



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

937 CRIMINAL WRIT PETITION NO.1304 OF 2024

1. Parvin Begum W/o Abdul Rahim Khan,
Age: 43 years, Occu: Household
 2. Johra Begum Abdul Rashid Khan,
Age: 58 years, Occu: Household
 3. Abdul Rashid Khan S/o Pasha Khan,
Age: 72 years, Occu: Business
-PETITIONERS**

VERSUS

The State of Maharashtra,
Through Police Station, Mudkhed.
Tq. Mudkhed, Dist. Nanded.

....RESPONDENT

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Mr. S. S. Gangakhedkar, Advocate for the Petitioners
Ms. Ashlesha S. Deshmukh, APP for the Respondent - State

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CORAM : Y. G. KHOBRAGADE, J.

RESERVED ON : 14.02.2025
PRONOUNCED ON : 03.03.2025

JUDGMENT :-

1. Rule. Rule made returnable forthwith and with consent of both the sides, the matter is heard finally.
2. By the present Petition, under Article 227 of the Constitution of India, the Petitioners take exception to the order

dated 29.06.2024, passed below Exh.180 in R.C.C. No.370 of 2009 by the learned Judicial Magistrate First Class, Mudkhed, thereby permitted the prosecution to re-examine the witness PW-3 to prove the documents i.e. Articles 1 to 101 enlisted in Exh.147.

3. Mr. Gangakhedkar, the learned counsel for the Petitioners canvassed that, on 26.10.2007, the informant Haibati Rakhmaji Mandave lodged a report alleging that, the Petitioner No.3, Abdul Rashid Khan S/o. Pasha Khan was working as EDMC in Mudkhed Post Office. The Petitioner No. 2, Zohra Begum Abdul Rashid Khan was appointed as a Women Regional Savings Agent under the scheme of 'Mahila Pradhan Kshetriya Bachat Yojana' as per licence No.NND1404, granted by the District Magistrate, Nanded on 29.08.1994. As per said scheme, the petitioner No. 2, has to collect recurring deposits from the account holders and she required to deposit the said collected amount with the Post Office in the accounts of the recurring depositors and to make entries. The post office had issued passbooks to recurring depositors. It is further alleged that, during the period starting from 09.02.2004 to 28.08.2006, the Petitioner No. 2, Johra Begum Abdul Rashid Khan and the Petitioner No. 3, Abdul Khan collected huge amount being Agents and signed

the cards in Urdu, but they did not deposit the said amount in the Post Office and thereby misappropriated huge amount of the depositors and cheated them. It is further alleged that, the accused Nos. 2 & 3 are husband and wife. Both have retained the passbooks of the depositors with them. The Petitioner No. 3, Abdul Khan appointed himself as the Authorized person and forged documents for withdrawing money and got sanctioned the amount with interest from Shri Ashok Narhar Doke, the then Sub Post Master. The Petitioner No. 3 withdrawn the entire amount with interest and misappropriated the same and closed R.D. accounts of the depositors.

4. According to the informant as per Schedule "A" list, the accused withdrawn an amount of Rs. 1,64,811/- from the account of 15 Recurring Deposit Account holders (by forging the duplicate signatures of the account holders) and closed the accounts without consent of the account holders, so also continued the collections from the account holders, but failed to deposit the collected amount i.e. of Rs. 86,000/- with Post Office in R D accounts of respective account holders. The Accused No. 3 failed to return the Passbooks to the account holders. As per Schedule "B", the accused withdrawn an amount of Rs. 39,952/- from the account of 9 Recurring Deposit

account holders (by forging the duplicate signatures of the account holders) and closed the accounts without consent of the account holders, and continued the collections from the account holders, but failed to deposit the collected amount i.e. Rs.18,800/-with the post office. It is further alleged that, the Petitioner No. 2 collected an amount of Rs.77,100/- towards recurring deposits from 35 depositors but did not deposit the same with the Post Office in their accounts. The petitioner No. 2 used said amount for her personal benefit and defrauded the Post Office as well as the depositors.

