

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No. 2717 of 2021

Pramod Kumar Sahoo

....

Petitioner

Mr. S. Panigrahi on behalf of

Mr. D.P. Das, Advocate

-versus-

State (Vigilance)

....

Opposite Party

Mr. Niranjana Maharana,

ASC (Vigilance)

CORAM:

JUSTICE SAVITRI RATHO

Order No.

ORDER

03.01.2022

02. 1. The petitioner has challenged the order dated 07.12.2021 passed in T.R. No. 43 of 2001 by the learned Special Judge (Vigilance), Bhubaneswar rejecting his application filed under Section 311 Cr.P.C., for recalling the witnesses i.e. P.W. 5, P.W.25 and P.W. 32 for their cross-examination.
2. The petitioner is facing trial for a case under Section 13 (2) read with Section 13 (1) (e) of the Prevention of Corruption Act and after prosecution evidence had been closed and the case was posted for examination of the accused under Section 313 Cr.P.C., the application under Section – 311 Cr.P.C was filed on behalf of the accused praying to recall P.W.5, P.W. 25 and P.W.32 stating that some questions relating to the assets of the petitioner could not be put to these witnesses.
3. Mr. S. Panigrahi, learned counsel appearing on behalf of Mr. Deba Prasad Das, learned counsel for the petitioner places reliance on the decision of the Hon'ble Apex Court in the case of ***Rajaram Prasad Yadav vrs. State of Bihar & Anr*** reported in ***AIR 2013 SC 3081*** and submits that power under Section 311 Cr.P.C. can be exercised by the Court at any stage if it appears to the Court that it

is essential for a just decision in the case and in this case it was necessary to cross examine the three witnesses for arriving at a just and correct decision . He has submitted that P.W 32 has been examined on 12.03.2013 and the case was posted for cross examination after lunch .This witness was discharged as the defence was unable to cross examine him on the same day . He was thereafter re -examined by the prosecution on 11.01.2019 as the person who had taken charge of the investigation and submitted chargesheet had died. PW 32 was cross examined on 17.01.2020 and therefore due to the Covid 19 pandemic, the case could not be taken up and when court work was resumed, the application under Section 311 CrI.P.C was filed on 29.11.2021 for summoning him and two others for cross examination.

4. Mr. N. Maharana, learned Additional Standing Counsel (Vigilance) opposes the application and submits that the application had been filed in the learned trial court after long delay in order to delay the trial which is pending since almost twenty years and no explanation has been submitted for the delay in filing such application or how cross examination of the witnesses is necessary for a just decision in the case. Therefore the application had rightly been rejected by the learned trial court. In support of his submission, he relies on the decisions of the Hon'ble Apex Court rendered in the case of ***Ratanlal vrs. Prahlad Jat, (2017) 9 SCC 340*** , ***Swapan Kumar Chatterjee vs Central Bureau Of Investigation dated 04.01.2019 (Crl. Appeal No. 15 of 2019 arising out of SLP (Crl.) No. 7748 of 2017)***, ***Anurag Srivastava vrs. State of U.P. & Anr., (2010) (71) AHC 504 (A11) and CRLMC No. 3628 of 2013 dated 16.12.2013, State of Haryana vrs. Ram Meher, (2016) 8 SCC 762*** and ***Dara Singh @ Dara vrs. Republic of India, (2003) 26 OLR 124.***

5. The Apex Court in the case of ***Rajaram Prasad Yadav (supra)*** has referred to a number of decisions on the scope and ambit of section 311 CrI.P.C and has enumerated the principles to be kept in mind by the Courts while dealing with an application under Section 311 Cr.P.C in paragraph 23 of the judgment which is extracted below:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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.”

6. There can be no quarrel over the settled proposition of law that the right of cross examination is a valuable right and power under Section -311 of the Cr.P.C to recall a witness for cross examination can be exercised at any stage for a just decision in the case , but it is also to be kept in mind that the application should be bonafide and should not be filed by way of an afterthought or to delay disposal of the case . Such power is not to be exercised for the mere asking ,but the Court has to be satisfied that it is in “every respect essential to examine such a witness or to recall him for further cross examination in order to arrive at a just decision” .

7. On careful examination of the impugned order, I do not find any error with respect to rejection of the prayer to recall P.W 5 and 25 as more than ten years have elapsed since they were examined and their cross examination was declined and it has neither been averred nor argued as to how their cross examination is necessary for a just decision in the case and the delay in filing the application has not been explained .

8. But as far as P.W 32 is concerned, the prayer to recall him has been rejected on the ground that the petition is silent as to what questions are to be put to this witness. Although it was not mandatory for the defence to indicate the exact questions which were sought to be asked to this witness but the defence should have at least indicated the points on which it wanted to cross examine P.W 32 . As P.W 32 is one of the I.O.s in this case and had been examined in chief on 12.03.2013 and thereafter re-examined by the prosecution on 11.01.2019 as the original I.O. who had submitted the chargesheet had died in the meanwhile and he has been cross examined on 13.01.2019 and on 17.01.2020 soon after which Covid 19 interefered with the regular functioning of Courts , I am inclined to grant the petitioner the liberty to file a fresh application to recall P.W 32 indicating the points on which he seeks to recall P.W 32 or indicate the questions

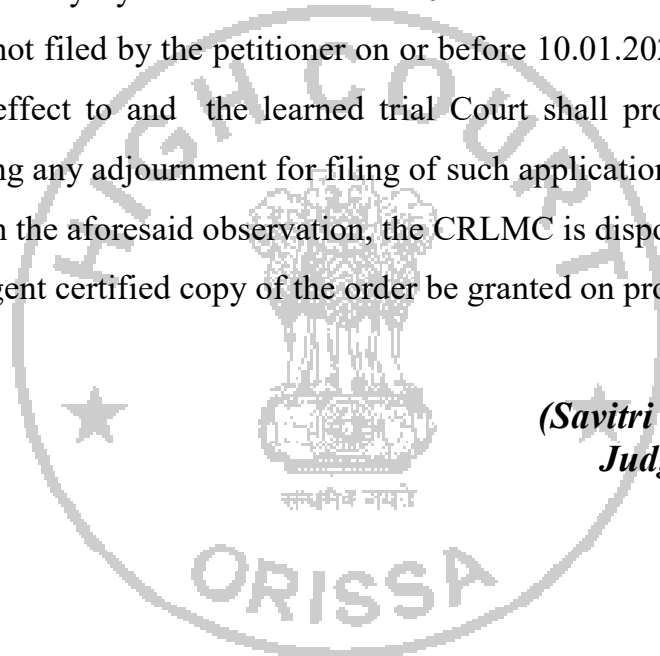
which he wants to put to P.W 32 , so that the learned trial Court can examine whether his recall for cross examination is essential and necessary for a just decision in the case .

9. It is stated by the counsels that the next date in the case is 10.01.2022. As the case is pending in the learned Court below since the year 2000, it is directed that if the application under Section – 311 Cr.P.C to recall P.W 32 is filed on or before 10.01.2022, in the manner aforesaid, it shall be considered in accordance with law on its own merit but expeditiously. It is also directed that the learned trial Court shall make endeavor to dispose of the trial without further delay and preferably by the end of March 2022. It is also clarified that if such application is not filed by the petitioner on or before 10.01.2022 , this order shall not be given effect to and the learned trial Court shall proceed with the trial without granting any adjournment for filing of such application .

With the aforesaid observation, the CRLMC is disposed of.

Urgent certified copy of the order be granted on proper application.

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(Savitri Ratho)
Judge