



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

910 CRIMINAL WRIT PETITION NO. 1399 OF 2024

ANILKUMAR SUVALAL MUGDIYA

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for the Petitioner
Mr. N. D. Batule, APP for Respondent State

CORAM : Y. G. KHOBRADE, J.

Dated : 17th October, 2024

PER COURT :-

1. Heard at length Mr. Mustafa, the learned counsel for the Petitioners. Mr. N. D. Batule, APP waives notice for the Respondent State.

2. In present petition a very short question arises for consideration that, whether the Court under the Criminal Procedure Code can record evidence of the witness in absence of accused and their counsel ?

3. The grievance of the Petitioners are that, on 08.11.2023, the learned Chief Judicial Magistrate, Aurangabad recorded evidence of PW-4 Manik Gangaram Lingayat in their absence and in absence of their counsel. So also, the learned trial court proceeded with the matter without cross examination on their

behalf. The petitioners further contended that, on 04.01.2024, they filed Exh. 53 an application for recall of order of no cross. However, on 14.06.2024, the learned trial Court passed an order and declined to recall the order of no cross.

4. Needless to say that on 08.11.2023 the matter was enlisted on the file of learned Additional Chief Judicial Magistrate, Aurangabad for recording evidence of the prosecution witness. After going through the petition paper book, it reveals that, PW-4 Manik Gangaram Lingayat was appeared before the Court and learned trial court recorded examination-in-chief of the P. W. 4. Though the Petitioners/ accused were called at 1.50 P. M., but they were absent. Therefore, the trail Court passed the order of "no cross" and matter proceed further without cross examination on behalf of the petitioners/ accused.

5. The learned counsel appearing for the Petitioner canvass that, the accused/Petitioners and their counsel were present before the Court on 08.11.2023, but the P.W. 4 was not present at the relevant time, therefore, the petitioners and their counsel were permitted to leave the Court, however, later on the learned trail court examined PW-4 Manik Gangaram Lingayat at Exh 49 in their absence.

6. Needless to say that the evidence of the prosecution witness can be recorded in presence of the accused, unless the accused exempted from personal appearance. In case in hand, it appears that, the learned trial court recorded examination-in-chief of PW-4 and when the matter was called out at about 1.50 p.m., the petitioners and their counsel remained absent. Therefore, on 04.01.2024, the petitioners filed Exh. 53 an application and prayed for striking off evidence of PW No.4 Manik Gangaram Lingayat mainly on ground that evidence of PW 4 recorded in their absence. On 14.06.2024, the learned trial court passed the impugned order and declined to set aside order of no cross.

7. Needless to say that, mere recording examination-in-chief of the witness in absence of the accused or their counsel is only irregularity and it does not constitute illegality. However, merely evidence of the P. W. 4 recorded in absence of the petitioners accused, it can not be the sound ground to set aside examination chief of the witness recorded by the court. However, considering the nature of offence as well as examination-in-chief, if the Petitioners are permitted to cross examine PW-4 through their counsel, no prejudice would be caused to the prosecution.

8. On 14.06.2024, the learned trial court passed the impugned order holding that, on 08.11.2023, the concerned Police field summons report which shows service of witness summons upon the PW-4, who appeared before the Court and entered into witness box. The learned trial recorded examination-in-chief of the P. W. 4 but the petitioners/accused and their counsel were remained absent. Therefore, order of no cross came to be passed. However, considering the principle of fair trial and providing proper opportunity to defend the charges, it would be just and proper to permit the Petitioners/accused to cross examine PW-4.

9. In view of the above, the impugned order is quashed and set aside. The Petitioners are permitted to cross examine witness PW-4 through their counsel.

10. The learned Trial Court shall recall the witness PW-4 by invoking powers under section 311 Cr.P.C., and shall permit the Petitioners to cross examine PW-4.

11. The Writ Petition is accordingly disposed off.

(Y. G. KHOBRAGADE, J.)