

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD****CRIMINAL WRIT PETITION NO. 809 OF 2022**

1. Bhaskar S/o Dattatray Jadhav,
Age : 43 years, Occu.: Agri.
R/o. Pathrud, Tq. Bhoom,
Dist. Osmanabad.
2. Ishwar S/o Dattatray Jadhav,
Age : 47 years, Occ.: Agri,
R/o. Pathrud, Tq. Bhoom,
Dist. Osmanabad.
3. Kanhopatra W/o Ishwar Jadhav,
Age : 47 years, Occ.: Agri,
R/o. Pathrud, Tq. Bhoom,
Dist. Osmanabad.

...Petitioners**Versus**

1. The State of Maharashtra,
Through Police Station In-Charge,
Police Station Bhoom,
Tq. Bhoom, Dist. Osmanabad.
2. Shriram Sarjerao Karale,
Age : 50 years, Occ.: Agri,
3. Rajendra Sarjerao Karale,
Age: 36 years, Occ.: Agri,

4. Shahaji Sarjerao Karale,
Age : 34 years, Occ.: Agri,
All R/o. Pathrud, Tq. Bhoom,
Dist. Osmanabad.

...Respondents

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Advocate for Petitioner : Mr. Doke Kishor R.
APP for Respondent No.1/State : Mr. S.R. Yadav-Lonikar
Advocate for Respondent No.2 : Mr. M.B. Kolpe

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CORAM : KISHORE C. SANT, J.
DATE : 20th MARCH 2023.

ORAL JUDGMENT :

1. Heard the learned Advocates for the respective parties at length.

By consent of the parties, taken up for final disposal.

2. In this petition, the petitioners have challenged an order dated 03.09.2021 passed by the learned Judicial Magistrate First Class, Bhoom in R.C.C. No.148/2014, whereby the Application filed by the petitioners/informant came to be rejected under Section 311 of the Code of Criminal Procedure.

3. At the inception, the learned Advocate for respondents raised a preliminary objection that the present petition is not maintainable at the hands of the informant. It is the State, who is prosecuting other

case. This would be dealt with by this Court in the coming paragraphs.

4. It is the case of the petitioners that the respondents are facing trial for the offences punishable under Sections 323, 324, 326, 504, 506 read with 34 of the Indian Penal Code. The prosecution examined total three witnesses in support of the case of the prosecution. The learned Public Prosecutor filed an application under Section 311 praying for issuance of summons to the husband/brother-in-law of the informant and to examine them as witnesses. The learned Magistrate however rejected the said application by order dated 09.03.2020 stating the reason that statements of both these witnesses were not recorded by the police under Section 161 during the course of investigation. The said order is admittedly not challenged by the State or even by the informant/present petitioners. The petitioners thereafter filed an application praying for issuance of summons to the same witnesses and to call issue summons and to examine them in the Court as a witness. The respondents /accused filed say stating that similar application is already rejected by the Court and prayed for rejection of the application.

. Learned Advocate for the petitioners submits that once the application was rejected, the informant has no locus standi to file similar application. Entertaining this application would practically amount to reviewing the earlier order. He also submits that after rejection of the first application, the said order was not challenged by State or by the informant and now after lapse of more than one, similar applications are filed and prays for rejection of the application.

5. On this submission, this Court has to consider the following questions.

- (i) Whether the persons can be summoned as witnesses whose statements are not recorded under Section 161 of the Cr.P.C. by the police during the course of investigation.
- (ii) Whether application under Section 311 is maintainable at the behest of the informants.
- (iii) Whether second application under Section 311 is maintainable.
- (iv) Whether entertaining second application would amount to review of the order already passed.

6. In support of his case, the learned Advocate for the petitioners

relied upon the judgment in the case of **M/s. Chemo Steel Ltd. and others Vs. State of A.P. and others**, reported in 2005 Cri.L.J. 716. Wherein, the Hon'ble Apex Court has considered this aspect and permitted the additional evidence to adduce to afford fair and reasonable opportunity to the accused in that case.

. The next judgment he relied upon is in the case of **Mukunda Dev Baral Vs. Sanjib Baral and others**, reported in (1991) 2 Orissa LR 550. Wherein it is held that the informant is not to be a silent spectator to irregular and/or inadequate participation in trial and therefore he can maintain the application under Section 311. In that case, the application for recall a witness was rejected and the said order was challenged by the informant. The Court further held that because the investigation was deficient, it cannot certainly be a ground for refusal of the prayer to recall a witness.

7. He further relied upon a judgment is in the case of **State of Sikkim Vs. Sri Thukchuk Lachungpa and another**, reported in 2005 Cri.L.J. 201. Wherein the Court has held that even in the permission to examine a witness under Section 311 is refused at the earlier stage still

same can be considered and in such a view, the Court cannot be said to have reviewed the earlier order.

. The next judgment he relied upon is in the case of **Sethuraman Vs. Rajamanickam**, reported in 2009 AIR SCW 2066. Wherein it is held that the order passed under Section 311 is an interlocutory order and the Revision is not tenable. He submits that in view of the objection of the respondents that the order ought to have been challenged in the Sessions Court by filing Revision and this petition is not maintainable.

8. The last judgment he relied upon is in the case of **Rajaram Prasad Yadav Vs. State of Bihar and Another**, reported in 2013 AIR SCW 4179. Wherein the principles born in power under Section 311 of Cr.PC. are discussed and laid down. This judgment is relied upon even by the learned Advocate for the respondents.

. The learned Advocate for the respondents invited attention to paragraph nos. 17.5, 17.6 and 17.8 of the said judgment, which read as below.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the

case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.8. The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

9. After considering all these judgments, this Court finds that the petition is maintainable. Section 311 application is maintainable even if the earlier application is rejected. The informant also can file an application under Section 311. This Court also holds that the present petition is maintainable.

10. This Court finds that a case is made out to call for interference at the hands of this Hon'ble Court. This Court finds that the learned trial Court has rejected the application only on the ground that statement of a person, who is sought to be summoned, is not recorded by the police under Section 161 of the Cr.PC. In view of the judgments discussed

above, this Court finds that the said order deserves to be quashed and set aside. Since the trial is pending since 2014, it would be necessary in the interest of justice to request the trial Court to complete the trial as early as possible and preferably within six months. Hence the following order.

ORDER

- (i) The Writ Petition is allowed in terms of prayer clause 'C'.
- (ii) The learned trial Court is requested to complete the trial as early as possible and preferably within six months from today.
- (iii) With this, the Writ Petition is disposed off.

[KISHORE C. SANT, J.]

Najeeb.