

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL WRIT PETITION NO.1519 OF 2016**

1. Prakash s/o Rambua Puri,
age 52 years, occu. Service,
r/o Pingale Nagar, Beed,
Tq. & Dist. Beed.
2. Babasaheb s/o Maruti Maneri,
age 49 years, occu. Service,
r/o Ajjipura, Mali Galli,
Tq. & Dist. Beed.

.. PETITIONERS.**VERSUS**

State of Maharashtra
through Anti Corruption Bureau,
Beed, Dist. Beed.

.. RESPONDENT.

...
Advocate for Petitioners : Mr.Thigale Girish K. (Naik).
APP for Respondent/State: Mr.S.Y. Mahajan.
...

CORAM : V.L. ACHLIYA, J.**10th AUGUST, 2017.****ORAL JUDGMENT:**

Rule. Rule made returnable forthwith. By consent,
heard finally.

2. By present petition, the petitioners - accused have

challenged the order dated 4.11.2016 passed by the learned Special Judge, Beed in Special Case (ACB) No.1/2011. By the impugned order, the learned Special Judge has allowed the application moved u/s 311 of the Code of Criminal Procedure by the prosecution to recall the persecution witness Ganesh Saruk (P.W.2) a panch witness. Being aggrieved, the petitioners have filed this petition.

3. Before advertng to appreciate the submissions advanced, it is useful to consider the few facts leading to filing of the petition. The petitioners herein are facing prosecution for committing offence punishable u/s 7, 13(1)(d) r/w section 13(2) and 12 of the Prevention of Corruption Act, 1988 with allegation that they had demanded and accepted the bribe amount of Rs.5000/- from complainant for clearing the pending bills. Pursuant to the complaint lodged by the complainant, trap was laid. The accused were caught while accepting the bribe amount.

4. In order to prove its case, besides the complainant (P.W.1), the prosecution has examined Ganesh Saruk (P.W.2), a panch witness in whose presence the accused alleged to

have demanded and accepted the bribe. After recording the examination-in-chief, P.W. No.2 was cross-examined at length by defence Counsel. On conclusion of his cross-examination, when the court offered the witness for re-examination, the learned Prosecutor moved application u/s 311 of Cr.P.C. *vide Exh.67* to recall the witness. In the application filed, it is stated that though the said witness supported the case of the prosecution in examination-in-chief as to pre and post trap panchanama but, during the cross-examination, he has made contradictory statement. In view of certain new facts brought through cross-examination of P.W.2, prosecution urged to recall said witness. The accused have opposed the application with contention that no case has been made out to recall the witness. However, the learned Special Judge has allowed the application by observing that as witness was confronted with previous statement recorded in the course of departmental enquiry proceeding P.W.2 deserves to be recalled. Being aggrieved, the petitioners have preferred this writ petition.

5. I have heard the submissions advanced by Mr. Thigale, learned Counsel for the petitioners and learned APP

appearing for respondent – State. Perused the copy of the deposition of P.W.2, copy of the application made by the prosecution and order passed by the trial Court.

6. The learned Counsel for the petitioners assailed the order with contention that the application made u/s 311 of Cr.P.C. is not maintainable in law. It is pointed out that the application has been presented as soon as the cross-examination of witness was concluded and witness was offered for re-examination. Instead of re-examination of witness, the prosecution has moved application u/s 311 of Cr.P.C. He submitted that if there is any ambiguity and some explanation is required to be obtained from the witnesses then the request to that effect could have been made to the Court within the ambit of section 138 of Evidence Act. He further submitted that only for the reasons that the defence has brought certain new facts during cross-examination of the witness prosecution is not entitled to recall such witness. It is contended that by taking recourse to section 311 of the Code of Criminal Procedure, the prosecution cannot wipe out the admissions brought on record through cross-examination of the witness. He has further submitted that it is settled

position in law that the powers u/s 311 of the Code of Criminal Procedure are to be exercised in a judicious manner to prevent failure of justice. In order to entertain such request, the Court must satisfy itself that recall of the witness is necessary for advancing justice. In support of the submissions advanced, the learned Counsel has referred and relied on the decision of the Apex Court in the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another**¹.

7. On the other hand, learned APP appearing for the State has supported the order and contended that in the facts and circumstances of the case and the reasons set out in the application, the trial Court has acted well within exercise of its powers u/s 311 of Cr.P.C in passing the order of recall of the witness. He further submit that during cross-examination of the P.W.2, the defence has confronted him with his previous statement recorded during the course of departmental enquiry. He has disclosed certain facts which found to be inconsistent as to facts deposed by him in his examination-in-chief. For the purpose of seeking clarification, the application u/s 311 of Cr.P.C was made. He further submit that order passed allowing the application, has not

¹ (2016) 2 SCC 401;

caused prejudice to defence.

8. As per the application moved u/s 311 of the Code of Criminal Procedure by the prosecution, the re-examination of the witness has been sought on the ground that during the cross-examination, the witness was confronted with his previous statement recorded during the course of departmental enquiry proceeding initiated against the accused and brought certain admissions which, according to the prosecution, inconsistent to earlier statement made by the witness. Thus, in view of certain new facts brought through the cross-examination of the witness, the prosecution has sought recall of the witness.

