

**(2006) 08 BOM CK 0039**

**In the Bombay High Court**

**Case No :** Criminal Application No. 2271 of 2004

Haribhau Pharate and Another

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

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**Date of Decision :** 03-08-2006

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 311, 482  
Negotiable Instruments Act, 1881 (NI) — Section 138  
Penal Code, 1860 (IPC) — Section 109, 494

**Citation :** (2006) 6 MhLj 540

**Hon'ble Judges :** J.H. Bhatia, J

**Bench :** Single Bench

**Advocate :** P.B. Shirsath, for the Appellant; K.M. Nagarkar, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

J.H. Bhatia, J.—Rule. Rule returnable forthwith. The matter is taken up for final hearing with consent.

2. The applicants, who are original accused Nos. 1 and 2 in R.T.C. No. 119/-1996, under Sections 109 and 494 of Indian Penal Code pending before J.M.F.C. Shrigonda, have filed this application invoking Section 482 of Criminal Procedure Code to quash and set aside the order passed by learned J.M.F.C. on the application of the complainant, who is respondent No. 2 before this Court, for calling certain witnesses u/s 311, Criminal Procedure Code.

3. According to the applicants, the case was pending before J.M.F.C. since 1996 against as many as 15 accused persons. It is contended that the complainant/respondent No. 2 had completed and closed her evidence and filed Purshis to that effect on 18-12-2003. Thereafter, the matter was fixed for arguments. However, suddenly on 26-8-2004 respondent No. 2 filed application Exh. 157 seeking permission to examine 9 more witnesses and direction for issuance of summonses to some of them. The application was opposed by the accused persons including the present applicants. However, after hearing both the parties,

the learned Magistrate passed the impugned order on Exh. 157 on 9-9-2004, allowing that application. According to the applicants, the said order is contrary to the principles of natural justice, equity and good conscious. No reasons are given in the application, how the evidence of the abovesaid witnesses is necessary for the just decision-nor any such reason was given in the impugned order. It is contended that the learned Magistrate failed to take note that the evidence was closed by the complainant long back on or about 18-12-2003. It is contended that the learned trial Court did not apply the case law properly. On these grounds, the applicants sought the said order to be quashed.

4. Heard learned Counsel for the parties and perused the application Exh. 157, impugned order thereon as well as Roznama of the case before the learned Magistrate. At the outset, it may be stated that though, the date of the impugned order is shown to be 9-9-2004 in the present application, in fact the said order appears to have been passed on 7-9-2004. Mr. Shirsath, learned Counsel vehemently contended that in view of the facts stated above, respondent No. 2 complainant could not be allowed to produce any more evidence as it amounted to enable the prosecution to fill up lacuna in the case and in support of this he placed reliance upon R.N. Kakkar v. Hanif Gafoor Naviwala and Ors. 1996 (2) ALL MR 466. Mr. Nagarkar, learned Counsel for respondent No. 2 placed reliance upon several authorities, in support of his contention that this was not an attempt just to plug the loopholes in the prosecution evidence or to fill up lacuna but it was necessary in the interest of justice and such power u/s 311 could be exercised by the learned Magistrate at any stage. Mr. Nagarkar, further contended that if the record is carefully seen the complainant had never closed the evidence at the stage of trial and she had also given sufficient reasons in her application Exh. 157 seeking permission to examine 9 more witnesses.

5. Before considering the legal position on the subject, it will be necessary to state the facts correctly.

6. The complaint was filed in 1996 and process was issued against 15 accused persons. Roznama reveals that on most of the dates, the accused persons were not present before the Court. On number of occasions it became necessary to issue warrants against them but the warrants were got cancelled. On most of the occasions only some of the accused used to remain present and most of the accused used to be absent and exemption was sought for their personal attendance. Evidence of the complainant herself before framing of charge was completed on 11-9-2003. Thereafter, matter was adjourned to 9-10-2003 as last chance for further evidence. On 13-11-2003 she again sought short adjournment for hearing and on 18-12-2003 she filed a purshis Exh. 129-A closing her evidence before Charge. Thereafter, arguments were heard and on 22-1-2004, charge was framed against accused persons. Thereafter, the matter was fixed for evidence after framing of charge and she sought issuance of summons which was granted on 19-3-2004. Thereafter, matter was adjourned on some occasion because summonses were not issued to the witnesses. At the cost of repetition,

it may be stated that during that period also on most of the occasions, the accused persons had sought exemption from personal appearance. On 16-7-2004, accused persons filed application Exh. 153 seeking direction that evidence of complainant be closed. Matter was adjourned to 29-7-2004 and then to 26-8-2004. On 26-8-2004, she filed application Exh. 157 (which was originally given Exh. 89 and later on all the exhibit numbers of the record appear to have been corrected). That application was fixed for arguments on 7-9-2004, the application was allowed and order was passed to issue summons to the witnesses. Matter was adjourned for further hearing on 6-10-2004. On that day accused persons were absent and the complainant filed an application to issue warrants against them. At the same time an application Exh. 159 was filed by the accused seeking stay to the proceeding because they wanted to challenge the order on Exh. 157. In view of this, the matter was adjourned to 7-12-2004. Before going to the contents of the application, it may be noted that on 14-10-2004 on behalf of the applicants/accused it was represented to this Court that the matter before the Magistrate was posted on 19-10-2004 for arguments and therefore, it was absolutely necessary to grant some interim relief of stay. Accordingly, interim relief of stay was granted by order dated 14-10-2004. In fact, the record reveals that the matter was not posted on 19-10-2004 before the learned Magistrate and it is clear that the applicants had misrepresented before this Court on 14-10-2004 for the purpose of obtaining interim relief of stay.

