



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO.194 OF 2024

Girish s/o Guraldas Thadani,
Aged about 35 years,
Occupation-Business,
R/o. Sindhi Colony Pachora,
District-Jalgaon.

.. Petitioner
(Original accused)

.. Versus ..

Sataram s/o Gopichand Chawala,
Aged about 58 years,
Occupation-Business,
R/o. Pakki Kholi, Sindhi Camp,
Akola.

.. Respondent
(Original complainant)

.....
Mr. Kamal H. Anandani, Advocate for the petitioner,
Mr. Parimal U. Kavishwar, Advocate for the respondent.

.....

CORAM : G.A. SANAP, J.
DATED : 10.07.2024.

ORAL JUDGMENT

Rule. Rule made returnable forthwith. Heard finally
by the consent of the learned Advocates for the parties.

2. In this writ petition the petitioner, who is an accused in a criminal complaint filed under Section 138 of the Negotiable Instruments Act, 1881, has challenged the order dated 16.12.2023 passed by the learned 5th Additional Chief Judicial Magistrate, Akola, whereby the learned Additional Chief Judicial Magistrate rejected the application at Exh.54 made by the petitioner under Section 311 of the Code of Criminal Procedure for recalling the complainant for further cross-examination.

3. The cross-examination of the complainant was conducted on behalf of the accused on 17.10.2023. The application for recalling the witness was made on 2.12.2023. It was stated in the application that on certain vital aspects, the proper cross-examination could not be conducted. It was stated in the application that the Advocate, after obtaining the copy of the deposition, realised that some vital questions regarding the relevant facts could not be asked to the complainant. On all these averments, he prayed for recalling of the complainant.

4. The respondent-complainant filed the reply and

opposed the application. It was contended that the application for recalling of the witness is bereft of any reason. It was further stated that the application was made with an intention to prolong the adjudication of the case.

5. Learned Magistrate, on giving thoughtful consideration to the contentions raised by the parties, found that the application was without substance and, therefore, rejected the same.

6. Learned Advocate for the petitioner submitted that in his cross-examination, the complainant has admitted that his annual income is Rs.2,00,000/-. Learned Advocate pointed out that the amount of a cheque is Rs.2,50,000/-. Learned Advocate would submit that in the context of this answer, certain clarification was required as to the relevant facts. Learned Advocate for the petitioner submitted that this is a fit case to exercise the discretion in favour of the accused and grant him an opportunity to recall and cross-examine the complainant. Learned Advocate, in support of his submission, has relied upon the following two decisions :

- (1) *Dhananjay Mahadev Dessai .vs. Canacona Urban Co-operative Credit Society Limited, having its Head office at Canacona, represented by its Power of Attorney holder, reported at (2016) 3 Bom CR (Cri) 687.*
- (2) *Wasudeo s/o Gulabrao Dhoke .vs. State of Maharashtra, reported at 2017 (1) Mh.L.J. 579.*

7. Learned Advocate for the respondent-complainant submitted that no reason has been stated in the application for recall of the complainant. Learned Advocate submitted that without stating any reason or relevant fact, which necessitated the further cross-examination, learned Magistrate was right in rejecting the application. Learned Advocate submitted that recall of a witness under Section 311 of the Code of Criminal Procedure falls within the discretion of the Court and the discretion is required to be exercised keeping in mind the relevant facts. Learned Advocate submitted that the case in question is not a fit case to exercise the discretion in favour of the accused. Learned Advocate submitted that there are no reasons stated in the application and, therefore, on the basis of the reasons put-forth at this stage, the prayer for recalling cannot be

granted. In order to support his submission, he has relied upon the decision in the case of *Dinesh s/o Lala Solanke .vs. State of Maharashtra*, reported at *2023 DGLS (Bom) 237*. He drew my attention to para 11. Para no.11 extracted below :

“11. I am conscious of the fact that the Court, when called upon to exercise the powers under Section 311 of the Cr.P.C., must see that the discretion is exercised in such a manner that it serves the cause of justice. It is to be noted that as per Section 311 Cr.P.C., before such power is exercised, on the basis of the facts placed on record as well as the material on record, the Court must be satisfied that recalling of witness for cross-examination or re-examination is essential for the just decision of the case.”

8. In my view, the legal position as can be seen from the above decision is required to be borne in mind while exercising the power under Section 311 of the Code of Criminal Procedure.

9. In the two decisions relied upon by the learned Advocate for the petitioner, it is held that if the application for recall is not intended to fill up the lacuna, then such a request has to be considered keeping in mind the other relevant facts. It is held that the court is also required to take into consideration the likely

prejudice to the parties one way or the other.

10. It needs to be stated that the object of this provision has to be borne in mind while deciding such application. The right to recall a witness for further cross or further chief is not an absolute right. The relief to that effect cannot be claimed as a matter of right. Similarly, such a relief cannot be granted as a matter of course and routine manner. The discretion has to be exercised to ensure the proper and complete adjudication of the issue.

11. In this case, on facts, I am constrained to observe that no case has been made out to recall the complainant for further cross-examination. The complaint was filed in 2022. After filing the affidavit of examination-in-chief, the complainant was cross-examined on 17.10.2023 on behalf of the accused. The case was then adjourned to 2.11.2023 for recording the examination of the accused under Section 313 of the Code of Criminal Procedure. The examination/statement of the accused was recorded on 6.11.2023. The matter was then listed on 2.12.2023 for the defence evidence. On 2.12.2023 the application (Exh.54) was made. Perusal of the

application would show that it is conspicuously silent about the relevant facts which could not be brought on record in the cross-examination. In one line, it has been stated in the application that certain vital facts could not be touched upon in the cross-examination. In my view, the reasons stated in an application are required to be scrutinized by the court at the first instance. The reasons are not stated in the application. The application made under Section 311 of the Code of Criminal Procedure, without stating proper reasons was, therefore, a defective application. Learned Magistrate has recorded the reasons for rejecting the application. If the reasons recorded by the learned Magistrate are considered in juxtaposition with the above stated facts, then it would show that there was no mistake or perversity on the part of the learned Magistrate while rejecting the application.

12. In my view, therefore, I do not see any substance in this petition. The petition is accordingly dismissed. Rule is discharged.

[G.A. SANAP, J.]