

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL PETITION No.9610 OF 2017

ORDER:

The present Criminal Petition is laid under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Code') questioning the order, dated 14.09.2017, in CrI.M.P. No.1994 of 2017 in C.C. No.7 of 2011, passed by the learned Principal Special Judge for CBI Cases, Visakhapatnam.

2. The State represented by Additional Superintendent of Police, CBI, Visakhapatnam, filed CrI.M.P. No.1994 of 2017 under Section 311 of the Code, requesting to set aside the order, dated 30.08.2017 and to recall PW.11 for examination, and the learned Principal Special Judge, by order, dated 14.09.2017, acceded to the request, thus, the petitioner - accused No.1, filed the present Criminal Petition.

3. The facts would reveal that PW.11 was examined in chief on 24.08.2017. Later, the case was posted to 30.08.2017 for cross-examination of PW.11. On 30.08.2017, it appears PW.11 did not attend the Court and a memo was filed by the prosecution requesting to grant an adjournment. The learned Principal Special Judge, somehow, overlooking the memo, on the ground that the Calendar Case relates to the year 2011 and it is an old and pre-2012 matter, eschewed the evidence of PW.11 in chief-examination from record.

Therefore, the State filed the aforesaid application stating that the evidence of PW.11 is crucial to prove the prosecution case and sought to set aside the said order and allow PW.11 to be cross-examined by the learned defence counsel.

4. It appears that the petitioner - accused No.1 resisted the request.

5. The learned Principal Special Judge, referring to the evidence of PW.1 in chief examination through whom Exs.P-26 to P-30 and MO.11 were marked, placing reliance on the decisions of the Hon'ble Supreme Court in AIR 1968 SC 178 (180); 1968 CrL.L.J. 231; and 2008 AIR SCW 2206 (2214), observing that the legal principle laid down therein is to the effect that Section 311 of the Code confers a wide discretion on the Court to act when exigencies of justice require, and the power of Court under Section 165 of the Indian Evidence Act, 1872, is complementary to its power under Section 311 of the Code, and observing that if the Court is of the opinion that the evidence of certain witnesses is essential to the just decision of a case, and the test of "just decision" is applicable to the case on hand, and also observing that the word "eschewed" in the order used was in the sense of closing the evidence only and Section 311 of the Code amply provides for recalling the witness whose evidence is closed, allowed the aforesaid application permitting the prosecution to produce PW.11 for cross-examination.

6. Heard Sri Koneti Raja Reddy, learned counsel for the petitioner and Sri K. Surender, learned Special Public Prosecutor for CBI Cases appearing for the respondent - State of Andhra Pradesh

7. The learned counsel would attack the order under challenge on the main ground that once the Court eschewed the evidence of a particular witness, the question of setting it aside under Section 311 of the Code does not arise and thereby sought to set aside the said order.

8. Per contra, the learned Special Public Prosecutor would submit that in fact, the phrase “eschewed” is not available in the Code, more particularly, on criminal side and, therefore, what was expressed by the learned Principal Special Judge that the said word was used ‘in the sense of closing the evidence only’ cannot be brushed aside. Even according to the learned Special Public Prosecutor, the instructions he received are to the effect that PW.11 was examined and even cross-examination was done and, therefore, sought to dismiss the present Criminal Petition.

9. Firstly, it is to mention that the learned Principal Special Judge, in paragraph No.7 of the order, while referring to the authorities mentioned in the above, does not specify the names of the parties. In fact, the names of the parties in the above cited rulings are to be invariably referred to, but, not just merely quoting the citation and even the principles are to be projected.

10. Be that as it may, when looked at the approach in passing an order eschewing the evidence of PW.11 which she termed as “closing the evidence only” appears to have been passed in *post-haste* without comprehending the consequences thereof. When PW.11 was examined in chief on 24.08.2017, the duty on the part of defence was to cross-examine the witness immediately, but, it appears at the request of the defence, the cross-examination was withheld deferring it to a later date. Then on the next date, PW.11 did not appear and a memo was filed on behalf of the prosecution requesting an adjournment. The Court ought to have acceded to such a request as there was no mistake on the part of PW.11. Refusing it and eschewing the evidence of PW.11 from record was not in the interest of justice, which the learned Principal Special Judge ought to have noted.

11. Be that as it may, the power exercised by the learned Principal Special Judge under Section 311 of the Code to recall PW.11 cannot be faulted as the cardinal principle of criminal jurisprudence is to trace out the truth and for that matter “quest for truth” is the endeavour. This apart, the order under challenge is the one passed under Section 311 of the Code and an interlocutory order, and it is clearly barred under Section 397 (2) of the code as the order did not, in any manner, decide finally in view of the law declared by the Hon’ble Supreme Court in **Sethuraman v. Rajamanickam**¹. Therefore, the order cannot be construed as illegal, nor would it suffer

¹. (2009) 5 SCC 153

from any irregularity warranting interference by this Court. There is no merit in the present petition.

12. The Criminal Petition is, accordingly dismissed at the admission stage itself.

As a sequel thereto, miscellaneous petitions, if any, pending in the present, stand closed.

A. SHANKAR NARAYANA, J

November 29, 2017.

Mgr

