

**IN THE HIGH COURT OF ANDHRA PRADESH ::**  
**AMARAVATHI**

**HONOURABLE SRI JUSTICE NINALA JAYASURYA**

**CRIMINAL PETITION No.4390 of 2022**

Seva Swarna Kumari @ Kumaramma and others ....Petitioners

Versus

The State of Andhra Pradesh represented by  
its Public Prosecutor ...Respondent

Counsel for the petitioners : Mr. V.Mallik

Counsel for the respondent : The Assistant Public Prosecutor

**ORDER:-**

The present Criminal Petition is filed seeking to quash the Order dated 11.04.2022 passed in Criminal Miscellaneous Petition No.182 of 2022 in C.C.No.1 of 2018 on the file of the Court of Special Sessions Judge for Trial of cases under SC & ST(POA) Act-cum-XI Addl.District Judge, Visakhapatnam.

2. The petitioners herein are accused in the above referred Calendar Case, which was registered for the offences under Sections 147, 148 r/w 149 of Indian Peal Code (for short 'IPC') and 324 of IPC. They filed the above mentioned Miscellaneous Petition seeking to recall some of the witnesses i.e., L.W.12-Chief Medical Officer, K.G.Hospital, Visakhapatnam, L.W.14-Investigation Officer for cross examination and L.W.1(P.W.1) for further cross examination. By the impugned Order, the said application was dismissed. Hence, the present quash petition.

3. Learned counsel for the petitioners while submitting that though the petition was filed to recall L.Ws.12 and 14, as also L.W.1(P.W.1), he is confining arguments to the extent of L.W.14 who was examined as P.W.13. He submits that there is a case and counter case, wherein the petitioners/accused are the victims in Crime No.297 of 2009 and C.C.No.693 of 2009 arising out of the said crime that L.W.14 in the present case i.e., P.W.13 was the main Investigating Officer in the said case, and therefore, his cross examination is essential. He submits that the learned Trial Court, without appreciating the matter in a proper perspective, went wrong in dismissing the petition by making certain observations and the petitioners/accused are denied a fair opportunity to establish their case.

4. Relying on the decisions of the Hon'ble Supreme Court in **P.Sanjeeva Rao v. State of Andhra Pradesh<sup>1</sup>, State represented by the Deputy Superintendent of Police v. Tr. N.Seenivasagan<sup>2</sup>** and a decision of a learned Single Judge of this Court in Criminal Petition No.6091 of 2020 dated 30.12.2020, the learned counsel submits that the order under challenge is liable to be set aside.

5. The learned Assistant Public Prosecutor appearing for the respondent-State, on the other hand, submits that the Order passed by the learned Trial Court contains cogent reasons, in

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1 (2012) 7 SCC 56

2 2021 SCC OnLine SC 212

accordance with Law and the same warrants no interference by this Court. He accordingly prays to dismiss the Criminal Petition.

6. This Court has considered the submissions made by the learned counsel for both sides and perused the material on record.

7. In **P.Sanjeeva Rao's case** referred to supra, the Hon'ble Supreme Court was dealing with an appeal against the order of High Court in a Criminal Revision Petition, confirming the order passed by the Trial Judge. In the said case, applications were filed under Sections 242 and 311 Cr.P.C., to recall prosecution witnesses for cross examination. The prosecution opposed the said applications, *inter alia*, contending that recall of P.Ws.1 and 2 for cross examination more than 3 ½ years, after they had been examined in relation to an incident that had taken place seven years back was bound to cause prejudice to the prosecution. The petitions were dismissed. While setting the said order as confirmed by the High Court aside, the Hon'ble Supreme Court at para No.12, referred to the observations made in **Hanuman Ram v. The State of Rajasthan & Others**, (2008) 15 SCC 652, the relevant portion of which, may be extracted for ready reference:

"12.....

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 of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the 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."

8. In **Tr.N.Seenivasagan's case** referred to supra, the Hon'ble Supreme Court was dealing with a matter wherein the miscellaneous petition filed by the prosecution under Section 311 of Cr.P.C., for recalling some witnesses dismissed by the Trial Court was confirmed by the High Court. The Hon'ble Supreme Court at para No.15, *inter alia*, held as follows:

"15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results.

An application under Section 311 Cr.P.C., must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party.....”

