

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.1195 OF 2019
WITH
CRIMINAL APPLICATION NO.1196 OF 2019
WITH
CRIMINAL APPLICATION NO.1197 OF 2019**

GUJARAT SIDHEE CEMENT LTD.)...APPLICANT

V/s.

STATE OF MAHARASHTRA AND ORS.)...RESPONDENTS

Mr.Subodh Desai a/w. Mr.Dushyant Purekar, Advocate for the Applicant.

Mr.A.R.Kapadnis, APP for the Respondent – State.

Mr.Punit B. Anand a/w. Mr.Siddharth Rajmohan, Advocate for Respondent No.3.

CORAM : A. M. BADAR, J.

DATE : 21st JANUARY 2020

P.C. :

1 Order below application for recalling Complaint Witness No.1 (CW1) Pralhad Karkaun is impugned in these applications. By the impugned order, the learned trial Magistrate

was pleased to reject the applications for recalling CW1 Pralhad Karkaun preferred by the complainant/applicant herein.

2 Heard the learned counsel appearing for the applicant/ original complainant. He argued that in the year 1999, the complainant/Company had passed a Board Resolution authorizing the Executive Vice President, the Managing Director and the Deputy Managing Director of the Company to execute a Power of Attorney to any Senior Executive for initiating or defending legal proceedings. That is how, in the year 2000, the a Senior Execxutive Waghela was given Power of Attorney but the said executive resigned from the complainant/Company in the year 2003. Therefore, the Deputy Managing Director of the applicant/ original complainant Company had executed a Power of Attorney in favour of Pralhad Karkaun, Assistant Supervisor, who, infact, was not a Senior Executive in terms of Board Resolution of the year 1999. Therefore, applications were moved for recalling the said witness in the light of the fact that in the year 2005, a Board Resolution came to be passed to ratify acts of

Pralhad Karkaun, Power of Attorney holder. The said applications, according to the learned counsel for the applicant/original complainant came to be rejected without considering the law on that aspect.

3 The learned counsel for the respondent/ original accused opposed the contention so raised by arguing that applications for recall of witness are nothing but an attempt to fulfill the lacuna in the case of prosecuting party. He drew my attention to evidence of Pralhad Karkaun, the Power of Attorney holder, and argued that documents were referred to him but he denied. No specific Board Resolution was stated by him in cross-examination. He has candidly admitted the fact that there is no Board Resolution permitting him to give evidence as Power of Attorney holder. Therefore, in submission of the learned counsel for the respondent/ original accused, the learned trial court has rightly rejected applications for recall of witness as the same were an attempt to fill the lacuna in the prosecution case.

4 I have considered the submissions so advanced and perused the impugned orders. The learned trial court while rejecting the applications for recall of witness has observed that it cannot be overlooked that recalling of witness under Section 311 of the Code of Criminal Procedure cannot be exercised as of right in order to fill up the lacuna. The learned trial court further observed that in the case in hand, record reveals that complainant filed evidence in the year 2008 and at that time he had not produced the copy of Resolution or copy of extract of Minutes of Resolution dated 27th October 2005. The learned trial court further observed that in cross-examination conducted on 13th April 2013, the witness stated that no Resolution to execute the Power of Attorney in favour of the witness came to be passed. According to the learned trial court, ample opportunity was given to produce documents and the record does not suggest that the complainant was prevented from filing documents. Ultimately, it is held that applications came to be filed for filling up the lacuna. Accordingly, the same came to be rejected.

5 Way back in the matter of **Rajendraprasad vs. Narcotic Cell**¹ the Hon'ble Apex Court has explained what it means by a "lacuna" in the prosecution case. It is held by the Hon'ble Apex Court that a "lacuna" in the prosecution case is not to be equated with the fall out of an oversight committed by the Public Prosecutor during the trial either in producing relevant material or in eliciting relevant answers from witnesses. Laches or mistakes during conducting of a case, as held by the Hon'ble Supreme Court, cannot be understood as a "lacuna" which the court cannot fill up. "Lacuna" must be understood as an inherent weakness in the case of prosecution or latent wedge in the matrix of the prosecution case. However, an oversight in management of the prosecution by the learned Public Prosecutor cannot be treated as a "lacuna". Some analogy applies even in case of the defence. Delay in applying for summoning the defence witness cannot be termed as "lacuna" in the defence.

6 The consideration for deciding the application under Section 311 of the Code of Criminal Procedure can only be

1 (1996) 6 SCC 110

whether evidence of the person sought to be recalled is essential for just decision of the case. This aspect is missed by the learned trial Magistrate in deciding the application under Section 311 of the Code of Criminal Procedure. This is particularly so in the light of the fact that according to the learned counsel for the applicant/ original complainant all relevant documents were already on record of the learned trial court, they being filed in the year 2016.

7 In this view of the matter, parties cannot be allowed to take advantage of technical lapses in the matter for thwarting cause of substantial justice. Hence, the following order :

ORDER

- i) Impugned orders are quashed and set aside.
- ii) Applications for recalling the witness are remitted for fresh decision, according to law, by the learned trial Magistrate.
- iii) Applications are accordingly disposed off.

(A. M. BADAR, J.)

Arti V.
Khatate

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by Arti V.
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Date: 2020.01.22
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