

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 298 OF 2016

Bhimrao @ Bhima s/o Govinda Iratkar,
Age: 48 years, Occ: Business,
R/o. Warud Chakrapan, Tq. Sengaon,
Dist. Hingoli.

...Petitioner

versus

Parasram s/o Ramaji Kotkar,
Age: 65 years, Occ: Agri.,
R/o. Warud Chakrapan, Tq. Sengaon,
Dist. Hingoli.

...Respondent

.....
Mr. S.K. Chavan, Advocate for petitioner
Mr. P.S. Agrawal, Advocate for respondent
.....

CORAM : N.W. SAMBRE, J.

DATE : 11th APRIL, 2016

ORAL ORDER :

The petitioner is an accused in a Summary Trial Case No. 238 of 2014 initiated by the respondent-complainant for an offence punishable under Section 138 of the Negotiable Instruments Act. After recording of statement under Section 313 of the Code of Criminal Procedure, the respondent-complainant moved an application styling to be under Section 311 of the Code of Criminal Procedure, seeking leave of the Court to call independent witness so as to prove an agreement between the accused and Grampanchayat. The said application Exhibit-47 came to be allowed by learned Judicial Magistrate, First Class, Sengaon by order dated

14/12/2015. Hence, the present writ petition.

2. Mr. Chavan, learned Counsel for the petitioner would urge that the stage at which powers under Section 311 of the Code of Criminal Procedure are exercised by the Magistrate, was not permissible, as according to him, once having opened his defence, the application under Section 311 of the Code of Criminal Procedure came to be moved with an intention to fill up lacuna.

3. He would then rely upon the language of Section 311 of the Code of Criminal Procedure so as to submit that the circumstances which prompted learned Court below to exercise powers granting application under Section 311 of the Code of Criminal Procedure are not known to the requirement of the said Section. By relying upon the judgment of the Apex Court in the matter of ***Hanuman Ram vs. State of Rajasthan and others*** reported in ***(2008) 15 SCC 652*** and in the matter of ***Kailash s/o Dhanraj Batra vs. Amol alias Jolly s/o Shrichand Kungwani*** reported in ***2014 ALL MR (Cri) 5112*** from this Court so as to substantiate the above referred contentions.

4. Learned Counsel for the respondent would submit that even if the accused has examined himself under Section 313 of the

Code of Criminal Procedure, however, the application under Section 311 of the Code of Criminal Procedure was rightly considered and granted by the Court having reached to the conclusion that by grant of such application, the complainant is not permitted to fill up lacuna, if any. He would then submit that the evidence as is known to the parties of that defence, will hardly be hampered and will be frustrated by allowing the application under Section 311 of the Code of Criminal Procedure. According to him, present writ petition lacks merit and be dismissed.

5. With the assistance, I have perused the order passed by learned Magistrate while allowing the application under Section 311 of the Code of Criminal Procedure.

6. It is required to be noted that the said application having regard to the language employed in the Section can be considered and allowed at any stage of the proceedings, provided, if it is essential to the just decision in the case.

7. If the above referred language of Section 311 of the Code of Criminal Procedure is tested in the light of provisions of Sections 138 and 139 of the Negotiable Instruments Act, it is to be noted that there is presumption as against the present petitioner in

the matter of issuance of cheque. Once such presumption is considered in the background of observations made by learned Court below while granting the application under Section 311 of the Code of Criminal Procedure and also having regard to the statement of the accused recorded under Section 313 of the Code, it is worth to observe here that learned Magistrate has exercised powers having reached to the conclusion that the said step is necessary for reaching to its just decision, which is essential in the facts and circumstances of the case. Furthermore, it is to be noted that the issue as regards grant of application under Section 311 of the Code of Criminal Procedure and prejudice to the accused, was very much at the back of the mind of the Magistrate. The Magistrate perhaps having considered the law cited before it, has inferred that the prejudice, if any, is not likely to be caused to present petitioner-accused as he has every right to cross examine the witness, who is summoned by the complainant under Section 311 of the Code of Criminal Procedure. Learned Counsel for the petitioner was right in inviting attention of this Court to the judgment of Apex Court in the matter of Hanuman Ram (supra) and judgment of this Court in the matter of Amol alias Jolly s/o Shrichand Kungwani (supra), however, when called upon, he is unable to satisfy as to how his disclosure of defence under Section 313 of the Code of Criminal Procedure has been benefited to the respondent-complainant while moving the

application under Section 311 of the Code.

8. In my opinion, once having noted that the powers under Section 311 of the Code of Criminal Procedure are discretionary, which are exercised by the Magistrate in the present case, no illegality or material irregularity could be noticed. As such, the writ petition fails and stands dismissed.

[N.W. SAMBRE, J.]