

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

...
Crl R no.46/2022
CrlM no.2263/2022

Pronounced on: 28.02.2023

Farid Ahmad Tak

.....Petitioner(s)

Through: Mr S.A.Hasmi, Advocate

Versus

Union Territory of J&K and others

.....Respondent(s)

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Impugned in this Criminal Revision is Order dated 6th December 2022, passed by the court Special Judge Anticorruption (Additional Sessions Judge) Doda (for short "*Trial Court*"), in a case bearing File no.27/Challan & 6/Challan, titled as *State through P/S V.O.J. v. Yoginder Saproo and others.*
2. I have heard counsel for petitioner and considered the matter.
3. According to counsel for petitioner, the Trial Court in violation of orders dated 10th February 2020 and 30th May 2022 of this Court, has allowed prosecution another unconditional opportunity to produce the witnesses by issuingailable warrants to procure the attendance of witnesses. It is stated by counsel for petitioner that in terms of

orders dated 10th February 2020 and 30th May 2022, the Trial Court ought to have refused to allow any further opportunity to prosecution for examination of the witnesses as the failure of prosecution to produce witnesses would amount to forfeiture of right of prosecution to adduce any prosecution evidence in view of aforesaid orders. It is also stated by counsel that this Court in terms of order dated 30th May 2022 had directed the Trial Court to hold trial expeditiously without allowing proceedings to be protracted by prosecution, yet the Trial Court in terms of order impugned has allowed prosecution another opportunity to produce witnesses.

4. Perusal of file reveals that earlier one of the accused namely, Yoginder Saproo, in abovementioned criminal cases had preferred a revision petition, being Crl R no.03/2022 titled as *Yoginder Saproo v. UT of J&K*, against the Trial Court order dated 10th February 2020, by virtue of which the Trial Court had allowed production of witnesses by prosecution. Petitioner therein had also assailed the Trial Court orders dated 22nd February 2021, 27th March 2021, 28th July 2021, 18th August 2021, 29th October 2021, 16th September 2021, 24th November 2021 and 28th December 2021 and had also sought setting-aside of the statements of witnesses recorded on 24th November 2021 and 28th December 2021 by the Trial Court.

A Bench of this Court while passing order dated 30th May 2022 in abovementioned criminal revision observed that the Trial Court order dated 10th February 2020 did not call for any interference and directed the Trial Court to expedite the trial.

5. It is pertinent to mention here that Section 311 of the Code of Criminal Procedure, 1973, provides and envisages that any court may, at any stage of any inquiry, trial or other proceedings, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and reexamine any person already examined, and the court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case.

6. Law on the subject is already settled. In terms of Section 311 Cr.P.C., the court is empowered to summon any person as a witness at any stage of inquiry, trial or other proceeding and the power is not confined to any particular class of person. reference in this regard is made to Power of the court to recall any witness or witnesses already examined or to summon any witness can be invoked even if the evidence in both sides is closed so long as the court retains seisin of the criminal proceedings.

7. In the above backdrop, reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 Cr.P.C. is must.

In *Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC*,

the Supreme Court has held:

“14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the cases demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case.

If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

8. In *Mohanlal Shamji Soni v. Union of India and another*, AIR 1991 SC

1346, the Supreme Court again highlighted the importance of power to be exercised under Section 311 Cr.P.C., as under:

"In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

9. In the case of *Raj Deo Sharma (II) v. State of Bihar*, 1999 (7) SCC 604

(AIR 199 SC 3524), the proposition has been reiterated as under:

"9. We may observed 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 (AIR 1992 SC 1701 : 1992 AIR SCW 1872) nor in Kartar Singh case (1994 Cri LJ 3139) 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 duty of the court to summon and examine or recall and reexamine any such person."

10. Again, in *Iddar and others v. Aabida and another*, AIR 2007 SC 3029,

the object lying under Section 311 Cr.P.C. has been stated by the Supreme Court in paragraph 11, which for facility of reference is reproduced hereunder:

“11. 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 for 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 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 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.”

11. The Supreme Court in *Rajaram Prasad v. State of Bihar, (2013) 14*

SCC 461, has held that widest powers have been invested with the courts under Section 311 Cr.P.C. when it comes to the question of summoning a witness or to recall or reexamine any witness already examined. The Supreme Court after referring to earlier decisions on the point, culled out following principles to be borne in mind:

- a) 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?
- b) 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.
- c) 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.
- d) 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.

- e) 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.
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.
- g) 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.
- h) 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.
- i) 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.
- j) 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.
- k) 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.
- l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
- m) 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.
- n) 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.”

12. As is evident from aforementioned principles laid down by the Supreme Court, 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. Upon applying the principles, as already propounded by the Supreme Court in the case of *Rajaram Prasad Yadav* (supra), it appears that there is nothing before this Court to show that examination of witnesses as asked by the Trial Court in terms of order impugned, would be a serious prejudice occasioned resulting in miscarriage of justice.
13. For the reason discussed above, the instant revision petition fails being without any merit and is, accordingly, **dismissed**.
14. Needless to say that it should be endeavour of the Trial Court to expeditiously conclude the matter.
15. Copy be sent down.

(Vinod Chatterji Koul)
Judge

Jammu

28.02.2023

Ajaz Ahmad, PS

