

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CR.M.P. No. 711 of 2015

1. Dilip Mishra, S/o. Sheshnath Mishra, Aged About 28 Years, R/o. Village Kandhi, Post & Police Station Maharaj Ganj, Civil And Rev. Distt. Jaunpur (U.P.). Present R/o. Near Shitla Temple, Changorabhata, Police Station D.D. Nagar, Raipur, Civil and Rev. Distt. Raipur Chhattisgarh.
2. Uday Chawda, S/o. Kishanlal Chawda, Aged About 27 Years, R/o. Village Mingpur Road, Orissa, Police Station Jaijipur, Civil and Rev. Distt. Raigarh (Orissa), Present R/o Changorabhata, Near Yadu Dairy, D.D. Nagar, Raipur, Police Station Purani Basti, Civil and Rev. Distt. Raipur Chhattisgarh.

---- Petitioners

Versus

1. State Of Chhattisgarh, Through Police Station - Purani Basti, Raipur, Civil and Rev. Distt. Raipur Chhattisgarh.

---- Respondent

For Petitioners	:	Mr. Manish Sharma, Advocate
For State/respondent	:	Ms. M. Asha, PL

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

21/08/2015

1. Challenge in this petition is to the order dated 28.05.2015, passed by the Special Judge (Electricity Act) and 1st Additional Sessions Judge, Raipur, in S.T. No.109/2014 (State of C.G. Vs. Dilip Mishra & Another), whereby an application preferred under Section 311 of Cr.P.C. to recall the witnesses was dismissed.

2. The learned counsel for the petitioners would submit that in Sessions Trial pending adjudication on 08.09.2014, two prosecution witnesses were examined, who were cross-examined and thereafter, they were discharged. Subsequently, it came to the notice of the petitioners/accused that the statement of Ravinder Singh, under Section 164 of Cr.P.C. is also part of the record, therefore, an application was filed to get the copy of the said documents. The Sessions Court by an order dated 18.02.2015 has directed to supply the copy of the such statement to the petitioners/accused, which was received by them on that date itself. Thereafter, an application under Section 311 of Cr.P.C. was preferred to recall the witnesses namely Ravindra Singh (PW-1), whose statement was recorded initially on 08.09.2014 and further the statement also existed under Section 164 of Cr.P.C.. It is contended by the learned counsel that since there was too much of variance was made on two statements, consequently, cross-examination would be necessary so as to unearth the truth. He therefore, submit that the case is still at the stage of evidence and no prejudice would be caused to the prosecution, if the witnesses are re-examined. Therefore, it is contended that the instant petition may be allowed and the necessary witnesses may be called.
3. The State counsel vehemently opposes the same and would submit that the order of the learned Court below is well merited, which do not call for any interference.
4. I have heard the learned counsel for the parties at length.

5. Perusal of the order sheet shows that on 08.09.2014, prosecution witness namely Ravindra Singh (PW-1) and Sameer Bhatt (PW-2) were examined and discharged. Subsequently, the order sheet shows that a prayer was made by the learned counsel for the petitioners/accused on 24.01.2014 to supply a copy of statement recorded under Section 164 of Cr.P.C., which is the part of the Court records. Subsequently on 18.02.2015, the learned Sessions Judge directed to furnish the copy of the statement of Ravinder Singh recorded under Section 164 of Cr.P.C. and it was supplied to the accused/petitioners.
6. Admittedly, in this case, Ravinder Singh (PW-1), whose statement recorded under Section 164 Cr.P.C. was supplied on 18.02.2015 to the petitioners/accused, and witness was earlier examined on 08.09.2014 and was discharged. Subsequently an application was filed under Section 311 of Cr.P.C. to reexamine the said witness, which was stands rejected therefore, the instant petition is filed.
7. The impugned order dated 28.05.2015 has been predominantly rejected on the ground that during the examination and cross-examination, no challenge was made to the statement made under Section 164 of Cr.P.C. However, if the order sheets are seen it shows that on 08.09.2014 the witness, Ravinder Singh (PW-1) was examined and cross-examined and subsequent to it on 18.02.2015, the Court after opening of sealed envelop handed over copy of statement U/s.164 of Cr.P.C. to the petitioners/accused. Therefore, on 08.09.2014 there was no occasion for the petitioners/accused to confront the witness with the statement given in the Court as

against 164 of Cr.P.C. or under Section 161 of Cr.P.C.

8. The law with respect to recall witness has been laid down by the Hon'ble Supreme Court in case law reported in **2013 AIR SC Weekly 4179 between Raja Ram Prasad Yadav Vs. State of Bihar**. The Court therein has interpreted the principle behind Section 311 with respect to the power of the Court to summon, recall or re-examine any witness. The following principles were summarised which are enumerated in para 23 are quoted herein below:-

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C., read alongwith Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

b) The exercise of the widest discretionary power under Section 311, Cr.P.C., should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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.

d) *The exercise of power under Section 311, Cr.P.C., 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.*

e) *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.*

f) *The wide discretionary power should be exercised judiciously and not arbitrarily.*

g) *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.*

h) *The object of Section 311, Cr.P.C., simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*

i) *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.*

j) *Exigency of the situation, fair play and good sense should be the safeguard, 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C., 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.”

9. Recently in another case law reported in ***AIR 2014 SC 2950 between Mannan Sk & Ors. Vs. State of West Bengal and Another***, the Hon'ble Supreme Court again examined the scope of Section 311 of Cr.P.C. and has held at para-10, which is reproduced as under :-

“10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just

decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.”

10. Applying such principles laid down by the Hon'ble Supreme Court, the argument advanced by the learned counsel for the petitioners appears to have considerable force. The facts of this case would show that when the witnesses were examined, the accused was not in hold of statement under Section 164 of Cr.P.C., therefore, there was no chance to confront the witness with such statement. The perusal of the order sheet, which is placed on record would show that the prosecution witnesses are yet to be examined. Consequently, in the opinion of this Court, no prejudice will be caused to the prosecution, in case, the witnesses are allowed to be reexamined.
11. In a result, the petition is allowed. The order dated 28.05.2015 is set-aside. The prayer to recall the witness Ravinder Singh (PW-1) is allowed by issuing summons. With such directions, the petition stands disposed off.

Sd/-
(Goutam Bhaduri)
Judge