

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

CRIMINAL WRIT PETITION NO.1305 OF 2019

Vishal S/o Parmeshwar Gadekar
Age: 33 years, Occu. : Business,
R/o. S.No.22, Swami Niwas,
Balaji Nagar, Dhankawadi, Pune.

.. PETITIONER

VERSUS

Bhagwanrao S/o Wamanrao Landge
Age : 62 years, Occ : Business,
R/o Karthik Building,
Mitra Nagra, Behind Akashwani,
Aurangabad.

.. RESPONDENT

...

Mr.Abhishek Kulkarni, Advocate for the
petitioner.

Mr.Yogesh Shinde, Advocate for respondent.

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CORAM : V.L.ACHLIYA, J.

DATE : 19.08.2019

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 order dated 24.07.2019 passed by learned Judicial Magistrate, First Class Court No.2, Aurangabad below Exhibit-159 in SCC No.1700/2013. By the impugned order, the trial Court has rejected the application to recall the complainant for cross-examination.

3. Heard learned counsel for the petitioner-accused and the respondent-complainant. Perused the impugned order.

4. Learned counsel for the petitioner assailed the impugned order with contention that the trial Court has erred in refusing to exercise the powers vested under Section 311 of the Code of Criminal Procedure. It is submitted that in order to prove the defence of the accused the trial Court ought to have afforded opportunity to the petitioner-accused to cross examine the complainant. It

is submitted that prejudice, if any, resulted to the respondent-complainant can be compensated in terms of money. In absence of proper cross examination of the complainant, the serious prejudice would cause to the petitioner-accused. It is further submitted that due to fault on the part of Advocate, the accused may not be subjected to suffer serious consequences to follow for non cross-examination of the witness. Learned counsel submits that in order to afford fair opportunity to defend the case against him, the application seeking recall of witness for cross-examination ought to have been allowed. In support of this submission, the learned counsel referred and relied upon the decision of this Court in the case of **Shri Kishor S/o Anandrao Gaidhane V/s The State of Maharashtra** reported in **2018 All MR (Cri) 3470**.

5. Learned counsel for the respondent supported the impugned order passed by the trial Court. It is submitted that the trial Court has afforded full opportunity to the petitioner-accused to cross-examine the complainant and establish his defence. With oblique intention to protract the hearing of the case, the accused has deliberately not cross-examine the complainant. The complaint was filed on 02.03.2013. The complainant filed his affidavit by way of examination-in-chief on 05.10.2013. Thereafter, the case was repeatedly adjourned at the instance of the accused. All the while the accused sought adjournment. On 23.09.2014, the trial Court rejected the application filed by the accused seeking adjournment and passed the order to proceed without cross-examination. On the application made by the accused, the trial Court has passed the order on 16.10.2014 and

allowed the accused to cross-examine the witness on payment of cost of Rs.500/-. In spite of the order dated 16.10.2014 passed in the matter, the accused failed to cross-examine the witness. On 23.02.2015, the trial Court has again allowed the application seeking permission to cross examine the witness by imposing cost of Rs.1000/-. Still the accused has not cross-examined the witness. Therefore, the trial Court was constrained to once again pass the order to proceed without cross-examination. Thereafter, on 19.11.2015, the petitioner-accused again moved an application to recall the order dated 09.10.2015 and permission to cross-examine the witness. The application was rejected. Against the order of rejection of application, the petitioner-accused preferred Criminal Revision Application No.270/2015 before the Sessions Court. The

Revisional Court allowed the Revision Petition and permitted to cross-examine the witness by imposing cost of Rs.2,000/-. While passing the order, the Revisional Court has directed the petitioner to appear before the trial Court on 29.01.2016 and cross-examine the witness on deposit of cost of Rs.2,000/-. It is further clarified that failure to comply with the order, the order passed by the Revisional Court stands recalled. Although the petitioner deposited the cost of Rs.2,000/- imposed by the Revisional Court, the petitioner failed to cross-examine the complainant. He sought further time to cross-examine the complainant. In this background, learned counsel submits that the order passed by the trial Court to reject the application seeking permission to cross-examine the witness suffers from no illegality and perversity so as to call for interference in

exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

6. I have carefully considered the submissions advanced in the light of over all facts of the case and overall scope and ambit of exercise of powers under Section 311 of the Criminal Procedure Code. There is no dispute that the petitioner was afforded opportunity to cross examine the complainant and the petitioner has failed to cross examine the complainant. In that view, the order passed to reject the application seeking recall of complainant passed by trial Court cannot be termed as perverse and contrary to law. However, the fact remains that in absence of cross examination of the complainant, the accused may not able to establish his defence. In anticipation of the

contingency that may crop up during the course of trial and Court may require to summon, recall or re-examine any witness, the legislatures in their wisdom incorporated Section 311 in the Code of Criminal Procedure to meet such contingency. The object of Section 311 of the Criminal Procedure Code appears to ensure that failure of justice be not 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. The exercise of powers under Section 311 of the Criminal Procedure Code is discretionary in nature and such discretion to be exercised in a judicious manner. While exercising such discretion the Court must ensure that the evidence which will help the Court to reach to a just decision of the case to be brought on record.

7. In the case of ***Rajaram Prasad Yadav Vs. State of Bihar and Another reported in AIR 2013 S.C.3081***, the Apex Court has considered the object of Section 311 of the Code of Criminal Procedure and laid down the principles to be borne in mind dealing with an application filed U/Sec. 311 of the Cr.P.C. After considering the previous decisions of Apex Court laying down the 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.

8. Thus, in the light of above principles laid down in the case of *Rajaram Prasad Yadav Vs. State of Bihar & another [supra]*, I am of the view, in the facts and circumstances of the case for providing fair opportunity to the petitioner-accused, the request of the petitioner for recall of complainant for cross-examination deserves to

be allowed. In case the petitioner—accused is not allowed to cross examine the complainant, then 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 deciding the case, I am of the view that the same can be compensated in terms of money. I am, therefore, inclined to allow the Petition and pass the following order :

ORDER

- (i) The petition is allowed in terms of prayer clause "C", subject to costs of Rs.25,000/-. The costs be deposited in Trial Court on or before 30th August, 2019.
- (ii) The deposit of costs shall be condition precedent to cross examine the complainant.

(iii) The petitioner and respondent are directed to appear before the Trial Court on 3rd September, 2019. On appearance of the parties and reporting the compliance of the order of deposit of costs, the trial Court is directed to fix the date for cross-examination of the complainant. On the date fixed by the trial Court, the petitioner shall appear along with his Advocate and cross-examine the witness.

(iv) In case, the petitioner fails to cross-examine the witness on the date fixed by the trial Court, the trial Court will be at liberty to forfeit the right of cross-examination of complainant provided by virtue of order passed by this Court and proceed further with the case.

(v) The respondent will be at liberty to withdraw the costs if deposited by petitioner.

(vi) The trial Court is directed to expedite the hearing of the case and decide the same as expeditiously as possible and preferably within 12 weeks w.e.f. 3rd September, 2019.

(vii) Rule made absolute in the above terms.

(viii) The Petition is disposed of accordingly.

[V.L.ACHLIYA]
JUDGE

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