

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

Criminal Writ Petition No. 01045 of 2017

District : Ahmednagar

Kavita w/o. Satish Agrawal,
Age : 46 years,
Occupation : Business,
R/o. Parshvanath Lane,
Sangamner, Taluka Sangamner,
District Ahmednagar. .. Petitioner.

versus

Mahesh Nagari Sahakari
Patsanstha Maryadit,
Sangamner, through its
Recovery Officer,
Rajendra Sudhakar Renguntala,
Age : 40 years,
Occupation : Service. .. Respondent.

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Mr. K.N. Shermale, Advocate, for the petitioner.

Mr. A.S. Bajaj, Advocate, for the respondent.

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CORAM : V.L. ACHLIYA, J.

DATE : 01ST SEPTEMBER 2017

ORAL JUDGMENT :

01. Rule. Rule returnable forthwith. By
consent, heard finally at the stage of admission.

02. Being aggrieved by order dated 29th June,

2017 in S.C.C. No. 0868 of 2011 by Judicial Magistrate (F.C.), Sangamner, District Ahmednagar, rejecting the application filed under Section 311 of the Code of Criminal Procedure, 1973 [**For short, "Cr.P.C.**], petitioner - accused has preferred this writ petition.

03. Heard learned counsel for the petitioner - accused and the respondent - complainant.

04. Perused the impugned judgment and order passed by the trial court.

05. In nutshell, it is the contention of the learned counsel for the petitioner, that the trial court has erred in rejecting the application seeking recall of witness. He submits that on the face of the cross examination conducted, it can be inferred that the counsel representing the petitioner has not properly conducted the cross examination. In view of another advocate engaged in the case and it being brought to the notice of the petitioner, that there was no proper cross examination, application under

Section 311 of the Cr.P.C. came to be filed. He submits that affording an opportunity to the petitioner to conduct further cross examination by recalling the witness would help the petitioner to prove her innocence and it would cause no prejudice to respondent - complainant. In support of the submissions advanced, learned counsel has referred and relied upon decisions of the Apex Court in the case of *Himanshu Singh Sabharwal Vs. State of Madhya Pradesh & others* ((2008) 3 SCC 602) and *Godrej Pacific Tech. Limited Vs. Computer Joint India Limited* [(2008) 11 SCC 108].

06. In counter to the submissions advanced, learned counsel representing the respondent supported the judgment and order passed by the trial court. By referring the reasons recorded by the trial court, the learned counsel submitted that the application filed by the petitioner seeking recall of witness has been made with an ulterior motive to protract the hearing of the case. He submits that change of an advocate cannot be a ground to entertain such request to recall the witness. He submits that the ground on

which the petitioner sought recall of the witness is not sufficient to entertain the request made under Section 311 of the Cr.P.C. Learned counsel for the respondent has further submitted that no case is made out to interfere with the order in exercise of writ jurisdiction. In support of the submissions advanced, the learned counsel referred and relied upon decision of the Apex Court in the case of *State (NCT of Delhi) Vs. Shiv Kumar Yadav and another* ((2016) 2 SCC 402) and decision of this court in the case of *Ahmedkhan s/o. Alamkhan Pathan Vs. State of Maharashtra & others* (2016 ALL MR (CRI) 5061).

07. In order to appreciate submissions advanced, I have perused copy of the application to recall the witness filed by petitioner as well as the order passed by the learned Magistrate. The fact is not in dispute that on account of dishonour of cheque of Rs. 80,000/- issued by the accused in favour of the complainant, the complaint under Section 138 of the Negotiable Instruments Act has been filed in the year 2011. Plea of accused was recorded on 17-09-2014.

Affidavit by way of examination in chief on behalf of the complainant was filed on 11-12-2015. Cross examination of the witness for complainant was concluded on 05-12-2016. Statement of accused under Section 313 of the Cr.P.C. was recorded on 11-01-2017. Thereafter, the case was kept for recording of evidence. Later on the petitioner - accused changed her advocate. After a period of about 5 - 6 months after recording of statement of complainant, application under Section 311 of the Cr.P.C. came to be filed by the petitioner seeking recall of witness with a sole ground that the advocate engaged in the matter has not properly cross examined the witness. On due consideration of submissions, learned Judge of the trial court has passed a well reasoned order. After taking note of conduct of the petitioner and bona fides on his part in filing the application, the trial court has rejected the application. The observations as made in the order reads as under :-

