

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.924 OF 2022**

Faizal A. Wahid ...Applicant  
**V/s.**  
The State of Maharashtra  
at the instance of C.B.I., BS & FC  
Mumbai ...Respondent

Mr. Sudeep Pasbola with Mr. Ayush Pasbola and Mr.  
Siddharth Mehta for the applicant.

Mr. Kuldeep S. Patil for the respondent no.1/CBI.

Ms. G. P. Mulekar, APP for the State.

Digitally  
signed by  
ATUL  
GANESH  
KULKARNI  
Date:  
2022.11.14  
14:32:49  
+0530

**CORAM : AMIT BORKAR, J.**

**DATED : OCTOBER 7, 2022**

**PC.:**

**1.** By this application under section 482 of the Code of Criminal Procedure, the applicant/accused is challenging the order dated 5<sup>th</sup> September 2022 passed below Exhibit 556 by the Special Court (C.B.I.) in *Special Case No. 95 of 2020* rejecting the application under section 311 of the Code of Criminal Procedure to recall two witnesses of the prosecution for further cross-examination.

**2.** The application was a director of a company along with other co-accused against whom prosecution has been launched for an offence under sections 12-B read with 201, 420, 467, 468 and

471 of the Indian Penal Code and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 2018 before Special Court in CBI Special Case No. 95 of 2000. During the trial, the prosecution examined two (2) witnesses, PW1 Mahindra Pal Singh Bakshi and PW2 Suresh T. Sahani.

**3.** The gist of the prosecution's case is that Indian Oil Corporation was supplying aviation fuel to East-West Airlines, which was granted twenty-one (21) days of interest-free credit facility for uplifting aviation turbine fuel for their aircraft. It is alleged that the accused no.1, from 21st March 1996 to 21st May 1996, cheated Indian Oil Corporation to the tune of Rs. 1.6 crore.

**4.** According to the applicant, PW1 and PW2 made a material improvement in their deposition. The defence advocate appearing for the applicant cross-examined PW1 and PW2. But since the cross-examination was composite, there was no cross-examination with regard to the role of the applicant. Therefore, the applicant applied for Exhibit 556 before the Special Court seeking recall of PW1 and PW2, which was rejected by the impugned order dated 26th September 2022. While dismissing the application, the learned Special Court recorded a finding that there is no omission in the statement either of PW1 or PW2. It is held that it is not expected from the witness to narrate the events in a cyclostyled form in accordance with their statements recorded by C.B.I. It is held that the evidence narrated by both these witnesses, which is termed as an omission by the applicant, is a part of the correspondence, and they make averments in their statements and correspondence which is part of the previous statement and,

therefore, recorded a finding that there is no material omission. The applicant has, therefore, filed the present application.

**5.** Learned advocate for the applicant submitted that the power under section 311 of the Code of Criminal Procedure could be exercised at any stage of the proceedings. It is submitted that the earlier advocate, due to inadvertence, had not conducted the cross-examination of PW1 and PW2 properly, causing legal prejudice to the accused no.3. He submitted that the statements of PW1 and PW2 implicating the applicant did not surface during the investigation but, for the first time, brought in evidence of PW1 and PW2. He relied on the Apex Court's judgment in the case of **Rajendra Prasad v. Narcotic Cell** reported in (1996) 6 SCC 110, and **Rajaram Prasad Yadav v. State of Bihar & Anr.** Reported in (2013) 14 SCC 461.

**6.** *Per contra*, learned advocate for C.B.I. submitted that mere change of advocate could not be a ground for allowing the application under section 311 of the Code of Criminal Procedure. Since the Special Court has recorded a finding that there is no omission at all in the statement of either PW1 or PW2, there cannot be scrutiny of oral evidence of the case of the prosecution to decide as to whether there is material omission or not which can be done at the time of delivery of judgment by the Special Court. He submitted that after the examination of PW1 and PW2, 32 witnesses were examined. The examination of PW1 and PW2 was conducted in 2015-2016, while the application under section 311 was filed on 19th August 2022, i.e., after six (6) years of examining PW1 and PW2. He, therefore, submitted that the

Special Court had rightly rejected the application.

7. Having carefully considered the submissions on behalf of the parties, I am satisfied that the learned Special Court has exercised its jurisdiction in a proper manner, and there is no error of jurisdiction committed by the learned Special Court while rejecting the application.

8. Apart from the finding recorded by the Special Court that there is no omission at all, it must be noted that the examination of PW1 and PW2 was conducted in 2015-2016. The application under section 311 of the Code of Criminal Procedure was filed on 19th August 2022. The cross-examination of PW1 and PW2 was conducted by the advocate by choice of the applicant. The learned advocate for C.B.I. is right in submitting that a mere change of offence is not a ground for grant of an application under section 311 of the Code of Criminal Procedure.

9. The Apex Court, in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav**, reported in (2016) 2 SCC 402 has held that the object of the provision for the recall is to reserve the power of the Court to prevent any injustice in conducting of the trial at any stage. While the advancement of justice remains the prime object of law, it does not mean that recall can be allowed for asking or reasons related to mere convenience. It is normal to be presumed that a counsel conducting a case is competent, particularly when a counsel is appointed by the choice of the applicant. The witness cannot be expected to face the hardship of appearing in Court repeatedly, which can result in undue hardship for victims if they

are required to repeatedly appear in Court to face prosecution.

**10.** In the facts of the present case, it is not the case of the applicant that the earlier advocate had any disability or could not cross-examine PW1 and PW2. There is no satisfactory explanation as to why the applicant waited for six (6) years and completed the examination of thirty-two (32) witnesses after the examination of PW1 and PW2.

**11.** In so far as the judgment in the case of **Rajendra Prasad** (supra) is concerned, there cannot be a dispute in relation to the ratio laid down in the said judgment, but it is settled in criminal cases, even a single deviation would make a difference in the application of ratio. In the case of **Rajaram Prasad Yadav** (supra), the Apex Court laid down the principles in paragraph 17 to be borne in mind by the Court while considering the application under Section 311 of the Code of Criminal Procedure. In the facts of the present case, in the absence of a satisfactory explanation as to why the applicant waited for a period of six (6) years and completion of the examination of thirty-two (32) witnesses after the examination of PW1 and PW2, in my opinion, the learned Special Judge was justified in rejecting the application of the applicant.

**12.** There is neither error of jurisdiction nor miscarriage of justice calling for interference.

**13.** The criminal application is, therefore, rejected. No costs.

**(AMIT BORKAR, J.)**

**Note:** This order is modified as per order dated 11.11.2022 to show the corrections in paragraph 1. The corrections are shown in italicize.