

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.11715 of 2013

Arising Out of PS.Case No. -85 Year- 2004 Thana -BARAULI District- -

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1. Bhola Sah, S/O Tilak Sah Village Sisai P.S. Barauli District Gopalganj
 2. Dharmdeo Sah, S/O Jakshan Sah Village Sisai P.S. Barauli District Gopalganj
 3. Ram Parvesh Sah, S/O Dharamdeo Sah Village Sisai P.S. Barauli District Gopalganj
 4. Vijay Pandit, S/O Late Mahabir Pandit Village Sisai P.S. Barauli District Gopalganj
 5. Kodai Pandit @ Kolai, S/O Ram Niranjana Pandit Village Sisai P.S. Barauli District Gopalganj
 6. Jakshan Sah, S/O Late Dhuri Sah Village Sisai P.S. Barauli District Gopalganj
 7. Chandrama Pandit, S/O Late Gate Pandit Village Sisai P.S. Barauli District Gopalganj
 8. Rudal Pandit, S/O Late Shivraj Pandit Village Sisai P.S. Barauli District Gopalganj
 9. Basudeo Pandit, S/O Rudal Randit Village Sisai P.S. Barauli District Gopalganj

.... Petitioner/s

Versus

1. The State of Bihar

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr.

For the Opposite Party/s : Mr. Shardanand Jha (App)

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR

SAHOO

ORAL ORDER

2 14-05-2015

Heard learned counsel for the parties.

2. This criminal miscellaneous application has been filed by the petitioners for quashing the order dated 06.02.2013 passed by learned A.D.J.-V, Gopalganj in Sessions Trial No.341 of 2006 arising out of Barauli P.S. Case No.85 of 2004 whereby the court below has allowed the application under Section 311

Cr.P.C. in spite of the fact that the earlier two occasions the same prayer was rejected by the court below.

3. The learned counsel for the petitioners submitted that the charge has already been framed under Sections 323, 341, 324, 307, 326/34 I.P.C. After framing charge, the witnesses have been examined and thereafter the informant filed an application under Section 311 Cr.P.C. for examining three persons as prosecution witness in the case on the ground that they are not cited by the I.O. as witness in the charge sheet. The rejoinder was filed by the petitioners to the said application. The court below after hearing the parties has rejected the application holding that it is not maintainable. I.O. has not been examined. According to the learned counsel for the petitioners nowhere in the order the court below said that in subsequent stage after the examination of I.O. the informant may again pray for the same relief. Subsequently again application under Section 311 Cr.P.C. was filed by the opposite party no.2 for the same relief. The court below again rejected the application filed by the petitioners but third time when the application was filed the court below has allowed the application, which amounts to review its earlier order whereby the same relief was rejected.

4. On the other hand, the learned counsel appearing on



behalf of opposite party no.2 submitted that the applications earlier filed by the opposite party no.2 were rejected on the ground that I.O. was not examined, therefore, the applications were not maintainable. Subsequently when the court below found that the examination of the witnesses mentioned in the application under Section 311 Cr.P.C. are essential for the just decision of the case, the court below has allowed the application by the impugned order. The court below has also assigned the reason that now the evidence has been closed and, therefore, in exercise of jurisdiction under Section 482 Cr.P.C. the impugned order cannot be interfered with.

5. Perused the first rejection order dated 14.10.2011. It appears that the application filed by the opposite party no.2 under Section 311 Cr.P.C. was rejected simply. No reason has been assigned that at that stage the application was not maintainable. The court below had not granted any liberty to the opposite party no.2 to pray for the same relief at the subsequent stage. Further from the order it is not clear as to whether the application that may be filed will be considered after the closure of the prosecution evidences. The second application was rejected on 25.04.2012 and at this stage also no liberty was granted to the other side to file subsequent application for the same relief after closure of the

evidence of the prosecution. Simply the application was rejected.

