

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

WRIT PETITION NO. 3551 OF 2016

M/s. Amcure Chemicals

... Petitioner.

V/s.

The State of Maharashtra & Ors.

... Respondents.

Mr. Sanjay P. Shinde, Advocate for the Petitioner.

Mr. V. V. Gangurde, APP for the State.

Ms.Pravina Arjun Thakker, Advocate for Respondent Nos.2 to 5.

CORAM : RAVINDRA V.GHUGE,J.

DATE : 16 MARCH, 2017

P.C. :

1 The Petitioner is aggrieved by the order dated 01.09.2016 by which the Application Exh. 132 filed by the Petitioner, seeking leave to examine one Mr.Anil P. Ujjal, has been rejected. Similarly, the petitioner is aggrieved by the order dated 23.09.2016, by which the application filed under section 311 of the Cr.P.C. for recalling of the witness for re-examination has been rejected.

2 I have heard the learned counsel for the respective parties.

3 In so far as the application Exh. 136, seeking leave to recall the first witness of the petitioner is concerned, it is

evident that the said witness was examined and cross-examined at length. Going by the pleadings set out in the plaint, the testimony of the said witness was recorded. After the witness of the petitioner was examined, an application was moved at Exh. 132, seeking leave to examine Mr. Anil Ujjal. After the said application was rejected, the petitioner has moved the application Exh. 136.

4 The Petitioner desires to prove the delivery of the goods. This aspect was within the knowledge of the petitioner. Some more witnesses are yet to be examined by the petitioner.

5 This court in the matter of **Vijay s/o. Haribhau Kindarle vs. Ramdas s/o. Mahadeorao Gaidhane** (2012 ALL MR (Cri) 1207), has concluded that if a party fails to prove a fact by leading evidence with regard to that aspect, if the same is within the knowledge of the party, it cannot be permitted to cure the lacuna in the said examination. If a party fails to produce evidence either or on account of not having knowledge of a particular aspect, an opportunity to do so could be given under section 311 of the Cr.P.C..

6 In the instant case, the first witness of the petitioner has been examined and the petitioner has declined to re-examine the said witness. Thereafter, the petitioner

moved application Exh. 132 for further evidence. In the peculiar facts, as I am not entertaining this petition to the extent of the impugned order dated 23.09.2016 by which Exh. 36 has been rejected. Merely because a second view is possible, the impugned order cannot be interfered with.

7 In so far as the application Exh. 132 is concerned, though the petitioner did not mention the name of Mr. Ujjal in the list of witnesses, it has moved an application for recording his evidence. An affidavit by way of evidence dated 12.08.2016 has also been tendered and Exh. 132 was moved for seeking leave to examine Mr. Ujjal, as name of the said witness was not mentioned in the list of witnesses.

8 The objection raised by the respondents before this court as well as before the trial court is that the petitioner desires to introduce a new case through the evidence of Mr. Ujjal. It is further contended that the entire nature of the cause of action is being sought to be altered by the petitioner.

9 The law does not prohibit examination of a person merely because his name is not mentioned in the list of witnesses. In so far as the grievance of the respondents is concerned that a new case is being sought to be introduced, the trial court would always be in a position to assess the evidence adduced and if the same is not based on the principle

of “first plead and then prove”. If the trial court concludes that the testimony of Mr. Ujjal is beyond the pleadings of the plaint/complaint, it can very well discard the testimony of the said witness rather than prejudge the matter merely on the objections being raised. It would be more practicable to permit the petitioner to examine Mr. Ujjal, who would obviously be subjected to cross-examination. The trial court can have the entire testimony of Mr. Ujjal before it while deciding the proceedings. If the trial court feels that the testimony is beyond the pleadings in the complaint, it can very well discard the testimony.

10 In the light of the above, the writ petition is partly allowed. The impugned order dated 01.09.2016 passed below Exh. 132 is quashed and set aside and Exh. 132 is allowed.

11 Since the affidavit in lieu of the oral evidence of Mr. Ujjal is already tendered before the trial court, the respondents would be at liberty to examine the said witness. While deciding the said proceedings, the trial court would consider whether the testimony of Mr. Ujjal deserves to be considered and if it is found that the same is beyond the pleadings of the case of the petitioner, it may discard the said evidence.

(RAVINDRA V.GHUGE, J.)

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