

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL WRIT PETITION NO. 6257 OF 2021**

Jubin Shah ...Petitioner  
Versus  
The State Of Maharashtra And Anr. ...Respondents

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Mr. Prasanna A. Bhangale, Advocate for the Petitioner.

Mr. Jahangir M. Khajotia, Advocate for the Respondent No.2.

Mr. Arfan Sait, APP for the Respondent – State.

**CORAM : PRAKASH D. NAIK, J.**  
**DATE : 24<sup>th</sup> AUGUST, 2022.**

**PER COURT:**

1. The petitioner is aggrieved by order dated 22<sup>nd</sup> September, 2021 passed by learned Metropolitan Magistrate, 7<sup>th</sup> Court, Dadar, Mumbai below Exhibit-76 in case No.2496/SS/2013 allowing application preferred by the Respondent No.2/complainant under Section 311 of Cr.P.C. seeking permission to file additional evidence in the case.

2. The petitioner is prosecuted for an offence under Section 138 of the Negotiable Instruments Act. The Respondent No.2 is the complainant. The complaint relates to offence under Section 138 of Negotiable Instruments Act. The complaint was filed on 6<sup>th</sup> July, 2013. The complainant filed his affidavit in lieu of his examination in chief alongwith documents. The complainant filed application to file additional documents and to exhibit the same and read in

evidence. This application was filed on 30<sup>th</sup> September, 2014. In the application it was contended that, complainant has filed his affidavit in lieu of examination in chief alongwith the documents relied upon thereto, before the Court on previous date of hearing. However, it appears that Advocate on record forget to produce certain vital documents on record which were just essential to prove the case beyond reasons doubt, though those documents have been referred in his affidavit in lieu of his examination in chief which has been filed before Court.

3. The complainant was cross-examined. Statement of accused was recorded under Section 313 of Cr.PC. on 21<sup>st</sup> September, 2017. The complainant filed application under Section 311 of Cr.PC. for recalling him. It was contended that during the cross-examination the accused cross-examined him on certain documents like statutory notice etc. However, the documents which were marked as 'Article' were not exhibited and exhibit numbers were not given and the same cannot be read in evidence. He has closed his case and filed pursis before Court. This application was preferred on 9<sup>th</sup> October, 2017. The application was opposed by the accused by filing reply dated 9<sup>th</sup> October, 2017 and it was urged that the complainant is constantly represented by the Advocate who has

filed affidavit and the Advocate for the complainant was present through out the cross-examination. The Court had marked certain documents as 'Article' when the Advocate for the complainant was present. The documents were marked as exhibits and Articles in September-2014. Thereafter, the case was listed on board for more than thirty dates. The complainant had delayed the matter. The same can be seen from Roznama. The statement under Section 313 of Cr.P.C. of the accused is already recorded and no such request was made by the accused prior to the stage of Section 313 of Cr.P.C. Once the accused opened his defense under Section 313 of Cr.P.C. the matter cannot go back to the stage of 311 of Cr.P.C. The case is kept for arguments. For the first time such application is preferred. The learned Magistrate vide order dated 8<sup>th</sup> December, 2017 allowed the said application subject to costs of Rs.3,000/-. While allowing the said application it was observed that record shows that the statement of the accused under Section 313 of Cr.P.C. was recorded on 21<sup>st</sup> September, 2017 and on 9<sup>th</sup> October, 2017 the complainant had filed the said application. Though the accused had disclosed his defence, it is necessary to give fair opportunity to the complainant to lead his evidence and to decide the case on merits. No prejudice would be caused to the accused and he will get opportunity to cross-examine the complainant to the extent of

additional evidence. The matter is prolonged as complainant did not take necessary steps to prove the documents as early as possible. However, delay can be compensated by way of cost. In the interest of justice and to decide the matter on merits, it is necessary to allow the complainant to re-examine himself to prove the documents which are noted as Article.

4. Matter did not proceed further and another application was preferred by Respondent No.2/complainant for recalling the complainant under Section 311 of Cr.PC on 16<sup>th</sup> December, 2019. On perusal of the contents of the said application it is apparent that the complainant has stated that the case is part heard and during the inspection of the case papers for noting down the Exhibit numbers of documents submitted in the case for final arguments, it was revealed that there are three vital documents of the person by name Vipul Shankarlal Shah, the proprietor of Yashraj Corporation, for whom the accused had requested him to part the amount of Rs.10,00,000/- and stood guarantor for such borrowings were not exhibited by the Court and there is other vital documentary evidence of the same person, which is in his possession. The evidence is necessary for just decision of the case. He has filed pursis and closed his evidence, however, in the interest

