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

WRIT PETITION NO.2951 OF 2022

Leena Nirmal Chhadwa

... Petitioner

V/s.

Rupa Utkal Gada & Anr.

... Respondents

Mr. Rahul A. Hande with Ms. Prajakta Khedekar for the petitioner.

Mr. Jatin P. Shah for respondent no.1.

Mr. A.R. Patil, APP for respondent no.2/State.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 11, 2022

P.C.:

1. Rule. Rule is made returnable forthwith by consent of the parties.

2. This petition under Article 227 of the Constitution of India arises out of a complaint filed under section 138 of the Negotiable Instruments Act, 1881. The complaint was filed through a Power of Attorney ("PoA", for short). During the hearing of the complaint, the accused conducted cross-examination of the PoA. On 20th October 2021 the complainant filed an application for recalling complainant's witness no.1 under section 311 of the Criminal Procedure Code. The learned Magistrate rejected the said application by order dated 23rd March 2022. While rejecting the

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said application, the learned Magistrate observed that if the complainant was to produce same PoA which was produced earlier, then recalling of such witness could have been permitted, but since the complainant is not willing to produce the same document, the complainant is trying to substitute documentary evidence at the time of final arguments. The application under section 311 of the Criminal Procedure Code was, therefore, rejected.

3. Relying on the observations above, the complainant filed second application for recalling of PW1 to place on record the original PoA dated 22nd October 2010. The said application has been allowed by the learned Magistrate by the impugned order dated 20th May 2022 holding that the said PoA is necessary for just decision of the case.

4. Learned advocate for the petitioner submitted that once the learned Magistrate had rejected earlier application of the complainant to place on record new PoA, the complainant could not have filed fresh application under section 311 of the Criminal Procedure Code for placing on record original PoA. It is submitted that the earlier adjudication on the rights of the complainant under section 311 of the Criminal Procedure Code would bar the learned Magistrate from allowing similar application in the later stage of the complaint.

5. *Per contra*, learned advocate for the complainant submitted that the subject matter of earlier application and the subsequent application being different, it was not permissible for the learned Magistrate to allow the application and the learned Magistrate in

his wisdom has allowed the application recording a satisfaction that the document is necessary for just decision of the case and, therefore, no interference is called for.

6. Having carefully considered the submissions on behalf of the parties, in my opinion, the petitioner has made out a case for interference in the order passed by the learned Magistrate as the learned Magistrate by order dated 23rd March 2022 had rejected earlier application of the complainant filed under section 311 of the Criminal Procedure Code. It needs to be noted that once there is adjudication of a particular issue, namely, application under section 311 made by the learned Magistrate, in the absence of any cogent reasons it would not be open for the learned Magistrate to reopen the said inquiry. The document which was the subject matter of adjudication in the earlier application rejected on 23rd March 2022 might have been different but while exercising powers under section 311, the learned Magistrate needs to balance rights of the accused along with the rights of complainant. Permitting a litigant to file successive applications under section 311 of the Criminal Procedure Code was never the intention of legislature. If the application to bring on record the PoA was *bona fide* exercise of power on the part of the complainant, it would have filed such an application at the first occasion when he filed the application initially. Therefore, in my opinion, once the application under section 311 of the Criminal Procedure Code to bring new PoA was rejected, it was not appropriate for the complainant to file another application under section 311 to bring on record original PoA.

7. Additionally, the earlier application under section 311 of the

Criminal Procedure Code was to recall the PoA holder. The impugned order is passed on an application to recall the PoA holder himself. Therefore, the witness which is sought to be recalled under section 311 is the same. This ought to have been an additional reason for rejection of application under section 311. Therefore, in my opinion, the learned Magistrate has acted in excess of his jurisdiction while allowing application below Exhibit 13. Hence, the following order:

- a) The impugned order dated 20th May 2022 passed by the Metropolitan Magistrate, 70th Court, Mazgaon, Mumbai in C.C. No.5331/SS/2018 is quashed and set aside;
 - b) The application below Exhibit 30 stands rejected.
- 8.** Rule is made absolute in above terms. No costs.

(AMIT BORKAR, J.)