

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No.1160 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, ('the Code') by the unsuccessful petitioner/ AO1 is directed against the orders, dated 11.04.2017, of the learned Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad, passed in CrI.M.P.no.683 of 2016 in C.C.No.62 of 2007.

1.1 By the orders impugned in this revision, the learned Special Judge dismissed the aforesaid miscellaneous petition of the petitioner/ AO1 filed under Section 311 of the Code requesting to recall PWs 1 to 13 for cross-examination by the petitioner/ AO1.

2. I have heard the submissions of *Sri G.L.Nageswar Rao*, learned counsel appearing for the petitioner/ AO1, and of the learned Public Prosecutor appearing for the respondent/ State of Telangana.

3. The facts, which are necessary to be stated as a preface to this order, in brief, are as follows:

On filing of the charge sheet against the petitioner/ Accused Officer 1 (AO1) and others for the offences punishable under Sections 13(1), (c), & (d) (ii) read with Section 13(2) of the Prevention of Corruption Act, 1988, and under Sections 120(B), 409, 420, 468 and 471 IPC, the aforesaid C.C.No.62 of 2007 was taken on file by the learned Principal Special Judge for SPE & ACB Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad. During the course of trial, PWs 1 to 13 were initially examined on the side of the prosecution. However, the petitioner/ AO1 failed to cross-examine PWs 1 to 13. Subsequently, PWs 14 to 25 were examined. And, the said witnesses, PWs

14 to 25, were cross-examined on behalf of the petitioner/ AO1. Thereafter, while the trial is still in progress, the petitioner/ AO1 filed the subject petition seeking to recall PWs 1 to 13 for cross examination on his behalf *inter alia* contending as follows: 'At the time of examination of PWs 1 to 13, the petitioner/ AO1 was suffering with severe ill health, that is, lower back pain. Hence, he was by then, not in a position to stand or walk. He was advised by the doctor to take complete bed rest for more than three months. For the said reason, he could not contact his counsel and instruct him for conducting cross-examination of PWs 1 to 13. Therefore, the said witnesses were not cross-examined on behalf of the petitioner/ AO1. Thereafter, PWs 14 to 25 were also examined. PWs 26 to 28 were given up by the prosecution. Further, the trial schedule was also fixed for examination of the remaining witnesses. A medical certificate issued by the Assistant Civil Surgeon, Gandhi Hospital, Secunderabad, was submitted by the petitioner/ AO1 to show that he suffered illness as stated by him. In the circumstances stated, the failure to cross-examine PWs 1 to 13 is not on account of either wilful or deliberate conduct on the part of the petitioner/ AO1. The cross-examination of the said witnesses is highly essential. Therefore, it is in the interests of justice to afford an opportunity to the petitioner/ AO1 to cross-examine the said witnesses, PWs 1 to 13, by recalling them.' The prosecution resisted the said request of the petitioner/ AO1 by filing a counter with the following averments: 'In the present case, the charge sheet was filed against AO1 and AO3 and the trial is in progress against the said accused officers. Insofar as A2, a separate charge sheet was filed and against him, trial is in progress in C.C.No.75 of 2009. Though sufficient opportunities were given to the petitioner/ AO1, he failed to cross examine PWs 1 to 13 by availing such reasonable and fair opportunities granted to him. Some witnesses out of the said 13 witnesses have retired from service. It is very difficult now to trace out and bring them to the Court for

their examination once again. Hence, the petition may be dismissed.’ As already noted, on merits and by the orders impugned in this revision case, the Special Court dismissed the petition of the petitioner/ AO1. Therefore the petitioner/ AO1 is before this Court.

4. Learned counsel for the petitioner/ AO1 while stating the facts and the case of the petitioner, which are already extracted supra, would further contend as follows: ‘The petitioner/ AO1 could not cross examine PWs 1 to 13 only because of his ill-health. On his recovery from ill-health, he participated *bona fide* in the further trial proceedings of the case and cross-examined the other witnesses. But for his ill health, he would have instructed his counsel to cross examine PWs 1 to 13 and his counsel would have cross examined the said witnesses. There are no wilful laches on his part in not cross examining the said witnesses, when they were examined during the year 2013. He is admittedly a public servant. Not only his personal interests but also interests of his entire family are dependent upon the result of the case. If the petitioner is not permitted to cross examine PWs 1 to 13, he would suffer serious and irreparable loss. He is prepared to bear all the necessary expenses for securing the attendance of PWs 1 to 13, in case, they are recalled for cross examination on behalf of the petitioner/ AO1. The Special Court dismissed the petition, merely on the ground that the petition for recalling of PWs 1 to 13 is filed belatedly. If an opportunity is given to the petitioner/ AO1 to cross-examine the said witnesses by recalling them, no prejudice would be caused to the prosecution as most of them are official witnesses and as it is not the case of the prosecution that the present attempt is being made to recall the witnesses after winning over the said witnesses. The only defence of the prosecution is that it is difficult to trace and produce the witnesses once again before the Court. The petitioner/ AO1 already filed a memo showing that out of the thirteen witnesses, PWs 1, 7, 8, 12 retired from service. In the said