of Justice, the application be allowed. The said application was preferred on 16<sup>th</sup> December, 2019. The application was opposed by accused/petitioner by filing say on 6<sup>th</sup> January, 2020. It was urged that, the complaint was filed in 2013. The case is more than five years old. Documents were marked in September 2014. Complainant was cross-examined. Two witnesses were examined by complainant. Statement of accused was recorded under Section 313 of Cr.P.C. Case was kept for final arguments. Application is filed to delay the matter and to fill up lacuna. The complainant had preferred application below Exhibit-52 to recall the witness and to re-examine himself under Section 311 of Cr.P.C. on 9<sup>th</sup> October, 2017 on the pretext that, some documents could not be exhibited due to errors of his earlier Advocate. However, the Advocate who was replaced by earlier Advocate was present Advocate. The Advocate was present throughout cross-examination and Court has marked certain documents as Articles. There is no explanation for delay. It is pertinent to note that vide order dated 6<sup>th</sup> February, 2021, the application was not pressed.

5. Another application was preferred which was titled as “application for permission to file additional evidence in the case by the complainant to prove the case beyond reasonable doubt.” This

application was dated 6<sup>th</sup> February, 2021. In this application it was stated that, it is a part heard case. During the inspection of the case paper for noting down the exhibit numbers of the documents submitted in the case for final arguments, it was revealed that there are three vital documents of the person by name Vipul Shankarlal Shah, proprietor of Yashraj Corporation for whom. The accused has requested the complainant to part amount of Rs.10,00,000/- and stood guarantor for such borrowings, were not exhibited by Court. The averments in this application are identical to application dated 16<sup>th</sup> December, 2019, which was not pressed. The title of application was moulded differently to give it a look of distinct application. This application was opposed by the accused by filing reply on 9<sup>th</sup> March, 2021. The learned Magistrate by order dated 29<sup>th</sup> September, 2021 allowed the application. From the tenor of the said order it is apparent that the Court has considered the fact that the application was moved at the fag end of the proceeding and on going through Section 311 of Cr.PC. There is no cap on the time / stage to move the application by the applicant by resorting to Section 311 of Cr.PC. The order also indicate that the complainant had a knowledge of the documents but in the interest of justice imposing cost of Rs.1,000/-. The said application was allowed by permitting Respondent No.2 to examine himself to

prove documents. The re-examination and cross-examination shall be subject to documents only.

6. The petitioner has taken exception to the order dated 22<sup>nd</sup> September, 2021. It is submitted that although the powers under Section 311 of Cr.P.C. can be exercised at any stage before the Judgment is delivered by the trial Court, such powers cannot be exercised to fill up lacuna. The complainant had knowledge and was in possession of the documents. The complainant has been delaying the proceedings. Three applications were preferred for recall of complainant and for exhibiting documents. If the complainant was interested in prayers sought in the third application dated 6<sup>th</sup> February, 2021, nothing had prevented him from perusing the said prayers when he preferred the previous application. The prayers in the second and third applications are similar. The reason for withdrawal of the application is not mentioned. The statement of the accused was recorded under Section 313 of Cr.P.C. All the applications under Section 311 of Cr.P.C. were preferred after the evidence was adduced and the statement of the accused under Section 313 of Cr.P.C. Hence, impugned order deserves to be set aside. Learned Advocate relied upon decision of this Court in Nayan Rajan Guhagarkar V/s. State

of Maharashtra, 2021 ALL MR(Cri.) 2716.

7. Learned Advocate for Respondent No.2 submitted that the complainant is not trying to bring new material on record. The documents are already on record. For some reason the second application was not pressed. The learned Magistrate has considered the necessity of allowing application dated 6<sup>th</sup> February, 2021 and permitted complainant to examine himself to prove documents. The accused would have an opportunity of cross-examining the complainant. No prejudice would be caused to the accused. The prayer sought in the application were not to fill up the lacuna. The learned Magistrate has assigned reasons for allowing the application. It was allowed for just decision of the case. Powers under Section 311 of Cr.P.C. can be exercised at any stage of proceedings before its conclusion. Reliance is placed on the following decisions are as follow:

- i. Mannan Sk & Ors. V/s. State of West Bengal & Anr., 2014 ALL MR (Cri.) 4463 (S.C.).
- ii. Shri Ketan Krishnakant Amin V/s. M/s. Tirumalai Chemicals Limited, 2019 ALL MR (Cri) 2987.
- iii. Anil s/o. Govindrao Chaudhari V/s. M/s Taori Marketing, 2016 ALL MR (Cri) 1090.

iv. Shri Kishor s/o. Anandrao Aaidhane V/s. The State of Maharashtra, 2018 ALL MR (Cri) 3470.

v. M/s. Yogiraj Cattle Feeds Vs. Govind Baba Sahakari Dudh Utpadak Sanstha Maryadit, 2018 ALL MR (Cri) 559.

vi. Ramdas s/o. Shrihari Munjekar V/s. State of Maharashtra, 2017 ALL MR (Cri) 647.

