

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.9279 OF 2017

ORDER:

This criminal petition is filed under Section 482 Cr.P.C to quash the order passed by the I Additional Special Judge for C.B.I. Cases, Hyderabad in CrI.M.P.No.887 of 2014 in C.C.No.28 of 2004 dated 11.08.2017, dismissing the recall petition filed by the petitioner under Section 311 Cr.P.C to recall P.W.1 for further cross-examination.

The petitioner filed CrI.M.P.No.887 of 2017 under Section 311 Cr.P.C to recall P.W.1 for cross-examination. The petitioner in the application submitted that earlier P.W.3 who was the then Chief Manager of Andhra Bank, Masab Tank Branch, during cross-examination was confronted with certain original communications between the bank and the petitioner and the said witness stated that the said initials on the communications were not that of P.W.3 and pertains to one T.V. Ramanuja Rao who was P.W.1 in the case and that the documents were traced by the petitioner while searching records and they have to be confronted to P.W.1 for limited purpose. The learned Public Prosecutor before the Court below opposed the petition on the ground that sufficient opportunity was afforded to the petitioner to elicit evidence in the cross-examination of P.W.1 and he was cross-examined about 10 years ago and he cannot be recalled at this stage and prayed for dismissal of the petitioner.

The Court below, upon hearing argument of both the counsel, dismissed the petition, holding that it was belated and that the petitioner has filed the petition only to protract the disposal of the matter, pending before the Court below. Aggrieved by the said order in Crl.M.P.No.887 of 2017 dated 11.08.2017, the present criminal petition is filed on the ground that sufficient opportunity must be afforded to elicit truth in the cross-examination of the witnesses and if, such opportunity is denied, it amounts to denial of justice. But the Court below did not consider the request on improper appreciation of facts and subsequent to completion of proceedings under Section 313 Cr.P.C and the petitioner filed an application under Section 311 Cr.P.C to recall P.Ws.3,14 and 17 in Crl.M.P.No.792 of 2016 for further cross-examination and the said application was allowed and the said witnesses were recalled to provide opportunity to the petitioner and the petitioner further cross-examined the witnesses. Further, the reason stated by the petitioner is that some original documents were confronted to P.W.3 during his cross-examination and he stated that the signature on the said communications pertains to P.W.1 and requested to recall P.W.1 for further cross-examination. Therefore, he prayed that the circumstances forced him to file an application to prove his innocence and prayed to set-aside the order and prayed to pass appropriate order by setting aside the order in Crl.M.P.No.887 of 2017 dated 11.08.2017 and recalling P.W.1.

Whereas, the learned Special Public Prosecutor for C.B.I contended that, when P.W.1 was examined in 2007, he cannot be

recalled after 10 years from the date of his cross-examination and it is only aimed to protract the litigation for some more time and to avoid the disposal of C.C.No.28 of 2004. In fact, there was no factual foundation in the cross-examination of witnesses and suddenly the document was marked as Ex.D-3, subject to admissibility of the document, as recorded in the cross-examination of P.W.3. Therefore, in the absence of any factual foundation, P.W.1 cannot be recalled and prayed for dismissal of the petition.

Considering rival contentions, perusing the material available on record, the sole point that arose for consideration is ***“Whether P.W.1 be recalled for limited purpose of confronting signature on Ex.D-3 photostat or on the letter admitted, subject to petition of the learned Public Prosecutor.”***

P O I N T:

Undisputedly, charge sheet was filed in the year 2004 against the petitioner and others by the State, through the Central Bureau of Investigation and the trial was already completed. P.W.1 was examined in the year 2007 i.e. about 10 years ago and later, the other witnesses were also examined. But, after completion of examination of the accused under Section 313 Cr.P.C, matter was adjourned for three times for argument and suddenly, a petition was filed under Section 311 Cr.P.C to recall P.W.3 for cross-examination to confront Ex.D-3.

