

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

CRIMINAL WRIT PETITION NO. 5139 OF 2017

M/s Hindustan Antibiotics & Anr. ... Petitioners

Vs.

The State of Maharashtra & Ors. ... Respondents

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Mr. M.D. Raychaudhari, Sr. Advocate I/by Mr. D.G. Dhanure for the Petitioners.

Mr. Y.M. Nakhwa, APP for the Respondent-State.

...

CORAM : PRAKASH D. NAIK, J.

DATE : 05th JULY, 2018.

P.C.

1. The petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India as well as the inherent power under Section 482 of Code of Criminal Procedure, challenging the order dated 2nd August, 2017 passed by the Chief Judicial Magistrate, Pune as well as the order dated 15th November, 2017 passed by the Sessions Court, Pune rejecting the application for recall of witnesses preferred by the petitioners under Section 311 of Code of Criminal Procedure.

2. The petitioners are prosecuted for the offence under Section 18 (a)(i),(vi) and Section 18(c) read with Section 16, 34, Rule 78 and Rule 76(1) punishable under Section 27 of the Drugs and

Cosmetics Act, 1940. The prosecution case is that the complaint dated 19th August, 1998 was received by the respondent-complainant on 20th August, 1998 from Dean, Sasoon General Hospital Pune-1 that after administration of injection Compound Sodium Lactate I.P. 500 ml B. No.0055 and 0056 manufactured by M/s Hindustan Antibiotic Ltd., Pimpri, Pune some patients had reaction of the said drug. In view of that the inquiry was conducted and thereafter, the prosecution was launched against the petitioners.

3. Trial commenced and evidence of three witnesses were recorded. In pursuance to that an application was preferred by the petitioner for recall of the said witnesses in accordance with Section 311 of Code of Criminal Procedure. The said application was rejected by the trial Court vide order dated 2nd August, 2017. The petitioners had preferred revision application before the Sessions Court, which was rejected on 15th November, 2017.

4. In the application for recall of witnesses it was contended that the list of the witnesses submitted by the prosecution listed 10 witnesses to be examined. However, the prosecution proceeded to examine three witnesses. It was further contended that the advocate appearing for the petitioners before the trial Court went

abroad and thereafter new advocate was appointed by the petitioner to represent them. It is submitted that in accordance with the charge against the petitioner, the witnesses were required to be cross-examined on scientific and technical aspect of the matter. Injection which was allegedly administered to the patients was Compound Sodium Lactate I.P.500 ml and considering the nature of the drug it was necessary to cross-examine the witness in that regard. The need for cross-examination was felt after perusing the evidence of P.W.No.1, P.W.No.2 and P.W.No.3 by the new advocate appointed by the petitioners.

5. The Courts below had rejected an application primarily on the ground that the trial was pending for a long period of time and all witnesses were cross-examined by the prosecution and even the statement of accused under Section 313 of Code of Criminal Procedure was recorded and the matter is kept for argument. The application was preferred belatedly after the case was closed for evidence. It is also observed that the change of advocate is no ground for allowing such an application and powers under Section 311 of Code of Criminal Procedure are to be exercised for just decision of the case. Learned Sessions Judge has also reiterated

the observations made by the trial Court and rejected the revision application preferred by the applicant.

6. Learned advocate for the petitioners submitted that although the application for recall of witnesses was preferred after the evidence of three witnesses was recorded and the case was due for arguments, it was necessary to recall the witnesses for cross-examination. It is submitted that the witnesses are required to be cross-examined in detail while taking into consideration the scientific and technical aspect of the matter more particularly considering the nature of drug which is allegedly used in the said offence for which the petitioners were tried before the trial Court. It is further submitted that an application under Section 311 of Code of Criminal Procedure can be moved before the trial Court at any stage before the trial is concluded. Need for exercise of powers under Section 311 of Code of Criminal Procedure was felt after going through the examination in chief and cross-examination conducted by the earlier advocate. The accused are entitled to defend themselves and for a fair trial an opportunity is required to be given to them to cross-examine the witnesses in proper prospectives. It is submitted that for just decision of the case, an application under Section 311 of Code of Criminal Procedure

ought to have been allowed by the trial Court. It is submitted that in support of the grounds for grant of the said application, the petitioners had relied upon the several decisions which were not considered by the Courts below. It is submitted that while rejecting the revision application by the revisional Court had merely referred to the said decision, without analysing the ratio laid down by the Courts in said decisions.

