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

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Reserved on: 11.05.2023
Pronounced on: 15.05.2023

+ **CRL.M.C. 1085/2023**

RAJESH KUMAR KHATRI

..... Petitioner

Through: Mr. Sandeep Gupta, Advocate

versus

STATE OF DELHI THR CBI

.....Respondent

Through: Mr. Nikhil Goel, SPP for State
with Mr. Kartik Kaushal,
Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. By way of instant petition filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), the petitioner seeks (i) quashing of order dated 27.10.2022 passed by learned Special Judge, CBI, Rouse Avenue Court, Delhi in CC No. 250/2019 titled 'CBI v. Rajesh Kumar Khatri' whereby the application filed by the petitioner under Section 311 Cr.P.C. was dismissed, and (ii) recalling of complainant/PW-2 for further cross-examination.

2. In the present case, the petitioner, who was working as Under Secretary with Ministry of Ayush and handling the additional charge of M.D. with M/s. Indian Medicines Pharmaceutical Corporation Ltd.

(IMPCL), was arrested on the complaint of one Sh. Janak Sharma (PW-2) who had alleged that the petitioner was demanding bribe of Rs.30 lakhs from him in lieu of releasing payment of the his pending bills with IMPCL.

3. Learned counsel for the petitioner submits that the examination-in-chief of the complainant/PW-2 was recorded before the learned Trial Court on 08.10.2021 and 23.11.2021, and his cross-examination had also commenced on 23.11.2021. However, it is stated that petitioner had placed on record voluminous documents and even prosecution, besides other documents, had relied upon transcripts of the audio recordings running into several pages, and as such, the petitioner had to confront PW-2 with the documents filed by the prosecution as well as by the petitioner himself. It is stated that though the counsel for petitioner was granted sufficient time by the learned Trial Court to cross-examine the complainant, the counsel had inadvertently failed to put the suggestions in defence of the petitioner to PW-2 which are of paramount importance for the case of petitioner. It is stated that immediately upon realising his mistake, the counsel for the petitioner had filed an application dated 29.08.2022 for recalling of the witness but the same was dismissed by the learned Trial Court. Learned counsel for the petitioner states that he be granted only 15 minutes as he intends to put only a few suggestions in defence of the petitioner to the complainant.

4. On the other hand, learned counsel for the CBI argues that there are no reasons to interfere with the impugned order as the counsel for the petitioner before the learned Trial Court had got sufficient time and opportunity to cross-examine the complainant/PW-2. It is stated that

PW-2 was cross-examined at length on four dates of hearing i.e. 23.11.2021, 16.02.2022, 23.03.2022 and 11.07.2022, and his cross-examination runs into 38 pages.

5. I have heard the rival contentions and have perused the material on record.

6. At the outset, this Court takes note of Section 311 Cr.P.C., which provides 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 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.”

7. The Hon'ble Supreme Court in *Rajaram Prasad Yadav v. State of Bihar* (2013) 14 SCC 461 had laid down guidelines regarding exercise of powers under Section 311 Cr.P.C. The relevant portion of the judgment reads as under:

“15.3. In the decision in *Raj Deo Sharma (2) v. State of Bihar*, the proposition has been reiterated as under in paragraph 9: (SCC p. 613)

“9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in *A.R. Antulay case* nor in *Kartar Singh case* such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. *We make it clear that if evidence*

of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.”

(emphasis in original)

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 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 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 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.

17.11. 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.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. 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.

17.14. 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...”

8. Discussing the powers conferred upon the Courts under Section 311 Cr.P.C., the Hon'ble Apex Court in *Varsha Garg v. State of Madhya Pradesh* 2022 SCC OnLine SC 986, has observed as under:

“32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.”

9. Further, this Bench in *Vinod Rawat v. State* 2022 SCC OnLine 2989 had observed as under:

“11. It is also to be kept in mind by the Courts that a constitutional duty has been cast on every Court to determine the truth and reach a correct and just decision so that miscarriage of justice does not take place by failure of affording an opportunity in a fair manner to the concerned party. In case the evidence sought to be brought on record is essential to the issue involved, the powers under Section

311 Cr.P.C. must be invoked. A fair trial is a constitutional goal and basic Fundamental Right of every individual...”

10. In the present case, learned counsel for the petitioner argued that he does not intend to ask any question on merits from the complainant/PW-2. He has stated that he was unable to put some suggestions to the complainant due to large number of documents involved in this case. In para 12 of the petition, it has also been mentioned that petitioner had moved application under Section 311 Cr.P.C. on 29.08.2022, which was decided on 27.10.2022, whereas the concerned witness was last cross-examined on 11.07.2022. It also shows that the learned counsel had immediately moved an application for putting suggestions to the witness as is apparent from the record.

11. Since in this case, learned counsel himself states and it is also mentioned in his application that he only intends to put defence of accused in the form of suggestions to the complainant/PW-2 so that his case is not adversely affected for not giving suggestions on certain points, this Court finds that learned counsel is not asking to put any question on merits of the case to PW-2. However, while passing this order, the Court remains conscious of the fact that learned counsel for petitioner has already cross-examined the witness on four dates of hearings and the cross-examination runs into 38 pages.

12. Therefore, considering the prayer of learned counsel for petitioner, this Court is inclined to set aside the impugned order dated 27.10.2022 and allow the present petition, on the following terms and conditions:

- a) A cost of Rs.5,000/- is imposed on the petitioner to be paid to complainant/PW-2.
 - b) The cross-examination of PW-2 will be limited only to giving suggestions as stated by learned counsel for petitioner and the time limit granted for putting the suggestions shall be limited to 30 minutes including the time of answers given by PW-2.
 - c) No questions will be asked by learned counsel for petitioner on merits of case.
 - d) No adverse inference will be drawn against the prosecution in case the witness will be unavailable and the cross-examination already conducted will be read in evidence, even in case the witness will not be available again.
13. Accordingly, the present petition stands disposed of in above terms, along with pending applications if any.
14. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 15, 2023/ns