



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO. 853 OF 2024

PETITIONER : Mr. Girish Dinesh Gokhale,
(Ori. Complainant) Aged about 43 years,
Occupation – Business, R/a. Near
Pundlik Baba Ashram, Raut Wadi,
Umri. Presently Akola Tq. & Dist.
Akola.

VERSUS

RESPONDENT : Mr. Prakash Premchand Yelwankar,
(Ori. Accused) Prop. Shri Sant Gajanan Baba
Travels, Aged about 47 years,
Occ. Business; R/o A/2 Ramdev
Baba Plot, Sudhir Colony, Akola,
Tq. & Dist. Akola.

Mr. P.K. Mohta, counsel for petitioner.
None for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 07/01/2025

ORAL JUDGMENT :

1. Despite the notice served on the respondent, respondent failed to appear before this Court and therefore,

matter is proceeded in his absence.

2. **Rule.**

3. Heard finally with the consent of learned counsel for the petitioner Mr. P.K. Mohta.

4. This criminal writ petition is filed under Article 227 of the Constitution of India along with Section 528 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) of 2023 and challenged the order dated 18/7/2024 and 22/8/2024 passed below Exhibit Nos. 34 and 37 by the learned Additional Chief Judicial Magistrate, (Court No. 4), Akola, in Summary Criminal Case No. 3892/2022, by which the learned trial Court has allowed the application for cross-examination of the complainant by recalling the complainant and also permitted to deposit the amount of cost to the respondent.

5. The facts giving rise to the petition are as under;

The petitioner in the present petition is the original complainant who has filed the complaint under Section 138 of the Negotiable Instruments Act, 1881, against the respondent. As per the allegation, the respondent, towards the discharge of debt and payment of existing liability, issued a cheque of Rs. 2,00,000/-

dated 18/03/2022 bearing No. 092484 of Union Bank of India, Station Road Branch, Akola, in favour of the petitioner. The said cheque was deposited by the petitioner in his bank account on 19/05/2022, however, the same were dishonoured for the reason “Inactive Account” on 20/05/2022. Thereafter, the petitioner had issued a legal notice dated 27/05/2022 to the respondent, which was received by him on 30/05/2022. After receipt of the notice, the respondent failed to pay the amount, and therefore the petitioner was constrained to file the complaint against the present respondent on 01/07/2022.

6. Learned Magistrate took cognizance of the complaint and issued the summons to the present respondent. In response to the summons, the respondent appeared and pleaded not guilty. The complainant has adduced his evidence on 06/04/2023, and after adducing the evidence, closed his evidence on 08/02/2022. The statement of the accused under Section 313 of Code of Criminal Procedure was recorded on 02/04/2024 thereafter, sufficient opportunities were granted to the present respondent to adduce the evidence, but he has not adduced the evidence, and therefore his evidence was closed on 22/04/2024. Subsequent to

that, he has filed an application under Section 311 of Cr.PC. for recalling the complainant. The same was rejected by the court, and subsequent to that, the matter was posted for the argument.

7. Learned counsel for the complainant has made his submissions, and thereafter again, the application was filed by the present respondent under Section 311 of Cr.PC., contending that he has to rebut the presumption and therefore, he has to cross-examine the witness, and therefore, the complainant requires to be recalled. The said application was allowed by the Court subject to the cost of Rs. 3000/-.

8. The application for seeking permission to deposit the costs was rejected, and subsequently another application was filed to deposit the cost, which was allowed.

9. Being aggrieved with the same, the petitioner approached this Court with contention that the tactics of the respondent, which he has played, are only to prolong the matter.

10. Learned trial Court ought to have considered that after sufficient opportunity, the evidence is not adduced by the respondent, and thereafter a considerable period, the application was filed. In fact, after rejecting the first application, there was no

reason for the trial Court to allow the said application. Even the complainant has not filed any grievance after allowing the application, but the conduct of the respondent is to be taken into consideration that he has not deposited the cost immediately after the application was allowed. Considering all these aspects, the order passed by the trial court allowing the respondent to deposit the cost. Admittedly, causing the prejudice to the interest of the complainant, as the complaint of the complainant is pending since 2022, and it is not disposed of merely because the accused has played the tactics to prolong the matter.

