

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.186 OF 2024

Vikas Vyankat Nipane

Age:45 Years, Occu:- Service and Agriculturist,

Residing at 28/237, Pradhikaran

Pune-411044

: Applicant

Vs.

1. Rajesh Balkrishna Suryawanshi

Age:-35 Years, Occupation:- Service,

Residing at 693, Shaniwar Peth

Devi Chowk, Satara, 415002

2. The State of Maharashtra

through Public Prosecutor

: Respondents

WITH
CRIMINAL APPLICATION NO.188 OF 2024

Vikas Vyankat Nipane

Age:45 Years, Occu:- Service and Agriculturist,

Residing at 28/237, Pradhikaran

Pune-411044

: Applicant

Vs.

1. Asha Rajesh Suryawanshi

Age:-32 Years, Occupation:- Housewife,

Residing at 693, Shaniwar Peth

Devi Chowk, Satara, 415002

2. The State of Maharashtra

through Public Prosecutor

: Respondents

Mr. A. M. Kulkarni a/w Mr. Sarthak S. Diwan for the Applicant.

Mr. Manoj M. Gadkari (through V.C.) a/w Mr. Naresh Parihar for the Respondent No.1.

Ms. P. P. Bhosale, APP for the Respondent No.2-State.

CORAM : SHYAM C. CHANDAK, J.

RESERVED ON : 3rd SEPTEMBER, 2024

PRONOUNCED ON: 10th OCTOBER, 2024

JUDGMENT :

. Present Applications are filed under Section 482 of the Code of Criminal Procedure. The Application No.186/2024 seeking for quashing and setting aside of two separate impugned Orders passed by the same Court of learned Joint Judicial Magistrate First Class, Pimpri, Pune on dated 15th December, 2023 below Application under Section 311 of Cr.P.C at Exh.30, in SCC No.4538 of 2021 and below Application under Section 311 of Cr.P.C at Exh.34, in SCC No.1000 of 2020, thereby said Applications have been rejected.

2) Heard learned Counsel Mr.Kulkarni for Applicant, learned Counsel Mr.Gadkari for Respondent No.1 and Learned APP Ms.Bhosale for Respondent No.2-State, in both Applications. perused the record.

3) Rule. Rule is made returnable forthwith and taken up for final hearing with consent of the parties.

4) Facts in brief are that, the Applicant has filed the aforesaid cases against Respondents Rajesh Suryawanshi and Asha Suryawanshi (*'Rajesh'* and *'Asha'*, for short) respectively alleging offence punishable under Section 138 of the Negotiable Instrument Act, 1881 (*'the Act'*, for short). The Applicant's case is that, by an Agreement dated 24th June 2017, the couple Rajesh and Asha, who are husband and wife, agreed to sale certain lands to the Applicant, for a consideration of Rs.15,00,000/-. Thereafter, from time to time, the Applicant paid the couple Rs.12,00,000/- as part consideration. That, on account of a decision in certain civil suit, the couple expressed their inability to execute the Sale Deed as per the Agreement and it led to cancel the agreement at their instance. Then, Respondent Rajesh paid Rs.1,00,000/- as part refund of the consideration of Rs.12,00,000/-. Then, the twosome gave separate cheques for a sum of Rs.4,50,000/- and Rs.3,00,000/- respectively, towards the balance consideration amount. The said cheques, however, returned dishonored. It was followed by the statutory notices but in vain and it ultimately led to filing the S.C.C. No.4358/2021 against Respondent Rajesh and SCC No.1000/2020 against Respondent Asha.

4.1) That on 10th August, 2023 the Applicant filed the Application Exh.30 in S.C.C. No.4358/2021 and Application Exh.34

in SCC No.1000/2020, both seeking for Applicant's re-examination as well as additional witnesses in the said cases. The Applicant also produced certain bank statement etc. to support the said Applications.

4.2) The Applications were based on the grounds that in the cross-examination of the Applicant, questions were asked as to the proof of payment of the consideration to the Respondents. However, both the Respondents denied the receipt of consideration as stated in the Agreement. In S.C.C. No.1000/2020, in the cross-examination the Applicant has admitted that, he has not produced any documentary evidence showing that the cheques of the consideration amount referred in the Agreement, were encashed; that, he has denied that said cheques were not credited in the bank account of Asha; and that, he will produce the evidence of the cheque encashed from it. However, in S.C.C. No.4538/2021, in the cross-examination the Applicant has denied that, he has not produced any documentary evidence showing that the cheques of the consideration amount referred in the Agreement to Sale, were encashed.

4.3) It is stated that, after executing the Agreement the Respondents have not issued any notice as to non-payment of the consideration, till the cross-examination of the Applicant. It is stated that the Respondent Rajesh has denied the receipt of Rs.50,000/- as

part consideration amount. Therefore, the Applicant wanted to re-examine himself and the bank officers to prove the bank statements filed along with Applications Exh.30 and Exh.34. It is stated that, it is essential to bring on record the said additional oral and documentary evidence, for a just decision in the cases. It cannot be said that the Applications were filed with an intent to fill lacunae of the Applicant's cases. That, Respondents Rajesh and Asha would get an opportunity to cross-examine and challenge the testimonies of additional witnesses and the documents proved by them. If the Applications at Exhs. 30 and 34 are not allowed, it would cause great loss to the Applicant but allowing the same will not cause any prejudice to the Respondents.

