

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

CRIMINAL WRIT PETITION NO. 77 OF 2022

Ambeshwar Milk Processing Ambhora, .. Petitioner
Through Chairman – Sambhaji s/o. Viththal Shinde,
Age.40 years, Occ. Chairman,
Milk Processing, R/o. Ambhora,
Tq. Ashti, Dist. Beed.

Versus

Mahadev s/o. Tukaram Ghule .. Respondent
Age. Major, Occ. Agri & Milk Provider,
R/o. Ghulewadi u/v Sautada,
Tq. Patoda, Dist. Beed.

Mr. S.E. Shekade, Advocate for the petitioner.
Mr. Nisargraj B. Garje, Advocate for sole respondent.

CORAM : KISHORE C. SANT, J.
DATED : 12.12.2022

PC. :-

01. Heard. The petition is taken up for final hearing by the consent of the parties.

02. The petitioner has challenged the order rejecting his application below Exh.48 in SCC No.438 of 2015, filed under the provisions of Section

138 of the Negotiable Instruments Act. After his evidence was over on 01.07.2019, the petitioner/original complainant filed an application on 11.09.2019 under section 311 of the Cr.PC. It is averment of the petitioner in the said application that there is high volume transactions between the complainant and the respondent. The complainant happens to be a milk federation, which may suffer huge losses and therefore it is necessary to again recall the manager of the milk federation for evidence. The complainant wants to prove (i) two notarized documents executed by the accused in favour of the complainant (ii) two receipts of Rs. 2 lakhs which amount was paid in cash (iii) contents of one more cheque (iv) notice given for presenting cheque (v) oral intimation given to the complainant to present the cheque on 31.07.2015 (vi) diesel bill towards rent of pickup etc. given by the complainant (vii) contents of documents submitted in the bank (viii) complaint filed with police station etc.

03. The respondent filed say stating that the application is not legally tenable. Already the evidence of the said witness is over and the evidence affidavit of complainant's witness No.2 is filed. The defence of the accused is already opened and if the application is allowed now it would be allowing the

complainant to fill up lacuna and prayed for rejection of the application.

04. After hearing the parties, the learned Judicial Magistrate, First Class, by the impugned order rejected the application, mainly on the ground that the complainant cannot be allowed to fill up lacuna. It is recorded further that there is no document to show that the complainant was unable to give this evidence earlier.

05. Heard both the learned Advocates for the parties. The learned Advocate for the petitioner has relied upon judgment in the case of Fatehsinh Mohansinh Chauhan & Ors. Vs. Union Territory of Dadra and Nagar Haveli & Anr., 2003 SCC OnLine Bom 207. He pointed out para 25 of the said judgment, which is reproduced below :-

19. The submission made on behalf of the petitioners however is that the exercise of this discretion by the learned Sessions Judge was not only prejudicial to the petitioners - accused persons, but was also helped the prosecution to fill up the lacuna in the prosecution case. It would, therefore, be necessary to understand what is meant by lacuna in the prosecution case. The Apex Court had occasion to explain the meaning of the lacuna. In the case of Rajendra Prasad Vs. Narcotic Cell, reported in (1999) 6 SCC 110. The relevant observations of the Apex Court are as under :-

"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 trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be 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."

. In para 25 of said judgment the Hon'ble Apex Court considered the judgment in the case of Rajendra Prasad Vs. Narcotic Cell, reported in (1999) 6 SCC 110 and held that exercise of power is discretion and cannot be used to fill up lacuna in the prosecution.

06. Learned Counsel for the petitioner further relied upon judgment of this Court in the case of **Sadashiv Srinivas Shetty Vs. The State of Maharashtra, 2017 SCC OnLine Bom 2954**. He relied upon para 5 and 6 of the said judgment. This Court after going through cross-examination of prosecution witness No.1 was pleased to allow the application under section 311 of the Cr.P.C. in the facts of that case.

07. Learned Advocate for the respondent relied upon judgment in the case of **Kewal Gupta Vs. The State of H.P., 1991 CRI.L.J.400**, wherein the High Court of Himachal Pradesh has held that though power under section 311 can

be exercised at any stage, in para 4 and 5 of the said judgment, it is held that fundamental thing to be seen is whether this evidence the Court thinks necessary in the facts and circumstances of the particular case before it. If this results in what is sometimes thought to be the “filling of lacunae” as contended by the learned counsel for the petitioner, that is purely a subsidiary factor and cannot be taken into consideration.

08. Considering the above position and considering the nature of the documents, it appears that it is clearly an attempt of the petitioner to fill up the lacuna as by way of this evidence, the petitioner wants to show that there was liability upon the respondent. Certainly it cannot be said that this voluminous evidence could not be given only due to inadvertence. This Court does not find merit in the petition.

09. The Criminal Writ Petition is dismissed.

[KISHORE C. SANT, J.]