

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

**CRIMINAL PETITION No.2210 OF 2015**

**ORDER:**

This Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C.'), is filed by the petitioner, challenging the order dated 19.02.2015 passed in CrI.M.P. No.1160 of 2014 in C.C. No.332 of 2014 by the Special Magistrate-I, Visakhapatnam (for short, 'the trial Court').

2. Heard, the learned counsel for the petitioner, learned Public Prosecutor appearing for the respondent-State, and perused the record.

3. The case of the petitioner, in brief, is that he filed this Petition before the trial Court under Section 311 of Cr.P.C. to issue summonses to 1) Kolli Ragavendra Rao, S/o.Late Surya Narayana, Hindu, aged 74 years, Resident of Flat No.201, Padmanaba Apartment, Chinna Waltair, Visakhapatnam (who is partner of Complainant in Ratna Garments), 2) A.Poorna Chandra Rao, S/o.Sri Rama Koteswara Rao, Hindu, aged 44 years, Resident of D.No.49-48-19, Plot No.302, Chaitanya Acriid, NGO's Colony, Akkayyapalem, Visakhapatnam, 3) Bikkira Srinivas S/o.Late D.V.V. Satyanarayana Murthy, Hindu, Aged 42 years, Resident of D.No.58-16-10/D, I Floor, Opposite Municipal Elementary School, Seethammapeta, Visakhapatnam and 4) Gangula Nageswara Rao, S/o.Kondayya, Hindu, Aged 48 years, Resident of Adarsh, Nagar, Peda Waltair, Visakhapatnam, as witnesses to speak about the transaction between him and the respondent/accused as they are known to both of them.

4. The petitioner sought summoning of the above said witnesses to speak about the transaction between the petitioner and the respondent to substantiate his specific defence set-up during trial in the main case.

5. The respondent/accused filed counter denying the material allegations *inter-alia* contending that the petitioner/complainant has filed this petition at a belated stage with intent to harass the petitioner and to protract the proceedings for some time and hence sought for dismissal of the Petition.

6. The trial Court dismissed the Petition opining that no satisfactory explanation is forthcoming for the delay occurred in filing the Petition, as to the relevancy of the witnesses to be summoned with the present transaction between the parties, and how their evidence is material and the trial Court further observed therein that the witnesses to be summoned to examine are strangers to the transaction and if they are permitted to lead evidence, at that stage, it would amount to filling of lacunae.

7. Aggrieved by the said Order, the present Petition is preferred on the ground that the witness can be summoned at any stage of the proceedings to facilitate the parties, to bring the entire evidence on record so as to decide the matter in all fairness but the trial Court did not permit the petitioner to examine them, without exercising its discretion properly, and committed a grave error in dismissing the Petition and that the delay is not a ground to summon the witnesses.

8. During course of hearing, Sri G.Rama Gopal, learned counsel for the petitioner, reiterated the same contentions urged in the Petition while bringing to the notice of this Court the specific defence set-up by this petitioner before the trial Court and insisted of examining the witnesses. He further submitted that the complainant is not a society and ten

members are there in the said society including complainant and to prove the said fact, the witnesses sought to be summoned are necessary and finally prayed to set-aside the order passed by the trial Court.

9. As seen from the material on record, the case is being prosecuted by a counsel on record and the specific defence set-up by him was there was no legally enforceable debt and the cheque was not issued towards discharge of legally enforceable debt. The respondent/accused also admitted that he established an Educational Society and he was the Secretary of the said Educational Society and ten members are in the Society including the complainant and his brother but the stage of the proceedings is that, it was at the stage of 313 Cr.P.C. examination of the accused, after completion of recording the entire evidence and that too the reason assigned in the Petition is not specific to contend that there was no legally subsisting enforceable debt or liability and therefore at the stage of arguments, when the C.C. was posted for arguments on 12.05.2014, after completion of entire evidence and 313 Cr.P.C. examination, but filed the Petition conveniently on 09.05.2014 without any satisfactory explanation.

10. It is a known practice in the mofussil areas of the State of Andhra Pradesh that in cases under Section 138 of the N.I. Act, the parties are not allowing the Courts to decide the matters in accordance with law and causing hurdles at every stage of the proceeding and therefore the trial Court declined to grant permission to summon the witnesses on the ground that the petitioner failed to explain the reason for summoning the witnesses.

11. However, Section 311 of Cr.P.C. permits the Court at any stage of inquiry, trial or other proceeding under this Code, summon any person as a 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 it to be essential to the just decision of the case. Thus, Section 311 Cr.P.C. consists of two parts. First part relates to issuance of summons to any person as a witness or re-summon who is already examined; and second part did not confer any discretionary power on the Court since the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to arrive at a just decision of the case. Hence, the first part confers discretion of the Court. As per Section 311 Cr.P.C., a general power is conferred on the Court to summon any person or recall any witness to enable the Court to arrive at a just conclusion, irrespective of whether either of the parties have chosen to summon him or not, but such power should be exercised sparingly.

12. In the present facts of the case, there is nothing to establish that the evidence of proposed witnesses is essential for just decision in the case and it appears after completion of entire trial the petitioner intended to fill up the lacunae by examining the other proposed witnesses to substantiate his case.

13. In **A.G. Vs. Shiv Kumar Yadav**<sup>1</sup>, the Apex Court laid down certain guidelines to exercise power under Section 311 of Cr.P.C. and they are extracted hereunder:

- “(i) he 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;

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<sup>1</sup> AIR 2015 (SC) 3501

- (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 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."

14. Further, the Apex Court in ***Rajaram Prasad Yadav Vs. State of Bihar***<sup>2</sup>, held as follows:

"We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any *bona fides* in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.05.2007, which

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

resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanor of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court.”

15. In view of the law declared by the Apex Court in **Shiv Kumar Yadav<sup>1</sup>** and **Rajaram Prasad Yadav<sup>2</sup>**, I find that the trial Court rightly exercised its discretion in dismissing the Petition and the impugned order does not call for interference of this Court at this stage.

16. Accordingly, the Criminal petition is dismissed. However, the trial Court is directed to dispose of the C.C. No.332 of 2011, as expeditiously as possible.

17. In consequence, miscellaneous petitions, if any, pending in this Petition shall stand dismissed.

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**M.SATYANARAYANA MURTHY, J**

Date: 13.07.2018.  
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**HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

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Date. 13.07.2018

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