7. Learned APP submitted that the trial has been pending in the Court for a period of about 10 years. The petitioners were afforded opportunity to cross-examine the witnesses which has been availed of by the advocate representing the petitioners. The witnesses were cross-examined by the earlier advocate and no ground is made out for recall of the said witnesses. The powers under Section 311 of Code of Criminal Procedure are required to be exercised in the light of object of the said provision. Merely on the ground that the new advocate is appointed by the accused to defend them in the Court is not sufficient ground to recall the witnesses who were already cross-examined at the instance of the defence. The petitioners have not elaborated the reasons for which the witnesses are required to be recalled. It is therefore submitted that the petition is devoid of merits and the same be

rejected.

8. Having gone through the documents on record and on perusal of the impugned order passed by the Courts below it is apparent that prosecution had indeed examined three witnesses and they were also cross-examined by the defence. The prosecution case is that drug which manufactured by the accused company was administered to the patient in the Sasoon General Hospital, Pune, and as a result of administering injection of the said drug there was reaction amongst patients. The drug in question is of Compound Sodium Lactate I.P. 500 ml and considering the nature of the controversy, the defence felt it necessary to recall the witnesses for cross-examination on technical and scientific aspects. It is true that there was no elaborated reasons explaining scientific purpose which requires cross-examination of the witnesses, however, it will be a subject matter of the cross-examination to be conducted by the defence advocate. On perusal of the evidence of the witnesses which was recorded by the trial Court and the cross-examinations conducted by the earlier advocate for the accused, the application appears to be genuine and hence opportunity is required to be given to the accused to protect their right to defend themselves in proper

prospective. The object of Section 311 is to recall the witness for the just decision of this case, such an application can be allowed at any stage of the trial, before conclusion of the trial. In the case of *Hoffman Andreas Vs. Inspector of Customs, Amritsar*¹ it was observed by Supreme Court that when the new counsel took up the matter, he was under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of defense strategy which the earlier advocate who had passed away had in mind or as to why he had not put further questions on certain aspects. In the circumstances, if the new counsel thought to have material witnesses further examined the Court could adopt latitude and liberal view in the interest of Justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code of Criminal Procedure. In the case of *Natasha Singh Vs. CBI*² it was observed that the scope and object of provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Section 311 of the Code of Criminal Procedure cannot be

1 (2000) 10 SCC 430

2 (2013) 5 SCC 741

allowed to fill up a lacuna in the prosecution case or the defence. The powers are indeed to be exercised judiciously. Prayer for recall of witnesses was justified in present case. No prejudice would be caused to the prosecution in the event of recall of said witnesses. Although the petitioners relied upon the several decisions, it is not necessary to scrutinize the ratio in the said decisions. Hence, I pass the following order.

ORDER

- (i) Writ Petition No. 5139 of 2017 is allowed.
- (ii) The impugned orders dated 2nd August, 2017 as well as dated 15th November, 2017 passed by the Courts below are set aside. The trial Court is directed to recall the P.W.Nos.1 to 3 for the purpose of cross-examination by petitioner's advocate.
- (iii) The Petitioner shall not delay the cross-examination of the said witnesses after they are recalled by the trial Court and would expeditiously conclude the cross-examination.
- (iv) Petition stands disposed off.

Sachidanand
Kuttan Nair

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by Sachidanand
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(PRAKASH D. NAIK, J.)