

CRIMINAL WRIT PETITION NO. 443 OF 2022

Pravin Namdev Bhagat

...Petitioner

Versus

The State of Maharashtra

...Respondent

Mr. Saurabh Butala i/b Mr. Sathe Harshad Ashok for the Petitioner

Ms. Anamika Malhotra, A.P.P for the Respondent–State

CORAM : REVATI MOHITE DERE, J.
THURSDAY, 7th APRIL 2022

P.C. :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith with the consent of
the parties and is taken up for final disposal. Learned A.P.P waives service
on behalf of the respondent–State.

3 By this petition, the petitioner has impugned the order dated 1st
February 2022 passed below Exhibit 18 in RCC No. 149/2011 by the

learned Judicial Magistrate First Class, Panvel, by which, the learned Judge was pleased to allow the application preferred by the respondent-State under Section 311 of the Code of Criminal Procedure (`Cr.P.C').

4 Learned counsel for the petitioner submits that the Prosecutor in the trial Court had filed an application (dated 31st January 2022) under Section 311 Cr.P.C for summoning a panch witness for examination, after the arguments of both i.e. the defence as well as the petitioner had concluded and the matter was posted for judgment. He submits that the said application was entertained by the learned Judge, only on the premise that the accused i.e. the petitioner would have an opportunity to cross-examine the said witness. He submits that the learned Special Judge ought to have seen and considered that the case is pending since 2011 and that the said application was filed, only when the arguments had concluded and the petitioner had disclosed his defence. He submits that multiple opportunities were given by the learned Judge to the prosecution to adduce evidence of the panch witness, however, the prosecution had failed to examine the said witness on the dates given by the trial Court, pursuant to which, the evidence of the prosecution was closed and the matter was posted for

recording the 313 statement of the petitioner. He submits that it is only after the arguments advanced by the petitioner with respect to non-examination of the panch witness to the recovery panchnama, that the said application was filed. He submits that for the dereliction of duty by the prosecution, the petitioner cannot be penalized and the prosecution cannot be permitted to fill in the lacunae.

5 Learned A.P.P vehemently opposed the application. She submits that earlier, the said witness was summoned, however, he could not appear and therefore, the prosecution rightly filed an application, though belatedly, before the judgment was pronounced.

6 Perused the papers. The petitioner was arrested in connection with C.R. No. 434/2010 registered with the Kalamboli Police Station, Panvel, for the alleged offences punishable under Section 392 of the Indian Penal Code. After investigation, charge-sheet was filed as against the petitioner. The learned Judicial Magistrate First Class, Panvel, framed charges as against the petitioner, who pleaded not guilty and claimed to be

tried. Thereafter, the prosecution examined 4 witnesses in support of its case. It appears from the Roznama that the learned Magistrate, Panvel, had given several opportunities to the prosecution to adduce the evidence of the panch witness. Infact, on 5th April 2021, the evidence was closed and the matter was posted for recording 313 statement of the accused. However, despite the same, again an opportunity was given to the prosecution to adduce the evidence of the panch witness. Since the prosecution did not produce the panch witness, the learned Judge again closed the evidence of the prosecution on 5th October 2021.

7 After the evidence was closed, the 313 statement of the petitioner was recorded and the matter was posted for final arguments. Both, the Prosecutor as well as the advocate for the petitioner completed their arguments on 20th January 2022 and the matter was posted for final judgment on 31st January 2022. It is only after the final arguments, when the advocate for the petitioner raised defence of non-examination of panch witness, that the Prosecutor filed an application under Section 311 Cr.P.C and sought summoning of the panch witness. The learned Judge allowed the same only on the ground that the same would not amount to filling up of

lacunae and that the defence will get an opportunity to cross-examine the said witness.

8 In the peculiar facts of this case, it is evident that several times prior, opportunities were given to the prosecution to summon the panch witness, however, the prosecution failed to summon the said panch witness. Infact, on one occasion, even after the prosecution's evidence was closed, the prosecution was given an opportunity to examine the panch witness. It appears that only when the final arguments were advanced by the advocate for the petitioner and the matter was posted for judgment, that the Prosecutor filed an application under Section 311 Cr.P.C. and sought examination of the panch witness. In the peculiar facts, the same clearly would amount to filling up of the lacunae. Merely because the defence will get an opportunity to cross-examine the witness, cannot be a ground for allowing the said application. The facts reveal that the application was allowed, after the defence had completed their arguments and had disclosed their defence. In the peculiar facts, the learned Judge ought not to have entertained the application.

9 Considering the aforesaid, the impugned order dated 1st February 2022 passed below Exhibit 18 in RCC No. 149/2011 by the learned Judicial Magistrate First Class, Panvel, cannot be sustained and as such, is quashed and set-aside. The matter to proceed in accordance with law.

10 Petition is allowed and Rule is made absolute on the aforesaid terms. Petition is accordingly disposed of.

11 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.