

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

CRIMINAL WRIT PETITION NO. 3357 OF 2022

Mr. Deepak Shah ...Petitioner
Versus
Prananjay N Mistry And Anr. ...Respondents

WITH

CRIMINAL WRIT PETITION NO. 3358 OF 2022

Atharva Realtors And Anr. ...Petitioners
Versus
Heena Rakesh Shah Through
Poa-rakesh G. Shahand Anr. ...Respondents

WITH

CRIMINAL WRIT PETITION NO. 3359 OF 2022

Deepak Shah ...Petitioner
Versus
Rakesh G. Shah (huf) And Anr. ...Respondents

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Mr. Kishor Patil i/b Ms. Vaishnavi Gujarathi, Advocate for the Petitioner.
Mr. Amod Elaspure, Advocate for Respondent No.1.
Mr. S. R. Agarkar, APP for the Respondent – State in W.P. No.3357 of 2022 & W. P. No.3359 of 2022.
Mr. M. G. Patil, APP for the Respondent – State in W.P. No.3358 of 2022.

CORAM : PRAKASH D. NAIK, J.
DATE : 19th SEPTEMBER, 2022.

PER COURT:

1. The Petitioners are facing prosecution under Section 138 of the Negotiable Instruments Act, 1881 in C.C. No.6216/SS/2019, C.C. No.6217/SS/2019 and C.C. No.6218/SS/2019 pending before the Court of learned Metropolitan Magistrate 20th Court, Mazgaon, Mumbai.
2. The Petitioners have challenged order dated 21st April, 2022

passed by learned Metropolitan Magistrate 20th Court, Mazgaon, at Sewree Mumbai below Exhibit-53 in C.C. No.6216/SS/2019 and order dated 22nd July, 2022 passed by the Sessions Court for Greater Bombay, in Criminal Revision Application No. 540 of 2022 vide Criminal Writ Petition No.3357 of 2022. The Petitioners in Criminal Writ Petition No.3358 of 2022 has challenged order dated 21st April, 2022 passed by learned Metropolitan Magistrate 20th Court, Mazgaon, at Sewree Mumbai below Exhibit-47 in C.C. No.6217/SS/2019 and order dated 22nd July, 2022 passed by the learned Sessions Judge, Mumbai in Criminal Revision Application No.541 of 2022. Whereas, in Criminal Writ Petition No.3359 of 2022, the Petitioner has challenged order dated 21st April, 2022 passed by learned Metropolitan Magistrate 20th Court, Mazgaon, at Sewree Mumbai below Exhibit-44 in C.C. No.6218/SS/2019 and order dated 22nd July, 2022 passed by the Sessions Court for Greater Bombay, in Criminal Revision Application No.542 of 2022.

3. C.C. No.6216/SS/2019 was filed under Section 138 of the Negotiable Instruments Act, by Prananjay Mistry against Deepak A. Shah proprietor, Atharva Developers. The complainant has alleged that, he had booked a flat in a building proposed to be constructed by accused known as Atharva Heights at Malad (East), Mumbai, being flat No.601/602. The complainant paid an amount of

Rs.1,00,00,000/- vide cheque bearing No.725776 dated 7th June, 2013, and further amount of Rs.1,07,00,000/- vide cheque No.725776 dated 10th June, 2013 to the accused towards the purchase price of the flat. The accused issued allotment letter and undertaking dated 27th November, 2018 about the receipt of amount of Rs.1,00,00,000/- towards purchase of flat. The undertaking also stated that, out of amount of Rs.1,00,00,000/- the accused had made payment of Rs.10,00,000/- to the complainant on 10th August, 2018 towards interest. The undertaking also stated that, since the building could not be completed and complainant desired to take refund of the amount paid, the accused cancelled the booking of flat and issued three cheques for an amount of Rs.30,00,000/- each dated 31st December, 2018, 7th January, 2019 and 3rd January, 2019 in favour of complainant. The cheques were deposited by the complainant with his bank and the same were returned unpaid vide memo dated 12th March, 2019 with remark fund insufficient. Notice was sent to the accused. Complaint was filed under Section 138 of the Negotiable Instruments Act. It was numbered as C.C. No.6216/SS/2019. C.C. No.6218/SS/2019 is filed by Rakesh G. Shah (HUF) through its karta Rakesh G. Shah against Deepak A. Shah, proprietor, Atharva Developers. It is alleged that, the complainant had booked a flat in the building to