5. Similarly, as per Schedule “D” the Petitioner No.3, accused Abdul Rashid Khan S/o. Pasha Khan in connivance with the Accused No.1, Parvin Begum Khan committed fraud of Rs.79,800/- by withdrawing the amount under the fake signature of 34 recurring depositors. So also, the Petitioner No.1, Parvin Begum Khan withdrawn the amount of Rs. 4,66,463/- from 93 R. D. accounts under the fake and fabricated documents. Therefore, on the basis of said report, Crime bearing No. I-59 of 2007 was registered against the present Petitioners for the offences punishable under Section 420, 421, 403, 409, 464, 468, read with Section 34 of the Indian Penal code, 1860.

6. Thereafter, the Investigating Officer conducted an investigation and seized several documents under separate list: Schedule A, B, C and D. The I.O. recorded statements of witnesses and issued a warrant for seizure of the documents. The documents were sent to the handwriting expert for examination. On completion of investigation, a charge-sheet came to be filed against the present Petitioners. The learned trial Court framed charges against the present petitioners/accused for the offences punishable under Sections 420, 421, 403, 409, 464, 468, read with Section 34 of Indian Penal code, 1860.

7. In order to prove the charges, the prosecution examined three witnesses. On 03.01.2024, the PW-3, Haybati Rakhmaji Mandve entered into the witness box and deposed at Exh.146. PW-3 proved Exh.147 i.e., the seizure panchanama of documents and Exh.149 Appointment Order of the Petitioner No.3, Abdul Rashid Khan as an agent. The PW-3 also proved documents Exhs. 150 and 151 i.e., Official licence/letter granted by the District Collector, Nanded regarding appointment of Petitioner No. 2, Johra Begum and Petitioner No. 1 Parvin Begum as R D Agent. The prosecution proved Exh. 155 SB Form No. 7, Exh.156 five specimen signatures of

Mohammad Iliyas Exh.158, Application submitted by Ajij Beg Ismail Beg and his five specimen signatures Exh.159, Original copy of sample signature register of Ajij Beg Exh.160 as well as other various documents.

8. On face of record, it appears that, prior to deposition of PW-3, copies of Schedule A to D total 1 to 101 were sent for expert's examination and those were not available when the PW-3 deposed her examination-in-chief. However, only the list of documents 1 to 101 is exhibited as Exh. 147 and the documents below the list were not exhibited. Thereafter, PW-3 undergone cross-examination conducted on behalf of the petitioners/accused. On 30.04.2024, the cross-examination of PW-3 was completed.

9. However, after cross-examination is over, the prosecution filed Exh.180 and prayed for permission to re-examine PW-3 to prove documents 1 to 101 produced under Schedule A to D Exh.174 because those documents were not referred to PW-3. Additionally, some documents under Schedules A to D were sent to the Chemical Examiner, which were seized during the course of investigation and filed along with the charge sheet, but due to oversight, those documents were not referred to the witness.

10. On 29.06.2024, the learned Judicial Magistrate, Mudkhed passed the impugned order below Exh.180 and permitted the prosecution to re-examine PW-3 in respect of documents filed along with Report Exh.147 enlisted as Articles 1 to 101. Being aggrieved by the said order, the Petitioners have filed the present Petition.

11. The learned counsel for the petitioners canvassed that, the prosecution failed to raise issue of ambiguity/oversight at the time of examination of PW-3 and no grounds are set out for re-examination of PW-3. Though said documents were available on record but the Public Prosecutor did not refer to the PW-3 and no such documents produced prior to entering the PW-3 in witness box. Therefore, the lacuna left in the evidence cannot be permitted to fill up by the prosecution and the prosecution has no right to recall and re-examine the witness. However, the learned trial court failed to consider that, no ambiguity left in the evidence of PW-3 and the witness cannot be recalled and re-examined. Therefore, the impugned order is illegal and bad in law, hence prayed to quash and set aside the same.

