

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.166 OF 2024

Kapilaben Dineshkumar Patni	Applicant
versus	
The State of Maharashtra	Respondent

Mr.Jatin P. Karia (Shah) with Mr.Dhaval K. Sangoi and Snehankita M. Munj, Advocates for Applicant.
Ms.Rashi P. Sheth, Advocate for Respondent no.2.
Mr.Arfan Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 7th February 2024

PC :

1. Applicant is tried for offence u/s.138 of Negotiable Instruments Act ('N.I.Act'). The limited prayer sought in this application is to recall the complainant for the purpose of further cross examination by Applicant.

2. Pursuant to the affidavit of evidence of complainant the cross-examination of complainant was conducted at the instance of accused on 1st April 2023. Subsequently the cross was continued and concluded on 8th September 2023. Petitioner preferred application for recall of complainant u/s.311 of Code of Criminal Procedure on 1st November 2023. Application was opposed by complainant by filing reply dated 2nd November 2023. Vide order dated 26th November 2023 learned Magistrate rejected the application for recalling the witness on the ground that no reason is assigned as to on what ground and for what reason further cross examination is required to be conducted.

3. Learned advocate Mr.Shah appearing for Applicant submitted that complainant needs to be further cross-examined for elucidating the truth. The accused intends to bring on record the fact that there were transactions with the father of complainant at the instance of father. The said factors were missed out while cross-examining the complainant. Applicant undertakes that in the event complainant is recalled, his further cross-examination will be conducted immediately without causing any further delay in trial.

4. Learned advocate for Respondent-complainant vehemently opposed the relief sought in this petition. It is submitted that complaint is pending since long. Sufficient opportunity was given to the Applicant to conduct cross-examination. The cross-examination was indeed conducted by accused. The case was adjourned on several occasions for the purpose of cross-examination. After closure of cross-examination application was preferred by Applicant without assigning cogent reasons as to for what reasons complainant was required to be recalled. Learned Magistrate has rejected the application by assigning reasons. Change of advocate is no ground to recall the witness. Having exhausted the opportunity of cross-examination, conducted at length, the complainant need not be recalled for conducting further cross-examination. No ground is made out by Applicant for recalling the witness u/s.311 of Cr.P.C. Reliance is placed on the decision of Hon'ble Supreme Court in the case of State of Haryana Vs. Ram Mehar and others (2016)8-SCC-762 and in the case of State (NCT of Delhi) Vs. Shiv Kumar Yadav and another (2016)2-SCC-402. Both the decisions relate to the fact that merely on the ground of change of advocate the witness cannot be recalled for cross-examination and the recall of witness is not a matter of course. A case is required to be made out to recall the

witness in accordance with Section 311 of Cr.PC.

5. It is well settled law that powers u/s.311 can be exercised before closure of case. But it should be in the interest of justice. The parties cannot be allowed to fill up lacuna. However, in the event the case is made out to recall the witness, the Court is not precluded from allowing such witness to be recalled.

6. Applicant is tried for the offence u/s.138 of N.I.Act. Record indicates that cross-examination was conducted and it was closed. Case was subsequently for recording statement u/s.313 of Cr.PC. However, application for recall of witness was made after cross examination of complainant was over. Apparently case is pending since long. It also appears that cross was conducted. However, as far as case u/s.138 is concerned, the accused is required to rebut the presumption u/s.139 of N.I.Act and unless the act of the accused is not bona fide, an opportunity could be given to the accused to rebut the presumption. Powers u/s.311 of Cr.PC can be exercised in the interest of justice.

7. Considering the aforesaid circumstances, Applicant can be permitted to cross-examine the complainant, however, subject to condition that Applicant shall not delay the cross-examination and proceed with the cross-examination on the next date of hearing.

ORDER

- (i) Criminal Application is allowed and disposed off;
- (ii) Application for recall Exhibit-31 preferred by Applicant is allowed and Respondent-complainant (CW-1) is recalled;
- (iii) Applicant shall proceed with cross-examination of complainant on the next date of hearing when complainant is present in the Court or immediately thereafter when Trial Court deems fit, and conclude

the same on the same day subject to convenience of Trial Court;

(iv) Next date before the Trial Court is tomorrow i.e. 8th February 2024. If the complainant remains present before Trial Court, learned advocate for Applicant shall proceed to cross-examine witness.

(PRAKASH D. NAIK, J.)

MST