9. Thus, it is clear from the expression of the Hon'ble Supreme Court that while dealing with an application under Section 311 Cr.P.C., the Court is required to exercise its discretion judiciously and not capriciously or arbitrarily and the said power must be invoked to meet the ends of justice. In the present case, the learned Trial Court instead of allowing the petitioners to cross examine P.W.13, came to a conclusion that the evidence of P.W.13 is having very limited scope. Such a view, with a pre-conceived notion amounts to arbitrary exercise of power and denial of fair opportunity to the petitioners which is contemplated under Law. Therefore, the Order under challenge is liable to be set aside on that ground.

10. Further, as seen from the impugned Order, the learned Trial Judge was also not inclined to allow the petition, *inter alia*, on the ground that the counsel for the petitioners/accused did not turn up after completion of the chief examination of P.W.13 for cross examination, that the witness was working as a Deputy Superintendent of Police, District Training Centre, West Godavari District, came from far away distance of 300 Kms., and therefore, he cannot be recalled.

11. The said reasoning of the learned Magistrate is not sustainable. In similar circumstances, in Crl.Petition No.6091 of 2020 on which reliance is placed, a learned Judge of this Court, set aside the order passed by the Trial Court in rejecting an application filed under Section 311 Cr.P.C., to recall the witnesses therein. In the said case, as the Senior Counsel was held up before the other Court and could not attend for cross examination of the prosecution witnesses, the evidence was closed. Seeking to recall the witnesses, a petition was filed and the same was dismissed. The learned Judge quashed the said order while holding, *inter alia*, as follows:

"Cross examination of a witness in a criminal case is an important part of trial and it is only means to elicit truth from the witness to prove the innocence of the accused. If, such right is denied, the petitioners/accused will be put to serious loss and it amounts to denial of fair trial. If, it is purely on account of negligence of the accused, certainly such denial is justifiable. The witness was absent on several occasions as stated above and on account of absence of the witness P.W.17, cross examination could not be completed. Merely because he is an official witness, the Rules of the Court cannot be relaxed and he is on par with any other witness. Therefore, denial of an opportunity to cross-examine the witness would cause serious prejudice to the rights of the petitioners/accused.

According to Section 311 Cr.P.C., 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 be essential to the just decision of the case.

Section 311 Cr.P.C contains two limbs. The first limb is discretion of the Court and the second limb does not confer any discretion and it is obligatory for the Court to summon, recall and re-examine a witness, if the Court finds that the evidence of the proposed witness is necessary to decide the real controversy between the parties, effectively.

But, here, the Trial Court denied the opportunity to cross-examine the witness and it is against the principles of fair trial, since, fair trial is a fundamental right guaranteed under Article 21 of the Constitution of India."

12. This Court is of the considered opinion that the above said decision aptly applies to the facts of the present case. At this juncture, it may be appropriate to refer to some of the principles laid down by the Hon'ble Supreme Court in **AG v. Shiv Kumar Yadav and Others<sup>3</sup>** which are to be kept in mind for exercising power under Section 311 Cr.P.C., and the relevant to the present context are:

- a) The exercise of widest discretionary power Under Section 311 Code of Criminal Procedure 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;
- b) The wide discretionary power should be exercised judiciously and not arbitrarily;
- c) The object of Section 311 of Code of Civil Procedure simultaneously imposes a duty on the court to determine the truth and to render a just decision.

13. In the light of the above legal position, the learned Trial Court ought to have allowed the petition to recall P.W.13 and to enable the petitioners/accused to adduce evidence and meet the requirements of a fair trial. As the petitioners are denied the opportunity of cross examination, the order of the Trial Court cannot be sustained in the light of the legal position referred to supra.

14. Accordingly, the impugned Order dated 11.04.2022 in Criminal Miscellaneous Petition No.182 of 2022 in C.C.No.1 of 2018 on the file of the Court of Special Sessions Judge for Trial of cases under SC & ST(POA) Act-cum-XI Addl.District Judge, Visakhapatnam, is set aside and the Criminal Petition is allowed with a direction to the Trial Court to fix a specific date for appearance of P.W.13(L.W.14)-Mr.K.Prabhakar and afford an opportunity to the petitioners/accused to cross examine the said witness. The petitioners/accused shall proceed with the cross examination of the said witness on the date fixed by the learned Trial Court, without seeking any adjournment.

Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

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**NINALA JAYASURYA, J**

Date: 18.08.2022  
BLV

**HON'BLE SRI JUSTICE NINALA JAYASURYA**

**Criminal Petition No.4390 of 2022**

**Dated 18.08.2022**

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