12. It is further canvassed that, the learned trial court failed

to appreciate scope of Section 311 of the Cr.P.C, which does not permit re-examination of a witness, when documents, which are part of the record, are not referred to the witness. The purpose of re-examination of the witness is to clarify some ambiguities remained in evidence, but the documents which are not referred in the examination-in-chief cannot be permitted to refer to the witness for re-examination. However, the learned trial court wrongly passed the impugned order without considering the scope of Section 311 of Cr.P.C. and Section 138 of the Evidence Act, hence, prayed to quash and set aside the impugned order.

13. In support of these submissions, the learned counsel for the Petitioners relied on the following cases as under:

- (i) ***Capitol Art House (P) Ltd. Vs. Neha Datta , 2022 SCC Online Del 1746***, wherein it is held that, when there is no ambiguity in the answers given by the witness that requires explanation through re-examination, hence, the re-examination cannot be used to give chance to the witness to undo the statement of the witness made in cross-examination and fill in the lacunae in evidence.

(ii) ***Rammi Alias Rameshwar V. State of Madhya Pradesh (1999) 8 SCC 649***, wherein the Hon'ble Supreme Court considered the scope of Section 138 of the Evidence Act and held in paragraph Nos. 17 , 18 and 19 as under:

“17. There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

18. Even if the Public Prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

19. A Public Prosecutor who is attentive during cross-examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient Public Prosecutor would gather up such answers falling from the mouth of a witness during cross-examination and formulate necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination.”

14. Per contra, the learned APP submits that, the documents filed along-with the charge-sheet under Exh.147, Schedule A to D total 1 to 101, however, during examination-in-chief, the learned prosecutor only referred the list of annexures/Schedule A, B, C and D i.e. list of documents but due to oversight of the public prosecutor, the documents are not exhibited and some documents were sent for Chemical Analysis. After receipt of said documents, the prosecution produced the documents on 04.03.2024 under List Exh.177 which was produced after the examination-in-chief recording of PW-3. Therefore, as per Section 311 of Cr.P.C. and Section 138 of the Evidence Act, the prosecution has every right to re-examine PW-3 and refer those documents which were produced alongwith charge-sheet and were sent to the Chemical Analysis. Therefore, after re-

examination of PW-3, the accused persons have right to cross-examine the witness.

15. It is further canvassed that, the documents produced under Exh.177 are already provided to the accused persons i.e., Petitioners with the charge-sheet, so also, in cross-examination, the defence counsel referred said documents to the PW-3. Therefore, the impugned order is just and proper, hence prayed for dismissal of the Petition.

16. Needless to say that, PW-3 entered into witness box on 01.03.2024 and his Examination-in-chief recorded at Exh.146. The evidence of PW-3 shows that exhibiting certain documents including Schedule (list of documents A to D), however, documents produced under list Exh. 147 were not referred to PW-3. On perusal of Schedules A to D, the list of account holders, dates of account opening, recurring deposit accounts and balances shown against recurring deposit holders were noted. Other documents pertaining to accounts and withdrawal form etc., were not referred to PW-3 because those documents along with charge-sheet were produced to the Chemical Analyser.

17. It is a matter of record that, the defence counsel conducted cross-examination of PW-3 and concluded cross-examination on 30.04.2024 and soon after cross-examination is over, the prosecution filed Exh.180 application seeking permission to re-examine the PW-3 on ground that some documents under Exh.147 were sent to the C.A., hence, said documents were not available at the time of examination of PW-3, however, some documents were not referred to PW-3 due to the oversight of the learned Public Prosecutor. After examination-in-chief of PW-3 documents were received from the Chemical-analysis and thereafter the same were produced on record under Exh.147.

18. It is not the case of the Petitioners accused that documents under Exh. 147 were not supplied to them alongwith charge-sheet. However after receiving documents under Exh.147 are filed after recording examination-in-chief of the PW-3. Therefore, it cannot be said that the prosecution wanted to re-examine the PW-3 to fill up the lacuna.

