

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1789 OF 2026

Meenanath Vasant Bodake ...Applicant

Vs.

1. Union of India ...Respondents
2. The State of Maharashtra

Mr. Anil G. Lalla a/w. Rushil Alag, Yash Pulekar and Dewang Rawal, for the Applicant.

Mr. Rushikesh Munde, SPP a/w. Shatabdi Netke and Pranit Kole, for Respondent No.1-D.R.I.

Mr. S.S. Ghag, APP a/w. Mr. Shahaji Shinde, 'B' Panel Counsel, for the Respondent No.2-State.

CORAM: MADHAV J. JAMDAR, J.
DATE : 30th SEPTEMBER, 2026

P. C.:

1. Heard Mr. Lalla, learned counsel appearing for the Applicant, Mr. Munde, learned Special Public Prosecutor appearing for Respondent No.1 and Mr. Ghag, learned APP appearing for the State.

2. By this application filed under Section 528 of Bharatiya Nyaya Suraksha Sanhita, 2023, the Applicant is challenging legality and validity of order dated 9th September 2026 passed by the learned Additional Sessions

Judge, Panvel, Dist. Raigad below Exhibit 281 in NDPS Special Case No. 14 of 2021. By the said application filed under Section 311 of the Code of Criminal Procedure, 1973 (“**Cr.PC.**”), the following prayer is made in paragraph No. 11 (page no. 135), which reads as under :

“11. That, in the present case prosecution has not closed his evidence since under section 311 of CRPC corresponding to 348 of BNSS Act, 2023 prosecution by making an application can seek permission to re-examine the mobile to extract the data through arranging the forensic of the said mobile along with the certificate of 65B of the evidence act, 1872. The court is vested with a broad and wholesome power, in terms of section 311 of the CRPC, to summons and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar.”

3. The said application has been allowed by the impugned order dated 9th September 2026. The Operative part of the said order (page no. 146) reads as under :

“ORDER

1. Application (Exh.281) is allowed.
2. The System Administrator, Computer Branch of District Court, Panvel, to copy contents of Vivo 1901 mobile phone MO No.24 in pen-drive provided by the DRI in the presence of both sides Advocates.
3. The activity of copying the data be carried out during court hours. Once the said activity is done, the said mobile phone be handed over to muddemal clerk.
4. Pen-drive containing copied data be submitted in the Court through System Administrator.
5. The System Administrator to submit a short report in this regard.”

4. It is the main contention of Mr. Anil Lalla, learned counsel appearing for the Applicant that power under Section 311 of Cr.P.C. cannot be utilized to cure any defect in the evidence of the prosecution. It is submitted that in fact prayer sought in the application which is filed under Section 311 and the order which is passed are outside the scope of Section 311. It is submitted that PW-16-Vikas Yadav has deposed for the prosecution and what is now sought to be retrieved or produced is already on record in the form of evidence of PW-16 and the material which has been produced in his evidence. It is, therefore, submitted that the application itself is not maintainable, and in any case, the impugned order should not have been passed. Learned counsel, further submitted that in the application there is no foundational facts necessary for the purpose of filing application under Section 311. He submitted that in fact the application should have been filed under Section 91 of Cr.P.C. and there also reasons are required to be given. Learned counsel relied on the decision of the Supreme Court in *Natasha Singh(Supra) vs. CBI (State)*¹

1 (2013) 5 SCC 741

5. On the other hand, Mr. Munde, learned SPP appearing for the Respondents pointed out the reasons which are set out in the said application which has been filed under Section 311 of Cr.P.C. and more particularly, paragraph Nos. 7 to 11. He further pointed out paragraph Nos. 6(d) and 6(e) of the affidavit in reply dated 22nd September 2026 of Daya Shankar Singh, Assistant Director of the Revenue Intelligence, Mumbai Zone.

6. The Applicant is original Accused No.1 in NDPS Special Case 14/2021 and is facing charges for alleged commission of offences punishable under Sections 8(c), 21(c), 23, 25, 27-A, 29 of NDPS Act, along with 3 other co-Accused in respect of a consignment allegedly imported into India in which Heroin was concealed.

