

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

CRIMINAL WRIT PETITION NO.680 OF 2022

YASHVANT NAROTTAM SONAWANE

VERSUS

PANDIT DINDAYAL NAGRI SAHAKARI PATPEDI LTD.
SHAHADA THROUGH SANJAY MOTILAL BAFNA AND
ANOTHER

...

Advocate for Petitioner : Miss R L Jakhade h/f Kulkarni
S. A.

APP for Respondent 2 : Mr. P G Borade
Advocate for Respondent 1 : Mr. Savale Amit S.

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CORAM : SHRIKANT D. KULKARNI, J.

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**Reserved on : September 07, 2022
Pronounced on : September 08, 2022**

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ORDER :-

1. The petitioner has challenged the order passed below exhibit 140 in STCC No.381 of 2008 by the Judicial Magistrate First Class, Court No.2, Shahada thereby application filed by the respondent no.1/original complainant under section 311 of the Criminal Procedure Code came to be allowed on payment of costs of Rs.1,000/-.

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2. It is necessary to have a glance on brief facts, which are important and relevant :-

The respondent no.1 herein has filed a complaint against the petitioner under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'). The respondent no.1 closed its evidence and thereafter, statement of the present petitioner under section 313 of Cr.P.C. came to be recorded on 29.12.2021. On 1.2.2022 respondent no.1 herein moved an application under section 311 of Cr.P.C. before the trial court and prayed to recall Sanjay Motilal Bafna as a witness. The learned Magistrate, after considering the say given by the petitioner and the argument advanced on behalf of both the sides was pleased to allow that application by the impugned order dated 8.3.2022.

3. Feeling aggrieved by the impugned order dated 8.3.2022 passed by the learned Magistrate, the petitioner/original accused has preferred this writ petition and assailed the order.

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4. Heard Miss Rutuja L Jakhade h/f Suniket Kulkarni, learned counsel for the petitioner, Mr. Amit Savale, learned counsel for respondent no.1/original complainant and Mr. Borade, learned APP for the State/ respondent no.2.

5. Miss Jakhade, learned counsel for the petitioner vehemently submitted that the learned Magistrate has allowed the application for recalling of witness u/s 311 of Cr.P.C. after a period of eight years. It has caused serious prejudice to the rights and interest of the petitioner/accused. She pointed out copy of the order passed by the learned Magistrate below exhibit 16 dated 29.4.2014 and pointed out that the learned Magistrate was pleased to exhibit all the documents except the documents produced below exhibit 3/7 and 17/6. That order was challenged before the revisional Court. Criminal revision application came to be dismissed and the order passed by the Magistrate dated 29.4.2014 came to be confirmed. Even then, respondent no.1 did not make any attempt to move an application under

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section 311 of Cr.P.C. She submitted that it is an attempt made on behalf of original complainant/respondent no.1 to cure the lacuna which is not permissible. She submitted that though the learned Magistrate is empowered under section 311 of Cr.P.C. to recall the witness, discretion should be used in a judicious manner. She submitted that having regard to the facts of the case it was not necessary to recall the witness. She, therefore, submitted that the impugned order is bad in law and liable to be quashed and set aside.

6. Miss. Rutuja Jakhade learned counsel for the petitioner has placed her reliance on following citations :-

- i. Rajaram Prasad Yadav Vs. State of Bihar and another reported in (2013) 14 Supreme Court Cases 461.
- ii. Criminal Writ Petition no.253 of 2019 (Mr. Shankar Lotlikar Vs. Mr. Pundalik Venktesh Verlekar (Goa Bench) dated 9.3.2020.
- iii. Criminal Writ Petition no.967 of 2022 dated 1.8.2022 (Ashok Mohanrao Wadkute Vs. State of Maharashtra.)

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7. Per contra, Mr. Savale, learned counsel for respondent no.1/original complainant supported the impugned order. He took me through the impugned order, more particularly, paragraph nos.5,7,9,10 and 11. He submitted that the learned Magistrate has considered the scope and ambit of section 311 of Cr.P.C. The learned Magistrate has discussed how those powers should be exercised. Learned Magistrate, after recording sound reasons arrived at conclusion that permission needs to be granted to examine the witness for just decision of the case. There is no legal defect. He submitted that the earlier order passed by the Magistrate regarding exhibiting the documents below exhibit 16 has reached its finality. In order to prove those documents below exhibit 3/7 and 17/6 the Magistrate was pleased to grant permission for just decision of the case and in order to have a best piece of evidence. He, therefore, submitted that, no interference is called for in the impugned order. The petition is liable to be dismissed.

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8. Mr. Savale, learned counsel for respondent no.1 has placed his reliance on following stock of citations :-

- i. Mannan Sk and others Vs. State of West Bengal and another reported in 2014 AIR (SCW) 4372.
- ii. State represented by the Deputy Superintendent of Police Vs. Tr. N. Seenivasagan reported in 2021 Cri.L.R. (SC) 925.
- iii. Godrej Pacific Tech Ltd., Vs. Computer Joint India Ltd., reported in 2008 (supl) Cri LR (SC) 393.
- iv. Shri Ketan Krishnakant Amin and another Vs. M/s Tirumalai Chemicals Limited Through its authorized signatory Mr. TKV Mohan (Jt. Mgr Logistics) having its office at thirumalai House, 101, Sion Matunga Estate S.No.6, Mumbai and others reported in 2019 (4) Bom.C.R. 216.
- v. Vilas N. Pawgi Vs. Mrs S.L.Pillai and another reported in 2008 (27) RCR (Criminal) 187.
- vi. Mr. Dhananjay Mahadev Desai s/o Mr. Mahadev Dessai aged 35 years, Business r/o Nagarcem Palolem, Canacona-Goa Vs. The Canacona Urban Cooperative Credit Society Limited, having its Head office at Canacona, Represented by its Power of Attorney Holder Mr. Vasant Devidas R/o. H No.21, Mudkud, Agonda reported in 2016 (3) Bom. C.R. (Cri) 68.

