

THE HONOURABLE JUSTICE G. SRIDEVI

CRIMINAL PETITION No.3665 of 2017

ORDER :

1. The present Criminal Petition is filed under Section 482 Cr.P.C. by the petitioner/*de facto complainant* seeking to quash the order, dated 25.04.2017, passed in CrI.M.P.No.1278 of 2017 in C.C.No.130 of 2014 on the file of the XXIV Metropolitan Magistrate, Cyberabad, Kukatpally at Miyapur, wherein and whereunder an application filed by the prosecution under Section 311 of Cr.P.C., to issue summons to one M.Venkat Ram, was dismissed.

2. The facts, in issue, are as under:

Respondents 1 and 2/accused were charge sheeted for the offences punishable under Sections 120-B, 420, 463, 464, 465, 468, 470, 471 and 204 read with Section 34 of I.P.C. The averments in the charge sheet disclose that the petitioner/*de facto complainant* is the absolute owner and possessor of Sy.No.18 of Babbuguda along with brothers viz., Athaullah, Saifullah and sisters namely Rafia Begum, Karima Begum and Vasima Begum and the same is evident from all the revenue records right from the year 1965. Plot Nos. 196, 197, 202 and 203 admeasuring 853.54 square yards are comprised in the said survey number which they kept for construction of their own houses. The said Sy.No.18 along with other survey numbers of Babbuguda were attracted by the Urban Land Ceiling Act as such

they could not alienate the said land to anybody and it is not taken as a surplus land till date. The respondents/A-1 and A-2 in collusion with the attesting witnesses created a forged document by forging his signature as if he has sold the said plots to A-1 being a GPA holder of his brothers and sisters on 15.07.1980. A-1, being the mother of A2, created a registered sale deed in favour of A-2 vide document No.2859/1996 dated 26.06.1996, in which it is clearly mentioned that the petitioner/*de facto* complainant sold the property to A-1 and in the said sale deed, it is also stated that 40 years old building is in existence and built up area is 200 square feet, which would clearly falsify the claim of A-1 and A-2. Basing on the said document and by colluding with the Municipal Authorities, they obtained H.No.1-55/1/5. A-2 also created false and forged document in respect of other plots on the name of Seelam Ayodhya Ramaiah. GPA holder of Ayodhya Ramaiah and the interested persons filed O.S.Nos. 297, 298 and 299 of 1997 before the Addition Junior Civil Judge, West and South and on contest the same are proved to be false and forged documents. Now, A-2 in collusion with the third party tried to grab the property and wants to raise a multi-storied complex. Then, the petitioner/*de facto* complainant made a complaint with Police, Sanathnagar and obtained the documents from G.H.M.C. under Right to Information Act and came to know that A-1 and A-2, being the mother and daughter, with the help of attesting witnesses created a registered sale deed secretly in collusion with each other and also the attesting witnesses therein

with an intention to grab the said property by forging the signatures of the petitioner/*de facto complainant*.

3. After examination of PWs.1 and 2, the Prosecution filed an application under Section 311 Cr.P.C. seeking to issue summon to the said M.Venkatram, stating that he is the crucial witness to the prosecution case and in the private complaint the name of the said person was shown as a witness, but unfortunately, the said witness was not cited as a witness in the charge sheet. A counter came to be filed by respondents/ A-1 and A-2 stating that since the investigation was already completed and charges were framed, the present application is not at all maintainable. After considering the entire material available on record, the trial Court dismissed the said application. Challenging the same, the *de facto complainant* filed the present Criminal Petition.

4. Heard learned Counsel for the petitioner/*de facto complainant*, learned Counsel appearing for the 1st and 2nd respondents/ A1 and A2 and learned Additional Public Prosecutor appearing for the 3rd respondent-State.

5. It has been submitted on behalf of the petitioner/*de facto complainant* that the said M.Venkatram is very essential and important witness to the case of the prosecution because he knew all the transactions being the Secretary of Kanaka Durga Housing Society to which the petitioner/*de facto complainant* entered into an

agreement of sale with regard to the plots in question. It is also submitted that the said M.Venkatram was the custodian of the relevant records pertaining to the said society at the relevant point of time and his evidence is material to say whether the petitioner/*de facto complainant* executed the alleged sale deed in favour of respondents/A1 and A2 or not. It is also submitted that if the Court does not give an opportunity to the petitioner/*de facto complainant* to examine the said Venaktram, he would be subjected to injustice.

6. Learned Counsel appearing for respondents/A1 and A2 would submit that the name of the said Venkatram has not been cited as a witness in the charge sheet. It is also submitted that the present application came to be filed only to fill up the lacunae in the prosecution case and the trial Court has rightly dismissed the application.

7. Before proceeding further, it would be appropriate to refer to Section 311 of Cr.P.C., which reads as under:

"311. Power to summon material witness, or examine person present .-

Any Court may, at any stage of any 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 if his evidence appears to it to be essential to the just decision of the case."

8. Dealing with the scope and object of Section 311 Cr.P.C., the Apex Court in *Hanuman Ram v. The State of Rajasthan and others*¹ held as under:

“6. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court by duty of examining a material witness who would not be brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

7. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of

¹ AIR 2009 SC 69

either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

8. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short 'Evidence Act'), are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on

intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant."

9. In the instant case, initially the petitioner/*de facto complainant* filed a private complaint before the learned Magistrate concerned, who in turn referred the said complaint to the police, under Section 156 (3) Cr.P.C, for investigation and report. On such reference, the Police, registered a case in Crime No.220 of 2011 against the accused under the aforesaid Sections of law. Eventually, the police filed charge sheet against the accused, which was taken on file as C.C.No.130 of 2014. In the original private complaint itself, the

petitioner/*de facto complainant* has shown the said Venkatram as witness No.2. Apart from that, in the petition filed under Section 311 Cr.P.C., the Assistant Public Prosecutor clearly stated that though the private complaint refers the name of the said M.Venkatram as a witness, but unfortunately he was not cited as a witness in the charge sheet.

10. Considering the position of law laid down in the aforesaid decision of the Apex Court and having regard to the facts and circumstances of the case, I am of the considered view that no party to the trial can be denied an opportunity to adduce evidence and if the proposed witness is examined as witness, no prejudice would be caused to the respondents/A-1 and A-2 as adequate opportunity would be available to the accused to cross-examine the said witness and to lead rebuttal evidence.

11. In the light of the aforesaid observations, the impugned order passed by the trial Court is liable to be set aside and is hereby set aside.

12. Accordingly, the Criminal Petition is allowed. The trial Court is directed to issue summons to the proposed witness M.Venkatram.

13. Miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

JUSTICE G. SRIDEVI

15.11.2019
Gsn/gkv.