

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.16002 OF 2016

ORDER:

This Criminal Petition is filed under Section 482 of Cr.P.C. to quash the order passed by the Principal Junior Civil Judge, Tiruvur in CrI.M.P.Nos.1077 and 1078 of 2016 in C.C.No.189 of 2015 dated 4th October, 2016 dismissing the application filed under Section 311 of Cr.P.C. to recall P.W.1 for further cross-examination.

Petitioner herein is the accused and 1st respondent herein is the complainant.

Petitioner filed the above applications to recall P.W.1 on the ground that P.W.1 was cross-examined and his evidence was closed on 17-5-2016 and the matter was posted for examination of accused under Section 313 of Cr.P.C. on 19-5-2016 and after hearing argument of counsel for the complainant, the matter was posted for argument of the accused, thereupon they filed present petition to recall P.W.1 for further cross-examination on the ground that the witness was not cross-examined properly by the counsel appearing before the trial court and he was cross-examined only by putting general questions in the cross-examination.

Trial court recorded its reasons for dismissal of the petition in para 8 of the order and as seen from the order, complainant was examined in chief on 19-5-2016 but the counsel for the petitioner herein sought time to cross-examine the witnesses but the trial court refused the same, later, posted the matter for examination of the

accused under Section 313 Cr.P.C. and at that moment, petitioner filed an application under Section 311 of Cr.P.C. to recall P.W.1 and petition was allowed, P.W.1 was cross-examined on 17-5-2016 and later, examination of accused under Section 313 Cr.P.C. was completed, posted the matter for argument. After obtaining two adjournments for his argument by the counsel for petitioner, he filed present two petitions reopening the evidence of complainant and recalling P.W.1 and the trial court recorded the finding that it is only to fill up gaps and lacunae in the cross-examination of P.W.1 and dismissed the petition.

During hearing, learned counsel for petitioner contended that the reasons for failure to cross-examine P.W.1 properly is lack of communication between the petitioner and counsel who is practicing at Hyderabad and not any other ground. However, counsel requested the court to grant further time to complete his cross-examination by fixing a date.

The undisputed fact in this matter is that the complainant was examined in chief on 19-5-2016 but the request of the counsel for the petitioner to adjourn the matter for cross-examination was not accepted by the trial court and the trial court recorded that cross-examination of P.W.1 as 'nil' and posted for examination of accused under Section 313 Cr.P.C. but the petitioner filed Crl.M.P.No.820 and 821 of 2016 for reopening and recalling of P.W.1 and those petitions were allowed. P.W.1 was recalled and cross-examined on 17-5-2016. Despite availing opportunity to cross-examine witness

by filing two application seeking reopening and recalling under Section 311 of Cr.P.C., now the petitioner contending that the witness was not properly cross-examined due to communication gap. This cannot be accepted as a ground to recall witness. The ground for recalling was not specified under Section 311 Cr.P.C. but under Order 18 Rule 17 of C.P.C., certain grounds were laid down and in recent judgment of apex court reported *GAYATHRI v. M.GIRISH* (¹), the Supreme Court pointed out the responsibility of an advocate and held as follows:

“Counsel appearing for a litigant has to have institutional responsibility and Code of Civil Procedure so command, applications are not to be filed on grounds which are referred in this case and that too in such a brazen and obstrusive manner and it is wholly reprehensible and Law does not countenance it, and professional ethics decries such practice and it is because such acts are against majesty of law.”

But the same principle is applicable to the present facts of the case for the reason that petitioner filed two applications CrI.M.P.Nos.820 and 821 of 2016 for reopening and recalling and availed opportunity and the evidence of complainant was reopened, cross-examined the witness and even after 313 Cr.P.C. examination and before completion of argument by the counsel for the petitioner, the petitioner did not file a petition for the above purpose but leisurely filed the present petitions when the matter was posted for argument of accused, such conduct would establish the irresponsible

¹ 2016 (3) L.S.17 (S.C)

conduct as held by the Apex Court in *GAYATHRI v. M.GIRISH* (1st cited). Therefore, petition cannot be allowed.

The court can exercise powers under Section 311 Cr.P.C. to recall a witness or re-examine a witness at any time but subject to certain limitations as held in a judgment reported in *RAJENDRA PRASAD v. NARCOTIC CELL THROUGH ITS OFFICER-IN-CHARGE ,DELHI* (2) wherein this court held as follows:

“Therefore, where there was negligence on the part of Public Prosecutor as he closed evidence twice without verifying whether cross-examination of all the witnesses has been concluded or not and therefore, in the interest of justice the application to the extent that prosecution witness be recalled for cross-examination was allowed by trial court and other witnesses were permitted to be re-summoned for purposes of proving certain documents for prosecution the steps which the trial court permitted for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.

The conventional concept is that Court should not permit lacuna in prosecution evidence to be filled up. But, then what is meant by lacuna in a proposition case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage ‘to err is human’ is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as the lacunae which a court cannot fill up. 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 fore-closed 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

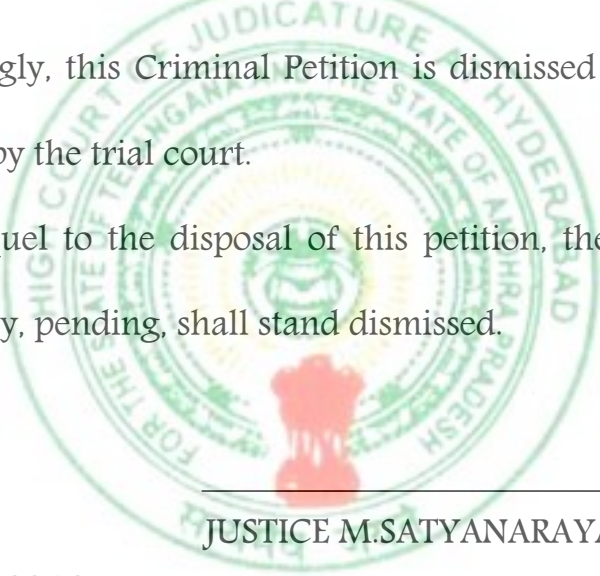
² AIR 1999 SC 2292

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. “

The petitions before trial court were filed at a belated stage, after completion of defence evidence. Therefore, lack of communication is not a ground, therefore, the order passed by the trial court do not suffer from any illegality requiring this court's interference with the order. Hence, I am totally in agreement with the order passed by the trial court and as such, this Criminal Petition is liable to be dismissed.

Accordingly, this Criminal Petition is dismissed confirming the order passed by the trial court.

As a sequel to the disposal of this petition, the Miscellaneous Petitions, if any, pending, shall stand dismissed.



JUSTICE M.SATYANARAYANA MURTHY

Dated 15-11-2016.

Dvs.

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



CRIMINAL PETITION No.16002 OF 2016

Dated 15-11-2016

Dvs