Bombay High Court R.N. Kakkar vs Hanif Gafoor Naviwala And Others on 15 September, 1995 Equivalent citations: 1996 (3) BomCR 292, 1996 CriLJ 356 Bench: V Sahai JUDGMENT 1. This petition under Article 227 of the Constitution of India read with Sections 391, 400 and 482 of the Criminal Procedure Code has been preferred by the Petitioner for quashing orders dated 1-8-1995 (Exhibit 72) and 2-8-1995 (Exhibit 73) passed by the Special Judge, under the N.D.P.S. Act, for Greater Bombay, in N.D.P.S. Special Case No. 1249 of 1988. 2. A narration of the facts in brief would be necessary for the disposal of this petition. The respondents Nos. 1 to 3 are being prosecuted for offences punishable under the N.D.P.S. Act and Section 135 of the Customs Act. A seizure of heroin, which took place on 21-1-1988 and 23-1-1988, which is said to have been imported into-India, by the respondents Nos. 1 to 3 along with an associate of theirs, who is absconding, is said to have given rise to their prosecution. 3. Following facts are not disputed by the counsel for the parties :- (a) trial in the instant case has been expedited by orders of this Court; and (b) applications on which impugned orders were passed were made by the Directorate of Revenue Intelligence on which the petitioner is employed, after the closure of evidence of parties, recording of statement of accused persons (respondent Nos. 1 to 3) under Section 313 of Criminal Procedure Code, conclusion of arguments of counsel for the parties and fixation of 7-8-1995 as date for judgment by the Court. 4. On 1-8-19995, an application was moved by the Directorate of Revenue Intelligence in the Court of the Special Judge, on which the impugned orders contained in Exhibit 72 were passed. It was prayed therein that the prosecution could not tender the seized drug samples and the original case papers as the same were not traceable till 28-7-1995 and today, it is learnt that they have been traced out hence : "the prosecution may be allowed to tender the said original case records, the samples of the contraband and lead the additional evidence in the case." The defence opposed the grant of this application on the ground that it was made far too belatedly, prejudice would be caused to the accused as their defence had already been disclosed and that the object in making it was to fill up the lacunaes in the prosecution case and this was not permitted by the law as it would amount to re-trial of the accused, under the garb of adducing additional evidence. The defence also contended that the grant of this application would unnecessarily prolong the trial which had been expedited by this Court. 5. After hearing the counsel for the parties, the learned Special Judge granted prayer of the prosecution for recalling : "P.W. 3 Mr. Gayabax M. Yadav - the then Asstt. Director of the DRI and the P.W. 5 Mr. Suresh K. Pradhan, the then Sr. Intelligence Officer of the DRI for the purpose of tendering the contraband samples in this case in the Court." It however, rejected the prayer for tendering original records : "as the carbon copies and the xerox copies of the original case papers have already been exhibited in the case, in view of grant of permission the prosecution to adduce the secondary evidence." The learned Special Judge also directed that :- "the case be kept on the date of 2-8-95 for recalling the P.W. 3 Mr. Gayabax M. Yadav - then Astt. Director of the D.R.I. and the P.W. 5 Mr. Suresh K. Pradhan the then Sr. Intelligence Officer of the D.R.I. for tendering the samples of the contraband in the Court." On 2-8-95, the

prosecution recalled P.W. 3 Mr. Gayabax M. Yadav and P.W. 5 Suresh Kasinath Pradhan and through their evidence, the samples of the contraband traced out by the prosecution were tendered in this case in the Court. 6. On 2-8-1995, the Directorate of Revenue Intelligence moved another application, on which the impugned orders in Exhibit 73 were passed, for : "tendering the following original records and additional evidence based on it. (1) Original documents annexed with the affidavit dated 15-6-1995 filed by Mr. Atul Dikshit, the A.D. D.R.I. (Narcotic Cell) (2) Additional evidence based on original records, which is as under :- (i) Gist of information in DRI 1 (ii) DRI 2 (iii) O.C. of summons (iv) Search warrants (v) Photographs 16 (sixteen) taken before 2nd S.M.M. (3) Permission to open the articles Nos. 3 and 4 tendered by the P.W. 2 Mr. Joseph Wessly the Court Officer." P.W. 2 Joseph Wessly is the Intelligence Officer of Directorate of Revenue Intelligence and not the Court officer as mentioned in the application. The defence opposed the grant of this application, in addition to the grounds canvassed while opposing the application dated 1-8-1995, on the consideration that in view of failure of the Officer to reduce the gist of information into writing as