be constructed by accused namely Atharva Heights. Towards purchase of flat No.802, the complainant paid an amount of Rs.1,50,00,000/- vide cheques. Allotment letter was issued by accused in respect of said flat. The undertaking dated 27th November, 2018 confirming receipt of the amount. It was also stated that, since the building could not be completed and complainant desired to take refund of amount paid, the accused cancelled the booking of flat and issued three cheques for Rs.25,00,000/- each dated 10th February, 2019, 20th February, 2019 and 20th February, 2019. The complainant deposited the said cheques, which were dishonoured vide memo dated 12th March, 2019. Demand notice was issued to the accused. Complaint was filed under Section 138 of the Negotiable Instruments Act. C.C. No.6217/SS/2019 is filed by Ms. Heena Rakesh Shah, against Atharva Realtors and Mr. Deepak Shah. It was filed through power of attorney holder Mr. Rakesh Shah (her husband). The complainant had alleged that, she had booked a flat in the building proposed to be constructed by the accused known as Atharva Landmark. The complainant paid an amount of Rs.40,00,000/- vide cheque dated 23rd January, 2013, Rs.35,00,000/- vide another cheque dated 23rd January, 2013 and Rs.5,00,000/- vide cheque dated 15th July, 2013 towards purchase of flat No.704 in the said

building. Allotment letter was issued to her. Undertaking was executed by the accused confirming receipt of amount and that, construction was not completed and as the complainant desired to take refund of amount paid, booking is cancelled. The accused issued three cheques for Rs.30,00,000/-, Rs.25,00,000/- and Rs.25,00,000/- dated 30th January, 2019, 23rd January, 2019 and 15th January, 2019. The cheques were dishonoured, demand notice was issued. Complaint was filed under Section 138 of Negotiable Instruments Act.

4. The examination-in-chief on affidavit of complainant in C.C. No. 6216/SS/2019 was filed before the Court of learned Metropolitan Magistrate, Mazgaon, Mumbai. The complainant was cross-examined at the instance of accused. Application vide Exhibit-53 was preferred before the learned Trial Court for recalling PW. No.1. Prananjay Mistry on the ground that, the witness Rakesh Shah had also stepped into the witness box in C.C. No.6218/SS/2019 and in his cross-examination about his wife's case, he has stated that, the case filed by his wife Ms. Heena Shah and Brother-in-law Prananjay Mistry are also in respect of purchase of flat and he was not involved in those transactions. Thus, the witness has made a false statement and admitted that he is not involved in the transactions of his wife in the present case. The

complainant Ms. Heena Shah has not come before the Court to depose her own case. The said witness is examined as PW-2 in C.C. No.6216/SS/2019 and made contrary deposition. Hence, PW-1 Prananjay Mistry be recalled for facing further cross-examination. The said application was opposed by the complainant vide reply dated 11th April, 2022. Vide order dated 21st April, 2022, the learned Metropolitan Magistrate 20th Court, Mazgaon, Mumbai rejected the said application below Exhibit-53 in C.C. No.6216/SS/2019. The order dated 21st April, 2022 was challenged by the Petitioner before the Court of Sessions by preferring Criminal Revision Application No.540 of 2022. The said Revision Application was rejected vide order dated 22nd July, 2022. Similarly the accused in C.C. No.6218/SS/2019 preferred an application for recalling PW-1 Rakesh G Shah. The application was opposed by the complainant vide reply dated 11th April, 2022. The said application was rejected by the learned Magistrate vide order dated 21st April, 2022. The accused challenged the said order by preferring Criminal Revision Application No.542 of 2022 before the Sessions Court which was rejected vide order dated 22nd July, 2022. The accused in C.C. No.6217/SS/2019 preferred an application for discarding the evidence of PW-1 Rakesh G Shah. The application was opposed by the complainant vide reply dated 11th April, 2022. The learned

Magistrate vide order dated 21st April, 2022 rejected the said application. The said order was challenged by the accused before the Court of Sessions by preferring Criminal Revision Application No.541 of 2022. The learned Sessions Judge vide order dated 22nd July, 2022 rejected the said Revision Application.

