

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

CRIMINAL WRIT PETITION NO.1054 OF 2019

Sushila w/o. Maroti Tupekar,
Age: 45 years, Occu. : Business,
R/o. Sharda Nagar, Nanded,
Tq. & Dist. Nanded. **.. PETITIONER**

VERSUS

Gangakhed Sugar and Energy Ltd.,
Vijay Nagar, Gangakhed,
Through Chief Agriculture Officer,
Nandkishor Ratanlal Sharma,
Age: 69 years, Occu. : Service,
R/o. C/o. Dhondibarao Kendre,
Venkatesh Colony, Gangakhed,
Tq. Gangakhed, Dist. Parbhani
At present R/o. Central Prison,
Parbhani, Dist. Parbhani. **.. RESPONDENTS**

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Mr.Mahesh P. Kale, Advocate for the
petitioner.
Mr.M.V.Nagargoje, Advocate for the
respondent.

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**CORAM : V.L.ACHLIYA, J.
DATE : 18.07.2019**

ORAL JUDGMENT:

1] Rule. Rule made returnable
forthwith. With the consent of the learned
Advocates, the Petition is heard finally.

2] By this Petition filed under Article 227 of the Constitution of India, the petitioner has challenged the orders dated 18.12.2018 and 27.02.2019 passed by the learned Judicial Magistrate First Class, Court No.3, Gangakhed, District Parbhani in SCC No.76/2013. By the impugned orders, the trial Court has rejected the application to recall the witness for cross-examination by setting aside order to proceed further without cross examination of witness for complainant.

3] Heard learned counsel for the petitioner and respondent. Perused the impugned orders.

4] Learned counsel for the petitioner assailed the impugned orders with contention that learned Judge of the trial Court has erred in refusing to exercise the powers

vested under Section 311 of the Code of Criminal Procedure to recall the witness. It is submitted that in order to prove the defence of the accused and for just decision of the case, it is necessary that the petitioner-accused be afforded opportunity to cross examine the witness. It is submitted that prejudice, if any, caused to the petitioner can be compensated in terms of money. If opportunity of cross examination is not afforded, the petitioner will have to suffer serious consequences.

5] On the other hand, learned counsel representing the respondent supported the impugned orders. It is submitted that the affidavit by way of examination-in-chief of the complainant was filed in the month of February, 2018. The case was reserved for cross examination w.e.f. 2nd May, 2018. In spite of repeated adjournments, the petitioner-accused failed to cross examine

the witness. On 11.09.2018 the adjournment was granted subject to payment of Rs.500/- as *Bhatta* to witness. The petitioner has neither deposited *bhatta* nor cross examined the witness. In the circumstances, the Court has passed the impugned order to proceed without cross examination of the witness for complainant.

6] I have carefully considered the submissions advanced in the light of over all facts of the case and scope of exercise of powers under Section 311 of the Criminal Procedure Code. The fact is not in dispute that the petitioner was afforded sufficient opportunity to cross examine the witness for complainant. The fact is also not in dispute that the petitioner has failed to deposit the cost and cross examine the witness. In that view, the order passed by the learned Judge to reject the application seeking recall of witness cannot be termed as perverse and

contrary to law. However, fact remains that in absence of cross examination of the witness, there is every likelihood that the accused may not be able to establish his defence. In anticipation of the contingency that may crop up during the course of trial to summon, recall or re-examine any witness to decide the case the legislatures in their wisdom introduced Section 311 in Code of Criminal Procedure to meet such contingency to recall, re-examine and summon any witness during the course of trial. The object underlined under Section 311 of the Criminal Procedure Code is that no failure of justice be occasioned on account of mistake of either party to bring proper evidence as well as to remove ambiguity, if any, caused during the course of recording of the statements of the witnesses.

7] The exercise of powers under Section 311 of the Criminal Procedure Code are

discretionary in nature. The discretion is to be exercised in a judicious manner. While exercising such powers the Court must ensure that the evidence must be permitted to be adduced which will help the Court to reach to a just decision of the courts. The exercise of powers under said provision should be resorted by keeping in mind that the object of criminal trial is to find out the truth or to obtain proper proof of the facts which will help the Court to reach to a just and correct decision of the case.

8] In the case of ***Rajaram Prasad Yadav Vs. State of Bihar and Another reported in AIR 2013 S.C.3081***, the Apex Court has discussed the object underlined Section 311 of the Code of Criminal Procedure and laid down broad principles to be borne in mind by the Courts of law while dealing with the application seeking recall of the witness or re-examination of the witness under Section

311 of the Code of Criminal Procedure. After taking survey of the previous decisions rendered by the Apex Court as to ambit and scope of exercise of powers under Section 311 of the Code of Criminal Procedure, the Apex Court has laid down following principles / guidelines to be borne in mind by the courts of law :

23. 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:

a) 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?

b) 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.

c) 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.

d) 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.

e) 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.

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

g) 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.

h) 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.

i) 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.

j) 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.

k) 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.

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

m) 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.

n) 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.

9] Thus, in the light of over all facts of the case and principles laid down by the Apex Court in the case of *Rajaram Prasad Yadav Vs. State of Bihar & another [supra]*, I am of the view that in order to meet ends of justice and to afford fair and proper opportunity to the petitioner-accused, the request of the petitioner for recall of witness for cross examination deserves to be allowed. In case the petitioner-accused is not allowed to cross examine the witness, there is every likelihood that the petitioner may not be able to establish his defence. In absence of proper evidence being brought on record, it will be difficult for the Court to reach to proper decision. So far as prejudice caused to the respondent-complainant on account of delay in conduct of the case, same can be compensated in terms of money. I

am, therefore, inclined to allow Petition and pass the following order :

ORDER

- i] Petition is allowed in terms of prayer clause 'B' subject to cost of Rs.15,000/- to be payable by petitioner to respondent within four weeks from the date of order. The payment of cost shall be condition precedent to cross examine the witness.
- ii] The petitioner and the respondent are directed to appear before the trial Court on 26th August, 2019.
- iii] On appearance of the parties and compliance of the order of payment of cost, the trial Court is directed to fix the date for cross examination of the witness for the complainant. On the date fixed by the trial Court, the petitioner is directed to appear along with his advocate and cross examine the witness. In case the petitioner

fails to cross examine the witness on the date fixed by the trial Court, the petitioner will forfeit his right of cross examination afforded by virtue of the order passed by this Court.

- iv] Rule made absolute in above terms.
- v] Petition is disposed of accordingly.

[V.L.ACHLIYA]
JUDGE

DDC