



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.02.2022

PRONOUNCED ON : 12.04.2022

CORAM

THE HON'BLE MR.JUSTICE G.CHANDRASEKHARAN

CRL.O.P.No.20677 of 2021

and

Crl.M.P.No.11269 of 2021

Bojarajan

... Petitioner

Vs.

The State Rep. by,
Deputy Superintendent of Police,
Vigilance and Anti-Corruption,
Tiruvannamalai.

... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records of the learned Special Judge and Chief Judicial Magistrate, Tiruvannamalai, pertaining to its order dated 08.09.2021 passed in Crl.M.P.No.296 of 2019 in Special Case No.10 of 2015, set aside the same.

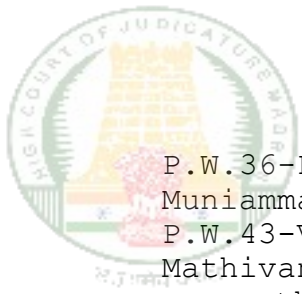
For Petitioner :Mr. R. Singaravelan, Senior Advocate
for Ms. R. Nirosha

For Respondent : Mr. E. Raj Thilak,
Additional Public Prosecutor

O R D E R

This petition is filed to call for the records in Crl.M.P.No.296/2019 in Spl.C.No.10/2015 on the file of Chief Judicial Magistrate, Thiruvannamalai and set aside the order passed in Crl.M.P.No.296/2019.

2. Crl.M.P.No.296/2019 was filed under Section 311 Cr.P.C., by the respondent herein for recalling P.W.2-C.Karthikeyan, P.W.3-Ganesan, P.W.7-Sirinivasan, P.W.8-Ramalingam, P.W.12-Dass@Dharmadass, P.W.13-Venkatesan, P.W.14-Kuppusamy, P.W.17-Chellam, P.W.20-Chinnapappa, P.W.21-Vellakarachi, P.W.23-Selvam, P.W.24-Rajammal, P.W.25-Rosy, P.W.26-Chinnathai, P.W.21-Valli, P.W.28-Kamala, P.W.29-Mariammal, W/o.Muganthan, P.W.30-Navaneetham, W/o.Devaraj, P.W.31-Sundaram, P.W.32-Navaneetham, W/o.Sankar, P.W.33-Mariammal, W/o.Nataraj, P.W.34-Indira, P.W.35-Amirtham,



P.W.36-Palanivel. P.W.37-Mahadevi, P.W.38-Chinnathai, P.W.39-Muniammal, P.W.40-Iyyanar, P.W.41-Ammavasai, P.W.42-Lakshmi, P.W.43-Vasantha, P.W.44-Shanmugapriya, P.W.46-Kumaran, P.W.47-Mathivannan, P.W.51-K.Ravi.I.O. For the purpose of marking more than 60 documents. It is also submitted that the certified copies of the depositions were obtained and perused and on perusal, it was found that recall of these witnesses are necessary for marking the documents. This petition was opposed by the petitioner alleging that the documents had already been filed by the prosecution and omitted to be marked. Now that defence evidence was closed, the case is posted for arguments. Filing recall petition at this belated stage is illegal and liable to be dismissed.

3. On considering the rival submission, the learned trial Judge allowed the petition. Challenging the said order, this petition is filed.

4. Learned counsel for the petitioner submitted that petition to recall has not given any specific reasons as to why the witnesses have to be recalled and why the documents now sought to be marked, had not been marked when these witnesses were examined earlier. Some of the documents now sought to be marked, had already been marked by the prosecution. It is also not known whether, the witnesses sought to be recalled, alive or dead. The evidence was closed in 2018, the recall petition filed in 2019 without specifying reasons, is not legal. Progress in the case will necessarily be dragged by filing the recall petition to recall multiple number of witnesses and it causes prejudice to the accused. The trial Court without considering this aspect had wrongly allowed the petition. Therefore, the learned counsel for the petitioner prayed for allowing this petition and set aside the order passed in CrI.M.P.No.296/2019.

