

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

**CRIMINAL WRIT PETITION NO. 3944 OF 2022  
WITH  
CRIMINAL WRIT PETITION NO. 3945 OF 2022  
WITH  
CRIMINAL WRIT PETITION NO. 3946 OF 2022**

M/s. Summai Shipping Pvt Ltd and Ors. ... Petitioners  
Vs

The State Of Maharashtra and Anr. ... Respondents

Mr. Ashutosh M. Dube a/w Ms. Mamta S. Panigrahi for the  
Petitioners.

Mr.A.D. Kamkhedkar, APP for the Respondent/State.

**CORAM : AMIT BORKAR, J.**

**DATED : 16<sup>th</sup> NOVEMBER , 2022**

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**PC.:**

1. The Petitioners in these petitions are original accused who have filed Applications in the respective complaints under Section 311 of Code of Criminal Procedure,1973,which have been rejected by the impugned order.

2. The Petitions arose out of the complaint lodged by the Income Tax Department Department for offences under Section 276B read with Section 278B of the Income Tax Act, 1961. In the said complaints, both parties lead evidence and completed

their arguments. After completion of arguments, the accused have filed these Applications under section 311 of Code of Criminal Procedure, 1973, stating that in the cross-examination of Income Tax Officer, the previous Advocate engaged by the Petitioners concluded his cross-examination in short without challenging traces of show cause notices and sanction order. It is further contended that the material facts were not brought on record by the previous advocate and, therefore, to clarify these facts, permission to recall the material witness needs to be granted.

3. Learned Magistrate rejected all Applications holding that the witness of complainant was examined on 4<sup>th</sup> August 2020 and his cross-examination was thereafter deferred. On 10<sup>th</sup> August 2021, he was partly cross-examined and thereafter, on 25<sup>th</sup> August 2021, his cross-examination was concluded. On 1<sup>st</sup> September 2021, the charges were framed and statement of accused under Section 313 of Code of Criminal Procedure, 1973, was recorded on 21<sup>st</sup> October 2021. Thereafter the accused took considerable time to examine themselves and ultimately on 2<sup>nd</sup> March 2022, the accused was examined and thereafter the evidence was closed.

4. Learned Magistrate therefore recorded findings that accused failed to mention a single reason as to why they could not file this application earlier. It is held that allowing of the

Application would amount to re-open of the trial.

5. The orders was challenged by way of Revision before learned Sessions Judge and learned Sessions Judge after considering Judgments relied upon on behalf of the Petitioners, dismissed, the Revision. The Petitioners therefore filed Petitions challenging order of Revisional Court.

6. Learned Advocate for the Petitioners submitted that opportunity to recall the witness is necessary in the interest of justice. He submits that the examination shall be completed in one day and there would not be any delay.

7. On perusal of the Applications filed before the learned Magistrate, it appears that only reason mentioned in the Applications for recalling of witness is that the previous Advocate had failed to properly cross-examine the witness of complainant and failed to bring material facts on record. The reason assigned in the application for recalling of witness in exercise of power under Section 311 of Code of Criminal Procedure, 1973, is no longer res-integra in view of the Judgment of Apex Court in case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav reported in 2016(2) SCC 402**. The Apex Court in said Judgment held that mere incompetence or change of Advocate cannot be a ground to recall the witness. Such a plea that previous advocate was not competent and had not

effectively cross-examined the witness, cannot be a reason for recalling of witness. Recall is not a matter of course and discretion given to the Court has to be exercised judiciously to prevent failure of justice and not arbitrarily. Mere observation that recall was necessary ensuring fair trial is not enough unless there are tangible reasons to show how fair trial has been suffered without recall.

8. In the facts of the case, the only reason mentioned in the application is inability of previous Advocate to cross-examine the complainant's witness. It is undisputed that previous Advocate was the Advocate of the choice of the accused.

9. In that view of the matter, the impugned Judgment of Revisional Court confirming order of rejection of Application under Section 311 of Code of Criminal Procedure, 1973, cannot be termed as perverse. This is not miscarriage of justice.

10. The Petitions are therefore dismissed. No costs

**(AMIT BORKAR, J.)**