11. In support of his contention, he placed reliance on the case of ***Madanmohan Chandak Kundanlal vs State Of Maharashtra And Anr [2008 Cri.L.J. 968]*** and submitted that, where the facts are identical, this court has considered that the tactics are played only to prolong the matter, and the power under Section 311 of Cr.P.C. cannot be exercised to fill up the lacuna. In view of that, the order passed by the learned trial Court deserves to be quashed and set aside.

12. It appears from the order of the Lower Court that initially, vide exhibit No. 31, the application was filed on

25/04/2024 for recalling the witness under Section 311 of Cr.P.C. The reply filed by the complainant strongly opposed the said application. Considering that evidence of the complainant was closed on 8.2.2024 and the statement of the respondent was recorded on 2.4.2024, and thereafter, after a considerable period, the application was filed on 25/04/2024 by the accused for recalling of the witness. The application was rejected. The Roznama on record shows that thereafter, the matter was fixed for adducing the evidence of the accused, but the accused has neither adduced the evidence nor made his final submission, and therefore, the evidence of the accused was closed on 22/04/2024. The accused, thereafter, also not having made his final submissions, again filed this application vide Exhibit No.34 on 05/07/2024 for seeking permission to cross-examine the complainant. The said application was allowed by the court subject to the cost of Rs. 3000/- on 18/07/2024. Despite the order passed by the trial Court allowing the application subject to the cost, the said cost was not paid by the accused, and adjournments were sought, and finally, the application was filed for seeking permission to deposit the cost, which was earlier rejected, and subsequently, again the said application was allowed, and he was

permitted to deposit the cost by imposing the additional costs of Rs. 200/-.

13. The submission of the learned counsel for the complainant is taken into consideration in the light of the above facts and circumstances. Though the accused has filed an application under Section 311 of the Code of Criminal Procedure (Section 348 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) of 2023). Section 348 (311 of Cr.P.C.) states about the power to summon a material witness or examined person present, which states that any court may, at any stage of any inquiry, trial, or other proceeding under this court, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Admittedly, the power to summon a material witness or examined person present is discretionary power of that court, but the discretion is to exercise judicially and not arbitrarily.

14. Here in the present case, after sufficient opportunity,

the accused has not taken any steps, either to adduce his evidence or to recall the witness, and after a lapse of sufficient time, he has applied for the recalling of the witnesses. Moreover, the witness cannot be recalled to fill up the lacuna.

15. The learned counsel rightly placed reliance on the decision of this court in the case of ***Madanmohan Chandak Kundanlal*** referred to (supra), wherein, in similar facts and circumstances, it is observed by this Court that the main ground upon which further cross-examination of the complainant and examination of other witnesses is sought is due to a change in the lawyer and want of instructions to the earlier lawyer. Both cannot be the grounds for the grant of applications. If the accused chooses not to give instructions to his lawyer, that cannot be helped. In the instant case, the accused had filed similar applications, which were rejected, and the accused did not care to challenge the rejection of these applications and allowed those orders to assume finality.

16. Similarly in the present case, earlier order has already attended to the finality, and thereafter, the adjournments were sought and subsequent applications are filed. It appears that the

learned magistrate has taken into consideration the entire previous conduct of the accused, but despite observing the conduct of the accused, allowed the applications. Since the earlier applications were rejected by the learned magistrate, the same relief cannot be granted in the new applications. If the Courts go on entertaining identical applications twice or repeatedly thereafter, there will be no end to the litigation. In view of this, the order passed by the magistrate deserves to be quashed and set aside. As a result, this writ petition deserves to be allowed. Accordingly, I proceed to pass the following order:

- a] The writ petition **allowed**.
- b] The order passed by the learned Magistrate below Exhibit Nos. 34 and 37 are hereby quashed and set aside.

17. Rule is made absolute in the above terms. No order as to costs.

[URMILA JOSHI-PHALKE, J.]