

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1706 OF 2019

Balu S/o Bajirao Shinde,
Age : 42 Years, Occ. Medical Profession,
R/o. Yeshwant Nivas, Loanarpura,
At the Back Side of Pratap Mill,
Beed.

..Petitioner

Versus

1. The State of Maharashtra,
Through the Police Station
Patoda, Dist. Beed.
 2. Ankush S/o Motiram Gite,
Age : 523 Years, Occu.,
Medical Profession,
R/o. At the Back Side of Bus
Stand, Near S. B. I. Bank,
Patoda Tq. Patoda, Dist. Beed.
- .. Respondents

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Advocate for the Petitioner : Mr. K.R. Doke
A.P.P for Respondent-State : Ms. R. P. Gour
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CORAM : SURENDRA P. TAVADE, J.

DATE : 23.08.2021

JUDGMENT :-

Rule. Rule made returnable forthwith with consent of the
learned counsel for the parties.

2. The petitioner is challenging the order passed by the
learned Judicial Magistrate, First Class, Patoda, District Beed in
Summary Criminal Case No. 477 of 2010 dated 26th August,

2019, whereby respondent No.2 is allowed to re-examine himself to prove the document mentioned in the application.

3. It is contended that the trial Court has not considered the provision of Section 311 of the Code of Criminal Procedure and wrongly allowed the application. It is contended that respondent No.2 has filed criminal complaint under Section 138 of the Negotiable Instruments Act against the petitioner on 16.10.2010. Thereafter, respondent No.2 filed affidavit of evidence on 24.02.2012. He was cross-examined by the petitioner. Thereafter, he adduced evidence of his witnesses on 20th April 2013. It is also contended that respondent No.2 has filed pursis for closing of evidence. Thereafter, he submitted applications for examination of Bank officers. The said applications came to be allowed. Thereafter, respondent No.2 has also called Manager of State Bank of India, Patoda Branch to prove the documents relating to the cheque in question. The said application was allowed. It is contended that on 26th June, 2019 respondent No.2 filed an application under Section 294 of the Code of Criminal Procedure calling upon the petitioner to admit or deny the documents referred therein. The said application came to be rejected by the trial Court. Thereafter, petitioner filed an application below Exh. 86 wherein he prayed for his re-examination to prove the original cheque, Bank

receipts, Bank memorandum, notice issued by him and postal acknowledgment of petitioner. The said application was objected by the petitioner but it was allowed. The said order is under challenge.

4. It is contended that respondent No.2 is trying to fill in lacuna, he was given sufficient opportunity to adduce his evidence but still no care was taken by respondent No.2 for proving all his documents. It is contended that even after the closing of evidence the trial Court had granted an opportunity to respondent No.2 to examine the witnesses but still respondent No.2 has not taken care and thereafter by filing application below Exh. 86 prayed for his re-examination which is not permissible. It is contended that the order passed by the trial Court is against law and it may be quashed and set-aside.

5. On the other hand, the learned counsel for respondent No.2 submits that the Court has ample powers under Section 311 of the Code of Criminal Procedure to recall the witness already examining in the case for proving the document. It is contended that the provision of Section 311 of the Code of Criminal Procedure can be invoked at any stage of the trial including at the stage of judgment. He also submits that some documents were remained to be proved on behalf of respondent No.2, therefore, respondent No.2 submitted an application for

his re-examination which was granted as per the provision of Section 311 of the Code of Criminal Procedure. The trial Court has rightly used its discretion and passed the impugned order which is just and reasonable and there is no need to interfere with the order of trial Court.

6. Heard the learned counsel for the petitioner and learned counsel for respondent No.2.

7. Perused the impugned order. To appreciate the contention of the petitioner, it is required to be seen the chequered history of the litigation. Admittedly, the complaint came to be filed on 16th October, 2010. Respondent No.2 filed his affidavit of evidence on 21st February, 2012. His cross-examination was completed on 16th September, 2012. Thereafter, petitioner has filed affidavit of his witnesses but he remain absent, therefore, the affidavit was treated as canceled. Thereafter, on 12th August, 2013 respondent No.2 filed evidence close pursis which was taken on record.

