

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2016

CORAM

THE HON'BLE MR.JUSTICE R.SUBBIAH

Crl.O.P.Nos.11440 & 11560 of 2016

1.G.Chandrasahnan ... Petitioner/Accused in Crl.OP.11440/16

2.K.M.Noorjehan ... 1st petitioner in Crl.OP.11560/16

3.Abdul Gafoor ... 2nd petitioner in Crl.OP.11560/16

Vs.

The State rep by
The Inspector of Police,
SPE/CBI/ACB/Chennai,
Sastri Bhavan,
Chennai-600 006 ... Respondent in Crl.OP.11440/16
(Crime No.RC MA 1 2003 A 0027)

The State rep.by
Inspector of Police,
CBI/ACB/Chennai,
Sastri Bhavan,
Chennai 600 006. ... Respondent in Crl.OP.11560/16

Prayer in Crl.O.P.No.11440/2016:- Petition filed under Section 482 of Cr.P.C., praying to call for the records and set aside the order passed by the learned XI Additional Special Judge for CBI Cases, Chennai (viz., to recall of PWs.1, 3, 4, 7, 25, 27, 39, 40, 44 and 45 were dismissed) in Crl.M.P.No.1801 of 2016, dated 11.05.2016 in C.C.No.3 of 2005.

Prayer in Crl.O.P.No.11560/2016:- Petition filed under Section 482 of Cr.P.C., against the order dated 11.05.2016 made in Crl.M.P.No.1802 of 2016 in C.C.No.3 of 2005 on the learned XI Additional Special Judge for CBI Cases, Chennai.

For Petitioner in Crl.O.P.11440/2016 : Mr.K.R.Rameshkumar

For Petitioners in Crl.O.P.11560/2016: Mr.N.Ramakrishnan

For Respondent in both Crl.OPs. : Mr.K.Srinivasan,
Special Public Prosecutor
for CBI.

COMMON ORDER

These Criminal Original Petitions have been filed the petitioners praying to set aside the order dated 11.05.2016 in Crl.M.P.Nos.1801 & 1802 of 2016 in C.C.No.3 of 2005, respectively, passed by the learned XI Additional Special Judge for CBI Cases, Chennai, in and by which the petitions filed by the petitioners under Section 311 of Cr.P.C., to recall some of the prosecution witnesses, were dismissed.

2.Since the issue involved in these Criminal Original Petitions is one and the same, these Petitions are disposed of by way of this common order. The petitioners herein have been arrayed as Accused 1 to 3 respectively in C.C.No.3 of 2005 pending on the file of the learned XI Additional Special Judge for CBI Cases, Chennai. For the sake of convenience, the petitioners are referred to as per their ranking before the Trial Court ie., A1 to A3.

3.The Petitioners/accused are facing the trail in that case, for the alleged offences under Sections 120b r/w 420, 468 & 471 IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act. During the course of trial, the prosecution had examined 53 witnesses, including the Investigating Officers, and also marked 313 exhibits. On closing the prosecution evidence, all the accused were questioned under Section 313 of Cr.P.C. and the case was posted for examination of defence witnesses.

4.At that juncture, the 1st accused filed a petition in Crl.M.P.No.1801 of 2016 before the Trial Court, seeking to recall the prosecution witnessed viz., P.Ws.1, 3, 4, 7, 25, 27, 39,40, 44, 45, 53, for the purpose of cross-examination. The 1st accused had also filed a Process application to recall the deferred witnesses viz., P.W.24 for the purpose of cross-examination. The Trial Court, vide impugned order dated 11.05.2016, has allowed to recall the deferred witness P.W.24 and the Investigating Officer viz., P.W.53 alone; insofar as the other witnesses are concerned, the Trial Court dismissed the petition. Aggrieved over the same, the 1st accused has filed

the Criminal Original Petition No.11440 of 2016 before this Court, for the relief as stated supra.

5. Similarly, the accused 2 & 3 had also filed a petition in CrI.M.P.No.1802 of 2016 before the Trial Court, seeking to recall P.Ws.11, 12, 13, 16, 17, 21, 22, 24, 25, 26, 27, 31, 32, 33, 34, 35, 37, 39, 40, 41, 44, 46, 47, 48, 49, 50, 51 and 53. The Trial Court, vide impugned order dated 11.05.2016, has allowed to recall P.Ws.24, 51 & 53 alone and insofar as the other witnesses are concerned, the Trial Court dismissed the petition. Aggrieved over the same, the accused 2 & 3 have come before this Court by filing CrI.O.P.No.11560 of 2016.

6. In respect of CrI.O.P.No.11440 of 2016, when the matter is taken up, the learned Special Public Prosecutor submitted that PW.27 is now no more and that the prosecution has no objection for recalling P.Ws.3, 7, 25, 39 & 40.

