

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

CRIMINAL WRIT PETITION NO. 449 OF 2019

Bhagwan s/o Fakira Patil, Age 70 years,
Occ. Retired, R/o. Plot No. 7, Gajanan
Gruhnirman Society, Near Laxmi Nagar
Back side of Bapuji Complex, Yaval
Road, Chopada, Tq. Chopada, Dist.
Jalgaon.

... **Petitioner**

VERSUS

Rohini Datta Ringe (Biraje),
Age Major, Occ. Business,
R/o. Flat No. 7, Muktai Apprt.
II nd Floor, Deshmukh Wadi,
N.D.A. road, Shivane, Varaje,
Pune- 32.

... **Respondent.**

...

Advocate for Petitioner : Mr. Mayure Pramod C.

Advocate for Respondent : Mr. S. P. Chapalgaonkar.

CORAM : **MANGESH S. PATIL, J.**

DATE : **25/09/2019**

JUDGMENT :

Heard. Rule. The rule is made returnable forthwith. The learned advocate Mr. Chapalgaonkar waives service for respondent No. 1. At the request of both the sides the matter is heard finally at the stage of admission.

2. The petitioner is the original complainant who has initiated a

proceeding under section 138 of the Negotiable Instruments Act against the respondent. After his examination-in-chief and cross-examination was over, he submitted the application (Exhibit 41) purportedly under section 311 of the Code of Criminal Procedure and requested for allowing him to record his further deposition on the ground that inadvertently he was unable to depose about the fact as to the manner in which the amount of Rs. 4,00,000/- was paid to the respondent. The respondent opposed the application. By the impugned order the learned Magistrate rejected the application. Hence, this Writ Petition.

3. The learned advocate for the petitioner submits that the application (Exhibit 41) was promptly moved after his testimony was concluded on 29.08.2018. The trial had not progressed thereafter. It is only to enable him to lead further evidence as to the manner in which he had paid the amount of Rs. 4,00,000/- to the respondent that he was sought to be recalled. There was no question of any filling up of the lacune. No prejudice was likely to be caused to the respondent since the trial was still in progress. Fair opportunity needs to be given to the petitioner. The Magistrate seems to have swayed away by the usual argument of the attempt being directed at filling up the lacuna when there was none. The impugned order suffers from gross

illgalility and deprives the petitioner of a fair opportunity to lead sufficient evidence. In support of his submission the learned advocate also cites decisions in case of **Rajendra Prasad Vs. The Narcotic Cell, A.I.R. 1999 SC 2292, P. Chhaganlal Daga Vs. M. Sanjay Shaw, (2003) 11 SCC 486** and judgment of the coordinate Bench of this Court in the case of **Karim Hasan Patel Vs. The State of Maharashtra (2012) ALL MR (Cri) 2378.**

4. The learned advocate for the respondent submits that it was an attempt to fill up the lacune which surfaced during the cross-examination of the petitioner wherein it was elicited from him that he had not produced any record to demonstrate as to in what form and when the amount was paid to the respondent and even there was no such pleading in the complaint. The learned advocate would submit that it was quite clear that the attempt was to fill up the lacuna. The request was beyond the scope of Section 311 of the Code of Criminal Procedure. He places reliance on the decision of Supreme Court in case of **Ratanlal Vs. Pralhad Jat and others; (2017) 9 Supreme Court Cases 340.**

5. I have carefully gone through the papers. One need not delve much as far as the scope and ambit of section 311 of the Code of Criminal Procedure is concerned. Suffice for the purpose to note that

the purpose of such provision in the statute book is only to enable a Court to do substantial justice.

6. As is apparent, after the deposition of the petitioner was over, he immediately filed this application (Exhibit 41) and submitted that he wanted to lead further evidence to demonstrate as to how he had parted with money. He wanted to bring on record all the details as to how he had paid the total amount of Rs. 4,00,000/- to the respondent, which he failed to bring on record during recording of his testimony. Admittedly, the trial has not progressed thereafter. During the cross-examination it was elicited that he had neither pleaded nor had he brought on record the particulars as to how he had paid the money. Perhaps realizing the lapse, the petitioner has filed this application. There was no question of filling up of any lacuna. He wanted only to substantiate his allegations by demonstrating that indeed he had parted with the amount of Rs. 4,00,000/- and the disputed cheque was issued to satisfy that liability.

7. One can gainfully refer to the decision in the cases of **Rajendra Prasad (supra)** and **P. Chhaganlal Daga (supra)**, and particularly the following observations from **Rajendra Prasad (supra)** :

"It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers u/s 311 of the Code or u/s 165 of the Evidence Act, 1872, by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistake to which humans are prone.

A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up"

Without deliberating much it would be sufficient to bear in mind these principles and if those are to be followed, there would be no escape from the conclusion that the request of the petitioner in the application (Exhibit 41) was indeed a bona fide request and was not an attempt to fill up the lacuna.

8. The decision of the Supreme Court in the case of **Ratanlal** (supra) was in the peculiar facts and circumstances of the case and the observations and conclusions cannot be read as taking any other view than what has been decided in **Rajendra Prasad** (supra). The observations in paragraph No. 17 read thus:

"In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of any orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order".

Perusal of these observations indicates that the power under section 311 of the Code of Criminal Procedure has to be exercised for strong and valid reasons and with caution and circumspection. The discretion has to be exercised judicially to prevent failure of justice.

9. Following the observations if one examines the matter in hand, the learned Magistrate seems to have not exercised the discretion judiciously and seems to have swayed away by the emotional arguments that the attempt is to washout the reply given in

the cross-examination. Since trial has not progressed after such cross-examination, it cannot be said that any prejudice is likely to be caused to the respondent by recalling the petitioner.

10 The impugned order suffers from gross illegality and is liable to be quashed and set aside.

11. The Writ Petition is allowed. The impugned order is quashed and set aside and the application (Exhibit 41) stands allowed. The Rule is accordingly made absolute.

(MANGESH S. PATIL, J.)

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