During cross-examination, P.W.3 expressed his inability to identify the signature appearing on Ex.D-3 i.e. photocopy of the

letter allegedly addressed to the Chief Manager, Andhra Bank, Masabtank Branch, Hyderabad by M/s Gradiente Infotainment Limited. But, this document was admitted in evidence, subject to objection raised by the learned Special Public Prosecutor, since P.W.3 expressed his inability to identify the signature and the petitioner wanted to cross-examine P.W.1 to confront the photocopy of the document i.e. Ex.D-3, which is marked subject to objection. No doubt, the power of the Court under Section 311 Cr.P.C is discretionary and the Court may exercise such power sparingly, keeping in mind the conduct of the parties before the Court.

According to Section 311 Cr.P.C, the Court may, at any stage of the proceeding, trial or enquiry, summon any person as witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. Thus, it is clear from the section that the Court is empowered to summon any person as a witness at any stage of enquiry, trial or proceeding and the power is not confined to any particular class of person.

In **Mohonlal Shamji Soni v. Union of India**¹, the Apex Court held that the power to summon and examine any witness can be exercised at any stage, however opportunities is to be given to the parties to rebut the evidence.

¹ AIR 1991 SC 1346

The Supreme Court dealt the aspect of the power to summon a witness can be exercised in **Rama Paswan v. State of Jharkhand**². In the said case, a rape victim has been examined and cross-examined. At the stage of argument a prayer has been made to recall her on the ground that the parties have settled the dispute outside the Court and the informant could not have properly identify the accused cannot be entertained and the Apex Court held that summoning, recalling or re-examining the witnesses cannot be allowed in order to fill up the gap or to remove the lacuna in the evidence of the prosecution.

In **Sister Mina Lalita Baruwa v. State of Orissa and Ors**³, the Supreme Court held that in criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the state and the prosecution to ensure that no stone is left unturned - It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it - Details stated. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt the prosecution side to clarify the

² 2007 Cr.L.J 2750

³ AIR 2014 SC 782

position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain a silent spectator in such situations.

Thus, the law laid down by the Apex Court in the catena of decisions referred supra, it is clear that the Court not only exercised such discretionary power on the application filed by either the defence or accused or the Court can also recall any person by exercising such discretionary power on its own motion.

In **Abdul Rehman Antulay v. R.S. Nayak and another**⁴ the Apex Court made it clear that when a petition is filed to protract or delay the litigation, the Court can declare to recall a witness by exercising power under Section 311 Cr.P.C.

In **AG vs. Shiv Kumar Yadav and Ors**⁵, the Apex Court culled out following principles to be borne in mind for exercising power under Section 311 Cr.P.C, and they are as follows:

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?
2. 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.
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.
4. 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.

⁴ AIR 1992 SC 1701

⁵ AIR 2015 SC 3501

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.
6. The wide discretionary power should be exercised judiciously and not arbitrarily.
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.
8. 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.
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.
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.
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.
12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
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.
14. 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.”

But, the present case would not fall within any of the above mentioned guidelines laid down by the Supreme Court.

Therefore, in the present case, the petitioner wanted to confront the signature on the Photostat copy of the letter i.e. Ex.D-3, subject to decision as to admissibility of the document, in view of the objection raised by the learned Public Prosecutor. But the learned counsel for the petitioner contended that when a document is received and admitted in evidence, though subject to objection, it is as good as marking of a document and on the ground that it is a photostat copy, opportunity cannot be denied to confront the same to the witness.

The petitioner wanted to confront the signature on Ex.D-3 which is a photostat copy and its admissibility is a matter to be decided at the end of the trial, in view of the objections recorded by the Trial Court in the evidence of P.W.3. Therefore, admissibility of the document is always subject to the decision of the Court and merely because it was admitted in the evidence, subject to objection, it cannot be read as a part of evidence, as good as any other document. Even otherwise, a signature on the photostat copy cannot be confronted in normal course of events and there may be several circumstances to create such document suppressing the original document. But, at this stage, confronting the signature on the photostat copy cannot be permitted, as the Trial Court rightly

exercised its discretion in favour of the prosecution, declining to permit the petitioner to recall P.W.1.