19. Needless to say that, the prosecution has no intention to get any explanation for the answers given by PW-3 in cross-

examination or to withdraw any admission given in cross-examination. However, the prosecution wanted to re-examine the PW-3 in order to refer documents which were seized during the course of investigation and produced with charge-sheet, but those documents were sent to the Chemical analysis and received on 04.03.2024 subsequent to recording of examination-in-chief of the PW-3.

20. In the case of *Raja Ram Prasad Yadav Vs. State of Bihar and Another, A.I.R. 2013 (SC) 3081*, it is held that invocation of Section 311 of Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provisions, namely, for achieving a just decision of the case. The power vested under the said provisions is made available to any court at any stage in any inquiry or trial or other proceedings initiated under the Code for the purpose of summoning any person as a witness or for examining any persons in attendance, even though not summoned as witnesses or to re-call or re-examine any person in attendance. In so far as recalling and re-examining of any person already examined, the Court must necessarily consider and ensure that such re-call and re-examination of any person, appears in the

view of the court to be essential for the just decision of the case.

21. In case of *Shailendra Kumar Vs. State of Bihar, A.I.R. 2002 (Supreme Court) 270*, it is held that, if there is any negligence, latches or mistake by not examining material witness, the Courts function to render just decision by examining such witness at any stage is not, in any way impaired.

22. In case of *Ramasami Vs. Srinivasan 1987 (3) Crimes 89 Madras*, it is held that the criminal court is not just umpire to deal only the material brought by the parties before it. The court has to play an active role in the administration of criminal jurisprudence. Though, it is not normal duty of the court to collect evidence, in cases where justice requires, the Court has power to further inquire into the matter in order to ascertain the truth.

23. In case of *Rama Paswan Vs. State of Jharkhand, 2007 CrI. L.J. 2750*, it is held that it would not be improper, the exercise of the power 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, Inquiries and trials under the Court and

empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or inquiry.

24. In case of *UT of Dadra and Nagar Haveli Vs. FatehSinhMohansinh Chauhan, (2006) 7 SCC 529*, wherein the Hon'ble Supreme Court considered the powers under Section 311 of Cr.PC and held that the lacunae in prosecution case is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.

25. In case of *Mina Lalita Vs. State of Orissa, (2013) 16 SCC 173*, the Hon'ble Supreme Court observed that it is the duty of the Criminal court to allow the prosecution to correct an error in the interest of justice. Re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be construed as filling up the lacuna in prosecution case.

26. Coming back to the case in hand, the learned trial court passed the impugned order on 29.06.2024 and permitted the prosecution to re-examine PW-3. On perusal of the impugned order it appears that, after completion of examination-in-chief of the PW-3, the police deposited certain documents along with report Exh.147 and during the course of examination-in-chief of PW-3 some documents were not available with the prosecution though said documents are included in charge-sheet and some enlisted in Exh.147 were not referred to PW-3 during examination-in-chief because the same were referred to the Chemical Analysis. The documents along with Schedule A to D seized under panchanama Exh.148 during the course of investigation and supplied to the Petitioners / accused. Therefore, those documents are not foreign and unknown to the petitioners/accused. Therefore, considering the scope of Section 311 of Cr.P.C. coupled with Section 138 of the Evidence Act, the learned trial court granted permission to re-examine the PW-3 as per law laid down in ***Rama Pawsan*** cited (supra), which does not appear to be perverse, illegal and bad in law, hence, no interference is called at the hands of this Court.

27. In view of above discussion, the Criminal Writ Petition is dismissed. Accordingly, Rule is discharged. No order as to costs. The interim order granted on 30.07.2024 is hereby vacated.

[Y. G. KHOBRAGADE, J.]

28. After the judgment is pronounced, the learned counsel for the Petitioner seeks for extension of interim order granted by this Court on 30.07.2024. However, I have not find substantial ground for extension of interim order. Hence, prayer is turned down.

[Y. G. KHOBRAGADE, J.]