8. The complaint is pending since 2013. The record indicate that complainant has been delaying the proceedings. Initially application was preferred to file additional documents on 30<sup>th</sup> September, 2014. Affidavit in evidence of complainant was submitted. He was cross-examined. After completing the evidence, complainant filed pursis of closing evidence. Statement of accused was recorded under Section 313 of Cr.P.C. Case was due for arguments. Thereafter, application was preferred for recalling complainant on 9<sup>th</sup> October, 2017. The tenor of this application indicate that complainant intended to exhibit documents which were marked as Article. This application was allowed on 8<sup>th</sup> December, 2017. Two years thereafter, application was preferred for recalling complainant on 16<sup>th</sup> December, 2019. It was prayed that complainant is in possession of documents and some documents are on record. Complainant be permitted to prove

documents. These grounds were absent in application dated 9<sup>th</sup> October, 2017. For reasons known to complainant, this application was not pressed. The impugned application dated 6<sup>th</sup> February, 2021 was preferred two years after application dated 16<sup>th</sup> December, 2019. The contents of last two application is identical except title of application. The complainant intended to seek permission to file additional evidence to prove case beyond reasonable doubt. Thus after the complainant adduced evidence, he was cross-examined, he filed pursis closing evidence and the case was due for arguments, after recording statement of accused under Section 313 of Cr.PC. and the the accused disclosed his defence, the complainant sought permission to file additional evidence to prove case beyond doubt. The subject was newly introduced in application dated 16<sup>th</sup> December, 2019 and 6<sup>th</sup> February, 2021. The learned Magistrate permitted complainant to examine himself to prove documents. It ws in the nature of allowing complainant to bring on record additional evidence. The Respondent No.2 while preferring application Exhibit-76 dated 6<sup>th</sup> February, 2021 did not make reference to Section 311 of Cr.PC. and the prayer was to permit him to adduce further evidence. Thus the further evidence or additional evidence was to be brought on record. This is certainly belated attempt to fill up lacuna.

9. In the case of Mannan Sk & Ors. V/s. State of West Bengal & Anr. (Supra) it was observed that Section 311 of Cr.PC. empowers the Court to discover truth . At any stage Court can summon any witness. Since the power is wide its exercise has to be done with circumspection. The concerned witness in the case was police officer who was already examined on the aspect that he recorded statement of deceased on the spot of offence. However, inadvertently, statement was not brought on record. The said statement was essential to the just decision of case. In the case of Ketan Krishnakant Amin V/s. M/s. Tirumalai Chemicals Limited (Supra) this Court had observed that, complainant can be allowed to produce document although the case is kept for arguments. In the case of Anil s/o. Govindrao Chaudhari V/s. M/s Taori Marketing (Supra), this Court held that the attempt to adduce evidence would not amount to filling up lacuna. In the case of Kishor s/o. Anandrao Aaidhane V/s. The State of Maharashtra it was observed that witness can be recalled for cross-examination to ensure right of accused to fair trial. In the case of M/s. Yogiraj Cattle Feeds Vs. Govind Baba Sahakari Dudh Utpadak Sanstha Maryadit (Supra) it was held that, accused is required to have complete opportunity of hearing in criminal trial which results in case of conviction terminating into freedom of individual. In the

case of Nayna Rajan Guhagarkar V/s. State of Maharashtra (Supra) it was held that, Court may at any stage summon any person as witness or recall or re-examine any person already examined, if it is essential to the just decision of the case, however, the power under Section 311 of Cr.P.C. cannot be used to fill in lacuna in prosecution evidence.

10. The principles enunciated in the aforesaid decisions are clear. Application under Section 311 of Cr.P.C. could be made at any stage for just decision of case and not to fill up lacuna. Applying the ratio to case in hand, I am of the opinion, that no case was made out to exercise powers under Section 311 of Cr.P.C. vide application preferred by Respondent No.2. The reasons are implicit in the observations made in the paragraphs hereinabove. Thus the impugned order deserves to be set aside.

11. Hence, the following order;

### **ORDER**

- i. Criminal Writ Petition 6257 of 2021 is allowed.
- ii. Impugned order dated 22<sup>nd</sup> September, 2021 passed by learned Magistrate, 7<sup>th</sup> Court, Dadar, Mumbai in Case No.2496/SS/2013 allowing application below Exhibit-76 is set aside.

iii. At this stage learned counsel for the Respondent No.2 submit that it may be observed that the observations made in this order shall not affect the case of the complainant. It is clarified that the observation made in this order are for adjudicating the issues involved in this petition and the trial Court shall decide the trial in accordance with law.

**(PRAKASH D. NAIK, J.)**