Section 311 of Cr.P.C. was preferred by the complainant. The case of the Petitioners is that they have repaid the loan amount by cheques and produce the bank statement and also examine the bank official. After knowing the defence of the Accused the complainant had preferred the said application. It is not the case of the complainant that whatever amount refunded by the Accused was towards TDS, GST and fees. The demand notice nowhere mentions about it. The examination-in-chief the complaint or the examination-in-chief filed by the complainant. He also silent about it. The letter dated 18th September, 2021 and bank statement reflects that the Accused has repaid the loan amount.

7. Learned Advocate for Respondent No.2 submitted that, there is no infirmity in the impugned order. It is submitted that examination of the witness is necessary for just decision of the case. The complainant's case is that he had advance loan to the Accused. The defence of the Accused that he has paid the entire amount. According to complainant the entries of payment made by the Accused were not in respect of loan transaction. The complainant is a chartered accountant and the account is his client. The payment made by the Accused are professional charges and not towards the repayment of loan.

8. Learned Magistrate while allowing the application had observed that, the question arises for consideration is whether the amount paid by the Accused to the complainant is towards loan or professional charges. It is therefore essential for just decision of the case to recall the complainant and examine his chartered accountant to ascertain whether the loan was advanced and repaid.

9. Considering the factual aspects as stated above and documents on record there is no reasons to set aside the impugned order dated 17th May, 2022.

ORDER

. Criminal Writ Petition No.3071 of 2022 is rejected and stands disposed of accordingly.

[PRAKASH D. NAIK, J.]