5. Learned Advocate for the Petitioners submitted that, during the cross-examination, the accused Deepak Shah in C.C. No.6218/SS/2019 gave notice dated 15th January, 2020 to produce certain documents in the said case. Complainant Rakesh Shah declined to produce the documents. PW-1 Rakesh Shah in C.C. No.6218/SS/2019 was confronted by the Advocate for the Petitioner with a certified copy of statement of accounts of New India Co-operative Bank and Axis Bank in which statement it was revealed that, the amount of Rs.25,00,000/- was paid by the Petitioner/accused to Rohan Rakesh Shah (son of Rakesh Shah and Heena Shah). Mr. Rakesh Shah was cross-examined in C.C. No.6218/SS/2019 about the transactions in the aforesaid cases filed by Ms. Heena Shah and Mr. Prananjay Mistry. In the cross-examination it was stated that, the case filed by his wife Heena Shah and brother-in-law Prananjay Shah are also in respect of purchase of flat and he was not involved in those transactions. Thus, the witness blocked all other questions in relation to

transaction of his wife and brother-in-law and denied opportunity to bring on record, different probabilities, then what is stated in the complaint. In C.C. No.6217/SS/2019 Rakesh Shah has deposed that, he is fully conversant with case and has personal knowledge about the transactions from the beginning. Rakesh Shah also deposed in C.C. No.6216/SS/2019 that, he is fully aware of the transactions and the facts of the case, since he has personal knowledge of the same and have also dealt with the accused in the transaction along with the complainant from the beginning. The accused preferred an application dated 25th March, 2022 vide Exhibit-53 for recalling PW-1 Prananjay Mistry for further cross-examination. The order passed by the learned Magistrate did not consider the applicable legal provisions. The learned Sessions Judge has also committed an error in rejecting the Revision Application. Once it was revealed that, witness had adopted a blatant falsehood about his knowledge of transactions in other cases, his evidence was liable to be discarded. Mr. Rakesh Shah had admitted in C.C. No.6218/SS/2019 that, he had no personal knowledge of the transactions of the complaint filed by Heena Shah and therefore, he was not competent to depose the said case. In the cross-examination of Mr. Prananjay Mistry there were major voids which were fatal to the complaint filed by Mr. Prananjay Mistry. To

improve upon the case, Rakesh Shah was introduced as witness in the said case. In the examination-in-chief of Prananjay Mistry there was no whisper of involvement of Mr. Rakesh Shah in any transactions. Name of Rakesh Shah was not mentioned in the list of witnesses. On 24th December, 2021 Mr. Prananjay Mistry was cross-examined and on 5th March, 2022 Mr. Rakesh Shah entered into witness box. The learned Magistrate did not consider the application preferred by the accused in proper perspective. The witness ought to have been recalled for cross-examination. Mr. Rakesh Shah had admitted in C.C. No.6218/SS/2019 that, he had no personal knowledge of transactions of complaint by Heena Shah. The power of attorney of Rakesh Shah was executed in 2019 by Heena Shah only for filing complaint in 2019. Rakesh Shah was not a person who has done any transactions of case as a power of attorney holder and he was not competent to lead evidence on behalf of Heena Shah. The power of attorney holder had not witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding transactions. The alleged transactions of Ms. Heena Shah were of 2014 and the power of attorney was given in 2019. Thus, the power of attorney holder Rakesh Shah had not witnessed the transactions. The evidence of Rakesh Shah ought to have been discarded by the

Court being incompetent witness and Heena Shah should have been directed to step into witness box. The order passed by learned Magistrate was not an interlocutory order and the learned Sessions Judge has committed an error. The power of attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course and he should have knowledge of transactions. The complainant has to make specific assertion about the knowledge of the power of attorney holder in the present case.

