

AFR

Court No. - 85

Case :- APPLICATION U/S 482 No. - 23428 of 2021

Applicant :- Manish

Opposite Party :- State Of U.P..And Another

Counsel for Applicant :- Sanjay Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Sanjay Mishra, learned counsel for the applicant and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-respondents.

2. The present application under section 482 Cr.P.C. has been filed seeking to quash the order dated 21.09.2021 passed by the Additional Sessions Judge/FTC Court No.2, Mainpuri in S.T. No. 393 of 2013 (State vs. Manish and another) arising out of Case Crime No. 407 of 2012, under Sections 452, 302, 364, 201, 34 IPC, P.S. Karhal, District Mainpuri, whereby the application under Section 311 Cr.P.C. moved by the applicant has been rejected.

3. While considering the application filed by the accused-applicant under Section 311 Cr.P.C. the learned trial court has taken notice of the fact that the case was at the stage of final arguments and the witness (PW-1) who was sought to be summoned in terms of the said application had already appeared and had been cross-examined at length by the counsel of the accused-applicant. The trial court on the basis of the aforesaid facts has taken a view that in case the accused-applicant wished to impeach the testimony of the PW-1 it would be open for him to do so during the course of final arguments and the application under Section 311 Cr.P.C. at this advanced stage of proceedings was only with a view to cause delay in disposal of the case. The application under section 311 Cr.P.C. seeking recall of the

witness was accordingly rejected.

4. Learned Additional Government Advocate has submitted that the power to summon witnesses under Section 311 Cr.P.C. is purely discretionary and in the present case the trial being at the stage of final arguments, the application filed by the applicant/informant could not be said to be *bona fide* and the court below having exercised its discretionary jurisdiction in the matter no interference was called for.

5. The nature and scope of the power of the court to summon, examine, recall and re-examine any witness in the context of Section 311 Cr.P.C. (and also the corresponding provision as contained in Section 540 of the Old Code of 1898) was subject matter of consideration in **Mohanlal Shamji Soni v Union of India and another**¹, and it was held that the power in this regard is in the widest terms exercisable at any stage so long as the court is in *seisin* of the proceeding as may be considered essential for a just decision of the case.

6. In **U.T. of Dadra and Nagar Haveli v Fatehsinh Mohansinh Chauhan**², while considering the power of the court to summon material witnesses under Section 311 Cr.P.C., it was opined that the said power can be exercised only with the object of finding out the truth or obtaining proper proof of facts which may lead to a just and correct decision.

7. The nature, scope and object of Section 311 Cr.P.C. came to be extensively discussed in **Zahira Habibullah Sheikh (5) and another v State of Gujarat and others**³, and a view was taken that the underlying object of the provision 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

1 1991 SCC (Cri) 595

2 (2006) 7 SCC 529

3 (2006) 3 SCC 374

witnesses examined from either side.

8. A similar view was reiterated in **P. Sanjeeva Rao v State of A.P.**⁴, after referring to the earlier decisions in **Hoffman Andreas v Inspector of Customs**⁵, **Mohanlal Shamji Soni v Union of India**⁴ and **Maria Margarida Sequeria Fernandes v Erasmo Jack de Sequeria**⁶.

9. Considering the scope and object of Section 311 Cr.P.C. in **Natasha Singh v CBI**⁷, it was held that the power conferred is to 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 great caution and circumspection.

10. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another**⁸ and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

“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

4 (2012) 7 SCC 56

5 (2000) 10 SCC 430

4 1991 SCC (Cri) 595

6 (2012) 5 SCC 370

7 (2013) 5 SCC 741

8 (2013) 14 SCC 461

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, 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.

x x x

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 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.”

11. The power to summon material witnesses under Section 311 Cr.P.C. which falls under Chapter XXIV containing the general provisions as to inquiries and trials has been held to confer a very wide power on the courts for summoning witnesses and accordingly the discretion conferred is to be exercised judiciously as wider the power the greater is the necessity for application of judicial mind.

12. The power conferred has been held to be discretionary and is to enable the court to determine the truth after discovering all relevant facts and obtaining proper proof thereof to arrive at a just decision in the case. The power conferred under Section 311 is to be invoked by the court to meet the ends of justice, for strong and valid reasons and it is to be exercised with great caution and circumspection. The determinative factor in this regard would be whether the summoning or recalling of the witness is in fact, essential to the just decision of the case keeping in view that fair trial – which entails the interests of the accused, the victim and of the society – is the main object of the criminal procedure and the court is to ensure that such fairness is not hampered or threatened in any manner.

13. The aforementioned legal position has been discussed in detail in a recent decision of this court in **Ajmer vs. State of U.P.**⁹.

14. Learned counsel for the applicant has not disputed the fact that the trial is at the stage of final arguments. It is also not disputed that the PW-1 had duly appeared as witness and was cross-examined by the counsel for the accused-applicant at length.

15. Counsel for the applicant has not been able to dispute the aforestated legal position with regard to the exercise of power of the court under Section 311 Cr.P.C. and has not been able to point out any material error or illegality in the exercise of the aforesaid discretion by the court below so as to warrant interference.

16. Having regard to the aforesaid, this court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C. to interfere in the matter.

17. The application stands accordingly **dismissed**.

Order Date :- 22.11.2021

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(Dr. Y. K. Srivastava, J.)