

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CrI.P.Nos.16824,16825,16827, 16828 and 16839 of 2016

COMMON ORDER:

These Criminal Petitions under Section 482 of Cr.P.C. are filed by the petitioner/Accused challenging the Order dt. 24.11.2016 passed in CrI.M.P.Nos.2259, 2266, 2263, 2271 and 2255 of 2016 in C.C.Nos.63, 65, 64, 66 and 62 of 2014 respectively, whereby the IV Special Magistrate at Hyderabad, allowed the petitions filed under Sections 311 Cr.P.C. to recall Pw.1 for further cross examination by reopening the evidence of Pw.1.

2. Since the issue involved in all these petitions is one and the same, they are disposed of by this Common Order.

3. The present Petitions are filed challenging the said Orders on various grounds and one of the major ground is that after the matter was posted for arguments and the petitioner filed written arguments, recall of PW.1 for further cross examination for undisclosed reasons is ill-designed and tantamount to abuse of process of law. The second ground is that the trial Court allowed the petition filed for recall of Pw.1 in the absence of points to be elicited, which are not disclosed in the petition, and such recall of witness is against the law declared by the Apex Court and that the Order passed by the trial Court is bereft of any sound reasons and change of Advocate is not a ground to recall the witness, who is already examined.

4. During hearing, Sri Venkateswara Rao Gudapati, learned counsel for the petitioner contended that the reason assigned by the petitioner i.e., change of Advocate is not a substantive ground to exercise power under Section 311 Cr.P.C. to recall the evidence or re-summon the witness who is

already examined and apart from that, the petition is bereft of any other ground on which the petitioner-PW.1 is required to be cross examined further. In the absence of any such details, more particularly, when written arguments were filed, the petition cannot be allowed; and, prayed to set aside the order passed by the learned IV Special Magistrate, Hyderabad.

5. Whereas, Sri C.Damodhar Reddy, learned counsel for respondent, contended that recalling of PW.1 is required since certain facts with regard to agreement of sale dt. 28.01.2009 have to be elicited in the cross examination of PW.1. He also drawn the attention of this Court to an Order passed by this Court on 4.04.2016 in a batch of criminal petitions i.e., Crl.P.Nos. 659 and batch, whereby this Court directed to allow the petitioner to produce the Xerox copy of the document in question, subject to the objection of respondent No.2 and decide the issue in accordance with law. He further contended that when the documents are marked, the witness is to be recalled for further cross examination and denial of such opportunity amounts to denial of fair trial and thereby, the Order passed by the trial Court is in accordance with law and finally he requested to direct the Magistrate to fix a specific date for further cross examination, while undertaking to complete the cross examination on that day.

6. Considering rival contentions of both parties and perusing the material on record, the Point for determination is:

“ Whether PW.1 can be recalled on the ground mentioned in the petition, if not, whether the Orders Dt. 24.11.2016 in the above Criminal Miscellaneous Petitions, be sustained ?

7. **Point:** The scope of jurisdiction under Section 482 Cr.P.C. is limited and such jurisdiction has to be exercised sparingly and in exceptional circumstances. In the present case, the main dispute is with regard to recall of PW.1. In view of specific objection raised by the counsel for petitioner before this Court, it is apposite to extract the para, which is the basis to seek recall of PW.1 and it is extracted hereunder:

“ It is submitted that the present CC is filed under Section 138 of NI Act and the same is posted today for arguments. It is further submitted that at the time of preparing for arguments and when we were going through the cross examination of PW.1, we have noticed that certain crucial and important points which are very much important for proper adjudication of the present case are missing. It is submitted that the cross examination of PW.1 was conducted by some other counsel who was on record at that point of time and previous counsel missed out asking some important questions and it is necessary to reopen the complaint side evidence (Pw.1 evidence) or else the petitioner will be put to irreparable loss and hardship”.

8. The only point in the above para is that some important points were not asked during cross examination of PW.1 by the previous counsel, but, later the counsel was changed and he found certain points to be elicited in the cross examination of witness-PW.1 by recalling the witness. So, the petition is bereft of points to be elicited in the cross examination by recalling PW.1-, but change of counsel alone is not a ground. Moreover, during hearing, learned counsel for the respondent drawn attention of this Court to the agreement of sale dt. 28.01.2009 executed in favour of M/s Contec Syndicate Private Limited by Smt H. Vijaya, w/o H. Sudeershan Reddy, agreeing to sell an extent of 1600 sq.yards, out of total extent of Ac.1-30 guntas, in Sy.No.172/3 situated at Hydernagar Village under GHMC, Kukatpally, for Rs.45,000/- per square yard. The petitioner is the said Vendor—H. Vijaya, W/o H. Sudeershan Reddy and the present petitioner is the purchaser of the said property. All these private complaints with regard to this transaction were filed before the trial Court under

Section 138 of NI Act. No doubt, agreement of sale is relevant to some extent if the case of the petitioner is based on the defence that those cheques were issued in connection with part payment of sale consideration under the agreement of sale. But, it was not the plea so far before the trial Court that those cheques were issued in relation to part payment of sale consideration covered by the agreement of sale.