" Perused the record. The complaint is filed by the complainant on 26-12-2011. Thereafter plea of accused is recorded by my predecessor on 17-09-2014. The affidavit of

examination in chief is filed by the complainant on 11-12-2015. Thereafter the accused failed to cross examine the complainant, hence "No cross" order was passed on 10-10-2016. Later on filing of application by the accused, said order was set aside on 28-11-2016. The complainant was cross examined by the learned counsel for accused on 05-12-2016. Thereafter on 11-01-2017 statement of accused under Section 313 of the Code of Criminal Procedure was recorded. Later on the accused changed her counsel. Now the learned counsel appearing on behalf of accused again wants to cross examine the complainant, as the cross examination of complainant is not conducted by previous learned counsel in detail. There are no specific reasons assigned by the accused to further re-cross examine the complainant. Merely to fill up the lacuna or loopholes in law cross examination previously conducted by the learned counsel cannot be considered. There should be specific reason and ground to file the application under Section 311 of the Code of Criminal Procedure. The accused could have taken recourse of Section 145 of the Negotiable Instruments Act which also does not allow examination or re-examination of the complainant. Hence there being no specific grounds and reasons to allow this application and complaint being too old, the application is liable to be rejected. "

08. Thus, on due consideration of the submissions advanced, I am of the view that the order passed by the trial court is a reasoned order. There

is no patent error in law nor a case of gross injustice has been made out to call for interference with the order passed by the trial court by invoking jurisdiction of this court under Article 227 of the Constitution of India as well as under Section 482 of the Cr.P.C. Neither a case of improper exercise of powers or a case of serious failure of justice has been made out by the petitioner. Conduct of the petitioner itself sufficient to refuse to entertain such request.

09. As per scheme of the Negotiable Instruments Act, 1881, proceedings under Section 138 is expected to be decided within a period of three months. The complaint in question was filed in the year 2011. Plea of accused was recorded in the year 2014. Affidavit of the complainant by way of examination in chief came to be filed in the year 2015. Witness of the complainant was not cross examined for a long time. Ultimately the court was required to pass order of 'no cross' and to proceed with the matter. Later on said order 'no cross' came to be recalled at the request of petitioner. The petitioner was

permitted to cross examine the witness by recalling the witness for cross-examination. Evidence of the complainant was concluded in the year 2016. Statement of accused under Section 313 of the Cr.P.C. was recorded on 11th January, 2017. After a period of 5 - 6 months of recording of statement under Section 313 of the Cr.P.C., present application came to be filed which itself reflects sufficient to infer the intention behind filing such application. In my view, filing of such application is nothing but an attempt to protract hearing of the case. Conduct of such nature needs to be deprecated.

10. On perusal of copy of the deposition and the statement of accused recorded under Section 313 of the Cr.P.C., make out no case to justify recall of the witness for further cross examination. In the statement recorded under Section 313 of the Cr.P.C., petitioner - accused has put forth a defence that the case against her is false. Accused had taken a loan from the respondent - Co-operative Credit Society. Towards repayment of the loan, the cheque in question alleged to have been issued. Thus, considering

overall facts of the case and order passed by the trial court, I am of the view that no case is made out for interference in exercise of writ jurisdiction. Rulings referred and relied upon by the learned counsel for the petitioner have no bearing on the facts of the case in hand.

11. In the case of *Rajaram Prasad Yadav Vs. State of Bihar* ((2013) 14 SCC 461), after taking survey of all previous decisions of the Apex Court, on the issue of recall of witness and particularly proceedings filed under Section 138 of the Negotiable Instruments Act, culled out broad principles to be borne in mind while dealing with the application moved under Section 313 of the Cr.P.C. The principles laid down read as under :-

“1. 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 ?

2. 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

3. *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.*

4. *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.*

5. *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.*

6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

7. *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.*

8. *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.*

9. *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.*

10. *Exigency of the situation, fair play and good sense should be the safeguard, 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.*

11. *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.

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

13. 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.

14. 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. ”

12. In the case of *State (NCT of Delhi) Vs. Shiv Kumar Yadav and another (supra)*, the Apex Court has considered the decision in the case of *Rajaram Prasad Yadav Vs. State of Bihar (supra)* and observed that the powers of judicial superintendence under Article 227 of the Constitution of India and under Section 482 of the Cr.P.C. has to be exercised sparingly when there is patent error or grave injustice in the view taken by the subordinate court. If at all the order is to be

interfered in exercise of writ jurisdiction, same must be supported by reason. It is further observed that mere change of advocate cannot be a ground to entertain application under Section 311 of the Cr.P.C.

13. In the case of *State of Haryana Vs. Ram Mehar and others* ((2016) 8 SCC 762), the Apex Court has ruled that while dealing with application under Section 311 of the Cr.P.C., the court has to strike a proper balance and interest of not only the accused but interest of the victim also to be taken into account while dealing with such application. In para 42 of the judgment, the Apex Court has observed as under :-

“ At this juncture, we think it apt to state that the exercise of power under Section 311 Cr.P.C. can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and

the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance. "

14. Thus, on due consideration of the submissions in the light of facts of the case and the order passed by the trial court, I am of the view that no case is made out to interfere with the impugned order in exercise of writ jurisdiction of this court under Article 227 of the Constitution of India as well as under Section 482 of the Cr.P.C. The petition filed is devoid of substance and merit therein. Accordingly, the writ petition is dismissed. Rule discharged.

(V.L. Achliya)
JUDGE

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