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

% *Date of decision: 17th October, 2023*

+ **CRL.M.C. 2286/2019**
MOHD. IRSHAD

..... Petitioner

**Through: Mr. Nitesh Kumar Singh,
Mr. Rahul Kumar and
Mr. Devender Singh,
Advocates.**

versus

THE STATE (NCT OF DELHI) Respondent

**Through: Mr. Utkarsh, APP for State
with SI Meenakshi, P.S.
Kamla Market.**

CORAM:

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T (oral)

1. The present petition is filed under section 482 Cr.P.C to impugn the order dated 15.03.2019 passed by the court of Sh. Vimal Kumar Yadav, Special Judge, (PC Act) CBI-08, Central District, Tis Hazari Courts in criminal appeal bearing no. 60/2019.
2. The charge sheet as per section 173 Cr.P.C. was filed under sections 324/34 IPC after conclusion of investigation in pursuance of FIR bearing no. 0122/2009 dated 27.09.2009 registered at P.S. Kamla Market.
3. The court of Sh. Kapil Kumar, MM-05, Central District, Tis Hazari Courts, Delhi vide judgment dated 13.12.2018 had convicted the petitioner and Mohd Nasir for the offence punishable under section



324/34 IPC. The petitioner being aggrieved filed the appeal bearing no. 60/2019 titled as **Mohd Irshad V State** stated to be pending in the court of Sh. Vimal Kumar Yadav, Special Judge (PC Act), CBI-08, Central District, Tis Hazari Courts/Successor Court (hereinafter referred to as the “appellant court”).

4. The petitioner filed an application under section 391 Cr.P.C. for recalling PW-2/Arun for cross examination which was dismissed vide order dated 15.03.2019 passed by the court of Sh. Vimal Kumar Yadav, Special Judge (PC Act), CBI-08, Central District, Tis Hazari Courts.

5. The counsel for the petitioner argued that PW-2/Arun is a material witness and his cross examination is required for the right of fair trial of the petitioner. The counsel for the petitioner prayed that the impugned order dated 15.03.2019 be set aside and another opportunity be given to the petitioner to cross examine PW-2/Arun during the pendency of the appeal as per the provisions of section 391 Cr.P.C. The counsel for the petitioner in support of his arguments cited **Brig. Sukhjeet Singh (Retd.) MVC V State of U.P. & Ors., (2019) 16 SCC 712**. The Supreme Court in the said judgment in para no. 24 observed as under:-

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in Rajeswar Prasad Misra v. State of W.B. [Rajeswar Prasad Misra v. State of W.B., AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] Hidayatullah, J., speaking for the Bench held that a wide discretion is conferred on the



appellate courts and the additional evidence may be necessary for a variety of reasons. He held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. Following was laid down in paras 8 and 9 : (AIR p. 1892)

“8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if was possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not



ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.”

6. The Additional Public Prosecutor for the respondent/State stated that PW-2/Arun was produced for cross examination during the trial but he was not cross examined on behalf of the petitioner and other co-accused. Accordingly, the court of Sh. Sachin Sangwan, MM-05 Central, Tis Hazari Courts, Delhi vide order dated 27.11.2015 closed the cross examination of PW-2/Arun on behalf of the petitioner and the co-accused by observing that PW-2/Arun was not cross examined despite opportunity being given.

7. A perusal of the impugned order reflects that an application under section 311 Cr.P.C. was filed on behalf of the petitioner for recalling PW-2/Arun for cross examination after considerable delay which was allowed by the trial court with certain conditions including that the witness could not be secured, then the testimony of PW-2/Arun Kumar shall be read against the petitioner. It is also reflecting that attempt was made to secure the presence of PW-2/Arun and despite best efforts of the prosecution the presence of PW-2/Arun could not be secured. The appellate court after considering the factual position of the trial pleased to dismiss the application under section 391 Cr.P.C. It is reflecting that the petitioner was given ample opportunity to cross examine PW-2/Arun during the trial. The petitioner also filed an application under section 311 Cr.P.C. after a delay of 05 years which was also allowed but conditionally and the presence of PW-2/Arun could not be secured despite best efforts made



by the prosecution.

8. The appellate court, in the impugned order dated 15.03.2019, has carefully considered all the aspects of recalling PW-2/Arun for cross examination. The impugned order is well reasoned and is based on correct facts and law. There is no reason to interfere in the impugned order. Hence, the present petition is dismissed.

9. The petitioner shall be at liberty to initiate appropriate legal proceedings in altered circumstances.

(DR.SUDHIR KUMAR JAIN)
JUDGE

OCTOBER 17, 2023

sk/am