

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.5212 of 2017

ORDER:

This petition is filed under Section 482 Cr.P.C., challenging the docket order dated 15.3.2017 in CrI.M.P. No.422 of 2017 in C.C. No.264 of 2014 on the file of the Court of Judicial Magistrate of First Class, Yemmiganur.

2. The learned counsel for the petitioners submitted that the trial court has not considered the gravity of the offence and dismissed the petition. He further submitted that even if one more opportunity is given to the petitioners to cross-examine the P.Ws.1 and 2, no prejudice would be caused to the *de facto* complainant.

3. A perusal of the record reveals that the petitioners-accused Nos.1 to 8 are facing trial in C.C. No.264 of 2014 for the offences punishable under Sections 323, 324 and 509 read with 34 of IPC. During the course of trial, the petitioners filed the petition under Section 311 of Cr.P.C., to recall P.Ws.1 and 2 for further cross-examination. The trial court, after affording reasonable opportunity to both parties, dismissed the petition. Hence, the criminal petition.

i. In **Rajendra Prasad vs. Narcotic Cell through its officer-in-charge Delhi**¹ the Hon'ble apex Court held at paragraph No.12 as follows:

12. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments, The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision, The steps which

¹ (1999) 6 SCC 110

the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.

- ii. In **Rajaram Prasad Yadav v. State of Bihar**², the Hon'ble apex court held at paragraph No.17 as follows:

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

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

² (2013) 14 SCC 461

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.

4. Let me consider the facts of the case on hand in the light of above legal principles.

5. Now, it has to be considered whether the trial court, while dismissing the petition, has exercised its discretion properly or not. The trial court dismissed the petition with an observation that P.Ws.1 and 2 were already cross-examined at length by the learned defence counsel on all material aspects and there are no grounds to allow the petition.

6. I have carefully scanned the cross-examination of P.Ws.1 and 2. The learned defence counsel, before the trial court, cross-examined these two witnesses at length covering all relevant aspects. He has not left over anything to direct P.Ws.1 and 2 to undergo further cross-examination. It is not uncommon to file this type of petitions by the parties to drag on the proceedings, on one

pretext or the other. The court has to exercise the discretion conferred on it under Section 311 of Cr.P.C., judiciously. The discretionary power has to be exercised by the trial court basing on sound principles of law. In the instant case, the trial court has considered the relevant aspects and passed the impugned order.

7. Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am of the considered view that there is no illegality or irregularity in the order passed by the trial warranting interference of this court.

8. Accordingly, the criminal petition is dismissed. Miscellaneous petitions, if any pending in this criminal petition, shall stand closed.

July 05, 2017.
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T.SUNIL CHOWDARY, J.

