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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 10.07.2023

+ CRL.M.C. 173/2023 & CrI.M.A.740/2023

KUNDAN SINGH

..... Petitioner

versus

CENTRAL BUREAU OF INVESTIGATION.... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Sulaiman Mohd. Khan, Ms. Taiba Khan, Mr. Bhanu Malhotra, Mr. Akash Bhushan and Mr. Gopeshwar Singh Chandel, Advocates

versus

For the Respondent : Mr. Rajesh Kumar, SPP with Ms. Mishika Pandita, Advocate

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. This is a petition under Section 482 Code of Criminal Procedure, 1973 (For Short 'Cr.P.C.) seeking setting aside of the dated 16.12.2022 passed by the learned ACMM-2 Cum ACJ, RACC, New Delhi in case CBI No. 309/2019 whereby the learned Trial Court has dismissed the application under Section 311 Cr.P.C, r/w Section 138 Indian Evidence Act, 1872 filed by the petitioner seeking recall of PW9 Hansraj and PW23 S. L. Mukhi who is the expert from the CFSL.



2. Learned counsel appearing for the petitioner submits that though both the witnesses were examined and cross examined by the petitioner, however, upon closer scrutiny of such cross examination, learned counsel appearing for the petitioner realised that certain very material and core questions crucial to tilt the case in favour of the petitioner were overlooked and the same would be required for just decision of the case.

3. Learned counsel appearing for the petitioner submits that even under the provisions of Section 311 Cr.P.C., the requirement for re examination is primarily in respect of the just decision of the case and the delay in such recall or even the application for recall itself would not disentitle any person from seeking such relief.

4. Mr. Khan also relies upon the judgment of ***Godrej Pacific Tech. Ltd. Vs. Computer Joint India Pvt. Ltd*** in CrI. Appl. No. 1181/2008 delivered on 30.07.2008 and specifically point out to para 7 to 10 to submit that the Supreme Court has categorically elucidated the law with respect to Section 311 Cr.P.C. as to the right accrued to the applicant thereunder.

5. *Per contra*, learned SPP for the CBI reiterates and relies upon the rationale contained in the impugned order passed by the learned Trial Court. Learned counsel submits that once having examined both the witnesses, it is not permissible to take advantage of the provisions of Section 311 Cr.P.C. to recall such witnesses and it appears to be dilatory tactic so that the matter can be further delayed.

6. Learned counsel submits that the petition should be dismissed as also the application under Section 311 Cr.P.C.

7. In rebuttal, Mr. Khan submits that the learned Trial Court



overlooked the ratio laid down by the Supreme Court in **Godrej Pacific Tech. Ltd.** (Supra) and therefore, the same ought to be set aside and an opportunity as sought be granted.

8. This Court has considered the submission of Mr. Khan as well as Mr. Kumar and perused the impugned order and the judgment of the Supreme Court.

9. It would be apposite to extract para 7 to 10 of the judgment of the Supreme Court in **Godrej Pacific Tech. Ltd.** (Supra) which are as under:-

“7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, 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 anyone as a witness, or (b) to examine any person present in the 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 the duty of examining a material witness who would not be otherwise 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.

8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of 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 of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the 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 any 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.

9. 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 Evidence Act, 1872 (in short "the 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.

*10. 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 the 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 provisions 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. These aspects were highlighted in *Jamatraj Kewalji Govani v. State of Maharashtra* (1967 (3) SCR 415)."*

10. A perusal of the ratio laid down by the Supreme Court in ***Godrej Pacific Tech. Ltd.*** (Supra) makes it manifest that the determinative factor or the essential test would be “*just decision of the case*” and that coupled with the fact that Section 311 Cr.P.C. employs the words “*any stage of any inquiry, trial or other proceedings under this Code*”. The Supreme Court while considering these words had also held that this



along with the fact that the determinative factor being just decision of the case, the issue of “*filling of loopholes*” may not be correct in each and every case. Ordinarily, the test would be on a case to case basis. Moreover, the Supreme Court also held that 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 learned Trial Court.

11. This Court is of the opinion that though the cross examination of PW9 and PW23 has been conducted by the petitioner, however, so far as PW23 is concerned, who is admittedly an expert from the CFSL and as the allegations are totally based on the documents, it would be imperative that an opportunity to conduct complete cross examination of the PW-23 be afforded, for the just decision of the case.

12. In that view of the matter as also coupled with the aforesaid clarity of law in ***Godrej Pacific Tech. Ltd. (Supra)***, this Court is of the considered opinion that interests of justice would be subserved in case, an opportunity to cross examine PW9 and PW23 is afforded to the petitioner one more time.

13. In view of the above, learned Trial Court is directed to permit and afford the petitioner an opportunity to cross examine PW9 & PW23 on one single date, whichever is convenient to the Trial Court.

14. In view of above, the petition is disposed of with no order as to costs.

TUSHAR RAO GEDELA, J .

JULY 10, 2023/ms