

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 253 OF 2019**

Mr. Shankar Lotlikar,
Son of late Damodar Lotlikar,
Aged 79 years, married,
Indian National, retired,
Employee, resident of
'Shri Damodar' House No.40/A,
Layamati, Maruti Nagar,
Davorlim, Salcete, Goa.

... Petitioner
(Original Complainant)

Versus

Mr. Pundalik Venkatesh Verlekar,
son of Venkatesh Verlekar,
Major in age, Married,
Indian National,
Resident of G-1, Block B,
Ground Floor,
Olijoan Henriques Appartment,
Opp. Govt. High School,
Mangor Hill, Vasco da Gama, Goa.

... Respondent
(Original Accused)

Shri S. S. Kakodkar, Advocate for the Petitioner.

Shri Ravi Gawas, Advocate for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 14th February, 2020.

Pronounced on : 09th March, 2020.

JUDGMENT:

The petitioner has invoked the jurisdiction of this Court under Section 227 of the Constitution of India read with Section 482 of Cr.P.C., 1973 in the matter of the order dated 14.10.2019 passed by the Court of the third Addl. Judicial Magistrate, First Class, Margao.

2. Heard Shri S.S. Kakodkar learned Advocate for the petitioner who contended that the complaint was lodged by him against the respondent for dishonour of the cheque in an amount of ₹9,00,000/- under Section 138 of the Negotiable Instruments Act, 1881 (Act for short hereinafter). A total number of five cheques were issued by the respondent in discharge of his liability which were however returned dishonoured and the process was started by filing a complaint under Section 138 of the Act. Process was issued and thereupon an order was made under Section 143 A of the Act directing the respondent to deposit an amount of ₹1,80,000/-. Since the amount was not forthcoming, an order was passed under Section 421 Cr.P.C. for recovery which was pending

since then. The petitioner as the complainant had filed his affidavit in evidence and as on 16.03.2019 part of the examination was over and part of the cross examination was conducted on 11.04.2019. The cross examination was closed on 16.08.2019 and thereafter the case was adjourned for recording the statement under Section 313 Cr.P.C. An application was moved under Section 311 Cr.P.C on 29.08.2019 by the respondent/accused seeking for the recall of the complainant for cross examination and setting aside the order dated 16.08.2019 closing the cross examination of the complainant.

3. The learned Magistrate however, consequent to the impugned order dated 14.10.2019 allowed the application for recall under Section 311 Cr.P.C. without any basis whatsoever when no power of recall was available to the Magistrate in terms of Section 311 Cr.P.C. on the closure of the evidence. It was also not available to invoke such a power to fill up the lacuna and moreover the learned Judicial Magistrate, First Class overlooked the reasons in the order dated 16.08.2019. There were also no findings recorded by the learned Judicial Magistrate, First Class that the recall of the witness was necessary for a just decision of the case. The reply filed by the petitioner was also not considered by the learned Trial Court which was besides the fact that it lacked inherent jurisdiction to recall its own order. The impugned order passed by the

learned Judicial Magistrate, First Class was against the statute and against its jurisdiction. The roznama produced by the respondent was from 11.06.2019 and not prior thereto which would show the number of occasions where he had sought for adjournments. He placed reliance in **Rajaram Prasad Yadav {(2013) 14 SCC 461}** and pressed for quashing of the order passed by the learned Judicial Magistrate First Class.

4. Shri Ravi Gawas, learned Advocate for the respondent submitted that the respondent/accused had moved the application which he had rightly done invoking the jurisdiction of the court recalling the witness under Section 311 Cr.P.C. He submitted that the learned Judicial Magistrate, First Class was well within its powers to allow the application. He placed reliance in **Natasha Singh Vs. CBI (State), {2013 Cr.L.J.3346}** and in **State Bank of India Vs. Km. Chandra Govindji, {(2000) 7 Supreme 707}** and submitted that the impugned order did not call for any interference in the exercise of the writ jurisdiction of this Court.