6. Section 311 Cr.P.C. reads as follows:

“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. In view of this provision it is clear that the application can be filed at any stage of the proceeding. So far the submission of the learned counsel for the opposite party no.2 that the application was not maintainable because at that time I.O. was not examined is concerned, it may be stated that there is no such provision in Section 311 Cr.P.C. It speaks that the Court may at any stage of any enquiry, trial or other proceeding has the jurisdiction to summon or examine, recall or re-examine any witness. Further if the application was not maintainable at that stage then the court should have stated that the application shall be considered after examination of I.O.

8. Recently the Division Bench of this Court in the case of **Umesh Ravidas Vs. The State of Bihar, 2015 (2) P.L.J.R. 484** has discussed elaborately the scope of Section 311



Cr.P.C. and held that a patient reading of the Section 311 Cr.P.C. clearly shows that this Section is divided into two parts. While the word used in the first part is “may” the word used in the second part is “shall”. It would, therefore, logically follow that the first part of Section 311 Cr.P.C. is permissive in nature and gives a discretion to a criminal Court to act, at any stage of enquiry, trial or other proceeding in one of the three ways, namely, to summon any person as a witness, to examine any person in attendance, though not summoned as a witness and to recall and re-examine any person already examined. The second part is however mandatory in nature and casts an obligation on the court to summon and examine, to call and re-examine any such person if his evidence appears to be essential to the just decision of the case.

At paragraph 31, the Division Bench has held as follows:-

“Though the law requires the parties to produce, before the court, the best available evidence, the fact remains that even in a criminal trial, prosecution as well as defence has the right to choose their witness or witnesses and also choose as to what evidence they would adduce. Nonetheless, they are bound to adduce the best available evidence. The Court has no power to compel either the prosecution or the defence to examine any particular witness. This embargo placed on the powers of the Court, i.e. the limitation of not directing either the prosecution or the defence to examine any particular witness as their witness, is sought to be balanced by the Legislature with the help of the provisions contained in Section 311 of the Code of Criminal procedure inasmuch as the Legislature has, with the help of Section 311 of the



Code of Criminal Procedure, empowered the criminal court to call, recall or re-examine any person as witness. The only rider, which Section 311 of the Code of Criminal Procedure attaches to the exercise of this power, is that a criminal court cannot call, recall or re-examine any person as witness unless examination of such a person is, in the opinion of the Court, essential to a just decision of the case. If, however, the court is of the view that evidence of a particular witness is necessary for reaching a just decision of the case, the court, either on its own or on the application of any of the parties concerned, call, recall or re-examine any witness as long as it does not cause prejudice to any of the parties concerned or does not give an undue advantage to any of such parties.”

9. The Division Bench has also held that the lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. Hence, when a defect arises, or crepts in,

due to faulty management of the case by party's Counsel or due to oversight or unmindfulness of a counsel, such a defect cannot, and shall not, be treated as a lacuna inherent in the case of the prosecution or the complainant. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses.

10. In the present case, in earlier two occasions the court below rejected the prayer and, therefore, now in the third time the same prayer would not have been allowed because the lower courts have only limited jurisdiction to exercise inherent power as has been held by Supreme Court in A.I.R. 1977 S.C. 2432. Once the application was rejected the only option of the opposite party was to challenge the order rejecting the application. It was not challenged, therefore it attains finality. The court below neither gave liberty to file again nor kept the application for consideration at later stage. Further there is no specific stage mentioned in Section 311 Cr.P.C. for filing application. By the impugned order the court below nullified, reviewed his earlier order without assigning any reason. A party cannot be allowed to agitate the same matter time and again. In view of this fact subsequently the said court could not have allowed the application

filed under Section 311 Cr.P.C., particularly when these persons were not cited as witness in the charge sheet and it is not the case of the prosecution that only they are the material witnesses or that there is no other witness examined by the prosecution. It is settled principle of law that for the purpose of arriving at a just decision, the quantity of evidence is not necessary but the quality is to be seen.

11. Therefore, in view of the above facts and circumstances of the case, in my opinion, the court below has overreached the order passed earlier rejecting the application and subsequently allowed the application, which the court below could not have done. Accordingly, this criminal miscellaneous application is allowed and the impugned order is set aside.

Harish/-

(Mungeshwar Sahoo, J)

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