

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.1406 OF 2022**

**GOVIND RATANLAL AASAWA AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA**

...

Mr. G. G. Kadam, Advocate for the Petitioners.

Mr. S. P. Deshmukh, APP for Respondents-State.

...

CORAM : S. G. CHAPALGAONKAR, J.

DATED : 20th SEPTEMBER, 2023.

PER COURT:-

1. The petitioners impugn the order dated 05.10.2021 passed below Exhibit-44 in Sessions Case No.134/2017 pending before the Additional Sessions Judge, Ahmednagar thereby rejecting the prayer of the applicants for recalling of the witness for further cross-examination.

2. The petitioners are accused in Crime No.186/2016 registered with Rahuri Police Station, Dist. Ahmednagar for the offences punishable under Sections 307, 427, 435, 504, 506 r/w 34 of the Indian Penal Code. On completion of the investigation, charge-sheet has been filed. The petitioners denied the charges. Hence, they are put to the trial in Sessions Case No.134/2017. The prosecution examined PW-1-Purushottam Aasawa. He has been duly cross-examined till 07.12.2019.

3. On 21.01.2020, the petitioners moved an application below Exhibit-44 seeking recall of PW-1 for further cross-examination. The reason mentioned in the application is that at

the time of cross-examination, the important questions regarding the previous disputes could not be put to the witness. The defence of the petitioners depends on such questions. Therefore, it is prayed to recall the witness.

4. The prosecution opposed the said application on the ground that PW-1 is elaborately cross-examined. The recall of the witness would not be necessary for further cross-examination without there being any foundation for such demand. It is an attempt to fill up the lacunas. The learned Sessions Judge after considering the submissions advanced by respective parties, rejected the application at Exhibit-44 holding that entertaining such application would be unending process and this is sheer attempt to fill up the lacunas.

5. Mr. Kadam, learned Advocate appearing for the petitioners would submit that the Courts are empowered to recall the witnesses under Section 311 of the Criminal Procedure Code. A wide powers are conferred upon the Courts and this would be the fit case where such powers ought to have been exercised. He would submit that the apprehension raised by the prosecution as well as the Court that recalling of the witness would amount to fill in of lacunas is subsidiary factor. The Courts are required to make endeavour for substantial justice and in the facts of the case the end of justice can be achieved only by recalling the witness. He would, therefore, submit that the order passed by the Sessions Court be quashed and set aside. To buttress his submission he relies upon the judgment of the Supreme Court of India in the matter of *Varsha Garg Vs. The State of Madhya Pradesh and Ors.* in *Criminal Appeal No.1021 of 2022* dated

08.08.2022. He would further rely upon the judgment of the Supreme Court of India in the matter of ***Sudevanand Vs. State through CBI¹***, so also judgment in case of ***Satbir Singh Vs. State of Haryana and Ors.*** passed in ***Criminal Appeal No.2634 of 2023*** dated **29.08.2023**.

6. Mr. Deshmukh, learned APP vehemently opposes the petition. He would submit that there are no grounds to exercise the powers under Section 311 of the Criminal Procedure Code in the facts of the case. He would submit that the judgments relied upon by the petitioners are distinguishable on facts and has no application so far as facts of the present case.

7. Having considered the submissions advanced, apparently, the petitioners are seeking recall of the cross-examination of the PW-1, which has been already cross-examined. Pertinently, on two occasions the witness was called and he was elaborately cross-examined. Initially, after recording the examination-in-chief, the cross-examination was started on 22.11.2019. Later on, it was deferred on the request of the learned Advocate appearing for the defence/petitioners. The witness was further put to the cross-examination on 06.12.2019 and elaborately cross-examined on behalf of the defence. After more than six weeks thereafter the application was moved by the petitioners seeking recall of the witness, wherein reason mentioned is that during the cross-examination some important aspects regarding previous dispute could not be put to the witness, which may have bearing on the defence of the petitioners. Pertinently, the application is bereft of the reasons, which

requires recalling of the witness. Perusal of the cross-examination conducted on 22.11.2019 and 06.12.2019 would show that the witness has been elaborately cross-examined. In this background, it would be appropriate to refer Section 311 of the Criminal Procedure Code:

“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

8. The careful reading of the aforesaid provision would depict that the Trial Court is envisaged with ample power to recall and re-examine any person already examined subject to rider that if his evidence appears to be essential to the just decision of the case. The aforesaid provision of the law has been interpreted by the Court through various pronouncements. The gist of such pronouncements would show that the Courts are required to apply the mind as to whether invocation of Section 311 of the Criminal Procedure Code was required to arrive at just decision.

9. In present case, either in application or during the course of arguments, the learned Advocate appearing for the petitioners could not explain as to why the cross-examination on desired issue could not be done, when the witness was available for cross-examination on two occasions. Even, it is not clarified as to why the necessary instructions were not passed on to the learned Advocate while conducting cross-examination. On specific query from this Court, the learned Advocate appearing for the

petitioners could not point out the exigencies and situations that would warrant the Court to exercise the power under Section 311 of the Criminal Procedure Code. Although, there is substance in contentions of the petitioners that only under apprehension that further cross-examination will amount to “fill in loopholes”, the Court should not refuse to exercise powers under Section 311 of the Criminal Procedure Code. However, in absence of specific reasons and in absence of bringing on record the exigencies to recall the witnesses, the Court cannot be blamed of failure to exercise jurisdiction. In that view of the matter, no case is made out to interfere in the order passed by the Sessions Court in exercise of writ jurisdiction of this Court. Hence, Writ Petition stands rejected.

(S. G. CHAPALGAONKAR)
JUDGE