6. Learned Advocate for the Respondents submitted that, there is no infirmity in the impugned orders passed by the learned Magistrate and the Sessions Court. The accused is trying to delay the proceedings. The complaint was filed in 2019. The plea of the accused was recorded on 26th June, 2019. The complainant filed affidavit of evidence of PW-1 and the case was kept for cross-examination. The case was thereafter, referred for mediation. The accused did not cross-examine PW-1 and the cross of PW-1 was closed on 26th November, 2019. The case was kept for recording statement of the accused under Section 313 of Code of Criminal Procedure on 11th December, 2019 and thereafter, for defence evidence on 26th December, 2019. The accused preferred

application for recalling of PW-1 on 26th December, 2019 which was allowed on 5th March, 2021. The cross-examination of the accused was closed and the case was kept for recording statement of accused under Section 313 of Code of Criminal Procedure. On 29th September, 2021. The Court allowed the recalling of PW-1. The accused remained absent and non-bailable warrant was issued against the accused. The statement was recorded under Section 313 of Cr.PC. The impugned application is to delay the proceedings. The accused has not stated under what provisions such application can be entertained. The learned Magistrate has assigned reasons for rejecting the application. Even before the cross-examination was completed, the accused should have put the very same questions made in the application to complainant who was in the witness box. The said questions were not put up by the accused during the cross-examination dated 6th December, 2021 and 24th December, 2021. There is no provisions for discarding evidence of PW-1 in C.C. No. 6217/SS/2019. Ms. Hina Rakesh Shah has neither filed affidavit of evidence nor given any oral evidence in the said case.

7. The Complaints relates to the offence under section 138 of the Negotiable Instruments Act. The Trial had commenced. The accused had preferred applications mentioned hereinabove. In C.C.

No. 6216/SS/2019, the accused preferred application for recalling PW-1 Mr. Prananjay Mistry. The learned Magistrate while rejecting the said application vide order dated 21st April, 2022 had observed that, from the contents of the application, it seems that, although it is mentioned that PW-1 Prananjay Mistry is required to be recalled, his name has been mistakenly typed instead of Rakesh Shah. Prananjay Mistry has not made any contrary statement as per the contents of application. It is Mr. Rakesh Shah who has made different statement in C.C. No. 6218/SS/2019 and C.C. No. 6217/SS/2019. Hence no purpose would be served by recalling Mr. Prananjay Mistry. Rakesh Shah was cross-examined by the accused in C.C. No. 6218/SS/2018 on 11th March, 2020 i.e. prior to two years. Hence the accused were aware as to what was stated by him in C.C. No. 6218/SS/2019. In C.C. No. 6216/SS/2019, the defence counsel has referred the copy of deposition in C.C. No. 6218/SS/2019 to Mr. Rakesh Shah and also questioned him which was recorded in question/answer form. The question asked to him mentions that, in his cross-examination he has stated that, he is not involved in the transaction of Mr. Prananjay Mistry and in the affidavit filed in the said case, he state that, he is aware of the transactions and the facts of the present case, as he has personal knowledge so which of these statements are correct. The question

was answered by the witness stating that, the statement made in paragraph 2 of the said case is correct. The learned Magistrate further observed that, it is not the case that, the accused did not get an opportunity to cross-examine Rakesh Shah on the point of contrary statements made by him in C.C. No. 6218/SS/2019. Whatever Rakesh Shah has deposed is already on record and accused got an opportunity to refer the contrary statement to Rakesh Shah and therefore, there is no justifiable reason to recall either Prananjay Mistry or Rakesh Shah.

