

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.14962 OF 2016

ORDER:

This criminal petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed by the petitioners to quash the Order dated 16.09.2016, in CrI.MP No.473 of 2016 in Special SC No.54 of 2016 passed by I Additional Sessions Judge, Warangal, whereby dismissing the petition filed under Section 311 Cr.P.C. for recall of P.W.1 based on the alleged bar under Section 33(b) of Protection of Children from Sexual Offences Act (for short, 'POCSO Act') while permitting the petitioners to recall P.Ws.2 to 5 on payment of costs of Rs.500/- to each of the witnesses.

It is the case of the petitioners that on the date of examination-in-chief of P.W.1, their counsel was not present due to health reasons. Therefore, P.W.1 and other witnesses could not be cross-examined, but on the sole ground, in view of bar under Section 33(b) POCSO Act, the child witness cannot be recalled. But there is no specific provision i.e. Section 33(b) POCSO Act.

Section 33(2) POCSO Act says that the Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child. But sub-Section (5) of Section 33 POCSO Act says that the Special Court shall ensure

that the child is not called repeatedly to testify in the Court. It appears that the trial court instead of referring Section 33(5) referred it as section 33(b) of POCSO Act.

However, even sub-Section (5) of Section 33 POCSO Act did not create any interdict from recalling any witness, but cautioned the Courts not to call the children as witness repeatedly to testify in the Court. Therefore, in the absence of any total bar of re-calling child witness to testify before the Court, there is no justification in denying the request made by the petitioners to recall P.W.1.

The Courts are expected to conduct fair trial in all cases and merely because Advocate is unable to attend the Court on the day, he cannot be totally debarred from the cross-examining the witness, and if that is the intention of the legislature, it would defeat the very concept of fair trial.

Therefore, considering the facts and circumstances of the case and seriousness of the offence, I find that it is a fit case to recall P.W.1 on payment of costs of Rs.1,000/- (one thousand only) to the witness and subject to cross-examining the witness on the day when the witness is appeared. If the counsel for the petitioners failed to cross-examine the witness on the day when she appeared as directed by the Court, the right of the witness for cross-examination is deemed to have been forfeited, in view of bar under Section 33(5) POCSO Act.

Accordingly, the criminal petition is allowed.

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Miscellaneous petitions, if any, pending in this criminal petition, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 21.10.2016
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