

THE HON'BLE SRI JUSTICE K.LAKSHMAN

Criminal Petition No.9224 of 2021

ORDER:

This Criminal Petition is filed under Section - 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C.') to set aside the order dated 24.11.2021 passed by the Principal Special Judge for CBI Cases, Hyderabad, in CrI.M.P.No.2115 of 2021 in C.C.No.1 of 2013.

2. Heard Sri M/s. V.R.Machavaram, learned counsel for the petitioner and Sri K.Surender, learned Special Public Prosecutor for CBI appearing for the respondent. Perused the record.

3. The petitioner herein is A.3 in C.C.No.1 of 2013. The offences alleged against the petitioner herein are under Sections 120-B, 420, 468 and 471 of IPC read with Section 13(2) read with 13(1) (d) of the Prevention of Corruption Act, 1988. The said Calendar Case posted for arguments. After completion of evidence of both sides, the respondent/prosecution has filed an application under Section 311 of Cr.P.C. vide CrI.M.P.No.2115 of 2021 in C.C.No.1 of 2013 to issue summons to one Sri Thondapu Sudheer, to examine him, receive original sale deed bearing document No.123 of 1984, dated 12.01.1984 on the following grounds:-

i) Said Thondapu Sudheer is the son of T.Jagan Mohan Rao, i.e.P.W.12.

ii) Since the said Thondapu Sudheer was staying in USA, the respondent/prosecution has not examined him during the course of investigation.

iii) The said Thondapu Sudheer is in possession of original sale deed bearing document No.123 of 1984.

iv) He came back to India during the month of August, 2021. His examination and marking of the said original sale deed is essential to prove the guilt of the accused and to arrive at a just decision.

4. The said petition was opposed by the petitioner herein on the following grounds:-

i) The prosecution did not make any effort to examine the said Thondapu Sudheer at any point of time during the course of investigation.

ii) They filed the present petition after the evidence on is closed by both sides and when the matter is posted for arguments, only to fill up lacuna in the prosecution's case.

iii) There is no mention in the application filed under Section 311 of the Cr.P.C. that the said Thondapu Sudheer never stayed in Hyderabad but he came to India only in August, 2021.

iv) They have not filed passport entries of the said Thondapu Sudheer.

v) Therefore, the prosecution cannot embark upon the role of an investigator and seek examination of a person who was consciously left out by the Investigating Officer.

5. The Court below vide order dated 24.11.2021 allowed the said petition holding that summoning the witness will not lead to retrial of the case.

6. CONTENTIONS OF COUNSEL FOR THE PETITIONER

i) The Court below erred in allowing the said petition without appreciating the contentions raised by the petitioner that the said Thondapu Sudheer, is neither a listed list witness nor a relevant witness.

ii) His name was not referred anywhere.

iii) There is no mention in the entire charge sheet that the original is with the said Thondapu Sudheer.

iv) Ex.P.59 attested true copy of the said sale deed was already marked through P.W.1.

v) Therefore, only to fill up lacunae, the prosecution has filed the said petition.

vi) With the said contentions, learned counsel for the petitioner sought to set aside the impugned order.

7. CONTENTIONS OF LEARNED PUBLIC PROSECUTOR

i) Said Thondapu Sudheer, is the son of the P.W.12-T.Jagan Mohan Rao.

ii) Said Thondapu Sudheer is having custody of the original of the said sale deed.

iii) The petition under section 311 of Cr.P.C. can be filed at any stage before pronouncement of judgment.

iv) He is not a new witness.

v) No prejudice would be caused to the petitioner if the said Sri Thondapu Sudheer is examined.

vi) To come to a just conclusion, examining the said Thondapu Sudheer and marking of the said document is relevant.

vii) Considering the said facts, the Court below has rightly allowed the petition filed by the respondent/prosecution under Section 311 of the Cr.P.C. and there is no error in it.

viii) With the said submissions, he sought to dismiss the present petition.

FINDINGS OF THE COURT

8. In the charge sheet in C.C.No.1 of 2013, there is a specific mention about the petitioner herein/A.3 that he is the proprietor of M/s Spectrum Mercantile. He has entered into criminal conspiracy with A.1 and has submitted a proposal and sought permission for takeover cash credit limit (agricultural loan) of Rs.12.5 lakhs of M/s Spectrum Mercantile from ICICI bank, Hyderabad.

9. A.3, as proprietor of the said M/s Spectrum Mercantile, had availed cash credit of 12.5 lakhs from ICICI Bank, Jubilee Hills branch, as agricultural loan in the year 2006. Sri Thondapu Sudheer, cousin of the petitioner/A.3, was the guarantor and he had mortgaged his immovable property Plot No.6 admeasuring 500 sq.yards, covered under registered sale deed No.123 of 1984 dated 12.01.1984 as collateral security for obtaining the said loan.

10. Perusal of the charge sheet would reveal that on the complaint lodged by the Chief Manager, Punjab National Bank, R.P.Road branch, Secunderabad, a case in Cr.No.RC.14(A)/2010/CBI-HYD, dated 24.05.2010 was registered against the petitioner and others. On completion of examination, the CBI has filed charge sheet and the same was taken on file as C.C.No.1 of 2013. During the course of investigation, the Investigating Officer has recorded the statements of 39 witnesses including the father of the said Thondapu Sudheer. During the course of trial, the prosecution has examined the father of the said Thondapu Sudheer as P.W.12 and also marked Ex.P.57-General Power of Attorney (GPA) said to have been executed by the said Thondapu Sudheer, son of P.W.12 in favour of A.3. The photograph affixed thereon does not belong to his son. P.W.12 in his evidence categorically stated that the Ex.P.112-sale deed executed by A.3 in favour of A.4 is a fabricated one and his son never mortgaged his property to anyone and the documents i.e. Exs.P.57, 58 and P.112 are fabricated documents, as his son was not in India from the date of execution of the said document.