contemplated under Section 42 of the N.D.P.S. Act and their failure to submit the copies of the said gist of information to the superior Officers, entire trial is vitiated and the accused have to be acquitted. It was further urged vehemently from the side of defence that in the application at Exhibit 7 filed on behalf of the prosecution, there is absolutely no mention about the gist of information, search warrants etc. Further, even during the entire evidence of the prosecution witnesses, there is not even a whisper about such gist of information being reduced to writing, forwarding copy of the same to the superior Officer, issue of search warrants for carrying out the search of any premises etc. 7. The learned Special Judge rejected the application dated 2-8-1995 on the ground that granting it would amount to the prosecution being permitted to fill in lacunas in its case "such as failure of the officers to reduce the information into writing, failure of the officers to forward copies of the such gist of information to the superior authorities, issue of search warrants for carrying out searches of the premises between the sunset and sunrise." The Special Judge felt that this could not be permitted to the prosecution under the garb of adducing additional evidence. However, in the interest of justice, the Court allowed the prayer of the prosecution to open articles 3 and 4 tendered by P.W. 2 Mr. Joseph Wessly in this case. 8. Aggrieved by the aforesaid orders, the petitioner-has come up to this Court by means of the present petition. I have heard Mr. R. M. Agarwal for the petitioner, Mr. Shirish Gupte along with Mr. K. Z. Nagamia for Respondent Nos. 1 and 2, Mr. H. H. Ponda for Respondent no. 3 and Mr. D. A. Nalawade for the Respondent No. 4 (State of Maharashtra). I have also perused the impugned orders and the averments made in the petition. After giving my anxious consideration to the matter, I find the present petition to be devoid of substance. In my view, the same deserves to be dismissed. 9. Mr. Agarwal learned counsel for the petitioner, vehemently contended that under section 311 of the Criminal Procedure Code, 1973, the learned Special Judge had ample powers to permit the prosecution to adduce evidence which the prosecution wanted to adduce and that he gravely erred in rejecting the

prayer of the prosecution for adducing the same. He further contended that the circumstances that a date for judgment had been fixed by the Special Judge in the case would be no bar to the exercise of that power. 10. Section 311 of the Criminal Procedure Code reads thus :- Section 311 : Power to summon material witnesses 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; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case." Mr. Agarwal is absolutely correct when he urges about the existence of such a power with the Court for the language of section 311 of Criminal Procedure Code is couched in very wide terms. A perusal of section 311 of Criminal Procedure Code, shows that the power of any Court to summon any person as a witness or examine any person in attendance though not summoned, as a witness was or to recall and re-examine any person already examined, may be exercised by it, at any stage of enquiry, trial or other proceedings under this Code. 11. In my view, the power of the Court under section 311 of the Criminal Procedure Code is not an unqualified, unbridled and unfettered power. The section itself qualifies or puts fetters on the powers of the court when it provides and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case." 12. In every case, while exercising power under this section, the Court has to examine the question whether the evidence of the person sought to be summoned and examined or recalled or reexamined “appears to it” to be essential to the just decision of the case." If the answer to this question is in the affirmative, then section 311 of the Criminal Procedure Code casts a mandatory duty on the court in terms “and the Court shall summon and examine or recall and reexamine any such person”. I am fortified in my view by the observations of the Apex Court in para 18 of its judgment, reported in (Mohanlal Soni v. Union of India) which are to the following effect :- “The next important question is whether section 540 gives the Court carte-blanche drawing no underlying principle in the exercise of the extra ordinary power and whether the said section is unguided, uncontrolled and uncannalised. Though section 540 (Section 311 of the new Code) is in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines section 540, namely evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further, it is incumbent that due care should be taken by the Court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by

