

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL WRIT PETITION NO.614 OF 2022**

VIJAY S/O ABLASAHEB KHARDE  
VERSUS  
THE STATE OF MAHARASHTRA

.....  
Advocate for Petitioner : Mr. N. R. Bhavar  
APP for Respondent-State : Mr. B. V. Virdhe

.....  
**CORAM : SMT.VIBHA KANKANWADI, J.**  
**DATE : 20-06-2022**

**ORDER :**

1. Present petition has been filed invoking the Constitutional powers of this Court under Article 226 and 227 of the Constitution of India to challenge the order passed by learned Additional Sessions Judge, Kopergaon on 23-03-2022 below Exhibit 167 in Sessions Case No.35 of 2020 thereby recalling his order dated 15-03-2022 passed on application Exhibit 163 thereby allowing that application under Section 91 of the Code of Criminal Procedure.
2. Heard learned Advocate Mr. N. R. Bhavar for petitioner and learned APP Mr. B. V. Virdhe for respondent/State.
3. It has been vehemently submitted on behalf of the petitioner/original accused No.2 that he had filed application Exhibit 163 under Section 91 of Cr.P.C. thereby calling upon the details of

calls from Reliance Jio Infocomm Limited, Mumbai in respect of two mobile numbers. According to him the informant had contended that he was an eye-witness but in fact he was not at all present at the spot of incident. The informant has falsely contended that he had seen the incident, and therefore, it is necessary to bring the location of the informant on record. By order dated 15-03-2022 the learned Additional Sessions Judge, Kopergaon allowed the said application, however, thereafter, application was filed on behalf of the prosecution at Exhibit 167 for recalling of the said order. It was contended in the application by the prosecution that the petitioner had filed Writ Petition No.320 of 2021 before this Court which was for the same purpose, but that writ petition was withdrawn by the present petitioner on 22-03-2022 before the Division Bench of this Court. In fact, by the said writ petition the present petitioner and co-accused were asking for free and fair investigation and directions to be given to the Investigating Officer to consider the representation/application dated 27-07-2020 filed on their behalf. The withdrawal of that writ petition had nothing to do with the application Exhibit 163 and it was independently filed under Section 91 of the Code of Criminal procedure. Learned Advocate for the petitioner has relied on the decision in *Nitya Dharmananda alias*

*Lenin and Another vs. Gopal Sheelum Reddy also known as Nithya Bhaktananda and Another*, reported in (2018) 2 SCC 93, wherein it was held that, even the accused has right to invoke provisions of Section 91 of Cr.P.C. The same Judge has then recalled his earlier order on 23-03-2022 which is illegal, and therefore, the petition deserves to be allowed and the order passed below Exhibit 163 deserves to be restored.

4. Per contra, the learned APP representing the prosecution submitted that if the entire Writ Petition No.320 of 2021 is considered, it was on the same basis stating that the informant was not the eye-witness and the Investigating Officer should carry out the investigation fairly. The withdrawal of that writ petition was in fact later on i.e. on 22-03-2022 after the order below Exhibit 163 was passed, but at least pendency of the writ petition ought to have been pleaded and shown by the petitioner in his application Exhibit 163. It can be said that the said order below Exhibit 163 was obtained by suppression of material facts, and therefore, the recall has been made by the same Court on 23-03-2022, it is perfectly legal.

5. At the outset, it is to be noted that the copy of Criminal Writ

Petition No.320 of 2021 has been now produced and in that in paragraph No.4 the present petitioner had clearly stated that the informant has posed himself as eye-witness though he was not at all present at the scene of offence. It is then stated that where the informant was in fact at the relevant time which was at a distance about seven to eight kilometers from the spot. It appears that when application Exhibit 163 was filed by the present petitioner before the Court below, in that application there is absolutely no whisper about he knocking the door of this Court by way of writ petition, and then after the order was passed on 15-03-2022 allowing that application Exhibit 163, it appears that the writ petition has been withdrawn on 22-03-2022. In fact, on 17-03-2022 itself the application Exhibit 167 was filed before the concerned Court, yet on 22-03-2022 the petitioner had withdrawn the said petition. It can be said that the purpose with which the application was filed was served, but still the application to recall that order was pending, yet when such action of withdrawal has been made, that withdrawal appears to be with some intention, and as aforesaid, it was as a result of allowing application Exhibit 163. But when application Exhibit 163 is silent on the point that the higher authority has been already been approached by the petitioner, then the order which has been so passed in view of the

said ignorance or not bringing the important fact to the notice, then such order could not have been allowed to sustain by the concerned Court. Under such circumstances, the application Exhibit 167 has been rightly passed.

6. In *Nitya Dharmananda Vs. Gopal Sheelum Reddy (Supra)* it has been observed by the Hon'ble Supreme Court that :-

"At the stage of framing of charge, the accused cannot ordinarily invoke Section 91 of Cr.P.C. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its powers, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court has to be satisfied that the material available with the investigator, not made part of the chargesheet, has crucial bearing on the issue of framing of charge."

Here in this case also it appears that even the charge is not framed. Therefore as aforesaid, in *Nitya Dharmananda vs. Gopal Sheelum Reddy (Supra)* ordinarily the petitioner could not have invoked Section 91 of the Cr.P.C. Secondly, he wanted to show the location of the informant at a different place. Whether such method is in fact practicable or not has not been considered by the concerned Additional Sessions Judge. It has to be noted that the mobile

phones work on the towers i.e. the mobile towers transmit, the signals and such mobile towers are located at different places having sufficient distance from each other. Therefore, location of one person near one mobile tower would indicate that that person is within that radius, it may not show exact location. Until all these clarifications were sought by the concerned Additional Sessions Judge, he could not have allowed that application under Section 91 of Cr.P.C. Interestingly the accused person was saying in the earlier writ petition that the Investigating Officer should carry out the investigation freely and fairly. He cannot show disrespect or raise doubts over the investigation since beginning. Further, when the charge-sheet was already filed, at the most he could have shown that the investigation is not done on a particular aspect, but whether he could have asked for further investigation under Section 173 (8) of Cr.P.C., was the question before the Division Bench of this Court before the earlier petition filed by the present petitioner. He had not allowed that petition to go on and had withdrawn the same. There is absolutely no merit in the present petition, it deserves to be rejected, accordingly it is rejected.

**(SMT. VIBHA KANKANWADI)**  
**JUDGE**

vjg/-.