7. But, the learned counsel for the petitioner in CrI.O.P.No.11440 of 2016 (1st accused) insisted to recall P.W.1 who is the General Manager, Canara Bank, who has issued Sanction Order to prosecute the petitioner. The learned counsel for the petitioner/A1 submitted that though P.W.1 was cross-examined, some of the important aspects has been omitted to elicit through P.W.1. Further, some of the documents relied on by the prosecution could not be confronted with P.W.1 at that point of time. Therefore, according to the learned counsel for the petitioner/A1, recalling of P.W.1 is very much necessary and crucial to prove the innocence of the petitioner/A1; hence, an opportunity must be given to the petitioner/A1 to cross-examine P.W.1.

8. But, the said submission of the learned counsel for the petitioner/A1 was vehemently opposed by the learned Special Public Prosecutor stating that already P.W.1 was cross-examined in detail and the request of the learned counsel for the petitioner/A1 to recall P.W.1 to cross-examine gain, is not within the power of the Court under Section 311 of Cr.P.C. In this regard, the learned Special Public Prosecutor has also relied upon the decision of the Hon'ble Supreme Court reported in (2016) 2 SCC 402 [State (NCT of Delhi) Vs. Shiv Kumar Yadav], wherein it has been held as follows—

"27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall

of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no

error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order."

9. Considering the above submission of the learned Special Public Prosecutor and in the light of the judgment cited supra, I am of the opinion that as contended by the learned Special Public Prosecutor, recalling P.W.1 once again will not fall within the scope of Section 311 of Cr.P.C. Hence, I am not inclined to accept the submission made by the learned counsel for the petitioner/A1.

10. Since the prosecution has no objection to recall P.Ws.3, 7, 25, 39 & 40, this Court is inclined to permit the petitioner/A1 to recall the said witness viz., P.Ws.3, 7, 25, 39 & 40. In respect of other witnesses, the petition is liable to be dismissed.

11. So far as CrI.O.P.No.11506 of 2016 is concerned, though the said petition is filed to recall 28 witnesses viz., P.Ws.11, 12, 13, 16, 17, 21, 22, 24, 25, 26, 27, 31, 32, 33, 34, 35, 37, 39, 40, 41, 44, 46, 47, 48, 49, 50, 51 and 53, now the learned counsel for the petitioner filed a memo stating that they are giving up recalling of P.Ws.13, 17, 21, 32, 33, 34, 37, 39, 41, 44, 46 & 49. They sought to recall only P.Ws.11, 12, 16, 22, 25, 26, 27, 31, 35, 40, 47, 48 & 50 only (13 witnesses). The learned Special Public Prosecutor has also submitted that P.W.27 is now no more and that the prosecution has no objection to recall the remaining 12 witnesses viz., P.Ws.11, 12, 16, 22, 25, 26, 31, 35, 40, 47, 48 & 50.

12. In view of the no objection expressed by the learned Special Public Prosecutor, this Court permits the petitioners/A2 & A3 to recall the said 12 witnesses viz., P.Ws.11, 12, 16, 22, 25, 26, 27, 31, 35, 40, 47, 48 & 50. In respect of the other witnesses the petition is dismissed.

13. In view of the above, the Criminal Original Petitions are partly allowed. The petitioner/A1 (petitioner in CrI.O.P.11440 of 2010) is permitted to recall P.Ws.3, 7, 25, 39 & 40 and similarly, the petitioners/A2 & A3 (Petitioners in CrI.O.P.11560 of 2016) are permitted to recall P.Ws.11, 12, 16, 22, 25, 26,

27, 31, 35, 40, 47, 48 & 50, for the purpose of cross-examination. The petitioners shall bear the cost for recalling the above said witnesses. The Trial Court is directed to fix the date for cross-examination and complete the cross-examination within a period of six weeks from the date of receipt of a copy of order. The petitioners shall co-operate for the completion of the cross-examination of the recalled witnesses.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ssv

To

1. The XI Additional City Civil and
Sessions Judge,
For CBI Cases, Chennai.
2. The XI Additional Special Judge for CBI Cases,
Chennai.
3. The Inspector of Police,
SPE/CBI/ACB/Chennai,
Sastri Bhavan,
Chennai-600 006
4. The Inspector of Police,
CBI/ACB/Chennai,
Sastri Bhavan,
Chennai-600 006
5. The Public Prosecutor,
Madras High Court.

+1cc to Mr.M.Ramesh Kumar, Advocate, S.R.No.38892

Cr1.O.P.Nos.11440 & 11560 of 2016

MG(CO)
CA(09/08/2016)