

VRJ

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

WRIT PETITION NO.4557 OF 2022

Suresh G. Motwani and Ors. ... Petitioners
V/s.
Securities Exchange Board of India and
Anr. ... Respondents

Mr. Milan Desai with Santosh D. Thakur for the petitioners.

Mr. Manoj Mohite, Senior Counsel with Ms. Anubha Rastogi with Ms. Rachita Padwal for the respondent No.1.

Mr. Arfan Sait, APP for the respondent No.2/State.

Mr. Siddharth Kumar, SEBI officer is present.

CORAM : AMIT BORKAR, J.

DATED : APRIL 12, 2023

P.C.:

1. The petition is directed against order admitting in evidence public document of ROC record and marking letter dated 20th March 2022 as Exhibit-81.

2. The petitioners have been prosecuted for offence under section 207 and 621 of the Companies Act, 1956. Allegation against the petitioners is that they had not paid final dividend amount of Rs.0.50/- per share of Rs.10/- each in financial year ending on 30th June 2001. The petitioners are being tried before the Special SEBI Court. During the course of trial the prosecution

examined two witnesses. During the course of proceeding, in Criminal Writ Petition No.1794 of 2021 filed by respondent no.1 this Court by order dated 30th March 2022 permitted recalling of prosecution's witness No.2 only for the purpose of getting the said seal/endorsement and his signature on the same exhibited. The petitioners were granted opportunity to cross-examine the witness.

3. After the order was passed by this Court in Writ Petition No.1794 of 2021, the defence counsel asked question relating to the payment of dividend. Prosecution's witness was asked as to whether such documents regarding payment of dividend were filed to which he showed ignorance. Therefore, the prosecution intended to produce certified copies of ROC record .

4. The complainant/prosecution therefore filed an application below Exhibit-54 for production of documents (ROC Record).The Special Court allowed the application by recording a finding that the ROC record is best evidence available against the accused to arrive at just decision.

5. Petitioners' objection to the impugned order is that this Court by order dated 30th March 2022 in Writ Petition No.1794 of 2021 restricted right of prosecution to recall witness No.2. The prosecution was, therefore, permitted to refer certified copies of ROC record to witness No.2. In my opinion, the submission on behalf of the petitioners cannot be accepted for multiple reasons.

i. It is well settled that rules of procedure are handmaid of justice.

ii. To arrive at just decision and to deliver justice, the Court has ample power to mould the relief so that just decision as arrived at during the trial.

6. The parameters of exercise of power under section 311 of the Code of Criminal Procedure, 1973 have been delineated by the Apex Court in the case of **Natasha Singh Vs. C.B.I.** reported in 2013 (5) SCC 741, paragraphs 7 to 12 which read as under:

“7. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined **if his evidence appears to it, to be essential to the arrival of a just decision of the case.** Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

8. In **Mir Mohd. Omar & Ors. v. State of West Bengal**, AIR 1989 SC 1785, this Court examined an issue wherein, after the statement of the accused under Section 313 Cr.P.C. had been recorded, the prosecution had filed an application to further examine a witness and the High Court had allowed the same. This Court then held, that once the accused has

been examined under Section 313 Cr.P.C., in the event that liberty is given to the prosecution to recall a witness, the same may amount to filling up a lacuna existing in the case of the prosecution and therefore, that such an order was uncalled for.

9. In **Mohanlal Shamji Soni v. Union of India & Anr.**, AIR 1991 SC 1346, this Court examined the scope of Section 311 Cr.P.C., and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, **who are expected to be able to throw light upon the matter in dispute**, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

10. In **Rajeswar Prasad Misra v. The State of West Bengal & Anr.**, AIR 1965 SC 1887, this Court dealt with the ample power and jurisdiction vested in the court, with respect to taking additional evidence, and observed, that it may not be possible for the legislature to foresee all situations and possibilities and therefore, the court must examine the facts and circumstances of each case before it, and if it comes to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a

failure of justice without such evidence being considered, and if such an action on its part is justified, then the court must exercise such power. The Court further held as under:-

“.....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.”
(Emphasis added)

11. In **Rajendra Prasad v. Narcotic Cell** through its **Officer-in-Charge, Delhi**, AIR 1999 SC 2292, this Court considered a similar issue and held as under:-

“Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. **No party in a trial can be foreclosed from correcting, errors. 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.** After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”
(Emphasis added)

12. Similarly, in **P. Sanjeeva Rao v. State of A.P.**, AIR 2012 SC 2242, this Court examined the scope of the provisions of Section 311 Cr.P.C. and held as under:-

“Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial,

observed this Court in **Hoffman Andreas v. Inspector of Customs, Amritsar**, (2000) 10 SCC 430. The following passage is in this regard apposite:

‘In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.’

We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old..... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

7. The argument of filling up a lacuna raised on behalf of the petitioners is not available in view of judgment in the case of **Rajendra Prasad v. Narcotic Cell** through its **Officer-in-Charge**, reported in AIR 1999 SC 2292.

8. The scope of judicial review under article 227 of the Constitution of India is restricted to errors of jurisdiction and not errors within jurisdiction. If the impugned order does not result in miscarriage of justice, it is not necessary for the writ Court to

invoke extraordinary constitutional jurisdiction to correct technical error if the court is satisfied that interest of justice is served.

9. As has been held by the Trial Court, considering the nature of issue involved before the Trial Court, the Court has rightly recorded a finding that allowing the prosecution to refer ROC record which are public documents, just decision in the trial would be arrived. Such exercise of discretion is neither arbitrary nor capricious nor can be termed as perverse. Therefore, no interference under extraordinary constitutional jurisdiction is called for.

10. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)