

Ghuge

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

CRIMINAL WRIT PETITION NO. 3369 OF 2022

Niketan Dilip Paldhe ... Petitioner
V/s.
State of Maharashtra & Anr ... Respondents

Mr. Adithya R. Iyer a/w Mr. Nyayesh Bharucha & Advit
Helekar for the petitioner.

Mr. A.R. Patil APP for the State.

Ms. Apurva Sanghkar i/b Link Legal for the Respondent
No.2.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 29, 2022

P.C.:

1. The petitioner, who is original accused in a proceeding under Section 138 of Negotiable Instruments Act, 1881, is challenging the order passed by the learned Magistrate allowing the application seeking recall of witnesses under Section 311 of Code of Criminal Procedure, 1973. The facts in brief are as under :-

2. The respondent is original complainant who has filed Complaint No.2133 of 2018. During trial the complainant examined himself. During the cross-examination of the complainant, the complainant stated as under :

“22. ... I have documentary evidence to show that there were transactions between the complainant and accused no.02. I can produce on record invoices raised by the complainant against accused nos. 01 and 02.”

3. On the basis of the said statement, the complainant filed an application under Section 311 of the Code of Criminal Procedure, 1973 seeking recall of complainant himself to produce two (2) documents in the form of invoices executed by the complainant in favour of the accused.

4. The petitioner opposed the application stating that earlier application filed by the complainant under Section 311 was allowed the complainant has examined himself. Thereafter, the petitioner's statement under Section 313 of Code of Criminal Procedure, 1973 was recorded. The proceeding was fixed for final argument and at that stage allowing application would amount to fill up lacunae.

5. The learned Magistrate by the impugned order allowed recalling of the complainant for the limited purpose of production of invoices mentioned in paragraph 22 of the cross-examination. The petitioner had, therefore, filed present petition.

6. The learned advocate for the petitioner submitted that the statement made in the cross-examination cannot be the basis to recall the witnesses. Essential ingredients of Section 311 of the Code of Criminal Procedure, 1973 are not fulfilled. Once the complainant was granted an opportunity in exercise of powers under Section 311 of the Code of Criminal Procedure, 1973 and the statement of the accused was recorded as required under section 313 the learned Magistrate could not have allowed the application.

7. *Per contra*, the learned advocate for the accused invited my attention to the relevant extract of the cross-examination quoted above and submitted that the accused having called upon the complainant to produce invoices, the application was filed and, therefore, the learned Magistrate was justified in allowing the application.

8. Having considered the submissions made on behalf of the both the sides, following factual scenario emerges :-

- a) The earlier application filed by the complainant under Section 311 of the Code of Criminal Procedure, 1973 was allowed;
- b) The statement of accused under 313 of the Code of Criminal Procedure, 1973 was recorded;
- c) The complaint was fixed for final arguments.

9. In the light of the factual scenario mentioned above, it needs to be noted that the suggestion in the cross-examination by the accused wherein the complainant shown his willingness to produce on record the invoices does not create any right in favour of the complainant to file an application under Section 311 of the Code of Criminal Procedure, 1973. One opportunity to recall witness to bring on record material crucial for decision in a complaint was already granted to the complainant by passing order dated 15th November 2021 whereby earlier application under Section 311 of the Code of Criminal Procedure, 1973 was allowed by the learned Magistrate. The statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded. The matter was

fixed for final arguments. It is well settled law that the power under Section 311 of the Code of Criminal Procedure, 1973 has been conferred on the learned Magistrate for advancing justice only in a case where the application is bona fide. The delay in trial is also relevant factor. It is well settled that power to recall is not the matter of course. The discretion has to be exercised by the Court judiciously to prevent injustice unless there are tangible reasons to show how fairness of trial suffered without recall. Merely because certain suggestions in the cross-examination are raised on behalf of the accused, does not create right in favour of the complainant to file such application, particularly when the complainant had exercised right under Section 311 of the Code of Criminal Procedure, 1973 on earlier occasion.

10. It needs to be noted that once the production of invoices is allowed, the invoices by itself cannot be read in evidence. Therefore, the complainant would file an application to examine himself to prove the invoices which would result in re-trial of the case. Therefore, in my opinion, the learned Magistrate was not justified in allowing the application.

11. The Judgment of the Apex Court in the case of **Varsha Garg Vs. The State of Madhya Pradesh** reported in 2022 SCC OnLine SC 986 is distinguishable on facts, as in the facts of the said case the documents sought to be proved by the prosecution were crucial for fair trial of the accused. In the facts of the said case the prosecution has not filed earlier an application under Section 311 of the Code of Criminal Procedure, 1973 which was allowed. The said facts distinguish the ratio laid down by the Apex Court.

12. In that view of the matter, the learned Magistrate is not justified in exercising discretion by allowing recall of the complainant for production of two (2) documents in the form of invoices. Hence, following Order :-

The impugned Judgment and Order dated 1st August, 2022 passed by the learned Additional Chief Metropolitan Magistrate's 33rd Court at Ballard Estate, Mumbai allowing application under Section 311 of the Code of Criminal Procedure, 1973 dated 14th July 2022 is quashed and set aside.

13. Rule is made absolute in the above terms. No costs.

(AMIT BORKAR, J.)