memo he furnished the present addresses of all the witnesses-PWs 1 to 13, except those of PWs 2 and 5. Hence, an opportunity may be given to cross examine PWs 1 to 13 by recalling them.'

5. Per contra, the learned Public Prosecutor appearing for the respondent/ State of Telangana while reiterating the case of the prosecution, which is already extracted supra, supported the order of the trial Court and stated that the very facts of the case make it manifest that the petitioner is grossly negligent and that he deliberately failed to cross examine PWs 1 to 13 despite granting fair and reasonable opportunities and that he did not take any steps at the earliest point of time for recalling the said witnesses though his petitions for adjournment were dismissed way back in the year 2013, by one of the learned Presiding Officers of the Special Court and that it is very difficult for the prosecution to secure the attendance of all the witnesses, i.e., PWs 1 to 13, at this distance of time and that the grounds mentioned by the petitioner are not valid and sufficient grounds to recall the witnesses for cross examination by the petitioner/AO1, as per the settled legal position. He further submits that the well reasoned order of the trial Court warrants no interference in the facts and circumstances of the case.

6. I have given earnest consideration to the facts and submissions.

7. Before proceeding further, it is necessary to refer to the legal position, which is succinctly stated in the decision in *Rajaram Prasad Yadav v. State of Bihar*<sup>1</sup>. In the said decision the following propositions are postulated:

"A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness",

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<sup>1</sup> AIR 2013 SC 3081



"person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

Further, after referring to earlier decisions on the point, the Supreme Court culled out following principles which are to be borne in mind:

- a) 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 Code of Criminal Procedure 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.
- d) The exercise of power under Section 311 Code of Criminal Procedure 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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.

8. Thus, the power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as a witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. It is needless to state that exercise of such power should be made judiciously and also with extreme care and caution. The Court has to keep in mind not only the aspect of giving a fair opportunity to the complainant but also the need for ensuring that the accused of the crime is not unduly harassed on account of the delay in disposal of the case.

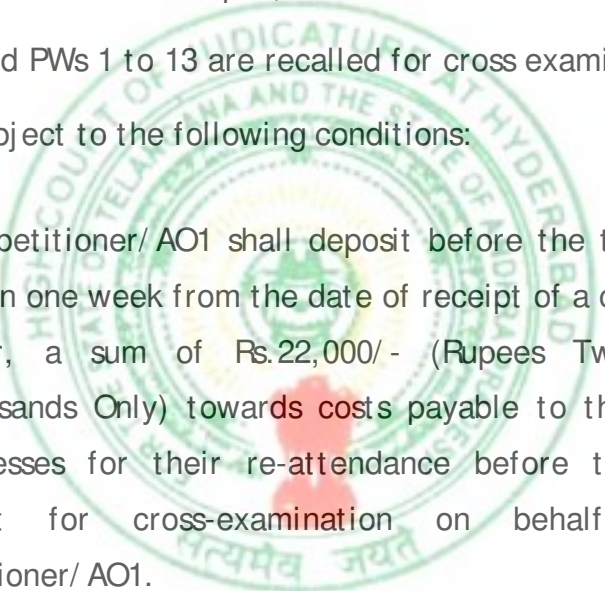
9. Admittedly, the petitioner/ AO1 is a public servant. He is facing trial along with AO3 for the offences punishable under Sections 13(1), (c), & (d) (ii) read with Section 13(2) of the Prevention of Corruption Act, 1988, and under Sections 120(B), 409, 420, 468 and 471 IPC. He failed to cross examine PWs 1 to 13 by not attending before the trial Court on the ground that he is suffering from ill-health, that is, lower back pain and that he is advised bed rest, as he could not walk or stand or move out of the bed. It is not disputed that the petitions in CrI.M.P.nos.328 of 2013 and 329 of 2013 filed by the petitioner seeking adjournment were dismissed by the Special Court on 16.05.2013. Even then, he did not take proper steps to instruct his counsel for cross-examination of PWs 1 to 13. Even thereafter, he did not take any steps promptly for

