

(1988) 07 OHC CK 0017
In the Orissa High Court

Kouta Markandeyulu

APPELLANT

Vs

Republic of India and Another

RESPONDENT

Date of Decision : 05-07-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Prevention of Corruption Act, 1988 — Section 5, 6

Citation : (1989) CriLJ 238

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Judgement

K.P. Mohapatra, J.—This revision is directed against the order passed by the learned Special Judge, Bhubaneswar, allowing a petition u/s 311 of the Code of Criminal Procedure (Code for short) and permitting the prosecution to examine the authority sanctioning the prosecution.

2. On the basis of the F.I.R. dated 9-8-1979 lodged by an Inspector of C. B. I. and after due investigation charge-sheet was submitted against the petitioner, ex-Branch Manager, United Commercial Bank, Narasingpur, on 26-4-1980 for having committed misappropriation of cash of Rs. 7000/-. He was charged for having committed offences under Sections 5(l)(c) and 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act (hereinafter referred to as the "Act"). The trial commenced on 28-4-1982 and in due course 14 witnesses were examined on behalf of the prosecution and 15 documents were proved and exhibited. Prosecution was closed on 25-9-1984, accused's statement was recorded on 21-1-1985 and arguments of both the parties were finally heard and closed on 25-3-1985. During argument it was submitted by the learned defence counsel that the order of sanction u/s 6 of the Act was not proved and the aforesaid technical defect was one of the grounds for which the petitioner was entitled to be acquitted. After close of the arguments, though on the same day, the prosecution filed a petition u/s 311 of the Code for examination of the sanctioning authority and for proving of the sanction order. The petitioner filed an objection that the court could not permit the prosecution to examine the

sanctioning authority and prove the sanction order so as to fill up its lacuna. The learned Judge after hearing both parties passed the impugned order allowing the petition.

3. Mr. B. S. Misra, learned Counsel appearing for the petitioner, urged that after a protracted trial and after close of arguments it was unjust on the part of the learned Judge to permit the prosecution to fill up its lacuna by examining the sanctioning authority so as to prove the sanction order. He further urged that on behalf of the defence no new material was brought in so as to enable the prosecution to meet the same by taking recourse to the provisions of Section 311 of the Code. In such circumstances, the impugned order is liable to be set aside.

4. The learned Judge relied upon *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, and held as follows:

...The I. O. (P. W. 14) deposed that he obtained the sanction order from the Deputy General Manager (Inspection and Vigilance). The learned P. P. submitted that a copy of the sanction order was earlier supplied to the accused. In any event, the sanction order is always in the record and the accused must be aware of its existence. So, the accused is not taken by surprise if the sanctioning order is presently proved through the sanctioning authority. Such proof of the sanction order does not amount to filling up the gaps in the prosecution case.

He concluded:

..In view of the facts and circumstances of the present case, I consider that examination of the sanctioning authority is necessary for coming to a just decision in the case.... Hence considering all aspects of the matter, I think it is necessary in the interests of justice that the sanctioning authority should be examined as a witness in the case.

In the leading case on the subject under discussion which has been followed not only by this Court but by other High Courts of the country reported in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, in which the provisions of Section 540 of the old Criminal Procedure Code in pari materia with Section 311 of the new Code came up for consideration, *Hidayatullah, J.* (as his Lordship then was) held as follows:

Section 540 is intended to be wide as the repeated use of the word "any" throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word "may" in the first part and of the word "shall" in the second, firmly, establishes this difference. Under the first part, which is permissive, the court may act in one of three ways : (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising

from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, However, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly.

In view of the legal principle laid down above, it is necessary to examine the relevant facts of this case.

5. Undisputedly, arguments in the case were over and on the same day on behalf of the prosecution a petition was filed for examination of the sanctioning authority with the intention of proving the sanction order which was all along in the record. Although the move was made by the prosecution, yet the learned Judge came to the specific conclusion that the evidence of the sanctioning authority was essential for the just decision of the case. Therefore, it was not a case in which fresh materials were brought by the defence so that it was necessary for the prosecution to adduce evidence to rebut the same. In view of the finding, it was a clear case in which examination of the sanctioning authority became necessary in the interest of justice and for the just decision of the case. Therefore, it was not a case so as to attract the first part of Section 311 of the Code. On the other hand, the second part thereof was attracted and once it was brought to the notice of the learned Judge, he was free to exercise the powers vested in him and in the language of the Supreme Court it was obligatory in character. In other words, once he was satisfied that the evidence of a witness was necessary for just decision of the case, he was bound to summon the witness and record his evidence. Mr. Misra drew attention to a case of this Court reported in (1984) 1 Ori LR 709, *Nurun Nisha Begum v. Hasina Khatun*. In that case the order of sanction had been exhibited and a passing reference was made to the first part of Section 311 of the Code and not the second part. No specific opinion was also expressed in that case. Therefore, it is of no help for disposal of the present case.

6. For the foregoing reasons, I am of the opinion that the learned Judge did not commit any illegality or irregularity in passing the impugned order. Accordingly interference is uncalled for.

7. In the result, the criminal revision is dismissed. The lower court records may be sent back forthwith.