5. Learned counsel for the petitioner relied on the judgment reported in 2000 (2) MWN (Cr.) 222 (Dandy Knit Garments & Another Vs. M/s.Subiksha Spinners (P) Ltd.), for the proposition that recall the witness cannot be permitted to fill up the lacuna, it is observed as follows:-

"9. The learned counsel for the petitioner also relied upon a decision of this Court in Govinda Reddy v. State. 1991 Mad L.W. (CrI.) 42, wherein it is observed that failure of prosecution to conduct the case with care, not a ground to rectify such laches by recourse to Section 311, as it will cause prejudice to the accused. This decision is applicable to the case on hand. Moreover, the respondent has not come forward with any case that L. Subramaniam was authorised by the other directors and only in such capacity, the said Subramaniam gave power of attorney to Swami Anandan. The sworn statement as well as



WEB COPY

in the evidence, Swami Anandan stated that he was authorised by Subramaniam and nowhere it is stated that the other directors gave power to Thiru L. Subramaniam on the basis of any document. Hence, after the closure of the evidence on the side of the respondent, he cannot be allowed to fill up the lacuna and, as such, I am of the view that the trial Court was not correct in allowing the application as it has caused prejudice to the petitioners. The order is liable to be set aside."

6. The judgment reported in (2013) 14 SCC 461 (Rajaram Prasad Yadav Vs. State of Bihar and Another), is relied to enlighten the principles underlying the application of Section 311 Cr.P.C. Thus, it is submitted by the learned counsel for the petitioner that 311 Cr.P.C., petition filed when the case is pending for argument, is nothing but an abuse of process of law and therefore, he prayed to set aside the order of the trial Court.

7. In response, the learned Additional Public Prosecutor submitted that though no proper reason has been stated in the petition filed for recalling witnesses, now status report is filed indicating reasons for recalling the witnesses. 311 Cr.P.C., petition can be filed at any time, to advance the cause of justice. If the witnesses are not permitted to be recalled and examined, the prosecution may not be in a position to place all its evidence and it would deprive the opportunity of establishing its case. Taking into consideration, the merits in the claim, the trial Court allowed the petition and thus, he prayed for confirming the order of the trial Court and dismissal of this petition.

8. Considered the rival submission and perused the records.

9. From the judgment cited by the learned counsel for the petitioner reported in (2013) 14 SCC 461 (Rajaram Prasad Yadav Vs. State of Bihar and Another), we can see that the Hon'ble Supreme Court has considered the judgment on the aspect of recall of witnesses under Section 311 Cr.P.C., and Section 139 of Indian Evidence Act. Announced the following 14 principles when dealing with an application under Section 311 Cr.P.C. They are:-

"17. 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:

17.1. Whether the court is right in thinking that the new evidence is needed by



WEB COPY

it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. 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.

17.5. 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. 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.

17.8. 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.

17.9. 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.

17.10. 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



be introduced. It is alleged that more than 60 documents had been omitted to be marked and these documents have to be marked through the witnesses named above.

12. No doubt, that if the documents are not marked through the concerned witnesses, prosecution case would be put to serious prejudice. If the documents are allowed to be marked through the concerned witnesses petitioner/accused would get an opportunity to rebut the evidence through cross examination. The status report filed before this Court shows that the details of documents sought to be marked and the witnesses through whom they are sought to be marked. The case of the prosecution cannot be allowed to suffer for the fault of the prosecutor, who failed to mark the documents earlier when these witnesses were examined.

13. In this view of the matter, this Court finds no reason to differ from the view taken by the trial Court and the order of the trial Court in Crl.M.P.No.296 of 2019 is confirmed and this petition is dismissed. Consequently, connected miscellaneous petition is closed. The trial Court is directed to expedite the process of recalling the witnesses and examine them and dispose the case as early as possible.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

AT

To

1.The Special Judge and Chief Judicial Magistrate,
Tiruvannamalai.

2.The Deputy Superintendent of Police,
Vigilance and Anti-Corruption,
Tiruvannamalai.

3.The Public Prosecutor,
High Court of Madras.

+1 cc to Ms. R. Nirosha, Advocate Sr.NO. 25335

CRL.O.P.No.20677 of 2021 and
Crl.M.P.No.11269 of 2021

skm(CO)

A.SK(04/05/2022)