recalling PWs 1 to 13 and waited till the year 2016 for filing the subject petition for recalling them. It is also borne out by record and it is undisputed that the petitioner/ AO1 cross examined PWs 14 to 25, who were examined upto 07.10.2015. Even during that time, he did not take any steps for recalling PWs 1 to 13, who were already cross-examined by the other accused facing trial. He has chosen to file the subject petition to recall PWs 1 to 13 after a lapse of three years after their examinations, i.e., only in the year 2016. He did not assign any reasons for the said long delay. It is well settled that the law helps those who are vigilant, but not those who are indolent. But the fact of the matter is that the prosecution is also delaying the examination of witnesses and contributed to the delay in the trial of the case; and, the trial, which was commenced in the year 2013, has not concluded till date as the prosecution is obviously examining the witnesses leisurely and at its own pace. Be that as it may, the learned counsel for the petitioner/AO1 submits that the petitioner/ AO1 is prepared to abide by any conditions that may be imposed and that he is even prepared to meet the expenses of the witnesses if they are recalled for cross-examination on his behalf. He would further submit that if no opportunity is afforded to cross examine PWs 1 to 13, great prejudice would be caused to the petitioner/ AO1 and that the cross examination of the said witnesses on behalf of AO1 is also just and necessary to enable the Special Court to arrive at a just decision in the matter. No doubt the petitioner/ AO1 having delayed the matter committed an error. However, in the light of the fact that PWs 1 to 13 were not at all cross examined on behalf of AO1, this Court is of the considered view that the petitioner/ AO1 can be given one more opportunity to cross examine PWs 1 to 13, more particularly in the light of the further fact that the petitioner/ AO1 has now furnished, by way of a memo, the present addresses of all the witnesses, i.e., PWs 1 to 13 including the particulars of the witnesses who had retired from service, except those of PWs



2 and 5. As per the precedential guidance, 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. On the above analysis, this Court finds that subject to heavy terms, one more opportunity can be given to the petitioner/ AO1 to cross examine PWs 1 to 13 by recalling them; as such a course would afford a fair and reasonable opportunity to the petitioner/ AO1.

10. In the result, the Criminal Revision Case is allowed and the order impugned is set aside. As a sequel, CrI.M.P.no.683 of 2016 in C.C.No.62 of 2007 is allowed and PWs 1 to 13 are recalled for cross examination on behalf of petitioner/ AO1 subject to the following conditions:

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- (i) The petitioner/ AO1 shall deposit before the trial Court, within one week from the date of receipt of a copy of this order, a sum of Rs.22,000/- (Rupees Twenty Two Thousands Only) towards costs payable to the thirteen witnesses for their re-attendance before the Special Court for cross-examination on behalf of the petitioner/ AO1.
  - (ii) On the petitioner/ AO1 making the deposit as directed, the Special Court shall issue witness summonses through Court and also through the prosecuting agency and also by other permissible means for the attendance of PWs 1 to 13 by fixing schedule for cross-examination of the said witnesses on three or four contiguous working days. The trial Court shall endeavour to complete the recording of the cross examinations of the witnesses in attendance on the dates fixed and shall not allow any further adjournments in the matter at the request of the petitioner/ A1.

- (iii) The petitioner/ AO1 shall cross examine, without fail, the witnesses who might appear before the Special Court on the dates fixed by the Court.
- (iv) This order, however, shall not preclude the Special Court from taking a just and fair decision to not to further examine any of the above said recalled witnesses whose presence may not be secured without undue delay and expenses for reasons like non-availability of any of the said witnesses at the last known address(s) or absence from the country or difficulties in tracing them out without delay and expenses etcetera. The failure to secure the presence of the recalled witnesses before the Court below for the above and any other valid reasons shall not in any way affect the validity of the already recorded depositions of such witnesses.

Pending miscellaneous petitions, if any, shall stand closed.

25<sup>th</sup> July, 2017

Note:- Furnish CC by 26.07.2017  
(B/ o)  
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M. SEETHARAMA MURTI, J