



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

CRIMINAL WRIT PETITION NO.566 OF 2024

Shreekrishna Ginning and Pressing,
a partnership firm, through its partner,
Atul s/o Prabhakar Talatule
Aged about 62 years, Occ. Business,
R/o. 206, 4th Floor,
Golden Palace, WHC Road,
Dharampeth, Nagpur
Tah. and District Nagpur

...PETITIONER

VERSUS

APMC Sindi (Rly.)
through its Asst. Secretary,
R/o Sindi Rly, Tah. Seloo,
District Wardha

...RESPONDENT

Mr. Sanjeev P. Deshpande, Advocate for the petitioner.
Mr. S.D. Paliwal, Advocate for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : JANUARY 28, 2025.

ORAL JUDGMENT :

RULE. Rule made returnable forthwith. Heard finally with
the consent of learned Counsel for the parties.

2. By this petition, the petitioner has challenged the order passed by the Judicial Magistrate First Class, Court No.2, Seloo below Exhibit-75 in S.C.C. No.855/2015 dated 26/06/2024. The present petitioner is the original accused who is prosecuted by the complainant under Section 138 of the Negotiable Instrument Act, 1881. The facts which are necessary for the disposal of this petition are as under :

A] The petitioner is the partner of the firm M/s Shreekrushna Ginning and Pressing, which deals with the business of sale and purchase of cotton and also holds license for the same. It is alleged by the complainant that the petitioner had not paid the bazar and supervision fees on the purchase of cotton and grains from the cultivators. It is further alleged by the respondent that, in view of discharging his liability to the aforesaid fees, the accused issued cheques bearing Nos.014988 and 014992 dated 10/05/2015 and 20/05/2015 amounting to Rs.5,00,000/- and Rs.3,00,000/- respectively in the name of the complainant. The said cheques were deposited by the complainant but the same were dishonoured with the endorsement that "Exceeds Arrangement", and therefore, after following the due compliance which is required, the complainant constrained to file the complaint application which is bearing S.C.C. No.855/2015, under the provisions of Negotiable Instruments Act, 1881.

B] After filing of the complaint, the process was issued against the present petitioner. The complainant has adduced the evidence. During evidence, the accused has filed an application below Exhibit 70 requesting the Court to call the witness by invoking Section 311 of Cr.P.C. contending that the evidence of the Bank Manager is required for the just decision of the case. But the said application Exhibit 70 is rejected by the Judicial Magistrate First Class, Seloo.

3. Being aggrieved with the same, the petitioner preferred the Criminal Writ Petition No.89 of 2024 which was subsequently withdrawn by the present petitioner. Thereafter, the final submissions were made by both the sides and thereafter, the application was filed by the complainant to summon the witness only on the ground that the complainant wants to examine the witness of Bank of India to prove the reason of dishonour of cheque. This fact came to the knowledge of the complainant at the time of the final argument and it is mentioned that it is necessary to call the witness, and therefore, the learned Magistrate shall grant the permission and summons be issued to the witnesses.

4. Though said application is strongly opposed by the accused, the learned Magistrate has allowed the application by observing that the examination of the said witness is required for the just decision of the

case. Being aggrieved and dissatisfied with the same, present petition is preferred by the petitioner on the ground that the application is filed at a belated stage when the petitioner has preferred an application under Section 311 of Cr.P.C. Said application was strongly opposed by the complainant and now he is seeking the same relief to examine the said witness only to fill up the lacuna, and therefore, the order passed by the Magistrate is illegal and erroneous and liable to be quashed and set aside.

5. Learned Counsel for the petitioner reiterated the said contention and submitted that the object of Section 311 of Cr.P.C. is that the witness can be examined at any stage of trial when it is essential for the just decision of the case. The present petitioner himself has given an opportunity to the complainant by filing an application to seek permission to examine the said witness. At the relevant time, the complainant has objected the same and now without assigning any reason, the complainant has filed an application and said application is allowed by the Court. Moreover, no reasons are assigned by the complainant why this witness is not examined at the relevant stage. Only to fill up the lacuna now the application is filed and the learned trial Court without considering the object of filing the application, allowed the application, which is erroneous. In support of his contention, he

placed reliance on the decision of this Court in ***Criminal Writ Petition No.1658/2021 decided on 13/07/2021*** (*Nayna Rajan Guhagarkar Vs. The State of Maharashtra*), then ***Rajaram Prasad Yadav vs. State of Bihar [(2013) 14 SCC 461]*** and ***Swapan Kumar Chatterjee Vs. Central Bureau of Investigation in Criminal Appeal No.15 of 2019*** decided on 04/01/2019.

