



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 669 OF 2024

Mansingh Palsingh Thakur

... Petitioner

VERSUS

The State Of Maharashtra

... Respondent

.....
Mr. Satyajit S. Bora, Advocate for Petitioner
Mr. A.R. Kale, APP for Respondents – State
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 16th APRIL, 2024

JUDGMENT :

1. Rule. Rule returnable forthwith. Heard finally with the consent of parties, at admission stage.

2. This petition filed under Article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure Code, challenges the order dated 23.02.2024 passed by learned Additional Session Judge-1, Nanded, below Exhibit-81 in Special (ACB) Case No.25/2015.

3. Petitioner is charged for offence punishable under section 8 of Prevention of Corruption Act in Special (ACB) Case No.25/2015. During trial, after recording of evidence of PW-2 on 17.06.2023, no cross order was passed by the trial Court. By filing application Exhibit-81, petitioner prayed for setting

aside no cross order and recalling of PW-2 for cross-examination. Trial Court has rejected the said application on the ground that from time to time opportunity was given to petitioner to cross-examine the said witness, but petitioner has failed to cross-examine him.

4. Heard learned advocate for petitioner and learned APP for Respondent – State. Perused the record.

5. Learned advocate for petitioner has assailed the impugned order contending that reasonable and fair opportunity to defend his case is denied to petitioner. Trial Court was lenient in granting adjournment to prosecution, but same approach is not adopted in case of petitioner.

6. Per contra, learned APP supported the impugned order contending that in spite of several opportunities given to petitioner, he has failed to cross-examine PW-2, and therefore, trial Court is justified in rejecting the application of petitioner.

7. Record indicates that, examination-in-chief of PW-2, a panch witness commenced on 24.09.2021 and the same was continued up to 28.03.2022. On that day, learned advocate for petitioner is not present and hence, the matter was adjourned for cross-examination on 12.04.2022. Again on 12.04.2022,

learned advocate for petitioner was absent due to his personal difficulty, therefore, application for adjournment is filed, which is rejected by the trial Court and no cross order was passed.

8. Petitioner filed application Exhibit-42, requesting to recall the order of no cross and the application was allowed by trial Court on 16.07.2022 by imposing costs of Rs.5,000/- and witness bhatta of Rs.500/-. Petitioner complied the said order by depositing costs and witness bhatta on 26.07.2022. Thereafter, summons issued to PW-2 returned unserved. Trial Court recorded examination-in-chief of PW-3, who was present in the Court on 28.09.2022. Thereafter, PW-3 remained absent on 21.10.2022, 25.11.2022, 17.12.2022 and petitioner and his advocate were present. Thereafter, at the instance of PW-3, the matter was adjourned to 02.05.2023. On that date, PW-2 Nagorao Kotkar was present so also petitioner and his advocate. As PW-3 was absent on that day, trial Court directed petitioner to conduct cross-examination of PW-2 by imposing costs of Rs.500/- and directing petitioner to pay witness bhatta of Rs.500/-. The matter, thereafter, was adjourned to 17.06.2023.

9. Thereafter, examination-in-chief of PW-3 continued on 20.07.2023, 09.08.2023, 06.09.2023. On 06.09.2023, petitioner filed application Exhibit-81, requesting the trial Court to set aside no cross order of PW-2 and recall the said witness for cross-examination. According to petitioner, instead of deciding that application, trial Court directed petitioner's advocate to start cross-examination of PW-3, who was present in the Court. PW-3 was then cross-examined up to 23.02.2024. On the same day, trial Court rejected application Exhibit-81, according to petitioner without giving opportunity of hearing to petitioner.

10. It is tried to submit that right of cross-examination is available to accused, which is the only weapon in his hand to defend his case. True it is that petitioner's advocate has failed to cross-examine PW-2 even after no cross order was recalled.

11. In *P. Sanjeeva Rao Vs. The State of A.P., (2012) 7 SCC 56*, it is held :

"Merely because a mistake was committed, should not result in accused suffering a penalty totally disproportionate to gravity of the error committed by his lawyer. Denial of an opportunity to recall witnesses for cross-examination would amount to condemning appellant without giving him opportunity to challenge correctness of the version and credibility of witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case could be tested only when the

testimony was put through fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in present case keeping in view serious consequences that would follow any such denial.

12. *The nature and extent of the power vested in the Courts under Section 311 of Code of Criminal Procedure to recall witnesses was examined by this Court in **Hanuman Ram v. The State of Rajasthan & Ors.** MANU/SC/8107/2008 : (2008) 15 SCC 652. This Court held that the object underlying Section 311 was to prevent failure of justice on account of mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed:*

This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

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, enquires 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 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.

16. 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."

12. In the light of aforestated ratio, petitioner deserves to be given fair opportunity to defend his case by cross-examining PW-2, who is a shadow panch witness, on certain conditions. Hence, the following order.

ORDER

(I) Impugned order dated 23.02.2024 passed by learned Additional Sessions Judge-1, Nanded, below Exhibit-81 in Special (ACB) Case No. 25/2015, is hereby quashed and set aside.

- (II) PW-2 Nagorao Kaduji Kotkar shall be re-called on 22nd, 23rd, 24th or 25th April, 2024 for cross-examination by petitioner.
- (III) On the date of appearance of PW-2, his cross-examination shall be conducted by advocate of petitioner, failing which, right to cross-examine PW-2 shall stand forfeited.
- (IV) Trial Court shall decide the matter on or before 04th May, 2024.
- (V) Petitioner to deposit costs of Rs.10,000/- in the trial Court on the next date kept by Trial Court.

Rule is made absolute in the above terms.

[NITIN B. SURYAWANSHI]
JUDGE