



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 947 OF 2024

Vilas s/o Sukdev Dhaneshwar,
Age: 44 years, Occu. Service,
R/o: Police Head Quarter, P.No. 16,
Building No. 28, 4th floor, N-10,
CIDCO, Aurangabad .. Petitioner
Versus
The State of Maharashtra .. Respondent

Mr. Nilesh S. Ghanekar, Advocate for the Petitioner;
Ms. S. S. Joshi, A.P.P. for Respondent/State

CORAM : S. G. MEHARE, J.

DATE : 21-06-2024

PER COURT :-

1. Issue notice to the respondent. Learned A.P.P. waives service of notice for the respondent.
2. Heard the matter finally at the admission stage.
3. The petitioner has challenged the order of the learned Additional Sessions Judge, Aurangabad, rejecting the application Exhibit-43 in Special Case (ACB) No.12 of 2016 dated 23.01.2024, recalling P.W. No.2 for further cross-examination.
4. The petitioner had applied before the Special Court for setting aside "no cross order" and calling the witness back for further cross-examination.
5. The learned Special Judge observed thus;

“The witness is present for the entire day today. Ld. Counsel for the accused Mr. Ghanekar has cross examined to another witness in another case. He was aware that the witness is present and his part chief examination is recorded. Therefore, it was his duty to remain present and conduct the cross-examination. However, his Junior Shri. Sartale is present and he has declined to take cross-examination and moved this application on the ground that Shri Ghanekar has left for his personal work. There is no sufficient ground to allow the application. Hence, the application is rejected.”

6. It is further observed in paragraph No.5 of the impugned order dated 23.01.2024 as follows :

“The object of Section 311 of Cr.P.C. is altogether different. It does not contemplate setting aside no cross order and recalling of witness for cross-examination, where the Advocate for the accused who was aware that the witness is present, he was present in the Court in other case and that he was aware that part evidence recorded and he has chosen to leave the Court and not to cross examine the witness. The opportunity to cross examine the witness was granted which the learned Advocate has willfully not availed and left the Court for his personal work. ”

7. Learned counsel for the petitioner submits that the application for recalling the witness was correctly filed. The cross-examination was not deliberately avoided. It was a case of the petitioner that the witness had to be cross-examined as he is the prime witness. For the mistakes of others, the client should not suffer. The Court ought to have asked for cross-examination by the

accused, but it was not done.

8. Learned A.P.P. opposed the arguments advanced by the learned counsel for the petitioner. She submits that the witness was coming from the remote place. Calling the witness time and again for the convenience of the accused is harassment. The case is of the year 2016. The accused was not diligent in producing the Advocate for cross-examination. The accused knew the trial before the Court. If the Court concludes that the witness is to be recalled for cross-examination, heavy costs may be imposed.

9. Apparently, the reasons for the absence of the Advocate to cross-examine the witness are not appreciable. It is the duty of the lawyer to respond the Court or at least show courtesy to the Court by appearing before and assigning the reasons for his difficulties to conduct the trial. Be that as it may, the facts remain that the impugned order has taken away the right of the cross-examination. Section 311 of the Cr.P.C. specifically provides for recalling the witness who has already been examined. It does not bar calling the witness for cross-examination. The witness was coming from Soygaon, which is a remote place. The Court must take care of the witnesses that they should not be harassed. In such circumstances, compensation would suffice for the purpose. Hence, to protect the interest of the accused to contest the case on merits, the impugned order deserves to be quashed and set

aside. Hence, the order:-

ORDER

- i) Criminal Writ Petition is allowed.
- ii) The impugned order passed by learned Additional Sessions Judge, Aurangabad, rejecting the application Exhibit-43 in Special Case (ACB) No.12 of 2016 dated 23.01.2024, is quashed and set aside.
- iii) Application Exhibit-43 in Special Case (ACB) No.12 of 2016 is allowed.
- iv) Summons be issued to P.W. No.2, calling him for cross-examination on depositing the costs of Rs.20,000/- (Rs. Twenty Thousand) as compensation to the witness, well in advance in the Court of Additional Sessions Judge, Aurangabad. Before the witness enter the witness box the cost deposited by the accused as mentioned above be paid to the witness.
- v) The accused shall complete cross-examination without unnecessary delay.

**(S. G. MEHARE)
JUDGE**

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