8. The learned Sessions Judge while rejecting the Revision Application No. 540 of 2022 challenging the aforesaid order has observed that, the impugned order is interlocutory but also observed that, it was a well reasoned order and cannot be said to be illegal, incorrect and perverse. The Trial Court did not find any justifiable reason to recall the witness. The learned Magistrate while adjudicating the application Exhibit-47 preferred by the accused in C.C. No. 6217/SS/2019 for discarding evidence PW-1 Rakesh Shah had observed that, the filing of complaint through power of attorney is legal. The power of attorney holder can depose and verify on oath before the Court to prove the contents of complaint. The power of attorney holder must have witnessed the transactions. Mr. Rakesh Shah has filed as power of attorney holder

of his wife Heena Shah in C.C. No.6217/SS/2019. It is specifically pleaded in the complaint as well as in the affidavit-in-lieu of examination-in-chief of Rakesh Shah that, he is fully conversant and aware of the facts of this case and has personal knowledge of the same. He has dealt with the accused in the transaction from the beginning in the cross-examination in C.C. No.6218/SS/2019, he deposed that he was not involved in the transactions of his wife and brother-in-law. However, no such statement was made by him in the present case, during the course of cross-examination in the present case, the said deposition was referred by Advocate for defence to Rakesh Shah in his cross-examination, wherein he stated that, he did stand with statement. It was further observed that both statements are on record. The evidentiary value of the testimony of Rakesh Shah cannot be decided at this juncture. On the basis of contrary statement in C.C. No.6218/SS/2019 his evidence cannot be discarded. No comment can be made at this stage regarding probative value of the evidence of the said witnesses. As far as examination of Heena Shah is concerned, it is the choice of complainant as to which witness is examined to prove his case. The accused cannot dictate the complainant to step into the witness box. There is no justifiable ground to allow the said application. The Criminal Revision Application No.541 of 2022 challenging the

aforesaid order was rejected by the learned Sessions Judge vide order dated 22nd July, 2022. Although, it was observed that, the impugned order was interlocutory, it was also held that, the trial Court refused to discard the evidence of the witness on the ground that, the evidentiary value of the testimony of the witness is kept open. The learned Sessions Judge also observed that, recalling complainant Ms. Heena Shah to depose in the case at the instance of defence cannot be considered. She cannot be compelled to examine herself at the instance of defence. The question of recalling her under Section 311 of Cr.P.C. at the instance of defence does not arise. The accused in C.C. No.6218/SS/2019 preferred application for recalling Rakesh G. Shah. The application Exhibit-44 was rejected by the learned Magistrate vide order dated 21st April, 2022. While rejecting the said application, the learned Magistrate had observed that, as per the contents of application Mr. Rakesh Shah had made different statement in C.C. No.6218/SS/2019 and 6217/SS/2019. Rakesh Shah has filed his affidavit in both the cases on the same day. It is not the case of defence that, they have not received any copy of affidavit filed by Rakesh Shah in both cases. The statement was made by Rakesh Shah in his deposition that, he was not involved in transaction of his wife and brother-in-law on 11th March, 2020. Thus, the said

statement was well within the knowledge of the accused. There was opportunity to refer that affidavit to Rakesh Shah in his cross-examination. That opportunity was availed by the defence. After the period of two years, the impugned application was filed. In C.C. No.6216/SS/2019 and C.C. No.6217/SS/2019, the defence counsel has referred the contrary statement of Rakesh Shah in cross-examination. The consequences cannot be decided at this stage. The Revision Application challenging the said order was rejected by order dated 22nd July, 2022. Although the learned Sessions Judge had opined that, the impugned order was interlocutory, it was also observed that, the trial Court did not find any justifiable ground to allow the application and rejected the same.

9. I do not find any illegality in the impugned orders. The learned Magistrate has assigned cogent reasons for disallowing the applications preferred by the accused. The trial is pending since long. As far as discarding evidence of the witness, the trial Court has observed that, the issue about probative value is kept open. The application for recalling witnesses was preferred belatedly. The learned Magistrate has rightly rejected the same. The reasons are cogent. I do not find any reason to deviate from the view taken by the trial Court. No case is made out to recall the witnesses or to

discard the evidence of the witness. I do not find any reason to interfere in the impugned order passed by the learned Magistrate as well as by the Sessions Court.

10. Hence I pass the following order:-

ORDER

i. Criminal Writ Petition No.3357 of 2022, Criminal Writ Petition No.3358 of 2022 & Criminal Writ Petition No.3359 of 2022 are rejected and disposed of accordingly.

(PRAKASH D. NAIK, J.)