the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. 13. When the impugned orders are perused in the light of the observations of Their Lordships of the Apex Court, made in (supra) and the factual matrix, in which they have been passed, they cannot be faulted as suffering from any infirmity which would vitiate them. In my view, the learned Special Judge has rightly held that granting of the applications dated 1-8-1995 and 2-8-1995 in entirety, would mean affording an opportunity to the prosecution to fill in the lacuna in its case and would virtually amount to retrial of the accused. 14. It needs to be emphasised that although the amplitude of the powers vested in a Court under section 311 of the Criminal Procedure Code, 1973 is very wide, the object of exercise of such powers is not to enable the prosecution to adduce evidence which would plug-in the holes in its case, for such an exercise of power would be defeating the very object for which it has been bestowed on the court, namely the just decision of the case. This would be a capricious exercise of power by the Court. It is a trite in law that no party can take advantage of its own wrong and if the powers are exercised under this section to enable the prosecution to plug-in the holes in its case, the aforesaid principle would be given a go-bye. 15. The power under section 311 of the Criminal Procedure Code, 1973 should be exercised by the Courts in rare cases, after the greatest circumspection and only when it is imperative for the just decision of the case. While exercising the power under this section, the Court should bear in mind that the larger the power the higher the circumspection required before exercising the same. In this connection, it would be relevant to quote the observations of Their Lordships of the Apex Court made in paras 13 and 17, in the decision reported in AIR 1978 SC 1558 Rameshwar Dayal v. State of U.P., which are to the following effect :-"It is true that under section 540 of the Criminal Procedure Code the High Court has got very wide powers to examine any witness it likes for the just decision of the case, but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be its exercise. .... The words "Just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fair play." 16. A perusal of the impugned orders, would show that the learned Special Judge was alive to these principles when he rejected the prayer of the prosecution for adducing additional evidence. I find no flaw in the impugned orders which would warrant the interference of this Court. Accordingly, this petition being devoid of substance is dismissed in-limine. 17. Mr. R. M. Agarwal, learned counsel for the petitioner, urged that I should stay the operation of my order for a period of eight weeks as the petitioner intends to approach the Apex Court. Mr. Shirish Gupte and Mr. H. H. Ponda counsel for the respondent nos. 1 to 3 vehemently opposed the aforesaid prayer. They urged that apart from the fact that the petition of the petitioner has been found to be devoid of merits by this Court, the sword of democles has been hanging on the head of the respondent nos. 1 to 3 since January 1988 and enough is enough.

However, considering the circumstance that respondents Nos. 1 to 3 are on bail, I feel that it would be just and proper to stay the operation of this order for a period of five weeks from today. Office shall forthwith send a complete copy of this order to the learned Trial Judge. 18. Finally, Mr. Agarwal, counsel for the petitioner, prayed that the compilation prepared by him be kept on record. Mr. Gupte and Mr. Ponda vehemently opposed his prayer. Apart from the fact that permitting filing of the compilation in this Court, which contains the entire documents and evidence pertaining to the case, would amount to this Court arrogating upon itself the functions of a trial Court, which certainly is not the intention of law in a petition preferred before this Court under Article 227 of the Constitution of India, and sections 391, 400 and 482 of Criminal Procedure Code, I am of the view that this prayer should have been made long ago. The order-sheet (Roznama) shows that this petition is pending in this Court since 11-8-1995 and ever since then, on a very large number of dates, this case has been on the Board of this Court. In my view, if the petitioner really wanted to file the compilation, the same should have been done much before by means of a Criminal Application. Permitting filing of the compilation on the date of hearing would not be proper. Accordingly, the aforesaid request is rejected. In spite of the fact that the petition has been dismissed, I cannot refrain from observing that the counsel for the petitioner has argued it with great competence. In case an application for a certified copy of this order is made by the counsel for the parties, the same shall be issued within one week from today. 19. Pition dismissed.