

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Cr. M. P. No. 1096 of 2015**

1. Premlal S/o Devnath Lodhi, aged about 60 years, R/o Village - Rakhi, Police Chowki-Devkar, Police Station - Saja, District – Bemetara, Chhattisgarh
2. Jalesh Kumar S/o Premlal Lodhi, aged about 32 years R/o Village - Rakhi, Police Chowki - Devkar, Police Station - Saja, District – Bemetara, Chhattisgarh
3. Kuleshwar S/o Premlal Lodhi, aged about 30 years, R/o Village - Rakhi, Police Chowki - Devkar, Police Station - Saja, District – Bemetara, Chhattisgarh

---- Petitioners**Versus**

State of Chhattisgarh through the Station House Officer, Police Station - Saja, District – Bemetara, Chhattisgarh

---- Respondent

For Petitioners	:	Ms. Sharmila Singhai, Advocate
For Respondent/State	:	Shri Lav Sharma, Panel Lawyer

Hon'ble Shri Justice P. Sam Koshy**Order On Board****11/01/2017**

The present petition under Section 482 CrPC has been filed seeking for quashment of the order dated 10.11.2015 passed by the Additional Sessions Judge, Bemetara in Criminal Revision No. 36 of 2014. By the said impugned order the Revisional Court has allowed the revision petition of the State challenging the order dated 08.08.2014 passed by the JMFC, Saja, District Bemetara in Criminal Case No. 259 of 2009.

2. The facts relevant for consideration are that complainant Dasrath Lal lodged a complaint alleging that the present petitioners impersonating the complainant and his brothers sold the property which

stood in the name of the complaint and his two brothers to Nihali and Dhanaram. Based on the said complaint, a criminal case against the petitioners was registered as Criminal Case No. 259 of 2009 (renumbered) before the JMFC, Saja, District Bemetara.

3. The petitioners were being prosecuted for the offence punishable under Sections 419, 420, 467, 468, 471 read with Section 34 of IPC. The case of the complainant is that the property which was in the name of the complainant and his brothers was given to petitioner no.1 as a caretaker. During the time of partition of the family property between the complainant and his brothers, Rinpustika which was in possession of the petitioner no.1 was required and in the course of inspection of the said document, it was found that the petitioner no.1 acting as a caretaker of the property and the Rinpustika that was in his possession, in connivance with petitioners 2 & 3 who impersonated the original land owners i.e. Dashrath Lal and his brothers sold the property to one Nihali and Dhanaram leading to the filing of the complaint and the subsequent criminal proceedings against the petitioners.

4. FIR in the instant case was lodged somewhere in the year 1993, charge sheet was filed in the year 1996 and charges were framed on 06.09.1996 against the accused persons. Thereafter, the matter proceeded for recording of the evidence on behalf of the prosecution for the first time on 11.09.1996 and all the important witnesses were examined and cross-examined during the course of time and on 14.12.2011 the prosecution evidence was closed. In between, the hand writing expert M. S. Thakur was also examined who has proved the opinion given by the finger print expert G. S. Thakur. The prosecution evidence went on from 11.09.1996 to 14.12.2011 i.e.

for more than 15 years and in spite of summons, bailable warrant, arrest warrant and all the powers which are conferred upon the Magistrate under the CrPC invoked for production of the prosecution witnesses, a few of the prosecution witnesses did not turn up for evidence and the prosecution evidence was closed on two occasions, first on 11.04.2008 and again on 14.12.2011. Thereafter, the matter was proceeded for defence evidence. In between, the accused persons also moved an application under Section 319 of CrPC for impleading certain more persons which too got rejected on 28.04.2011. The statement of the accused was also recorded and the matter was at the fag end stage when the prosecution moved the application under Section 311 of CrPC on 11.04.2014 for re-examination of the Investigating Officer as well as the purchasers of the property i.e. PW-1 Ghanaram and PW-6 Nihali. In addition, the prosecution also sought for the evidence of certain witnesses who could not be examined earlier i.e. the finger print expert, the person who had initially registered the complaint and the police personnel who had seized the documents.

