



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

CRIMINAL APPLICATION (APL) NO. 1428 OF 2024

APPLICANT : Madhukar Kacharuji Jumale,
Aged about 68 years, Occupation :
Business, r/o Near Gopal Talkies,
Washim, Tq. and District – Washim.

VERSUS

RESPONDENTS 1] Thakurdas Hasaram Santani,
Aged about 72 years, Occupation :
Business, R/o Pakki Kholi, Sindhi Camp,
Akola, Tq. and District Akola, Tq. and
District – Akola. P.S. Khadan, Akola.

2] State of Maharashtra,
through District Government Pleader,
Akola, Tahsil and District Akola.

Mr. J.B. Gandhi, counsel for applicant.
Mr. D.M. Ailani, counsel for respondent No.1.
Mr. V.A. Thakre, APP for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : 29/01/2025

ORAL JUDGMENT :

1. Heard.

2. **Admit.**

3. Heard finally by consent of learned counsel appearing for the parties.

4. By this application, the applicant is seeking quashing and setting aside the order passed below Exhibit No. 146 by the Judicial Magistrate First Class Court No. 2, Akola, by which the application filed under Section 311 of the Criminal Procedure Code is rejected.

5. It is contended by the applicant that a complaint has been filed under Section 138 of the Negotiable Instruments Act, 1881, in the Court of Chief Judicial Magistrate Akola, which was registered as S.C.C. No.1205/2013. It is alleged that the complainant has paid the amount of Rs. 10 lakhs for business purpose for the accused, and the amount of Rs. 7 lakhs was decided to be repaid, and the M.O.U. was executed on 17/01/2007. There was a business partnership in between complainant and the accused. However, ultimately the amount was demanded back by the complainant, and therefore, the applicant

has issued two cheques on 20/07/2012 drawn on Washim Urban Cooperative Bank Ltd., Washim, of Rs. 5 lakhs dated 20/11/2012 and Rs. 5 lakhs dated 31/01/2013. The cheques were presented and returned back with an endorsement "funds insufficient.". Accordingly, the notice was issued on 27/02/2013, which was duly served and received by the applicant on 01/03/2013. After receipt of notice, the amount was not paid, and therefore, the complaint was filed on 04/04/2013.

6. After filing of the complaint, the complainant has examined himself on affidavit. On 26/03/2017, the applicant engaged the counsel, and after recording the evidence and the statement of the present applicant under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the Judicial Magistrate First Class was pleased to hold him guilty and sentenced him to suffer rigorous imprisonment for a period of one month and to pay a fine of Rs. 10 lakhs, in default to undergo simple imprisonment for three months.

7. Being aggrieved and dissatisfied with the judgment and order of sentence, the applicant has filed an appeal bearing No. 25/2019. The contention of the applicant before the appellate

court was that he was not given any opportunity of adducing the witness or evidence, and also the prayer was made for remanding the matter. Accordingly, the appellate Court, i.e., the District and Additional Sessions Judge, considered the prayer and remanded back the matter by setting aside the conviction of the present applicant. It was directed that the applicant be permitted to adduce his evidence in support of his defence by giving him the opportunity to examine the defence witnesses.

8. After remanding back the matter to the trial Court, the present applicant has filed an application under Section 311 of the Cr.P.C. for recalling the complaint for further cross-examination. On the ground that, after filing of evidence on affidavit, the complainant was cross-examined by the accused. The bulk of the document is filed by the complainant on record. The cross-examination was not conducted, and many important facts and documents were not presented, and many important questions remained to be asked during the cross-examination, and therefore, he was permitted to recall the witness. In view of that, the application be allowed.

9. The said application is strongly opposed by the complainant on the ground that the matter was remanded back only on the prayer that he be permitted to adduce the evidence in support of his defence, and as far as recalling of the witness is concerned, never raised before the appellate Court. It is further contended by the complainant that this application is filed only to prolong the matter.

10. Considering the submissions of both sides and the settled law, the application is rejected by the Judicial Magistrate First Class, Court No. 2, Akola, and therefore, this application is filed.

11. Heard learned counsel for the applicant and learned counsel for the respondents. Perused the impugned judgment passed by the appellate Court. It was argued before the Appellate Court that during the evidence, and after recording the statement of the accused under Section 313 of the Cr.P.C., the learned trial Court has closed the evidence of the accused, and subsequent to that, there was a death of the counsel. Therefore, the appellant could not produce his evidence in support of his defence and therefore, he has not been given any sufficient opportunity to

adduce the evidence.