5. i have considered the submissions of Shri S.S. Kakodkar, learned Advocate for the petitioner and Shri R. Gawas on behalf of the respondent, considered the judgments relied upon and more particularly the predicates of Section 311 Cr.P.C. to decide the petition accordingly.

6. Section 311 Cr.P.C. reads thus: The Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

7. First and foremost, a bare reading of Section 311 Cr.P.C. would reveal in no uncertain terms that it was not available to the learned Judicial Magistrate, First Class to recall the order of closure of evidence by invoking Section 311 Cr.P.C. when it amply demonstrates in clear terms what is the latitude and extent of the said provision. Secondly it is abundantly clear that the recourse to such an application under Section 311 Cr.P.C. is not to fill up the lanuna but to examine and or re-examine a witness which estimation of the Court is essential to the **just decision of the case**. Thirdly, the learned Judicial Magistrate, First Class totally overlooked the reasons in its earlier order dated 16.08.2019 wherein there was a clear record that the advocate for the respondent had been seeking time on the ground of his own sickness on several occasions and that the Court did not doubt the genuineness of the

ground stated in the present application. Nonetheless, the court observed that inspite of giving various opportunities no cross examination came to be conducted as well and there being no merit in the application where the complainant was a senior citizen the Court did not find any reason for granting time, rejected the application for seeking time and closed the cross examination of the complainant. These aspects were not at all looked into by the learned Judicial Magistrate, First Class while passing the order as it did which is assailed in the present petition. The learned Judicial Magistrate, First Class also overlooked the predicates of Section 311 Cr.P.C. which empowered the Court to summon a material witness or examine a person or recall and re-examine a person who was already examined if it appeared to be essential to the just decision of the Court. There was no finding by the learned Judicial Magistrate, First Class that the recall and re-examination of the complainant was necessary for the just decision of the case which is besides the fact that there was no inherent power in the learned Judicial Magistrate, First Class to recall its earlier order dated 16.08.2019. Moreover, there was no power in the Court while invoking Section 311 Cr.P.C. to recall its earlier order of closure of the cross examination under the misappreciation of the law that the power to recall the witness included also the power to recall its own order. This is besides the fact that it has been otherwise shown that the respondent has been evading the

process of the Court in depositing the amount as ordered by it in terms of Section 143 A of the Act and for which necessary recovery proceedings under Section 421 Cr.P.C. are pending.

9. In **Rajaram Yadav** (supra) a two Judge Bench of the Hon'ble Apex Court discussed the nature and the scope of the powers under Section 311 Cr.P.C. and the principles to be followed by the Court in exercise of such powers but the paramount consideration should always be for the just decision of the case. It spelt out the principles which will have to be borne in mind by the Courts while dealing with the application under Section 311 Cr.P.C. and being enumerative as below.

i) 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?

ii) 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

iii) 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.

iv) 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.

v) 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.

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

vii) 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.

viii) 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.

ix) 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.

x) 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.

xi) 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.

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

xiii) 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.

xiv) 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.

10. In **Natasha Singh**, the Hon'ble Apex Court reiterated the proposition that the power under Section 311 Cr.P.C. has to be exercised to render a just decision in the case. It does not at all buttress the case of the respondent that the power to recall a witness under Section 311 Cr.P.C. also encapsules within it the power to recall its own order and in the absence

of any inherent power vested in the Judicial Magistrate, First Class. The judgment in State Bank of India is also not of any significance to the case of the applicant which observed that in ascertaining whether a party had a reasonable opportunity to forward his case or not one should not ordinarily go beyond the date on which the adjournment is sought for. The earlier adjournments, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if on the date on which adjournment is sought for the party concerned has a reasonable ground.

11. In the result therefore, Rule is made absolute. The impugned order is quashed and set aside and the petition is disposed off with no order as to costs.

NUTAN D. SARDESSAI, J.

MF/-