8. It appears from the record that thereafter respondent filed an application on 31.10.2018 for examination of the officers from State Bank of India. The application for

examination of Bank Officer from the State Bank of India was allowed and he was examined.

9. Then on 25th March, 2019 respondent No.2 filed an application for calling Branch Manager of Union Bank of India, Branch at Beed. The said witness was examined. Thereafter, on 19.08.2019 respondent No.2 filed an application for his re-examination to prove the documents. The said application was allowed and the said order is under the challenge. The events mentioned above are taken into account, it can be said that the proceeding is going on before the trial Court since 2010. Respondent No.2 had adduced his evidence and the evidence of Bank officers, even after closing the evidence. In fact, the documents namely cheque, notice, postal acknowledgment ought to have been produced and exhibited during the examination of the respondent himself. But it appears that the said documents were not even produced on record along with the evidence affidavit of respondent No.2. Thereafter, respondent No.2 was given opportunity to examine the Bank officers to prove documents namely cheque return memo and other documents. Accordingly both the officers of the Banks were examined. Thereafter, respondent No.2 has tried to re-examine himself to prove the documents. In fact, the cheque

return memo could have been exhibited during the examination of the Bank officers. If those documents were not exhibited then why officers of both the Banks were examined by respondent No.2. The said fact is not revealed from the record.

10. Now coming to the provision of Section 311 of the Code of Criminal Procedure which runs as under :-

“ Section 311. Power to summon material witness, or examine person present-

Any Court may, at any stage of any inquiry, trial or other proceeding under Any Court may, at any stage of any inquiry, trial or other proceeding 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.”

11. There is no dual opinion about the powers of trial Court to examine or re-examine the witnesses at any stage of the trial with the aid of Section 311 of the Code of Criminal Procedure. At the same time, the trial Court is required to see whether there is genuine error/ misstate/ fault on behalf of the party applying under Section 311 of the Code of Criminal Procedure. The provision of Section 311 of the Code of Criminal Procedure cannot be invoked to fill up the lacuna in the case. The learned

counsel for the petitioner relied on the ratio laid down in the case of **Gurmeet Surjitsing Asla Vs. Renusingh Jogising and Others 2008(2) Bom. C.R. (Cri) 924** wherein the complainant examined himself and thereafter filed two applications. Whereby the complainant wanted to bring on record evidence, which was later discovered. However, the facts represented through these documents built a totally new case which even is showing new stance diagonally opposite to facts which were proved by the complainant. In view of above facts the Court has set-aside the order of recalling of witnesses by the trial Court.

12. The ratio of the said case is not applicable to the facts of this case.

13. On the other hand, learned counsel for respondent No.2 has relied on the ratio laid down in the case of **Haribhau S/o Vithal Pharate And Others Vs. The State of Maharashtra and Another** reported in **2006(6) Mh.L.J. 540** wherein, the application for recalling of witness was allowed. The said order was challenged before this Court. This Court has rejected the petition and observed that

S. 311. Powers to summon material witness, or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding 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.

It does not put any limit or restriction about stage at which a witness may be summoned or may be allowed to be examined by the Court. It empowers the Court to issue summons at any stage of enquiry or trial if evidence of such witness is necessary for fair trial and just decision. In *P. Chhaganlal Daga Vs. M. Sanjay Shaw*, in a complaint under section 138 of Negotiable Instruments Act, the complainant had completed his evidence including his examination, cross-examination and re-examination. During cross-examination the accused had denied service of statutory notice and had disowned the signature on the acknowledgment. After completion of evidence, case was posted for judgment. At that stage, the complainant sought permission to produce additional material, that is postal receipt, to prove the service of the statutory notice. The trial Court granted the permission, which was set aside by the High Court. The Supreme Court held that the High Court had erred in interfering in the order of the trial Court. After referring to authority in *Rajendra Prasad V. Narcotic Cell*, the Supreme Court observed as follows in para 6 of the said judgment.

