

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Criminal Writ Petition No. 298 OF 2023

1. M/S. RASHMI REALTY BUILDERS PVT. LTD.,
Through its director and authorised
signatory Mr. Yogesh Pranjivan
Bosmiya, having office address at
B/215, Shanti Shopping
Centre, Opp.Railway Station Mira
Road (East), Dist: Thane 401107,
Maharashtra.
2. MR. YOGESH PRANJIVAN BOSMIYA,
An adult, aged 48 years, Occ: Business,
residing at 1505-6, Agarwal Residency,
Wing D, Shankar Lane, Near Shankar temple,
Aadarsh Dugdhalay, Kandivali (West),
Mumbai-400067, Maharashtra.
3. MR. ASHOK PRANJIVAN BOSMIYA,
An adult, aged 46 years, Occ: Business,
residing at 1505-1506, Agarwal Residency,
Building No.2-C, Shankar Lane,
Near Shankar Temple, Kandivali (West),
Mumbai-400067, Maharashtra.

...Petitioners

Versus

1. THE STATE OF MAHARASHTRA,
Copy to be served upon Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad.
2. MR. AKHIL RAJESH KUMAR GUPTA,
Age: 31 years, Occ: Service
R/o C/o: R. K. Gupta
Bungalow No.2 Sailabh Enclave,
Itkheda, Behind Maa Baap Drgah,
Aurangabad – 431105.

3. MR. RAJESH KUMAR S/O TARAKCHAND GUPTA,
Age: 59 years Occ: Service
R/o: Bunglow No.2 Sailabh
Enclave, Itkheda, Behind Maa Baap Drgah,
Aurangabad-431105.

...Respondents

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Advocate for Petitioners : Mr. Ashok Kumar Upadhyay
APP for State/Respondent No.1 : Smt. D. S. Jape
Advocate for Respondent No.2 and 3 : Mr. Ajeet D. Kasliwal

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CORAM : KISHORE C. SANT, J.

RESERVED ON : 31st MARCH, 2023.

PRONOUNCED ON : 12th MAY, 2023.

JUDGMENT :

Heard.

1. Rule.
2. Rule made returnable forthwith by consent of the parties.
3. The petitioners are facing a trial for the offence punishable under Section 138 of the Negotiable Instruments Act, in the Court of learned Judicial Magistrate First Class, Court Room No.14, Aurangabad. The petitioners are aggrieved by an order dated 13.12.2022 passed by the learned Court on an application below Exhibit-89 in the said proceeding, rejecting their application. The petitioners had filed an application under Section 311 of the Code of Criminal Procedure, for recall of complainant/witness for re-examination. The learned Magistrate however holding that the prayer of the

accused is not covered within the ambit of re-examination and therefore the question of no re-examination order does not arise. The Court therefore held that the accused has already concluded the cross-examination of complainant on 07.12.2022 and also closed his evidence. After closing the evidence, the application moved on 16.12.2022 and that would amount to filling the lacuna in the case and rejected the application. It is thus the petitioners are before this Court.

4. The facts giving rise to the present petition in short, are as under;

that the complainants/respondent no.2 & 3 filed a complaint under Section 138 of the N.I. Act. The petitioner no.1 happens to be a Company and petitioner no.2 and 3 are the Directors of the Company. The petitioners and respondent no.2 and 3 had executed a memorandum of understanding dated 20.06.2015, whereby the complainants agreed to purchase 2BHK flat admeasuring 458 Sq.Ft. for consideration of Rs.25,62,500/- in Vasai, District Palghar. Upon the said agreement, complainants paid Rs.16,75,000/-through cheque to the petitioner no.1. The said amount was credited in the account of the Company/petitioner no.1. However no possession was handed over. Complainants therefore were pursuing the matter since the possession was not handed over. The accused issued 24 cheques for total amount of Rs.26,76,500/-, all bearing date 17.01.2022. On presentation, all the cheques came to be dishonoured. The petitioners received intimation on 25.05.2022.

