

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

CRIMINAL WRIT PETITION NO. 3151 OF 2015

Ganesh Agencies & Ors.

.. Petitioners

v/s.

Standard Chartered Bank & Anr.

..Respondents

Mrs. Racheeta Dhuru a/w B. Pooja i/b P.Y. Shankar for the
petitioners

Mr. K.D. Devassy for the respondent no.1

Mrs. R.V. Newton, APP for the respondent State

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 14th OCTOBER, 2015.

P.C.

1. Heard learned Counsels for the respective parties. Rule. By
consent, rule is made returnable forthwith.

2. The petitioners herein have challenged the order dated
29.07.2015 whereby the learned Metropolitan Magistrate, 33rd
Court, Ballard Pier, Mumbai has dismissed the application filed by
the petitioners accused under Section 311 of the Cr.P.C.

3. The petitioners were the accused in C.C. No.79/SS/2012 pending on the file of the learned Metropolitan Magistrate, 84th Court, Ballard Pier, Mumbai under Section 138 of the N.I. Act. The evidence of respondent no.1 complainant was concluded and at the stage of final argument, the petitioners-accused filed an application under Section 311 of the Cr.PC. for recall of PW-1, mainly on the ground that the petitioners-accused had made some payments to the complainant and due to inadvertence and oversight, the said fact remained to be brought on record at the time of cross-examination of the complainant. The petitioners submitted that the evidence is material and that no prejudice would be caused to the respondent complainant if the application is allowed.

4. The learned Judge held that the petitioners accused were aware of the filing of the original application. The learned trial Judge further held that the statement of account and the copy of the original application filed on record reveal that the original application filed before the DRT is for recovery of Rs.40,70,342/-

and that according to the complainant, the said original application was filed after deducting the amount paid by the accused. The learned Magistrate has held that the recovery proceedings of the subject matter and the complaint are entirely different aspects and, therefore, there was no reason to recall the complaint.

5. I have perused the records and considered the submissions made by the learned Counsels for the respective parties. At the outset, it must be mentioned that powers under Section 311 of the Cr.P.C. can be exercised at any stage provided, the Court is satisfied that the evidence of any witness sought to be recalled under Section 311 of the Cr.P.C., is essential for its decision. In the case of ***Rajaram Prasad Yadav Vs. State of Bihar & Anr. AIR 2013 SC 3081***, the Apex Court has held thus :-

“23. From a conspectus consideration of the above decisions, while dealing with an application under [Section 311](#) Cr.P.C. read along with [Section 138](#) of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new

evidence is needed by it? Whether the evidence sought to be led in under [Section 311](#) is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under [Section 311](#) Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under [Section 311](#) Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of [Section 311](#) Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a

just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under [Section 311](#) Cr.P.C. 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

6. Reverting to the facts of the case, the petitioners had claimed that they had already made several payments to the complainant. However, due to inadvertence and oversight, the same was not brought on record by the earlier advocate, who had cross-examined the complainant. The evidence sought to be elucidated was germane to the issue. The learned Magistrate has not arrived at a conclusion that such evidence was not necessary for the just decision of the case, but has rejected the application on the basis of the statement made by the Counsel for the petitioners that the proceedings before the D.R.T. will be filed after deducting the said amount. Needless to state that such inference could not have been drawn relying upon the statement made by the learned Counsel for the petitioners. Such evidence could only be elucidated through the cross-examination of PW-1.

7. The question whether the petitioners had made payments to the respondent-complainant was necessary to the just decision of the case. Recalling of witness under exercising powers under Section 311 of the Cr.P.C. would not have caused any serious prejudice to the petitioners-accused nor it could have resulted in miscarriage of justice. On the contrary, as stated earlier, it was essential to bring such evidence on record for just and correct decision of the case.

8. Under the circumstances, the petition is allowed. The impugned order dated 29.07.2015 passed by the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai in C.C. No.79/SS/2012 is quashed and set aside. The petitioners are permitted to cross-examine the complainant on the ground stated in paragraph 4 of the petition under Section 311 of the Cr.P.C. Rule is made absolute.

(ANUJA PRABHUDESSAI, J.)