In deciding so, this Court has taken into account some of the earlier decisions of this Court including Mohanlal Shamji Soni Vs. Union of India. In the said decision this Court had observed that the power to receive evidence in exercise of Section 311 of the Code could be exercised " even if evidence on both sides is closed" and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word " any" at different places. This would also indicate the widest range of power conferred on the Court in that matter. It is so stated by this Court in Ram Chancier Vs. State of Haryana.

In Sama Ram Vs. State of Rajasthan and Another 2002 Cril.L.J. 3134, the Rajasthan High Court held that an application for summoning material witnesses can be filed at any stage before pronouncement of judgment and power under Section 311 can be exercised even during final arguments of the case. In Sidhu Sukhdev Waghmare Vs. State of Maharashtra, 2004(1) BCR (Cri.) 351, the learned Single Judge of this court held that Section 311 of the Criminal Procedure Code empowers the Court to issue summons to witness at any stage of trial if the evidence of such witness is essential to just decision of the case. The learned Judge observed in para 6 as follows :

“However, after taking into consideration the provisions of Section 311 of Code of Criminal Procedure, it is clear that it is not restricted only to issuing the summons to examine the witness who is cited as a witness by the prosecution, but summons can also be issued by the Court to a witness whose evidence is essential for the just decision of the case even if the said witness is not cited as witness by the prosecution”.

In view of the provisions of Section 311 and the above-referred authorities, it is abundantly clear that Section 311 empowers the Court to issue summons to any witness whose evidence is found essential for the just decision of the case, even if such witness is not cited by the prosecution originally and this power can be exercised at any state of the enquiry or trial till before the judgment is actually pronounced. ”

14. The facts of the said case are also not identical to the facts of the present case. As already observed that there is no dual opinion regarding the powers of the Court under Section 311 of the Code of Criminal Procedure. The said provision allows the Court to summon material witnesses which is already examined or calling new witnesses which is not cited in the charge sheet or in the complaint but the rider is that if the evidence of such witnesses appears to it to be essential to the just decision of the case.

15. In present case respondent No.2 had given sufficient opportunity to adduce his evidence. He had in fact adduced his evidence and evidence of his witnesses and thereafter at his request three witnesses were allowed to be examined after closing of the case with the aid of section 311 of the Cr.P.C. Even thereafter respondent No.2 had submitted application to re-examine himself to prove the documents. In fact respondent No.2 had an opportunity to prove his cheque return memo and cause of dishonour of cheque through Bank Officers. But it appears from the application at Exh. 86 respondent No.2 sought permission of Court for his re-examination to prove cheque, Bank receipt, cheque return memo and Bank memorandum. The respondent No.2 had an opportunity to prove the said documents through his own examination as well examination of the Bank officers. But it appears that he has not proved those documents when witnesses were examined in the Court. As far as the point of delay is concerned, the complaint is pending since last more than eleven years. As per the mandate of Negotiable Instrument Act, 1871 the complainant should have been disposed or decided within a period of six months. Therefore, it is high time to curb the activities or tactics of delay. With this, in my considered view the trial Court has not taken into consideration the opportunities given to respondent

No.2 for leading evidence and proving the documents through leading evidence. The trial Court has also lost sight of the pendency of the litigation and not use its discretion properly. The impugned order is required to be set-aside. Hence, I pass the following order.

ORDER

(i) The impugned order passed by the learned Judicial Magistrate, First Class, Patoda, District Beed below Exh. 86 dated 26.08.2019 in Summary Criminal Case No. 477 of 2010 is hereby set-aside.

(ii) Rule is made absolute.

**(SURENDRA P. TAVADE)
JUDGE**

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