5. The trial Court vide its order dated 08.08.2014 rejected the application under Section 311 of CrPC holding that it does not appear to be a strong case for allowing the application under Section 311 CrPC as the complaint pertains to the year 1996 and the said application was more with an intention of further delaying the case.

6. This order dated 08.08.2014 passed by the JMFC, Saja, District Bemetara rejecting the application under Section 311 CrPC was put to challenge in Criminal Revision No. 36 of 2014. The Revisional Court vide impugned order dated 10.11.2015 allowed the revision petition and granted further six months time to the prosecution to adduce whatever evidence they intended as per their application under Section

311 with a direction to the trial Court to decide the matter thereafter in accordance with law.

7. It is this order dated 10.11.2015 i.e. allowing of the Revision petition of the prosecution which has been assailed by the petitioners in the present CrMP.

8. According to the counsel for the petitioners, the order of the Revisional Court was totally uncalled for as the order sheet of the trial Court itself would reflect that sufficient and ample opportunities were granted to the prosecution for adducing their evidence. The order sheet also reflects that the Court below had issued summons, bailable warrants and warrant of arrest against certain witnesses and in spite of all efforts, the prosecution could not lead its evidence at the appropriate time, therefore, there was no strong case made out on behalf of the prosecution firstly to move the application under Section 311 CrPC and secondly for the Revisional Court for allowing the same without there being any strong, cogent and justifiable reason. Counsel for the petitioners relied upon the decision of the Supreme Court in the case of State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another reported in (2016) 2 SCC 402 to harp on the issue whether it was justified on the part of the prosecution to move the application under Section 311 CrPC and whether it was equally justifiable on the part of the Revisional Court to entertain the Revision petition and allow the same. Thus, counsel for the petitioners prayed for setting aside of the impugned order.

9. State counsel, however, opposing the petition submits that the Revisional Court had given its explanation while allowing the Revision petition and since it is a well reasoned and speaking order, there is no scope of interference with the same. It is also alleged by the State counsel that the present petition would not be maintainable under

Section 482 CrPC as it would have been a revision which should have been filed against the impugned order.

10. Having heard the rival contentions put forth by the counsel appearing on either side and on perusal of the records, this Court is of the opinion that the preliminary issue whether the present petition under Section 482 CrPC is maintainable or not does not require much discussion as in one of its recent decisions of the Supreme Court in the case of **Prabhu Chawla v. State of Rajasthan and Another** reported in **AIR 2016 SC 4245** it has been held in paragraph-6 as under:

“6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482, Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: “Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.” A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. “abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more.” We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482, CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable.”

11. As regards the merits of the case, it cannot be lost sight of the fact that initially the evidence on behalf of the prosecution was closed on 11.04.2008. Subsequently, a revision petition was preferred by the prosecution which was allowed and further time was granted to lead evidence. In spite of that, the prosecution could not adduce all the witnesses whom they had cited as prosecution witnesses and again on 14.12.2011 the prosecution evidence was closed. The said order of the closure of prosecution evidence dated 14.12.2011 was not

subjected to challenge by the prosecution at any point of time till now and as such the same attained its finality. Subsequent to which, the matter proceeded for defence evidence. It is then that the application under Section 311 CrPC was moved on 11.04.2014 i.e. after about 2 1/2 years from the date of closure of the prosecution evidence. A plain reading of the application under Section 311 would itself clearly reflect that there was no strong reason or explanation given by the prosecution as to the necessity for calling these witnesses as also for recalling of certain witnesses who have already been examined. Likewise, it was also not explained by the prosecution as to what is the prejudice that would be caused in case these witnesses are not called or recalled for evidence. Similarly, the application also does not disclose any reason, explanation or justification for moving the same at this belated stage. It also does not give any reason as to why the order dated 14.12.2011 by which the evidence of the prosecution witnesses was closed has not been sought to be recalled, reviewed or reconsidered nor has the prosecution given any reason for not challenging the same before the High Court seeking for an opportunity to lead evidence. This aspect also does not find place in the order of the Revisional Court who on the contrary seems to have gone only on the principle of fair trial and fair adjudication without discussing as to why the same was necessary in the given facts and circumstances of the case.

