



\$~93

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

+ **CRL.M.C. 9141/2024& CRL.M.A. 35020/2024**

BHAWNA GROVER

.....Petitioner

Through: Ms. Usha Mann, Mr. Vijayala M.
Bhalla, Advs.

versus

THE STATE GOVT OF NCT OF DELHI AND ORS.

.....Respondents

Through: Mr. Sanjeev Sabharwal, APP for the
State

Ms. Vishalakshi Goel, Mr. Archit
Mittal, Advs. along with respondent
SI Anup Rana, PS Paschim Vihar
West.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

%

26.11.2024

1. This is a petition seeking setting aside of the order dated 22.10.2024 and 16.11.2024 passed by the Ld. Mahila Court (West) Tis Hazari Courts in FIR 130/2012, PS Mianwali Nagar, Delhi.

2. It is the case of the parties that on 22.10.2024, one DW Ms. Beena Thakural was to be cross examined by the APP. Since she did not appear on 3 opportunities and it was a time bound case, the learned JMFC considered it fit not to grant any further opportunity to DW Ms. Beena Thakural and consequently dropped her from the list of DW.

3. My attention has been drawn to a judgment of the Hon'ble Supreme Court in *Rajaram Prasad Yadav v. State of Bihar*, (2013) 14 SCC 461, wherein the principles for recall and re-examination of witnesses have been enumerated. The relevant paragraphs reads as under:-

“14. A conspicuous reading of Section 311 CrPC would show that



widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has been used as a prefix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the



paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

....

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC 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 CrPC 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 CrPC 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 CrPC 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 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 CrPC 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.”

4. In view of the above position, the court under section 311 of CrPC can recall or re-examine any witness already examined. In the present case, the examination-in-chief of DW Ms. Beena Thakural has already taken place and the cross-examination was stated to not have been done on account of the witness being unable to appear on 3 occasions and the case being time-bound. However, the witness has been examined and only her cross-examination is pending. Her testimony is important for complete and effective adjudication of the issue in controversy. Therefore I consider it fit that she should be permitted to be cross-examined by the learned APP as well as the learned defence counsel.

5. The learned JMFC is requested to fix a date as per the convenience of the learned JMFC for DW Ms. Beena Thakural to be cross examined by both learned APP as well as the learned counsel for defence on the same date and thereafter list the matter for further proceedings.

6. With these observations, the petition is disposed of.

7. *Dasti.*

JASMEET SINGH, J

NOVEMBER 26, 2024/NG