11. There is no dispute that the son of P.W.12 i.e. Thondapu Sudheer was not in India. According to the prosecution, he came to India in August, 2021. In the charge sheet, there is specific mention about the said Thondapu Sudheer, more particularly at paragraph Nos.4, 7 and 8 etc.

12. There is a specific allegation in paragraph No.7 of the charge sheet that during the course of investigation, it was revealed that A.3 got executed a GPA in his favour by Thondapu Sudheer on 20.03.2006 in respect of the same property. In paragraph No.8 of the charge sheet, there is a specific mention that A.3 has obtained GPA in his favour and submitted the same to the ICICI bank. Therefore, the petitioner herein cannot contend that there is no reference of the said Thondapu Sudheer and the said sale deed bearing document No.123 of 1984, dated 20.03.2006 in the charge sheet. A perusal of the record would further reveal that the father of the petitioner Thondapu Sudheer was examined as P.W.12. In his evidence, he has categorically deposed that Plot No.6 admeasuring 500 sq.yards in Sy.No.62/1/E at Bahadurpally is owned and possessed by his son Thondapu Sudheer and he has the custody of the original sale deed. He did not hand over the sale deed to anyone till the date of his evidence i.e. 19.12.2017. His son never executed Ex.P.57-GPA in favour of A.3. Photographs affixed therein do not belong to his son. His son never mortgaged his property to anyone and Exs.P.57, 58 and P.112 are fabricated documents.

13. It is also relevant to note that the Court below in the impugned order has specifically mentioned that the prosecution has got marked Ex.P.58 sale deed dated 12.01.1984 executed by S.Krishna as GPA in favour of Thondapu Sudheer covering Plot No.6 in Sy.No.62/1/A

admeasuring 500 sq.yards of Bahadurpally Village. The prosecution has also got marked GPA executed in favour of A.3 by Thondapu Sudheer. A.3, in turn, executed Ex.P.112-sale deed in favour of his wife. Ex.P.12 is the document which is mortgaged to the bank for availing loan in Punjab National Bank, R.P.Road, Secunderabad. It is the case of the prosecution that Exs.P.57, 58 and 112 sale deeds are fabricated documents.

14. Referring to the same, the Court below has allowed the application filed by the prosecution under Section 311 of the Cr.P.C. Therefore, according to this court, the contention of the petitioner herein that the said Thondapu Sudheer, is not a relevant witness and the Court below has allowed the said petition filed by the prosecution erroneously, cannot be accepted. The said contention of the learned counsel for the petitioner is unsustainable.

15. Learned counsel for the petitioner would submit that after closing of the evidence when the matter is posted for arguments, Section 311 of Cr.P.C. petition seeking to call any witness is not maintainable.

16. In view of the same, it is relevant to refer Section 311 of the Cr.P.C:-

“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 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.”

17. The above said section clearly states that at any stage of any inquiry, trial or other proceedings, 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. 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.

18. The factors to be considered while deciding a petition under Section 311 of Cr.P.C. were discussed by the hon’ble Apex Court in **Rajaram Yadav Vs. State of Bihar**¹.

The relevant paragraph is extracted below:-

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Code of Criminal Procedure read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

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 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

¹ (2013) 14 SCC 461

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 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 safe guard, 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.

19. In **Jamatraj Kewalji Govani Vs. State of Maharashtra**² the Apex Court, interpreting Section 540 of Cr.P.C, 1898 which is identical to Section 311 of the present Cr.P.C., held that witnesses can be recalled or summoned at any stage even after the close of the prosecution and defence.

20. In **Mannan Sk Vs. State Of West Bengal**³, the hon'ble Apex Court held that recall or re-examination of the witness is necessary, since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power, greater is the responsibility on the Courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna by the prosecution.

21. The above said proviso and discussion would reveal that the power under Section 311 of the Cr.P.C. is wide. At any stage of inquiry, filing of petition under Section 311 of the Cr.P.C. is permissible. In the present case, the evidence of both sides is over. The matter was posted for arguments. At this stage, the prosecution has filed the said application

² AIR 1968 SC 178

³ 2014 13 SCC 59

under Section 311 of the Cr.P.C. contending that said Thondapu Sudheer, son of P.W.12 came to India in August, 2011 and therefore, his evidence and marking of original sale deed bearing document No.123 of 1984 dated 12.01.1984 is essential to come to a just conclusion. Therefore, according to this Court, in view of the above said discussion, the said Thondapu Sudheer is a relevant witness and his name is also referred in the charge sheet and marking of the original of the said sale deed, bearing document No.123 of 1984 dated 12.01.1984 is essential and necessary to come to a just decision by the trial Court. Therefore, referring to the principle laid down by the Apex Court, the Court below has rightly allowed the application filed by the prosecution under Section 311 of the Cr.P.C. vide impugned order dated 24.11.2021. It is a reasoned order. There is no error in it. The petitioner fails to prove any ground to interfere with the said order.

22. Accordingly the Criminal Petition is dismissed confirming the order dated 24.11.2021 passed by the Principal Special Judge for CBI Cases, Hyderabad, in CrI.M.P.No.2115 of 2021 in C.C.No.1 of 2013.

Miscellaneous petitions, if any, pending in the criminal petition, shall stand closed.

K. LAKSHMAN, J

Date: 13.12.2021

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