IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.809 OF 2022

Ashok @ Ashokkumar L. Gupta, Age 45 years,
Occ.Business, R/o.Flat No.403, 4th floor,
Sai Complex, Plot No.578/588,
Opp.Parel S.T.Depot, Sayani Road,
Mumbai-400 025. Applicant

versus

1. Be-jod Co-op. Credit Society Limited,
Office at 105-106, 1st floor, Shirin Apartment,
B.J.Marg, Jacob Circle, Saat Rasta,
Mumbai-400011.
2. The State of Maharashtra. Respondents

Mr.Princekumar Dubey with S.Rajak, Advocate for Applicant.
Mr.S.R.Gupta, Advocate for Respondent no.1.
Mr.Arfan Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.
DATE : 7th September 2022

PC :

1. This is an application u/s.482 of Code of Criminal Procedure (Cr.P.C) challenging order dated 1st July 2022 passed by learned Magistrate rejecting application for recall of witness preferred by applicant u/s.311 of Cr.P.C.

2. Applicant is facing prosecution vide C.C No.4204/SS/2019 pending in the Court of learned Additional Chief Metropolitan Magistrate for the offence u/s.138 of Negotiable Instruments Act (N.I.Act). The complaint was filed by Respondent no.1. The complainant is a co-operative credit society. The complainant is accepting deposits and advancing loans to its members. The complainant/respondent no.1 had granted loan to Mr.Deepchand Gupta of Rs.6,00,000/- on 29th November 2010. Applicant was a

guarantor to the said loan. The principal borrower did not repay the loan and amount of Rs.1,55,286/- was due and payable by the principal borrower to complainant. In discharge of the liability the applicant issued a cheque for a sum of Rs.1,30,000/- dated 10th January 2019 in favour of Respondent no.1. The cheque was dishonoured vide return memo dated 16th January 2019 with remarks “funds insufficient”. Demand notice was issued to the accused. Payment was not made. Complaint was filed. Process was issued.

3. The complainant through their Authorized Officer Mr.Omkarnath Gupta filed affidavit of evidence in lieu of examination-in-chief and also filed documentary evidence. Complainant produced extract of accounts statement regarding account of principal borrower with certificate u/s.65B of Indian Evidence Act. The witness examined by respondent was cross-examined by advocate for applicant. The authorized representative of complainant died on 15th October 2022. Subsequently permission was granted to replace the authorized officer.

4. Applicant preferred an application for recall of authorized representative of complainant for cross examination. The application was opposed by complainant. Vide order dated 1st July 2022 the application was rejected. The applicant is aggrieved by said order and has approached this Court challenging the same.

5. Learned advocate for applicant submitted that Trial Court has committed an error in rejecting the application. In the interest of justice and fair trial, the application preferred by applicant should

have been allowed by giving an opportunity to the applicant to cross examine the representative of complainant. The earlier advocate representing applicant had not conducted the cross examination in proper perspective. No questions were asked regarding accounts statement produced by respondent no.1. No questions were asked relating to cheque which is not a valid instrument being non CTS cheque. The cheque is misused by respondent no.1. Further cross examination of complainant's representative is necessary. Applicant was not borrower. He was guarantor. He was not having knowledge of due amount of respondent no.1. The principal borrower had expired in 2016. This fact is suppressed by complainant. The cheque was not issued by applicant to respondent no.1. Death of authorized representative does not take away right of accused to put his defense.

6. Learned advocate for Respondent no.1 submitted that applicant had ample opportunity to cross examine the witness. Right to cross examine has been exercised by applicant. Belated attempt has been made to recall the witness with a view to fill up lacuna. The complainant had closed his evidence and filed evidence closing purshis. The complainant had examined PW-2 and he was cross examined by defense. Thereafter application for recall of witness was preferred with several contentions which is after thought.

7. Application u/s.311 of Cr.P.C can be preferred before trial concludes. However, there has to be justification for preferring such application and its purpose cannot be to fill up lacuna. Learned Magistrate has rejected application on the ground that complainant was fully cross examined. Thereafter complainant examined another

witness. The authorized representative of the complainant had expired on 15th October 2020. He is substituted by another representative. The ground in the application is not considerable and supported by cogent reasons.

8. It is relevant to note that evidence of complainant's representative was filed on 22nd August 2019. He was cross examined by the advocate for applicant on 10th February 2020 and 12th March 2020. Perusal of notes of evidence indicate that detailed cross examination was conducted by advocate for applicant. Apparently complainant had examined another witness and he was cross examined by advocate for accused. Thereafter on 5th May 2022, application u/s.311 of Cr.P.C was preferred by applicant. In the application it was stated that applicant is the guarantor of borrower Deepchand Gupta, complainant had relied upon accounts statement, previous advocate has not cross examined the complainant on accounts statement, he had no knowledge of the dues of borrower, the cheque was non-CTS cheque and it was lying with the complainant and it was misused by the complainant. Applicant had sufficient opportunity to cross examine the complainant. Cross examination has been indeed conducted by previous advocate. Applicant cannot be permitted to fill up the lacuna. No ground is made out to entertain the application. Hence the application deserves to be rejected.

ORDER

(i) Criminal Application No.809 of 2022 stands rejected and disposed off.

(PRAKASH D. NAIK, J.)

MST