12. So far as the law in respect of an application under Section 311 CrPC is concerned, the Supreme Court again in one of the recent decisions in the case of **State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another** reported in **(2016) 2 SCC 402** which has also been relied upon by the counsel for the petitioners, considering all the important

decisions rendered by it on the subject under Section 311 CrPC in paragraphs - 10 & 11 has held as under:

“10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.”

13. The Hon'ble Supreme Court referring to the principles laid down in the Case of **Rajaram Prasad Yadav Vs. State of Bihar and Another reported in (2013) 14 SCC 461** in paragraph-13 in the aforesaid judgment of Shiv Kumar (supra) held as under:

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

“17.1. 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?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative

presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under Section 311 CrPC 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.

17.5. 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. 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.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. 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.

17.10. 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.

17.11. 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.

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

17.13. 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.

17.14. The power under Section 311 CrPC 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.”

After discussing all the important decisions on the subject under Section 311 CrPC the Supreme Court in paragraphs-27 & 28 of its judgment in the case of Shiv Kumar has held as under:

“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[47]. 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.”

The Hon'ble Supreme Court in the said case of Shiv Kumar (Supra) finally laid down the broad principles in paragraph-29 which for ready reference is being reproduced hereunder:

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

- (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;
- (vii) Mere change of counsel cannot be ground to recall the witnesses;
- (viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;
- (ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This

observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

14. If we take into consideration the ratio and the proposition of law laid down by the Supreme Court in the aforesaid judgments and consider it with the facts of the present case it would clearly reflect that it was not a case where the Revisional Court should have entertained the application under Section 311 CrPC. The Revisional Court lost sight on the fact that in the instant case the FIR was lodged in the year 1993, the charge sheet was filed in the year 1996 and the prosecution case also commenced immediately and subsequently, the charges were framed as early as on 06.09.1996. From 06.09.1996 till 14.12.2011 i.e. for a period of more than 15 years, the prosecution was granted sufficient and ample opportunity to adduce evidence. From the record it also appears that on an earlier occasion they had also challenged the closure of the prosecution evidence by way of a revision in the year 2008 which too was allowed and in spite of that they could not lead evidence of a few witnesses which they had cited.

15. The record also shows that the evidence of the prosecution witnesses was again closed on 14.12.2011 which too was not challenged by the prosecution before any higher Court nor was any application was moved to recall the said order before the same Court. Subsequently, the matter proceeded for recording of the evidence of defence witness and when it reached to the final stage, the present application under Section 311 CrPC was moved by the prosecution. The contents of the application under Section 311 also reflect that there is only a general observation made by the State in its application

seeking for recall of certain prosecution witnesses and also for summoning of those witnesses who have not been examined. The order of the Revisional Court also does not meet the requirement of law as has been laid down by the Supreme Court in the case of Shiv Kumar and the principles that were laid down in its earlier decisions which have been referred to in the said case particularly the case of Rajaram Prasad (supra). One could understand if there was not sufficient opportunity provided to the prosecution before their right was closed for leading evidence. But in the instant case, the prosecution was granted well over 15 years time for leading their evidence and consideration of these facts is not reflected from the order of the Revisional Court. Hence, the order of the Revisional Court dated 10.11.2015 does not seem to be proper, legal and justified at this stage of trial.

16. Thus, the impugned order dated 10.11.2015 passed in Criminal Revision No. 36 of 2014 deserves to be and is accordingly set aside/quashed and the order of the trial Court dated 08.08.2014 stands affirmed.

17. Considering the fact that the complaint is of the year 1996 i.e. almost 21 years, it is directed that the trial Court shall proceed further with the matter on priority basis and try to dispose of the matter within a period of four months from the next date of hearing fixed before the Court below.

18. Accordingly, the present Cr.M.P. stands allowed and the interim relief granted by this Court stands merged with the present final order.

Sd/-
(P. Sam Koshy)
JUDGE