6. *Per contra*, learned Counsel for the complainant supported the order passed by the Magistrate and submitted that the power under Section 311 of Cr.P.C. is manifestly in two parts and when the evidence appears to be essential for the just decision of this case, then the Court is right in allowing the complainant to adduce the evidence by invoking the powers under Section 311 of Cr.P.C., therefore, no illegality is committed by the Court, and therefore, the petition is devoid of merits and liable to be dismissed.

7. I have heard learned Counsel for both the parties. Perused the documents on record it is undisputed fact that the present petitioner is prosecuted for the offence punishable under Section 138 of the N.I. Act. It is also undisputed that below Exhibit 70, the petitioner has filed an application to examine the bank witness. At the relevant time, the complainant has objected for the same and the application came to be

rejected. The writ petition filed against the said order is also withdrawn as this Court has shown the disinclination to interfere with the said order. Thereafter, the final submissions were made and the case was posted for the judgment and the complainant has filed an application on the ground that now it came to his knowledge that said witness is essential for the just decision of the case and filed an application and said application is allowed.

8. Before entering into the controversy it is necessary to see the object underlying under Section 311 of Cr.P.C. which is explained by the Hon'ble Apex Court in the case of ***Zahira Habibullah Sheikh & anr. Vs. State of Gujarat & ors. [2006 (3) SCC 374]*** wherein the Hon'ble Apex Court has observed that object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the

Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. Thus, In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

8. In the light of the above observations and in the light of the guidelines issued by the Hon'ble Apex Court in the case of Rajaram Prasad Yadav vs. State of Bihar (supra) wherein it is held that :

“while dealing with an application under Section 311 Cr.PC. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

(a) Whether the court is right in thinking that the new evidence is needed by it?

(b) The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) 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.

(d) The exercise of power under Section 311 CrPC 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.

(e) 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.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) 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.

(h) 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.

(i) 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.

(j) 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.

(k) 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.

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

(m) 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.

(n) 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.

9. In the light of the above principles if the facts of the present case are considered admittedly, at the time of launching the prosecution or filing the complaint against the present petitioner, the complainant was well aware regarding the memos issued by the bank, and therefore,

it was obligatory on the part of the complainant to examine this witness to prove his case. At that time, the complainant has not used the recourse to examine the such witness. Thereafter the opportunity was with the complainant to cross-examine the witness when the present petitioner who is the accused has filed an application but said application is opposed by the complainant and same was rejected by the trial Court. Subsequent to that writ petition was filed and it was withdrawn by the petitioner and thereafter the final submissions were made by both the sides and at the stage of the final submissions the application is filed. Thus, it is apparent that the complainant initially has closed his evidence thereafter the statement of the accused was recorded under Section 313 of Cr.P.C. After recording the statement under Section 313 of Cr.P.C. the accused has filed an application for examining the witness by invoking Section 311 of Cr.P.C. the same was objected. Thereafter the said order was challenged by the petitioner before this Court and subsequently the writ petition was withdrawn and thereafter the matter was fixed for final submissions. Thus, the application came to be filed at a very belated stage. Moreover, the application Exhibit 75 nowhere contains the purpose why the complainant has not examined the said witness at the earlier stage and why the opportunity is to be granted to the complainant. Admittedly, the provision under Section 311 of Cr.P.C. not be invoked or used for filling up the lacuna. Considering

the fact and in view of the observation of the Hon'ble Apex Court in the case of Swapan Kumar Chatterjee Vs. Central Bureau of Investigation (supra) in para No.13 it is held as under:

“13. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed.”

10. The said observation is applicable in the present case also wherein the complainant evidence has been closed long back. Complainant was aware about the memos which were issued by the bank. The accused has filed an application for recording the evidence of the said witness i.e. the bank witness. At that time, complainant has objected the same and subsequently at the final stage of the proceeding this application is filed and i.e. also without assigning any reasons. In view of the observation of the Hon'ble Apex Court that when the summoning of witness at a belated stage without assigning any reasons would definitely cause great prejudice to the accused, and therefore, it should not be allowed. In view of that, the writ petition deserves to be allowed. Accordingly, I proceed to pass the following order:

- (i) The writ petition is allowed.

(ii) The order passed by the Judicial Magistrate First Class, Court No.2, Seloo below Exhibit-75 in S.C.C. No.855/2015 dated 26/06/2024 is hereby quashed and set aside.

(iii) The application filed by the complainant for seeking permission to examine the witness by invoking power under Section 311 of Cr.P.C. is hereby rejected.

11. Learned Counsel for the complainant requested for six weeks time as he wants to challenge this order before the Apex Court.

12. The operation and implementation of this order be stayed for six weeks.

13. The petition is disposed of.

(URMILA JOSHI-PHALKE, J.)

**Divya*