7. According to the applicants, no valid reasons were given either in Exh. 157 or in the impugned order for invoking powers u/s 311 of Criminal Procedure Code. The application Exh. 157 clearly shows that out of the witnesses, who were originally cited in the complaint, two witnesses, had some dispute with the complainant and they were not inclined to speak the truth and one had expired during pendency of the case. Therefore, those three witnesses could not be examined. It was stated that out of the witnesses originally cited only one witness Sulochana could be examined during the trial. It was further stated that during pendency of the matter the complainant had come to know that the proposed witnesses were important witnesses to prove the offence and therefore, it was necessary to examine them. She sought summonses for three of the witnesses, while she could produce remaining six witnesses on her own. In para 5 of the impugned order after referring to some case law, the learned Magistrate observed that considering the facts and circumstances of the case, it was necessary to allow the application and to give opportunity to the complainant to lead evidence. It is true that he did not repeat all the facts and circumstances which are quoted in the application but it is clear that he allowed the application in view of the facts and circumstances quoted in the application.

8. From the facts stated above, it is clear that after framing of charge, the evidence of the complainant is not yet opened and by this application Exh. 157 she sought permission to examine 9 witnesses which were not originally cited in the complaint. By no stretch of imagination it can be said that allowing the

complainant to examine these witnesses during the trial would amount to filling up lacuna or plugging certain loopholes in the prosecution evidence. Therefore, the authority in the case of R.N. Kakkar (supra) is not applicable to the present case.

9. Section 311, Criminal Procedure Code reads as follows :

311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined.

It does not put any limit or restriction about stage at which a witness may be summoned or may be allowed to be examined by the Court. It empowers the Court to issue summons at any stage of enquiry or trial if evidence of such witness is necessary for fair trial and just decision. In Narayan Prasad Agrawal Vs. State of M.P. and Others, , in a complaint u/s 138 of Negotiable Instruments Act, the complainant had completed his evidence including his examination, cross-examination and re-examination. During cross-examination the accused had denied service of statutory notice and had disowned the signature on the acknowledgment. After completion of evidence, case was posted for judgment. At that stage, the complainant sought permission to produce additional material, that in postal receipt, to prove the service of the statutory notice. The trial Court granted the permission, which was set aside by the High Court. The Supreme Court held that the High Court had erred in interfering in the order of the trial Court. After referring to authority in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, , the Supreme Court observed as follows in para 6 of the said judgment.

6. In deciding so, this Court has taken into account some of the earlier decisions of this Court including Mohanlal Shamji Soni v. Union of India. In the said decision this Court had observed that the power to receive evidence in exercise of Section 311 of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers u/s 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word "any" at different places. This would also indicate the widest range of power conferred on the Court in that matter. It is so stated by this Court in Ram Chancier v. State of Haryana.

In Sama Ram Vs. State of Rajasthan and Another, , the Rajasthan High Court held that an application for summoning material witnesses can be filed at any stage before pronouncement of judgment and power u/s 311 can be exercised even during final arguments of the case. In Sidhu Sukhdev Waghmare v. State of

Maharashtra, 2004 (1) BCR 351, the learned Single Judge of this Court held that Section 311 of the Criminal Procedure Code empowers the Court to issue summons to witness at any stage of trial if the evidence of such witness is essential to just decision of the case. The learned Judge observed in para 6 as follows :

However, after taking into consideration the provisions of Section 311 of Code of Criminal Procedure, it is clear that it is not restricted only to issuing the summons to examine the witness who is cited as a witness by the prosecution, but summons can also be issued by the Court to a witness whose evidence is essential for the just decision of the case even if the said witness is not cited as witness by the prosecution.

In view of the provisions of Section 311 and the above-referred authorities, it is abundantly clear that Section 311 empowers the Court to issue summons to any witness whose evidence is found essential for the just decision of the case, even if such witness is not cited by the prosecution originally and this power can be exercised at any state of the enquiry or trial till before the judgment is actually pronounced.

10. In view of the facts and legal position discussed above, it is clear that the impugned order was rightly passed by the J.M.F.C., and no fault can be found in the same. In fact, the applicants, who are the original accused Nos. 1 and 2, made certain wrong statements of facts before this Court when they alleged that the complainant had already closed evidence on 18-12-2003, while in fact, on that date evidence before framing of charge only was closed and charge was framed long after that and after framing of charge evidence was yet to be recorded. Thus, it is clear that the applicants unnecessarily dragged the complainant respondent No. 2 to the High Court by filing the present application and put her to unnecessary expenditure. Therefore, I find that the application is liable to be dismissed with costs.

11. For the aforesaid reasons, the application stands rejected. The applicants shall pay costs of Rs. 2,000/- to the original complainant/respondent No. 2. Costs shall be deposited before the trial Court within one month from this date.

12. Rule discharged.