



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

CRIMINAL WRIT PETITION NO. 361 OF 2024

Mohd. Sharik Sheikh S/o Haji Abdul Qayyum

-- VERSUS --

Shabana Pravin Sheikh W/o Mohd. Sharik Sheikh and Another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Mr. N.G. Moharir, Advocate for the Petitioner.

Mr. A.Gawande, Advocate h/f Mr. J.M. Gandhi, Advocate for
the Respondent Nos.1 and 2.

CORAM : M.M. NERLIKAR, J.

DATE : NOVEMBER 04, 2025.

Heard the learned counsel for both the
parties.

2. The impugned order dated 20/02/2024
passed below Exh.-67 by the learned Judge, Family
Court, Nagpur, Court No.4, is under challenge.

3. The learned counsel for the petitioner
submits that the ground raised by the respondent was
that due to high fever of his counsel, he was not able
to properly cross-examine the original petitioner
(respondent herein). He submits that certain
questions remained to be asked by him, and
therefore, he prayed for recall of the witness in the
interest of justice.

4. On the other hand, the learned counsel for the respondent submits that the case pertains of the year 2015 and sufficient opportunity had already been granted for cross-examination. However, on 24/07/2023, a “no cross” order was passed, which was subsequently set aside, and the matter was again posted for cross-examination. Therefore, it cannot be said that sufficient opportunity for cross-examination was not granted. He further submits that it is only a delaying tactic as the matter arises out of a matrimonial dispute. Accordingly, he prayed for rejection of the present petition.

5. After hearing both the counsels, it appears that the petitioner has been granted sufficient opportunity for cross-examination. Further, there is nothing on record to show that on the relevant date the counsel was unwell. The only ground put forth was that the counsel for the petitioner was suffering from high fever and infection, and therefore, was not physically fit to cross-examine the respondent herein.

6. Further, it is to be noted that a “no cross” order had already been passed, which was subsequently set aside. Under such circumstances, Section 311 of the Code of Criminal Procedure ensures that the Court must arrive at a just and

correct decision by obtaining a clear picture of the facts. For this purpose, the Court may examine any witness at any stage. If the evidence of such a witness appears to it to be essential to the just decision of the case, meaning thereby powers should be exercised judiciously and also with extreme care and caution.

7. The Supreme Court in the case of ***Rajaram Prasad Yadav VS State of Bihar and Another, (2013) 14 SCC 461***, in paragraph No.17 has culled out parameters/guidelines with respect to Section 311, which are as follows:-

“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

17.1 Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

17.2 The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3 If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

17.4 *The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5 *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*

17.6 *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7 *The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8 *The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*

17.9 *The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10 *Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*

17.11 *The Court should be conscious of the position that after all the trial is basically for the*

prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12 The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13 The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14 The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

8. It would also be useful to refer to the judgment of the Supreme Court in the case of ***Neha Begum & Ors. VS The State of Assam and Anr.***, (Special Leave to Appeal No.3910/2024). The Supreme Court, while considering the scope of Section 311, held that the powers under Section 311

cannot be exercised to fill in the lacunae. Further, it was held that lawyer engaged by the petitioners did not conduct proper cross-examination of the witnesses cannot be considered to be a valid ground for the trial court to invoke power under Section 311 Cr.P.C.

9. Under these circumstances, failure on the part of the counsel representing the petitioner / original respondent to put proper questions in cross-examination of the witness, when he had the opportunity, thereby citing his illness that he was not fit cannot be a ground for recalling of the witness. In this view of the matter, there is no merit in the petition. The impugned order does not require any interference, and hence, the present petition is **dismissed**.

[M.M. NERLIKAR, J]