9. On perusal of the testimony of Ganesh Saruk (P.W.2), I am of the view that the reasons assigned are not sufficient to recall the witness. If we consider his examination-in-chief, then he has deposed as per the case of the prosecution. In cross-examination also, the witness has not resiled from the facts deposed in his examination-in-chief. No doubt, through his cross-examination, it has been brought on record that during the course of departmental enquiry, his statement was

recorded by the Enquiry Officer. He has admitted that during departmental enquiry proceeding he has stated that after visiting the office of accused and waiting for a considerable time, the accused No.1 did not turn up and therefore, the complainant, panch witness returned back to office of the ACB. Later on the complainant again contacted the accused No.2 who in turn, told him that he will come to the office at 5.30 p.m. Accordingly, the complainant, panch witness and the raiding party again went to office wherein the complainant handed over the bribe amount to accused No.1 who in turn, after accepting the bribe amount handed over the same to accused No.2, and left the spot with bribe money. It is also brought on record that the incident of acceptance of bribe has taken place outside the office premises and later on office was opened. The officer-in-charge of the office was called in the office and Almirah was opened in presence of the officer. Later on, one person came enquiring about accused No.2. On enquiry made with that person, it was revealed that accused No.1 was sitting in the barber's shop. Thereafter, the Investigating Officer, complainant and panch witness went to barber's shop from where the bribe amount was recovered from possession of accused No.2. Whereas, as per the

prosecution story, the accused No.2 was caught by the raiding party outside the office premises with the bribe amount. Thus, although there is inconsistency brought on record as to place from where the bribe amount recovered, from accuse still I am of the view it is not sufficient to justify the recall of witness. If there is any ambiguity in the testimony of the witness then proper course available for prosecution is to seek re-examination of witness within the scope of section 138 of Evidence Act. Witness has given certain admissions in the cross-examination, cannot be a ground to recall such witness.

10. In this context of case in hand it is useful to refer to provisions of Chapter X of the Indian Evidence Act, 1972. Section 137 of the said Act explains the meaning of words 'examination-in-chief, cross-examination and re-examination.' Section 138 provides for order of examination of witness which reads, as under:

“138. Order of examinations

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross –examined, then (if the party calling him so desires) re-examined.

The examination and cross – examination must relate to relevant facts but the cross – examination need not be confined to the facts to which the witness testified on his examination –in-Chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

11. Thus, as provided u/s 138 of the Evidence Act, the scope of cross-examination is not confined to the facts to which the witness testified in his examination-in-chief. It is confined to relevant facts. Similarly, the scope of re-examination of witness also restrict to the extent of explanation of the matter referred to in cross-examination. Under Section 145 of the Evidence Act, the witness can be cross-examined as to previous statement made by him in writing or reduced into writing and relevant to matter in question without such writing being shown to him or being proved. Section 146 of Evidence Act provides that in cross-examination the witness can be asked any questions which tend to test his veracity, to discover who he is and what is his position in life as well as to shake his credit. Further Section 154 of Evidence Act permits the person who calls a witness to

put questions to him which may be put in nature of cross-examination by the adverse party with permission of court.

12. In the case of **Rajaram Prasad Yadav Vs. State of Bihar and Another**², the Apex Court, after taking survey of the precedents of law on the point of recall of witness u/s 311 of the Code of Criminal Procedure, has laid down the broad principles to be borne in mind by the courts of law while dealing with the application seeking recall of witness made u/s 311 of the Code of Criminal Procedure. Para 17 of the judgment reads, as under:

“17. 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:

17.1. 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?

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

² (2013) 14 SCC 461;

17.3. 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.

17.4. 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.

17.5. 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.

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

17.7. 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.

17.8. 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.

17.9. 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.

17.10. 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.

17.11. 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.

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

17.13. 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.

17.14. 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.”

13. Upon due consideration of the principles to be borne in mind as laid down by the Apex Court in the case of **Rajaram Prasad Yadav** (supra) while dealing with an application seeking recall of witness, I have thoroughly examined the impugned order passed by the trial Court. I am of the view that the order passed by the trial Court is not sustainable in law. It is quite settled position that though the powers to be exercised u/s 311 of Cr.P.C. are discretionary in nature, same are required to be exercised judiciously and not arbitrarily. Such powers cannot be allowed to be exercised to fill in lacuna in prosecution case. The scope of exercise of powers u/s 311 of Cr.P.C. cannot be stretched to allow the prosecution to wipe out the material admissions brought through cross-examination of the witness. The powers u/s 311 of Cr.P.C. are expected to be exercised only in order to meet the ends of justice for strong and valid reasons. It is further necessary on the part of the Court exercising such powers to be careful and cautious in entertaining such request. As observed, prosecution has moved the application though the evidence of P.W.2 was not concluded. While the witness was offered for re-examination, the prosecution has moved the application seeking recall of the witness. In the

facts and circumstances of the case, prosecution could have exercised the option to conduct the re-examination of the witness. Thus, on due consideration of overall facts and circumstances of the case, I am inclined to allow the petition and set aside the order with liberty to prosecution to make request to the court to re-examine the witness within the ambit of section 138 of the Evidence Act. Hence, the following order:

: ORDER :

- i) The petition is allowed in terms of prayer clause (B). However, prosecution is permitted to request the Court to allow to conduct re-examination of witness as contemplated u/s 138 of the Evidence Act. In case, such request is made, the learned Judge of trial Court is directed to consider such request.
- ii) It is clarified that the observations made as above while deciding the petition are made for the limited purpose of deciding the petition and the same shall not be construed as an

expression of views by this Court as to the evidentiary value as well as credibility of the testimony of the witness. The trial Court is directed to decide the case on its own merits, without influenced by any observations made in this order.

Iii) Rule made absolute in above terms.

[V.L. ACHLIYA, J]

*Kadam/**