Learned counsel for the petitioner placed reliance on the judgment of this Court reported in Crl.P.Nos.6976 and 6990 of 2017, wherein, this Court held that witness can be recalled at any stage of the proceeding, by exercising discretionary power under Section 311 Cr.P.C to meet the ends of justice. But, this Court did not lay down any law in the judgment, except observing that the Court has got discretionary power. But, in view of the law declared by the Apex Court in A.G case referred supra, when the case of the petitioner does not fall within the parameters laid down by the Apex Court, the order passed by the Trial Court exercising its discretionary power conferred on it under Section 311 Cr.P.C cannot be interfered, unless the Court concludes that the finding of the Trial Court is manifestly perverse. Apart from that, the conduct of the petitioner in filing petitions one after the other is explicit that the intention of the petitioner is to protract the proceedings for some time more, for one reason or the other. Therefore, the order under challenge cannot be interfered by this Court, by exercising power under Section 482 Cr.P.C, since the power of this Court is limited.

The order under challenge is interlocutory in nature, no revision is maintainable against such an order, in view of the law laid down by the Apex Court in **Sethuraman Vs. Rajamanickam**⁶, to get over the difficulty contained in Section 397(2) Cr.P.C, the petitioner invoked inherent jurisdiction of this Court under Section

⁶ 2009 CriLJ 2247

482 Cr.P.C, circumventing the law, wherein the Apex Court in paragraph 4 held as follows:

"4. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed."

The **Girish Kumar Suneja v. C.B.I**⁷, full Bench of the Supreme Court had an occasion to decide the similar subject and held as follows in paragraphs 24,25,27,28 & 29:

"Therefore, when Section 397(2) prohibits interference in respect of interlocutory orders, Section 482, cannot be availed of to achieve same objective. In other words, since Section 397(2) prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482. To set aside an interlocutory order prohibition in Section 397 will govern Section 482 thereof. In the present case, although, appellants might have an entitlement (not a right) to file a revision petition in High Court but that entitlement can be taken away and in any event, High Court is under no obligation to entertain a revision petition – such a petition can be rejected at threshold. If High Court is inclined to accept revision petition it can do so only against a final order or an intermediate order, namely, an order which if set aside would result in culmination of proceedings. There appear to be only two such eventualities of a revisable order and in any case only one such eventuality is before Supreme Court. consequently result of paragraph 10 of order dated 25.07.2014 passed by Supreme Court is that entitlement of appellants to file a revision petition in High Court is taken away and thereby High Court is deprived of exercising its extraordinary discretionary power available under Section 397 of the Cr.P.C. However, it does not mean that appellants have no remedy available to them – paragraph 10 of order dated 25.07.2014 does not prohibit appellants from approaching

⁷ AIR 2017 SUPREME COURT 3620

Supreme Court under Article 136 of Constitution. Therefore all that has happened is that forum for ventilating grievance of appellants has shifted from High Court to Supreme Court. Mere fact that Supreme Court could dismiss petition filed by appellants under Article 136 of Constitution without giving reasons does not necessarily lead to conclusion that reasons will not be given or that some equitable order will not be passed. Thus, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) that cannot be circumvented by resort to Section 482.”

In view of the law declared by the Supreme Court in **Girish Kumar Suneja**⁷ case, where no revision is maintainable against interlocutory order, in view of bar under Section 397(2) Cr.P.C, similarly petition under Section 482 Cr.P.C is also not maintainable. Hence, the petition is liable to be dismissed on this ground also.

Hence, I find no ground to recall P.W.1 and consequently, the criminal petition is liable to be dismissed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:04.10.2017

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