4.4) The Respondents Rajesh and Asha filed their reply at Exhs.33 and 37 and opposed the Applications at Exhs.30 and 34, respectively. In the reply, they have contended that the Applications at Exhs.30 and 34 have been filed with much delay after completion of the evidence of the Applicant. There is no explanation for non-examination of the relevant witnesses and non production of the documentary evidence on the earlier occasion. The cases were fixed for Judgment when the said Applications were filed. By virtue of said Applications, the Applicant intends to fill up lacunae and to cover up the inherent weaknesses in his cases, which is against the settled

principle of law under Section 311 of Cr.P.C. Therefore, the Applications at Exhs.30 and 34 are nothing but an attempt to abuse process of law. It is stated that in a prosecution under Section 138 of the Act, the evidence collected by way of questions and suggestions put to the prosecution witness in the time of cross-examination, may be used to rebut the presumptions. Hence, it is not necessary for the accused to examine him/her or any independent witness. Lastly, it is contended that the additional witnesses which the Applicant proposed to examine, have not been listed in the list of witnesses. Therefore, there is no scope to invoke the powers under Section 311 of the Cr.P.C. Hence, said Applications may be rejected.

5) The submissions advanced by the learned counsel for the Applicant and Respondents are similar to what is stated in the Applications and the reply. Therefore the said submissions are not reproduced here, for the purpose of brevity.

5.1) In support of his submissions, learned Counsel for the Respondents has relied on following reported decisions.

- (i) ***Swapan Kumar Chatterjee Vs. CBI***, in this case, with respect to the power under section 311 of the Code, the Hon'ble Supreme Court observed that, "Where the prosecution evidence has been closed long back and the

1 (2019) 14 SCC 328

reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed.

(ii) ***Nayan Rajan Guhagarkar Vs. State of Maharashtra***², in this case this Court held that, under Section 311 Cr.P.C. any Court may, at any stage of any inquiry, trial or other proceeding summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined, if it is essential to the just decision of the case, however, at the same time, the said power under Section 311 cannot be used to fill in the lacunae in the prosecution evidence.

(iii) ***Niketan Dilip Paldhe Vs. State of Maharashtra & Anr***³, In this case this Court held that, “It is well settled law that the power under Section 311 of the Code of Criminal Procedure, 1973 has been conferred on Court 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

² 2022 (1) Bom (Cri) 105

³ Criminal Writ Petition No.3369 of 2022,

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...”

6) In view of the rival submissions and considering the ratio in the cited decisions, I have carefully examine the facts of the cases in hand. There is no dispute that the parties had entered into the aforesaid Agreement to Sale for the consideration of Rs.15,00,000/-. As stated in the Agreement, the said Rs.15,00,000/- were to be paid in cash and by cheques, as under :-

Sr. No.	Mode of payment	Date	Amount	Recipient of the Amount
1	Cash	24/06/2017	Rs.50,000/-	Shree Rajesh
2	Cheque-016601	22/06/2017	Rs.1,00,000/-	Sou. Asha
3	Cheque-016602	24/06/2017	Rs.2,00,000/-	Shree Rajesh
4	Cheque-016603	07/07/2017	Rs.2,00,000/-	Sou. Asha
5	Cheque-016604	21/08/2017	Rs.2,50,000/-	Sou. Asha
6	Cheque-016605	06/12/2017	Rs.7,00,000/-	Sou. Asha
Total Rs.15,00,000/-				

7) The complaints claims that the actual payment as under :-

Sr. No.	Mode of payment	Date	Amount	Recipient of the Amount
1	Cash	24/06/2017	Rs.50,000/-	Mr. Rajesh Suryawanshi
2	Cheque No.016601	22/06/2017	Rs.1,00,000/-	Mrs.Asha Suryawanshi
3	Cheque No.016602	24/06/2017	Rs.2,00,000/-	Mr. Rajesh Suryawanshi
4	Cheque No.016603	07/07/2017	Rs.2,00,000/-	Mrs. Asha Suryawanshi
5	Cheque No.016604	21/08/2017	Rs.2,50,000/-	Mrs. Asha Suryawanshi
6	Cheque No.016611	12/02/2018	Rs.2,00,000/-	Mrs. Asha Suryawanshi
7	Cheque No.016615	12/02/2018	Rs.2,00,000/-	Mr. Rajesh Suryawanshi
Total Rs.12,00,000/-				

8) However, the Agreement to Sale does not mention that on the same date of Agreement, the Applicant had paid Rs.50,000/- in cash to Respondent-Rajesh and the latter acknowledged the receipt of the cash. In fact, the Agreement states that, the said amount was only agreed to be paid, but without specifying any date for such a payment. Even though the Applicant has admitted that he would summon the witness to prove the said cash payment, he did

not summon that witness. In S.C.C. No.1000/2020, in the cross-examination, Applicant has admitted that he has not produced any documentary evidence showing that the cheques of the consideration amount referred in the Agreement to Sale, were encashed. Further, Applicant has admitted that he has no document showing that he had issued the subject cheques towards the aforesaid transactions. Even in this Application, the Applicant has not produced any material to show that the aforesaid cheque Nos. 16611 and 16615, in Table No.2 were encashed in the bank account of the Respondents. The Respondents had already opened their defence when the Applications Exhs.30 and 34 were filed and the cases were posted for Judgments. In this background and having regard to the reported decisions referred above, I am of the considered view that it would not be proper to allow the Applicant to recall himself for re-examination, produce additional witnesses and documentary evidence.

9) Conspectus of the aforesaid discussion is that, the impugned Order is not erroneous, thus, there is no substance in the instant Applications. As a result, both the Applications are liable to be dismissed and are accordingly, dismissed.

(SHYAM C. CHANDAK, J.)