12. In support of his defence, and considering the submissions made by learned counsel for the applicant and considering the order passed by the learned trial Court below Exhibit No. 1 dated 01/10/2018, though sufficient opportunity was given to the accused, he failed to argue the case. Hence, the case is to proceed further without argument for the accused. The matter was remanded back to the Judicial Magistrate First Class by specific directions that he be permitted to adduce the evidence in support of his defence by examining the defence witness. As far as the submission before the Appellate Court is concerned, it was never raised that for the interest of justice or for the just decision of the case, the recalling of the witnesses is also necessary, and therefore, he be permitted to recall the witness. Thus, first time after remanding the matter, the issue was raised by the present applicant by recalling the witness is required. As the complainant is not cross-examined on the material issues, he be permitted to cross-examine the witness by recalling the witness.

13. As far as the issue of recalling the witness is concerned, now it is well settled that the object underlying Section

311 of the Cr.P.C. is that there may not be a failure of justice on account of mistakes of either party in bringing the valuable evidence on record or living ambiguity in the statements of witnesses examined from either side. The determinative factor is whether it is essential to 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 of 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 applies to all proceedings and empowers the 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 any 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 the necessity for application of judicial mind."

14. In the case of *Vijaykumar Vs State of U.P [(2011) 8*

SCC 136] The Hon'ble Apex Court while explaining scope and ambit of Section 311 has held as under;

Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.

15. Learned counsel for the respondent no.1 placed reliance in the case of **Rajaram Prasad Yadav Vs State of Bihar and another [Law Finder Doc Id # 461433]** wherein the Hon'ble Apex Court has laid down the principles, which have to be born in mind by dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act. The said principles are as follows ;-

“(i) 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?

(ii) The exercise of the widest discretionary power under Section 311 Criminal Procedure Code 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.

(iii) 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.

(iv) The exercise of power under Section 311 Criminal Procedure Code 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.

(v) 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.

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

(vii) 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.

(viii) The object of Section 311 Criminal Procedure Code simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(ix) 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.

(x) 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.

(xi) 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.

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

(xiii) 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.

(xiv) The power under Section 311 Criminal Procedure Code 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.”

16. By referring the judgment of ***Raj Deo Sharam (II) Vs State of Bihar [1999 (4) RCR (Criminal) 206]***, the proposition has been laid down is that “We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal

Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay* case nor in *Kartar Singh* case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

17. Thus, the powers conferred under Section 311 of the Criminal Procedure Code must therefore be invoked by the court only in order to meet the ends of justice, strong and valid reasons, and the same must be exercised with great caution and circumstances.

18. In light of the above principles and considering the scope and object of the provision, which is to enable the court to determine the court and to render a just decision after discovering relevant facts and obtaining the proper course of such facts, to arrive at a just decision in the case.

19. As far as the present matter is concerned, the record shows that initially also, after giving sufficient opportunities, the applicant has not taken a call and not examined the witness in support of the statement, but considering that remand of the matter is required as the opportunities are to be given to the present applicant to adduce the evidence, the matter was remanded back, with a specific condition that he shall adduce the evidence in support of his evidence. Before the appellate court, he never raised any issue that he has not got an opportunity to cross-examine the witness on material points, as the counsel was suffering from the illness and was not able to cross-examine the complainant on material aspects, and now the said application is filed.

20. The transaction is of year 2007. The complaint was filed in the year 2013. The criminal case was decided on 16/11/2018, and the appeal was decided on 24/11/2023, and now the application under Section 311 of the Criminal Procedure Code is filed on 11/02/2023.

21. Considering the entire scenario, in which the complaint and the entire proceeding is proceeded, it reveals that

the present application is also filed only to prolong the matter. Admittedly, the issue of recalling the witness was never raised before the appellate Court. It was also never raised that the complainant is not cross-examined on material aspects, and therefore, that opportunity should be given to the applicant to cross-examine the complainant. If that could have been raised, definitely the appellate Court would have given an opportunity to the present appellant while disposing of the appeal. It is well settled that for filling up the lacuna, the provision under Section 311 of the Criminal Procedure Code cannot be evoked.

22. In view of the above facts and circumstances of the case, the criminal application deserves to be rejected. Accordingly, I proceed to pass the following order.

The criminal application is **rejected**.

[URMILA JOSHI-PHALKE, J.]