9. The learned counsel for the respondent herein drawn the attention of this Court to first para of page No.3 of the agreement of sale dt. 28.01.2009, which is as follows:

“ That the vendor gave five (5) blank cheques bearing Nos. 324104 to 324108 drawn on Andhra Branch, Santosh Nagar, without name, date and amount and blank Non-judicial Stamps Paper signed by the vendor to the vendee on the date of agreement. He also drawn the attention of this Court to the Order passed by this Court regarding receipt of document subject to objection. But, these documents are of no use and according to the contention of the learned counsel for the petitioner, the plea set up before the Court is that the cheques are forged. But, no piece of evidence is brought on record to find what was the defence set up by the learned counsel for respondent herein before the trial Court”.

10. A bare look at the allegations made in the petition filed under Section 311 Cr.P.C is that certain questions were not put to Pw.1 by the previous counsel and after change of Advocate, they found the points to be elicited in the cross examination, which are necessary for deciding the matter. As per the judgment of the Apex Court reported in **A.G v. Shiv Kumar Yadav**¹, certain guidelines were framed and in Clause No.VII, it was held that recall of a witness on the ground of mere change of counsel is impermissible. If the same principle is applied to the present facts of the case, the ground mentioned in the petition filed under Section 311 Cr.P.C. cannot be allowed.

¹ AIR 2015 (SC) 3501

11. Learned counsel for the petitioner also drawn the attention of this Court to para No.20 of the judgment reported in *Rajaram Prasad Yadav v. State of Bihar*², wherein it was held as follows:

“we find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under [Section 311](#) Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under [Section 311](#) Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under [Section 311](#) Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under [Section 311](#) Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court”.

It appears that, the principle laid down in the above judgment is not directly applicable to the present facts of the case. But, in the same judgment, the Apex Court pointed out certain circumstances where the Court can exercise power under [Section 311](#) Cr.P.C., which are as follows:

“(i) 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.

² AIR SC 2013 3081

- 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 safe guard, 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”.

12. No doubt, as per the contention of the learned counsel for petitioner, power is conferred on the Court to do complete justice to the parties before the Court and Section 311 Cr.P.C. consists of two parts. First part relates to issuance of summons to any person as a witness or re-summon who is already examined; and second part did not confer any discretionary power on the court since the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to arrive at a the just decision of the case. Hence, the first part confers discretion on the Court. As per Section 311 Cr.P.C., a general power is conferred on the Court by Section 311 Cr.P.C. to summon any person or recall any witness to enable the Court to arrive at a just conclusion, irrespective of whether either party have chosen to summon him or not, but such power should be exercised sparingly. In the present facts of the case, Pw.1 was already examined and the reason assigned by the petitioner for re-examination is failure of the earlier counsel on record to put certain questions, without disclosing on what aspect the witness is to be examined and questions to be put to him. But, the counsel, who was engaged later, found certain important questions to put to witness. But, strictly applying the principle laid down in *A.G v. Shiv Kumar Yadav* (1 supra), it is difficult to sustain the Order passed by the trial Court. Even otherwise, the trial Court did not assign any reason for recalling the witness within the parameters laid down in the judgment of *A.G. v. Shiv Kumar Yadav*, referred to supra. But, unfortunately, the trial Court, in the penultimate para of the order impugned concluded that cross examination of Pw.1 was conducted by some other counsel, who was on record at that point of time, and the previous counsel missed out asking some important questions and it

is necessary to reopen complaint side evidence i.e., PW.1 evidence and on the other hand, the respondent opposed the same. Further, in the last para, the Court passed the following Order:

“ In view of the arguments advanced by the petitioner/accused counsel and rival arguments advanced by the respondent/complainant counsel, in my considered view, it is a fit case to give opportunity to the petitioner to reopen the evidence of Pw.1. There are laches on the petitioner accused counsel in conducting the case. The respondent complainant is compensated by awarding day costs of Rs.200/- in this petition. Accordingly, this Petition is allowed on payment of Cost of Rs.200/-”.

13. The reason recorded by the trial Court is not in consonance with the parameters laid down by the Apex Court and the power conferred on the Court under Section 311 of Cr.P.C. and on this ground alone, the present orders are liable to be set aside. Even otherwise, the change of counsel is not a ground to recall the witness, in view of the judgment referred to supra.

14. Accordingly, these petitions are allowed and the Orders dt. 24.11.2016 in Crl.M.P.Nos.2259, 2266, 2263, 2271 and 2255 of 2016 in C.C.Nos.63, 65, 64, 66 and 62 of 2014 on the file of IV Special Magistrate at Hyderabad, are set aside. The learned Magistrate is directed to decide the above calendar cases uninfluenced by the observations, if any, made in the above paras, as they will not have any bearing on the final decision of the main case.

Miscellaneous Petitions, if any, pending in this Criminal Petition, shall stand closed.

M. SATYANARAYANA MURTHY, J

December 28, 2016.
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THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



Crl.P.Nos.16824,16825,16827, 16828 and 16839 of 2016
Dt.28.12.2016

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