

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 1880 OF 2021

M/s. Shah Steel Impex Pvt. Ltd. ...Petitioner
V/s.
Kanade Anand Udyog Pvt. Ltd. and ors. ...Respondents.

Mr. Pradosh Patil i/b Lex Juris for the Petitioner.
Mr. Ashok M. Saraogi for the Respondents.

CORAM : N.R. BORKAR, J.
DATE : JUNE 19, 2021.

P.C. :

1. This petition takes an exception to the order dated 14.1.2021 passed by the learned Metropolitan Magistrate, 56th Court, Mazgaon, Mumbai below Exhibit-298 in Criminal Case No.5607135/SS/2019.

2. The petitioner, a company incorporated under the Companies Act, 1956, had filed the complaint case against the respondents for the offense punishable under section 138 read with 141 of the Negotiable Instruments Act. The Director of the petitioner company namely Amrbish Lalubhai Shah was examined as PW-3.

3. An application at Exhibit-298 was filed under section 311 of Cr.P.C. seeking permission to produce Board resolution dated 15.2.2019, by which PW-3 was authorised to depose on behalf of the petitioner and to recall PW-3 to prove the said resolution.

4. The petitioner has stated as per the Board resolution dated 15.2.2019, it was resolved that Mr. Ambrish Shah (PW-3) is authorised to represent the company and to give evidence on behalf of the company in the court of law, however, inadvertently, the said resolution was not produced along with the list of documents filed with affidavit-in-lieu of examination-in-chief of PW-3.

5. It is stated that due to inadvertent mistake of the advocate appearing for the petitioner, the resolution was not produced along with affidavit-in-lieu of examination-in-chief of PW-3, albeit, the resolution was very much there and the same has also been recorded in the minutes of the meeting of the Directors of the petitioner company. It is stated that the evidence with regard to authorisation of PW-3 is essential for just decision of the case. It is stated that, in the interest of justice, the petitioner be thus

allowed to recall PW-3 to give evidence with respect to authorisation and to produce the Board resolution dated 15.2.2019.

6. The respondents contested the application at Exhibit-298. It is stated that the complainant has not made out any sufficient cause for recalling of PW-3. It is stated that great prejudice will be caused to the respondents, if PW-3 is recalled as he would try to fill up the lacunas in the case.

7. The trial court, after hearing both the parties, rejected the application at Exhibit-298 by the impugned order.

8. I have heard the learned counsel for the petitioner and the learned counsel for the respondents.

9. The learned counsel for the petitioner submits that due to inadvertent mistake, the Board resolution dated 15.2.2019 could not be filed along with affidavit-in-lieu of examination-in-chief of PW-3. It is submitted that the procedural defects, which are curable should not be allowed to defeat substantive rights of the

parties. It is submitted that the trial court ought to have allowed the prayer made in the application at Exhibit-298 for just decision of the case. It is submitted that the order passed by the trial court thus, needs to be quashed and set aside and the application at Exhibit-298 filed by the petitioner needs to be allowed.

10. The learned counsel for the petitioner has relied upon the following judgments of the Hon'ble Supreme Court in support of his submissions.

(i) State Represented By the Deputy Superintendent of Police Vs. Tr.N. Seenivasagan - 2021 SCC OnLine SC 212 ; &

(ii) Rajendra Prasad Vs. Narcotic Cell - (1999) 6 SCC 110;

11. On the other hand, the learned counsel for the respondents submits that an objection was raised in the cross-examination of PW-3 about his competence to depose on behalf of the petitioner company in absence of any resolution to that effect on record. It is submitted that the petitioner now cannot be allowed to fill up the lacunas in their case by recalling PW-3 and permitting them to file the Board resolution on record. It is submitted that the trial court was, therefore, justified in rejecting the application filed by the

petitioner at Exhibit-298. It is submitted that the petition thus needs to be dismissed.

12. It is well settled that rules of procedure are handmaid of justice and should not be made a tool to deny justice. The procedural defects which are curable should not be allowed to defeat substantive rights of the parties.

13. In the case of *State Represented by the Deputy Superintendent of Police vs. Tr.N. Seenivasagan (supra)*, an application under section 311 of Cr.P.C. was filed by the prosecution seeking permission to produce a copy of relevant document pertaining to the approval granted by the Board of TANGEDCO on the record and to have it marked as an exhibit in the evidence and for that purpose permission was sought to recall PW-1 and PW-11.

14. The Hon'ble Supreme Court while dealing with the nature and ambit of section 311 of Cr.P.C. in paragraph Nos.13 and 16, has observed :

"13. In our view, having due regard to the nature and

ambit of Section 311 of the CrPC, it was appropriate and proper that the applications filed by the prosecution ought to have been allowed. Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the CrPC, 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". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case.

... ..
 16. *Undoubtedly, we note that the respondent must have an opportunity to cross-examine these witnesses. Hence, we are not expressing any view on the merits of the submissions which were urged on behalf of the respondent by Mr Senthil Jagadeesan, in regard to the depositions of PWs 1 and 11, since these will have to be evaluated by the learned trial Judge. However, we are of the view that the rejection of the applications for recall under Section 311 was not in order. We accordingly allow the appeals and set aside the impugned judgment and order of the High Court dated 24 June 2019. The applications filed by the prosecution for recall of PWs 1 and 11 shall accordingly stand allowed. The respondent would also be at liberty to cross-examine these witnesses."*

15. The trial court has not examined this aspect of the matter as to whether the evidence of witness, who is sought to be recalled is essential to the just decision of case or not and rejected the application on the ground that the attempt of the petitioner appears to be to fill up the lacunas.

16. As regards the above said finding of the trial court, it would be appropriate to quote the observations of the Hon'ble Supreme Court in the case of *Rajendra Prasad vs. Narcotic Cell (supra)*. The Hon'ble Supreme Court in paragraph Nos.7 and 8, has observed:

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts

exercise powers under Section 311v gb of the Code or under Section 165 of the Evidence Act, 1872 by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

17. Considering the overall facts and circumstances, the trial court was not justified in rejecting the application at Exhibit-298. The impugned order, thus, needs to be quashed and set aside. In the result, the following order is passed.

- a. Writ Petition is allowed.
- b. The impugned order dated 14.1.2021 passed by the learned Metropolitan Magistrate, 56th Court, Mazgaon, Mumbai below Exhibit-298 in Criminal Case No. 5607135/SS/2019 is quashed and set aside. Application at Exhibit-298 filed by the petitioner under section 313 of Cr.P.C. is allowed.
- c. The petitioner is permitted to produce on record of the trial court, the Board resolution dated 15.2.2019. The trial court shall recall PW-3 and grant an opportunity to the petitioner to prove the said Board resolution.

[N.R.BORKAR, J.]