7. Perusal of the record shows that PW-16-Vikas Yadav, Enforcement Officer was examined by the prosecution and he has stated in paragraph Nos. 2 to 4 in his deposition as under :-

“02 Four mobile phone handsets were given to me by the Intelligence Officer Himanshu Kushwah for data extraction. Those mobiles were duly sealed and seal was intact. Thereafter, seal was opened in the presence of panchas. Out of the said four mobiles, two mobile phones Samsung Model and Reliance Jio Model belong to accused No.5 Mahendra Nigam and one Samsung mobile belongs to accused No.3 Sarvesh Bhatiya and one mobile of Vivo Model belongs to accused No.4- Nauman. Cyber Forensic Engineer Maheshkumar Gupta connected the said mobiles to the data extraction machine and data was extracted. Accordingly, four extraction reports were generated. The panchas put their dated signatures on extraction reports. The workable copy of extracted data was copied into Seagate make hard-disk. Thereafter all the four mobile phones were again packed into four independent envelopes and duly sealed. On the said

envelopes myself and panchas put signatures and date. The extraction proceeding was completed in the presence of panchas and me. Accordingly, I prepared detail panchanama in the presence of panch witnesses. Now, I am shown the said panchanama dated 10/08/2020. Panchas put their signatures on each pages of panchanama. I also put my signature on last page. Now, I am shown the said panchanama. The contents therein true and panchanama marked as Exh.P. 277/PW16.

03 After panchanama, I handed over all the seized mobile phones and workable copy of retrieved data to Intelligence Officer Himanshu Kushwah.

04. (Now one sealed envelope is opened in the presence of witness, Advocates for accused persons and Spl.PP). Inside the said envelope one Vivo mobile of accused No.4 is there. The said mobile phone is marked as [M.O.No. 24](#).

Examination-in-Chief is over.

8. In view of the above Examination-in-chief of P.W. 16-Vikas Yadav, it is significant to note his cross-examination. In the cross-examination in paragraph No.6, he has stated as under :

06. It is true to say that Himanshu Kushwah did not provide me report of mobiles seized from accused Nos. 3 to 5, but he orally intimated to me. Maheshkumar Gupta, Forensic Cyber Engineer was private person, acted in private capacity. It is true to say that we could have sent the said mobiles to CRCL at Delhi, but due to shortage of time we could not sent. I have not prepared any record regarding shortage of time. It is not true to say that Exh.P277/PW16 is false. It is not true to say that I am deposing false.

(Emphasis Added)

9. In this background of the matter, application under Section 311 of the Cr.P.C. has been filed bearing Exhibit 281 (page no. 133 – 135) *inter alia* raising following contentions in paragraph Nos. 7, 8 and 11, which read as under :-

7. That Shri Mahesh Kumar Gupta the forensic analysis retrieved the workable image of data stored in Mo. No. 24 and other mobile phones and saved to one Seagate external hard disk drive provided by the DRI, MZU, Mumbai. Shri Mahesh Kumar Gupta exported the data retrieved from the four mobile phones to the aforesaid external hard disk drive. After completion cyber forensic proceedings, extraction reports in respect of said mobile phones was generated by Shri Mahesh Kumar Gupta. The said report is annexed along with panchnama dated 10.08.2020.

8. That it is respectfully clarified that the aforesaid external hard disk drive was only working copy/storage medium used during the forensic process. It was not seized as an independent evidentiary article, was not sealed, and was not treated or recorded as muddemal/evidence in the present case. The evidentiary mobile phone, namely the VIVO 1901, is the original source device relevant for the present application.

11. That, in the present case prosecution has not closed his evidence since under section 311 of CR.PC. corresponding to 348 of BNSS Act, 2023 prosecution by making an application can seek permission to re-examine the mobile to extract the data through arranging the forensic of the said mobile along with the certificate of 65B of the evidence act, 1872. The court is vested with a broad and wholesome power, in terms of section 311 of the CRPC, to summons

and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar.

(Emphasis added)

10. In this context, it is also relevant to note paragraph Nos. 6(d) and 6(e) of the affidavit in reply dated 22nd September 2026 filed in this application which read as under :

6(d) The Respondent No. 1 submits that at the relevant time, it was practice for the forensic lab to provide a working copy of the extracted data to the Investigating Officers for the purpose of analysis and investigation. The original device, which is the primary source of the data, was always in the safe custody of the Learned Trial Court and remains so even today. The working copy was merely a storage medium used during the forensic process and was never intended to substitute the original device as evidence.