9. Mr. Borade, learned APP for the State/respondent no.2 also supported the impugned order passed by the learned Magistrate.

10. I have considered the submissions of both sides. I studied the citations relied upon by both the sides.

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11. There cannot be any debate about vast powers of the Court to recall or re-examine any witness by invoking section 311 of the Cr.P.C. The object of section 311 of Cr.P.C. is to be considered. This provision is made with a view that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or there should not be ambiguity in the statements of witnesses examined from either side. Thus, most important factor is whether it is essential to grant such permission for the just decision of the case. The significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code.” It is, however, to be borne in mind that the discretionary power conferred under section 311 of Cr.P.C. needs to be exercised judiciously, as it is said “wider power, greater is the necessity of caution while exercise of judicious discretion.”

12. In **Rajaram Prasad Yadav Vs. State of Bihar and another** (supra) the Hon’ble Supreme Court has held as under :-

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“A conspicuous reading of section 311 of Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. [Section 138](#) of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of [Section 311](#) Cr.P.C. and [Section 138](#) Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under [Section 138](#), will have to necessarily be in consonance with the prescription contained in [Section 311](#) Cr.P.C. It is, therefore, imperative that the invocation of [Section 311](#) Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentially of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

13. The Hon'ble Supreme Court has also laid down following parameters while dealing with an application under section 311 of the Cr.P.C.

“i) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under [Section 311](#) is noted by the Court for a just decision of a case ?

ii) The exercise of the widest discretionary power under [Section 311](#) Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

iii) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

iv) The exercise of power under [Section 311](#) Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

v) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

vi) The wide discretionary power should be exercised judiciously and not arbitrarily.

vii) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

viii) The object of [Section 311](#) Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

ix) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but

because there would be a failure of justice without such evidence being considered.

x) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

xi) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

xii) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

xiii) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

xiv) The power under [Section 311](#) Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

14. In case of **Mannan Sk and others Vs. State of West Bengal and another** (supra), the Hon'ble Supreme Court has reiterated the view that witness can be

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recalled and re-examined any number of times if required for just decision of the case. Section 311 of the Cr.P.C. does not prevent further recall though only because of delay in recalling the witness.

15. In **Manju Devi Vs. State of Rajasthan reported in 2019 SCC 203** the Hon'ble Supreme Court has held that an application under section 311 of Cr.P.C. could not be rejected on the sole ground that case had been pending for an inordinate amount of time (10 years). Rather, it noted that the "length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself cannot be decisive of the matter when a prayer is made for examination of a material witness.

16. In **Godrej Pacific Tech. Ltd., Vs. Computer Joint India Ltd.**, (supra) the Hon'ble Supreme Court was pleased to allow the prayer under section 311 of Cr.P.C. for recalling of a witness even though evidence is closed

in the year 2004 so as to prove the relevant documents when the party had inadvertently failed earlier to do so.

17. In **Vilas N. Pawgi Vs. Mrs S L Pillai and anr** (supra), this Court was pleased to allow the party to recall a witness u/s 311 of Cr.P.C. in order to prove two documents, one cheque in question and another demand notice u/s 138 of the Act. The facts of the case in **Vilas N. Pawgi Vs. Mrs S L Pillai and anr** and facts of the case in hand are practically similar. In the present case two documents below exhibit 3/7 and 17/6 are remained to be proved. In order to prove those two documents, respondent no.1/complainant had filed an application to recall witness u/s 311 of Cr.P.C. Even though the application is moved after lapse of eight years, prayer cannot be rejected in view of decision of the Hon'ble Supreme Court in case of Manjudevi (supra). Those two documents are already on record. It is not the case that respondent no.1 intended to produce altogether new documents. He could not prove those two documents inadvertently despite of earlier order

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passed by the Magistrate below exhibit 16 on 29.4.2014.

In that background, even though evidence of complainant was closed long back, learned Magistrate thought it fit to recall the witness to prove those two documents. The learned Magistrate, after considering the scope of section 311 of Cr.P.C. and considering the facts of the case, arrived at conclusion that for just decision of the case, it is necessary to allow the application u/s 311 of Cr.P.C. and extend one opportunity to prove those two documents.

18. On careful study of the impugned order, it is noticed that learned Magistrate has recorded sound reasons with the ambit and scope of section 311 of Cr.P.C. Learned Magistrate was pleased to allow that application for just decision of the case. I do not see any legal defect in the order.

19. In **Rajendra Prasad Vs. Narcotic Cell reported in 1999 (6) SC 110**, it is observed by the Hon'ble Supreme Court that *'after all, function of the criminal court is administration of criminal justice and not to count*

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errors committed by the parties or to find out and declare who among the parties perform better.’ The courts function to render just decision by allowing a party to examine important witness at any stage and cannot be said that it is by way of filling of lacuna. No interference is called for. There is no merit in the petition.

O R D E R

- i. Writ Petition stands dismissed.
- ii. No order as to costs.
- iii. The learned Magistrate is requested to expedite the proceedings of S.T.C.C. No.381 of 2008 and dispose off the same by looking towards its old nature, as early as possible.

(SHRIKANT D. KULKARNI, J.)

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