

**HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**Crl.P. No.7832 OF 2018**

**ORDER:**

This criminal petition is filed under Section 482 Cr.P.C. challenging the order dated 10.07.2018 passed by the Principal Judicial Magistrate of First Class, Jangaon in Crl.M.P.No.383 of 2018 in C.C.No.324 of 2009 allowing the petition filed under Section 311 Cr.P.C. to recall LWs.14 to 17.

The prosecution filed petition under Section 311 Cr.P.C. to recall LWs14 to 17 on the ground that when the matter was posted for issuance of summons to LWs.14 to 17, due to some unavoidable circumstances, the witnesses could not appear before the Court, as such, the Court closed their evidence on 21.03.2018 and that non serving of summons to all the witnesses is neither willful nor wanton since the regular Court Constable transferred to Kazipet and new constable was appointed and that LWs14 to 17 were also posted to different places. The newly appointed Court constable is readily available to serve summons to the witnesses personally on the date fixed for their appearance. In fact, LWs14 to 17 are very much crucial to establish the case of the prosecution being the investigating officers, who conducted investigation in the case. But if for any reason, they are not summoned by exercising power under Section 311 Cr.P.C., much prejudice will be caused to the 2<sup>nd</sup> respondent and prayed to allow the petition.

A2 and A3 filed counter, *inter alia* contending that the petition is not maintainable at this stage since the prayer of the petitioner was dismissed for non production of witnesses and the said order has become final and that filing of petitions one after the other would not serve any purpose and prayed to dismiss the petition.

The trial Court allowed the petition as their evidence is necessary and essential for just decision, other wise it would be impossible to pronounce judgment and no prejudice would be caused to the petitioners herein.

During hearing, learned counsel for the petitioners contended that earlier application was dismissed on failure to produce the witnesses though it was allowed by order dated 21.03.2018 and filing another application for the same relief having failed to produce the witnesses and got the petition dismissed is a serious illegality and the order passed by the Court below is silent about the dismissal of the order and that the Court committed serious error in allowing the petition. It is also brought to the notice of the Court that even yesterday when the matter was posted for examination of LWs.14 to 17, only LW.14 was present and he was examined in chief, but denied to cross examine him on the ground of filing the criminal petition before this Court though learned counsel for the petitioners herein filed memo informing about the filing of criminal petition and no stay was granted by this Court..

Learned Public Prosecutor contended that as per the information he received, the case is posted for examination of the accused under Section 313 Cr.P.C., at this stage, no purpose will be served even if the order is set aside and prayed to pass appropriate order.

It is an undisputed fact that the summons were returned, but not served on LWs.14 to 17, who are investigating officers and that the Court closed their evidence as they did not appear before the Court, but filed CrI.M.P.No.160 of 2018 under Section 311 Cr.P.C. to summon LWs.14 to 17 and that was allowed by order dated 21.03.2018 directing the prosecution to produce the witnesses on specified date. As the prosecution failed to produce LWs.14 to 17, the Court dismissed the petition on

21.03.2018 and posted the matter for arguments on 22.03.2018. Again, the prosecution filed petition to reopen and recall exercising power under Section 311 Cr.P.C. As the Court did not advert to the earlier order, the question of recalling witnesses does not arise since they were examined earlier. At best, the Court may issue summons to the witnesses by exercising power under Section 311 Cr.P.C. Section 311 Cr.P.C. consists of two limbs. The first limb confer discretion on the Presiding Officer of the Court and the second limb did not confer any discretion of the Court since the Court shall issue summons or recall, reopen etc, if the Court finds that their evidence is essential to determine the real controversy between the parties.

The Apex Court in **AG vs. Shiv Kumar Yadav and others**<sup>1</sup> laid down certain guidelines at paragraph 29, they are extracted hereunder:

- 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

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<sup>1</sup> AIR 2015 sc 3501

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.

Similarly in **Rajaram Prasad Yadav v State of Bihar**<sup>2</sup> the Apex Court pointed out certain circumstances where the Court can exercise power under Section 311 Cr.P.C. which are as follows:

- 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 and 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

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<sup>2</sup> AIR SC 2013 3081



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 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.
- 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."

If the above principles are applied to the present facts of the case the power exercised by the Magistrate is in accordance with law. However, the Court did not take into consideration of the earlier order in CrI.M.P.No.160 of 2018 filed for the same relief, which was allowed directing the prosecution to produce the witnesses on a particular day, i.e. 21.03.2018, but the witnesses were not produced before the trial Court as directed. As such closed the evidence and posted the matter for arguments. Even yesterday when the matter was posted for production of witnesses i.e.

LWs.14 to 17, they were not produced before the Court and only LW.14 was examined in chief. Therefore, taking into conduct of the prosecution, the closure of evidence of prosecution on 21.03.2018 allowing the petition by the Magistrate exercising power under Section 311 Cr.P.C. is nothing but giving undue importance to the prosecution case rather than the accused and it is contrary to the purport of Section 311 Cr.P.C. Therefore, I find that it is a fit case to set aside the order dated 10.07.2018 passed in CrI.M.P.No.383 of 2018 in C.C.No.324 of 2009 by the Principal Judicial Magistrate of First Class, Jangaon and dismissing CrI.M.P.No.383 of 2018.

Accordingly, the criminal petition is allowed.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

27.07.2018  
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**M.SATYANARAYANA MURTHY,J**