

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

CRIMINAL APPLICATION NO. 1501 OF 2018

Bhavesh S/o Ramesh Thakkar ... Applicant
Versus
The State of Maharashtra & Anr. ... Respondents

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Mr. Amit G. Dubey i/by Mr. Ashok M. Saraogi, Advocate for the Applicant.

Mr. Sachindra B. Shetye, Advocate for Respondent No.2.

Mr. Arfan Sait, APP for the Respondent No.1 – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 30th JANUARY, 2024.

P.C.:

1. The applicant is the original complainant. The complaint was filed for an offence under Section 138 of the Negotiable Instruments Act (for short “NI Act). The trial Court took cognizance of the complaint and process was issued. The trial had commenced. The complainant adduced the evidence. The statement of the accused was recorded under Section 313 of Cr.P.C. The Respondent No.2 preferred an application under Section 311 of Cr.P.C. on 24.01.2018 recalling the complainant for cross examination. It was contended that the cross examination of the complainant was completed on 27.09.2017 and thereafter the

statement of the accused was recorded under Section 313 of Cr.P.C. The accused was suffering from health issues. He could not recollect the transactions between the complainant and the accused. There was no transaction with regards to the property as alleged by the complainant. Accused intends to bring on record some material evidence by further cross examination of the complainant which is important for just decision of the case in order to rebut the presumption. The accused has good defence and he wants to prove his innocence by cross examining the complainant. The learned Magistrate vide order dated 03.03.2018 rejected the application. The respondent No.2 challenged the said order before the Sessions Court by preferring Criminal Revision Application No.392 of the 2018 which was allowed vide order dated 19.09.2018.

2. Learned Advocate for the applicant submitted that the application under Section 311 of Cr.P.C. was preferred by the Respondent belatedly. The evidence was adduced. Statement of the accused was recorded under Section 313 of Cr.P.C. Thereafter, the application for recalling the witness for the purpose of cross examination was preferred by respondent No.2. The learned Magistrate had rejected the application. The Sessions Court has

erroneously allowed the application. The reasons assigned for preferring such application belatedly were not unsupported by any evidence. It was vaguely stated that the accused was suffering from health issues and could not recollect the transaction at the time of cross examination. The explanation was devoid of merits. The learned Sessions Judge has committed an error in allowing the application. The accused is trying to fill up lacuna by preferring the application at belated stage.

3. Learned counsel for the respondent No.2 submitted that the learned Sessions Judge has rightly allowed the application. The trial was not over. Statement of the accused was recorded under Section 313 of Cr.P.C. However, before the trial could be concluded, the accused can prefer an application under Section 311 of Cr.P.C. For the just decision of the case the Sessions Court has allowed the application. The Court has assigned reasons for allowing the application. The Sessions Court has used the discretion in allowing the application which does not call for any interference. The accused is required to rebut the presumption under Section 139 of the NI Act and opportunity ought to be given to him for effectively cross examine the complainant which was granted by the Sessions Court while allowing revision application.

4. It is true that the trial had already proceeded. The statement of the accused was recorded under Section 313 of Cr.P.C. The Respondent No.2/accused preferred an application for recalling complainant. It is settled law that an application under Section 311 of Cr.P.C. can be preferred before the conclusion of trial for the just decision of the case. The learned Sessions Judge while allowing the revision application has observed that no prejudice would be caused to the complainant if some transactions are to be brought on record by the accused. The learned Magistrate in the impugned order had observed that the transaction of Igatpuri has no concerned in this case and thereby rejected the application for the just decision of the case. The accused is facing the prosecution under Section 138 of the NI Act. He is required to rebut the presumption under Section 139 of the NI Act. No case for interference in the impugned order is made out.

ORDER

- i. Criminal Application No.1501 of 2018 is rejected;
- ii. The trial is expedited.
- iii. The Respondent No.2 shall proceed with the cross examination of the complainant without causing further delay in the trial.

- iv.** The accused shall not seek unnecessary adjournments in trial.
- v.** Both the parties are directed to appear before the trial Court on 20.02.2024 at 10.30 a.m. and produce this order before the trial Court.
- vi.** Application is disposed off.

(PRAKASH D. NAIK, J.)