

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

CRIMINAL WRIT PETITION NO.967 OF 2022

**ASHOK MOHANRAO WADKUTE
VERSUS
THE STATE OF MAHARASHTRA**

....
Mr. S.T. Tandale, Advocate for the Petitioner
Mr. R.D. Sanap, APP for Respondent/State
....

CORAM : SHRIKANT D. KULKARNI, J.

DATE : 1 AUGUST, 2022

PER COURT:-

. The petitioner has challenged the order passed below exhibit 109 in Special Case (ACB) No. 11 of 2013 by the learned Special Judge/Additional Sessions Judge, Osmanabad dated 21.06.2022.

2. Mr. S.T. Tandale, learned counsel for the petitioner submitted that the petitioner/accused has moved an application vide exhibit 109 before the trial court so as to recall the witness in view of change of advocate. He submitted that the petitioner intends to place on record the document in order to support his defence and that's why he has applied for recalling the witness. The learned Additional

Sessions Judge, Osmanabad was pleased to reject that application by the impugned order dated 21.06.2022. He submitted that the impugned order came to be passed in absence of the petitioner and his advocate. It has caused injustice. No opportunity was given to the petitioner. He submitted that Section 311 of the Code of Criminal Procedure Code empowers the court to allow either parties to recall the witness for the just decision of the case. He submitted that if the witness is not recalled, it may cause serious prejudice to the rights and interest of the petitioner. He, therefore, urged to allow the application moved by the petitioner.

3. To buttress his argument, he has placed his reliance on the following citations.

- (i) ***V.N. Patil Vs. K. Niranjan Kumar and others*** reported in ***(2021) 3 SCC 661***.
- (ii) ***State represented by the Deputy Superintendent of Police Vs. Tr N Seenivasagan*** reported in ***AIR Online 2021SC 128***.

4. Per contra, Mr. R.D. Sanap, learned APP strongly opposed to allow this application. He invited my attention to the impugned order, more particularly, para No.7. He pointed

out that after six years, the application came to be filed for recalling of witness on the ground of change of advocate. That cannot be a ground to recall the witness. He further pointed out that the prosecution is going on in a case under the Prevention of Corruption Act, which is pending since nine years. Only because the advocate of the petitioner was absent as observed in the impugned order can not be a ground for remand. He submitted that the impugned order is proper and correct in the eye of law. It does not require any interference.

5. Having regard to the submissions of the learned counsel for the petitioner and the learned APP for the respondent/State, I have studied the impugned order passed below exhibit 109 in Special Case (ACB) No. 11 of 2013 by the learned Additional Sessions Judge, Osmanabad. Perused Section 311 of the Code of Criminal Procedure, which relates to recalling of witness. The position of law is well settled in case of ***V.N. Patil Vs. K. Niranjana Kumar and others*** (supra), wherein the Hon'ble Supreme Court has observed in para 14 as under.

“The object underlying Section 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the valuable

evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to 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 Cr.P.C. has to be exercised judiciously, as it is always said “wider the power, greater is the necessity of caution while exercise of judicious discretion.”

6. In case of *State represented by the Deputy Superintendent of Police Vs. Tr N Seenivasagan* (supra), the Hon’ble Supreme Court has again reiterated the same view regarding recalling of witness.

7. There cannot be any debate about the powers of the trial Court to recall or re-examine the witness if it is required for just decision of the case. The facts of the case in hand are very important and crucial to decide the faith of this petition. Let me examine whether the application made by the petitioner in the trial court was *bonafide* or otherwise.

8. On going through the impugned order, more particularly, para 7, the facts would be very clear. It would be appropriate to reproduce para 7 as under.

“In the instant case only because the accused after six years has changed his advocate cannot be the ground to recall the witness. Further it is to be taken note as of now it is almost more than 9 years the case being pending in the court and today also even the application was to be argued learned Advocate for the accused is absent. Conduct of accused clearly indicates it is nothing but a tactics used for prolonging the matter for unwarranted reasons. Hence, in the above said circumstances no ground is made for recalling the witness. Application is hereby rejected.”

9. Having regard to the above scenario, it is very much clear that since last nine years, the case under the prevention of Corruption Act is pending on the file of the Special Judge/Additional Sessions Judge, Osmanabad. After six years, the application for recalling of witness is moved by the petitioner and that too on the ground of change of Advocate. Certainly, that ground is not available to recall the witness under Section 311 of the Code of Criminal Procedure.

10. Another important point is about exercise to recall the witness in the light of one document sought to be produced. The copy of the document is produced at Exhibit ‘E’ (page

48), which relates to the tax assessment register of Grampanchayat Palsap. The copy of the document no where speaks when that document was received by the petitioner. There is absolutely no whisper when that document was received by the present petitioner and sought to be produced before the trial court.

11. In the above scenario, certainly the application for recalling of witness filed by the petitioner cannot be said to be *bonafide*. The view taken by the learned Special Judge/Additional Sessions Judge under the fact and circumstances cannot be said to be erroneous. The learned trial Judge has used his judicious discretion in a proper way having regard to the facts of the case. The intention of the petitioner in making an application to recall witness was not *bonafide*. He wanted to prolong the litigation by using such tactics. As observed by the Apex Court in case of ***Vijay Kumar Vs. State of U.P.*** reported n ***(2011) 8 SCC 136***, though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Having regard to the legal position settled by the Apex Court, no case is made out to use discretionary power

by the trial court when the conduct of the petitioner is found to be willful and contumacious. As such, no interference is required. The petition must fail.

ORDER

- (i) The petition stands dismissed.
- (ii) Having regard to the pendency of the trial for long period of nine years, the learned trial Judge is requested to give top priority to conclude the case.

[**SHRIKANT D. KULKARNI**]
JUDGE

S.P. Rane