

Court No. - 92

Case :- APPLICATION U/S 482 No. - 32051 of 2023

Applicant :- Smt Hasibun Nisha And 3 Others

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Deepak Upadhyay

Counsel for Opposite Party :- G.A.

Hon'ble Anish Kumar Gupta,J.

1. Heard Sri Deepak Upadhyay, learned counsel for the applicants and Sri Sandeep Choudhary, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. challenging the order dated 14.03.2023 whereby the application u/S 311 Cr.P.C., filed by the applicants herein seeking re-examination of PW-1, namely Waseem, has been rejected by the learned Trial Court.

3. Learned counsel for the applicants submits that the examination in chief and the cross-examination of PW-1, Waseem, was concluded on 23.05.2022. Thereafter, the other witnesses were also examined and now the examination for PW-7 is going on. Learned counsel for the applicants submits that after the conclusion of the examination of PW-1, the applicants have come to know about the conversation, which was recorded in the phone of the deceased, which apparently according to the applicants shows that there was no cruelty on the part of the applicants immediately before the death of the deceased, which goes into the root of the matter once the applicants are able to establish that there was no cruelty on the part of the applicants immediately before the death of the deceased then the offence u/S 304-B I.P.C., will not be attracted to the applicants herein. Learned counsel for the applicants submits that the Trial Court has rejected the application on the ground that the certificate u/S 65-B of the Indian Evidence Act, has not been produced with regard to the said recording produced by the applicants, as if the applicants are trying to solely rely upon the said recording itself as an evidence. Learned counsel for the applicants further submits that its a material available with the applicants on which the witness is required to be examined. Applicants are not requesting the Court to take that material as evidence itself for which a certificate is required u/S 65-B the Indian Evidence Act. Therefore, learned counsel for the applicants prays for that only an opportunity for one day be granted to the applicants for the re-examination/cross-examination of the PW-1, on the said aspect of the matter.

4. Learned counsel for the State submits that the instant application

u/S 311 Cr.P.C., has been filed by the applicants after a long delay in the March, 2023 whereas the evidence of PW-1 was concluded on 23.05.2022. Therefore, the instant application is nothing but a dilatory tactics on behalf of the applicants. Learned counsel for the State further submits that the said material cannot be relied upon unless a certificate u/S 65-B of the Indian Evidence Act, is produced alongwith said recording, the same cannot be relied upon. Therefore, the learned Trial Court has rightly rejected the application, hence, no interference is called for by this Court.

5. Having heard the rival submissions made by learned counsels for opposite parties, this Court has carefully perused the record of the case as well as the impugned order dated 14.03.2023.

6. Section 311 Cr.P.C. 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; 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."

7. From the perusal of the provisions of Section 311 Cr.P.C., it appears that the witnesses can be re-called and re-examined at any stage of the trial before the delivery of the judgement, if in the opinion of the Court the evidence of such persons is essential for the just decision of the case. In the instant case, the applicants have been charged for an offence u/S 304-B I.P.C., alongwith the other offences and u/S 304-B I.P.C., a presumption is raised against the applicants that if the deceased died within a period of seven years of marriage, that there must be a cruelty soon before her death. The object of the cross-examination/re-examination of the PW-1 is just to counter the witness with the said conversation, which may re-but the said presumption against the applicants. Therefore, in the opinion of this Court, in the aforesaid aspect in the matter, the re-examination of PW-1 is essential for the just decision of the case. Therefore, the other objection on behalf of the State that the instant application is dilatory tactics on behalf of the applicants is not sustainable due to the fact that the examination of prosecution witnesses is still on and some other prosecution witness is yet to be examined and the applicants have filed the application in March, 2023, itself. Therefore, in the considered opinion of this Court, the objection with regard to the dilatory tactics is not sustainable.

8. In the light of the aforesaid observations, the instant impugned order dated 14.03.2023, is hereby **set-aside** and the application u/S 311 Cr.P.C., filed by the applicants herein is **allowed** and the Trial

Court is directed to fix a date for calling upon the PW-1 for re-examination/cross-examination by the applicants herein for one day only.

9. It is made clear that if on the date fixed by the trial Court and when the PW-1 appears before the Trial Court, for his re-examination, no cross-examination is done by the applicants. They will not be given any further opportunity to cross-examine said witness.

10. With the aforesaid observations, the instant application is ***disposed of***.

Order Date :- 26.10.2023

Shubham Arya