Complainants then issued notice of demand through RPAD. Since the amount was not paid in spite of notice, a complaint came to be lodged.

5. The complaint proceeded further. The evidence of the complainant started and the application came to be filed for recall and the same came to be rejected. The main submission of the petitioners is that the trial Court can pass the order under Section 311 of Cr.P.C. at any stage of the trial. The petitioners invite attention to provision of Section 311 of Cr.P.C. to submit the Court has the power to recall the witness at any time. In this case, immediately on closure of the evidence, it was realized that certain material questions inadvertently were not asked by the Lawyer during the course of cross-examination for 313 statements. He also submits that the learned Advocate for the accused completed his cross-examination just within one paragraph and did not ask any questions as per the instructions. He submits that it was necessary to allow the application.

. The learned Advocate for the petitioners relied upon the judgment passed by the Hon'ble Apex Court in Criminal Appeal No.1021/2022 in the case of **Varsha Garg Vs. The State of Madhya Pradesh and Ors.**, reported in 2022 LiveLaw (SC) 662.

6. The learned Advocate for respondent no.2 and 3 submits that under the garb of further cross-examination, petitioners in fact want to fill up the lacuna

in their case. The application is not bonafide that the power under Section 311 of Cr.P.C. cannot be used for the purpose of filling up the lacuna and no case is made out to show that only due to some inadvertence, the question could not be asked. He further submits that looking to the application itself it is clear that now the petitioners want to practically put all the material questions. He relied upon the following judgments :

- (i) **Pandurang Namdeorao Rankhamb Vs. Sardar Chandasingh s/o Sardar Ishwarsingh Bawari**, reported in 2021 ALL MR (Cri.) 2108.
- (ii) **Mr. Shankar Lotlikar Vs. Mr. Pundalik Venktesh Verlekar** in Writ Petition No.253/2019, reported in 2020 NearLaw (Bombay HC Goa) Online 1036.
- (iii) **Lawrence Dias Vs. The State of Goa**, reported in 2019 ALL MR (Cri) 2342.

7. Before coming to the conclusion, it would be necessary to discuss the judgment cited by both the parties. In the case of Varsha Garg (supra), the Hon'ble Apex Court has considered Section 311 of Cr.P.C.. In the said case, the Additional Sessions Judge had rejected the application under Section 311 of Cr.P.C., seeking to summon the nodal officers of certain cellular entities along with the decoding register to trace the mobile location of accused. In that case, accused were facing trial under Section 302 of the Indian Penal Code. The prosecution had filed four applications for some purpose. The fourth application was for summoning the nodal officers of the cellular entities. The

trial Court rejected the fourth application. The said order was challenged before the High Court. The High Court upheld the order of trial Court. Therefore the matter was taken up before the Hon'ble Apex Court. The Hon'ble Apex Court by considering the various judgment examined the scope of Section 311 and by relying upon the judgment in the case of **Mohanlal Shamji Soni Vs. Union of India**, reported in AIR 1991 SC 1346 summed up the position from various decisions. It is held that the power of the Court is not constrained by the closure of evidence. The power under Section 311 of Cr.P.C., is to be governed by the requirement of justice and it must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasis that the court is not a hapless bystander in the derailment of justice. The Court also considered the provision of Section 92 and had allowed the petition. The Court also considered the relevant paragraphs in the case of **Rajendra Prasad Vs. Narcotic Cell Through Its Officer Incharge, Delhi**, reported in 1999 (3) SCR 818. The Court ultimately came to the conclusion and allowed the appeal directing the trial Court to allow the application filed by the prosecution.

8. So far as the first judgment relied upon by learned Advocate for respondent no.2 and 3 is in the case of Pandurang Namdeorao Rankhamb (supra), this was also a case of dishonor of cheque, wherein accused had filed an application for recall of complainant for further cross-examination as

earlier cross-examination was conducted under wrong conception. Certain questions about source, capacity etc. were not asked. Complainant had produced eighteen documents after cross-examination of the accused. This Court at Goa had considered and ample opportunities were given to accused to conduct cross-examination. However that was not properly utilized and application was dismissed.