6(e) During the trial, the prosecution examined PW-16 Vikas Yadav on 14.08.2026, who had drawn the forensic panchnama dated 10.08.2020. The mobile phone of deceased Accused No. 4 was de-sealed before the Learned Trial Court during his examination, and the same was marked as MO No. 24/PW-16. **The Applicant, through his counsel, raised questions regarding the data contained in the original copy of extracted data. It is in this context that the prosecution moved an application under Section 311 of Cr.PC. seeking permission to extract data from the original device (M No. 24), which is the primary evidence, under the monitoring of Learned Trial Court.**

(Emphasis added)

11. Thus, the contentions raised in the application filed under Section 311 of Cr.PC. is that external hard disc was only a working copy/storage device used during the forensic process. It was not seized as an independent article, was not created or recorded as muddemal article in

the present case. The evidentiary mobile phone namely vivo 1901 is the original source device and therefore, permission is required to extract the data from the original device i.e mobile, which is the primary evidence through arranging the forensic expert by producing the certificate of 65b of the evidence act, 1872.

12. In paragraph Nos. 6(d) and 6(e) of the affidavit in reply, it is stated that the original device which is the primary source of the data was and is always in the safe custody of the learned Trial Court and the working copy, which is referred in the evidence of PW-16-Vikas Yadav was merely a storage medium used during the forensic process and was never intended to substitute the original device as evidence. It is further stated in the said affidavit that as certain questions have been raised regarding the data contained in the original copy of extracted data, it is in that context, the application under Section 311 of Cr.P.C. seeking permission to extract data from the original device has been filed.

13. Thus, in this background of the matter, the contentions raised by the learned counsel appearing for the Applicant are required to be examined.

14. The first contention raised by learned counsel for the Applicant is that the application could not have been filed under Section 311 of Cr.P.C. and order passed is also outside the scope of Section 311 of Cr.P.C. However, learned counsel appearing for the Applicant fairly admits that such type of application could have been filed under Section 91 of Cr.P.C. It is further submitted that the application is filed for the purpose of curing the defects and when evidence which is sought to be produced is already on record in view of the evidence of PW.-16.

15. In view of the above contentions, it is relevant to note the decision of the Supreme Court in the case of **Zahira Habibulla H. Sheikh v. State of Gujarat** ². The Supreme Court in the said case has examined the role of the Court while dealing with applications under Section 311 of the Cr.P.C. The relevant discussion is as under :-

2 (2004) SCC 158

“43.The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the

prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44.The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. : (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] this Court has

observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. **However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to**

arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. **The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”**

(Emphasis Added)

16. Thus, what the Supreme Court has said that the Courts have to take a participatory role in a trial. Section 311 of the Cr.PC. and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. It has been observed that ultimate objective is to bring on record the truth.

17. The above observations of the Supreme Court are squarely applicable to the present case. Apart from Section 311 of Cr.P.C., there is adequate power in the Court to pass the order which is impugned in the present application. It is not even the contention of learned counsel appearing for the Applicant that there is no power with the Court to pass the impugned order.

18. The contention raised that the application is filed for the purpose of curing the defects is also without basis as primary evidence is the mobile which is in the custody of the court and by the impugned order data is directed to be extracted. As noted earlier as per the settled legal position the aim in any trial is to arrive at truth.

19. As far as the contention raised that the foundational facts are not set out in the application, the relevant paragraphs of the application are already extracted hereinabove which clearly shows that the foundational aspects for exercising power under Section 311 of Cr.P.C are adequately set out. Apart from that, affidavit in reply has also been filed and the relevant contentions are

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already extracted hereinabove. Thus, there is no substance in the contention raised that foundational facts for exercising jurisdiction under Section 311 of Cr.PC are not set out.

20. Mr. Lalla, learned counsel of the Applicant has relied on the decision of Supreme Court in the case of *Natasha Singh (Supra)*. The following paragraphs of said decision are relevant:-

15.The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to *cause serious*

prejudice to the defence of the accused, or to give an *unfair advantage to the opposite party*. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be

obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.

21. Even if the factual position in the present case is examined on the touchstone of above parameters then also it is clear that impugned order is correctly passed.

22. Although, learned counsel for the Applicant submitted that the application is premature, however, the application is necessary in view of the cross-examination of PW-16. In any case, there is no prejudice whatsoever to the present Applicant as the cellphone which is the primary evidence is in the custody of the learned Trial Court and data will be extracted from the same.

23. Thus, in the facts and circumstances of the case and for the reasons stated hereinabove, no interference in the impugned order is warranted.

24. Accordingly, the Criminal Application is dismissed.

[MADHAV J. JAMDAR, J.]