. In second judgment in the case of Mr. Shankar Lotlikar (supra), the Court had considered that the evidence pursis was already filed. It was further observed that allowing the party to call the witness would allow to fill up the lacuna. Proper opportunity was given on several times to the accused, but he could not avail such opportunities. Considering the parameters given in the case of Rajendra Prasad (supra), the Court allowed the petition quashing and setting aside the order directing recall of witness.

9. In the case of **Rajaram Prasad Yadav Vs. State of Bihar and Another**, reported in (2013) 14 SCC 461, the Hon'ble Apex Court led the principles to be born in mind by the Court while dealing with the application under Section 311 of Cr.P.C. Guidelines X, XII and XIV read as below:

(X) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was

not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

(XII) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(XIV) The power under Section 311 of Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

. This Court finds that considering the above guidelines (X, XII and XIV) in this case are relevant.

10. Coming to third judgment cited by the learned Advocate for respondent in the case of Lawrence Dias (supra), this Court at Goa has held that in the fact of the case, the application under Section 311 of Cr.P.C. was rejected and considering the judgment, the Court dismissed the Writ Petition. In the said case, again the judgment in the case of Rajaram Prasad Yadav (supra) was considered.

11. This Court finds that the Hon'ble Apex Court in the case Varsha Garg (supra) had quashed and set aside the order passed by the Sessions Court and

confirmed by the High Court, whereby the application of the prosecution, was rejected. By considering various judgments that is **R.B. Mithani Vs. State of Maharashtra**, reported in (1971) 1 SCC 523; **Mohanlal Shamji Soni Vs. Union of India**, reported in AIR 1991 SC 1346; **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation**, reported in (2019) 14 SCC 328; **Zahira Habibullah Sheikh Vs. State of Gujarat**, reported in (2006) 3 SCC 374 and various other cases.

. From the judgment of R.B. Mithani (supra), the Court has considered paragraph No. 27, which is reproduced below.

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”

12. The Hon'ble Court considered paragraph no.11 and 12 of the judgment in the case of Swapan Kumar Chatterjee (supra), which are produced below:

“11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with

great caution and circumspection. The court has vide power under this Section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

"12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

13. Paragraph No.27 of the judgment in the case of Zahira Habibullah Sheikh (supra) is as under :

"27. The object underlying Section 311 of the Code 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 section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to

issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 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 whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

14. From the above paragraph i.e. paragraph No.27 of the judgment in the case of Zahira Habibullah Sheikh (supra), it is clear that the object underlying Section 311 is to see that there is no 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. On this discussion we need to test the facts of this case.

. Coming to the facts of this case, this Court finds that the application in this case was filed before closing of the evidence. It was filed immediately after the cross-examination of the complainant on realizing that due to inadvertence certain questions were not asked to the witness. In the application itself, it is stated as to what questions remained to be asked. The purpose of recall of the witness, this Court also considered the cross-examination. From the cross, it does appear that certain questions were not asked. The cross was furnished just within one paragraph, when the chief runs

in fourteen paragraphs. Not allowing the application would be denying the opportunity to the accused to put the relevant questions.

15. Considering the facts of the case and in view of the above discussion, this Court finds that a case is made out to allow the petition by directing the learned trial Court to recall the witness as prayed for by the petitioners. Hence the following order.

ORDER

- (i) Rule is made absolute in the following terms.
 - (a) The impugned order dated 30.12.2022 passed by the learned Judicial Magistrate First Class, Court No.14, Aurangabad on application below Exhibit-89 in S.C.C. No.2725/2022, is quashed and set aside.
 - (b) Application below Exhibit-89 stands allowed.
- (ii) It is made clear that the petitioners would complete the cross-examination in only one sitting.
- (iii) With this, the petition is disposed off.

[KISHORE C. SANT, J.]

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