

(2014) 10 SHI CK 0048
In the High Court Of Himachal Pradesh
Case No : Cr. MMO No. 120 of 2014

Mahesh Puri

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(8), 311
Penal Code, 1860 (IPC) — Section 109, 120B, 420, 465, 468
Prevention of Corruption Act, 1988 — Section 13(1)(d)

Citation : (2014) 10 SHI CK 0048

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : J.S. Bhogal, Senior Advocate and Satyen Vaidya, Advocate for the Appellant; D.S. Nainta and Virender Verma, Additional Advocates General, Advocate for the Respondent

Judgement

Dharam Chand Chaudhary, J.—Complaint is that learned trial Court vide order Annexure P-9 under challenge in this petition, has erroneously allowed the prosecution to produce in evidence Annexure-1, Annexure B-1, Annexure C-1, Annexure-D, Annexure-E and Annexure-F to the report Ext. PW-10/B, being not the part of the investigation conducted nor taken into possession by the Investigating Officer during the course of investigation.

2. The petitioner is accused in Corruption Case No. 8-S/7 of 2009 and is being tried for the commission of offence punishable under Sections 465, 468, 420, 109, 471, 120B of the Indian Penal Code and Section 13(1)(d) of Prevention of Corruption Act, 1988. The report Ext. PW-10/B has been relied upon against him. The same as per version of the prosecution is incomplete as its Annexures referred to hereinabove could not be taken into possession by the Investigating Officer during the course of investigation.

3. The prosecution initially filed an application under Section 311 of the Code of Criminal Procedure in the trial Court for permission to produce the Annexures to

report Ext. PW-10/B in evidence by examining Shri Anil Gupta, Executive Engineer (PW-10). The said application was allowed by learned trial Court vide order dated July 19, 2013. In a petition registered as CRMMO No. 4043 of 2013 preferred in this Court against the said order, the same was quashed with liberty reserved to the respondent-State to file fresh application vide judgment dated November 26, 2013. Relevant portion thereof reads as follows:

"Having gone through the record and also taking into consideration the rival submissions it transpired that in the application under Section 311 Cr.P.C., Annexure P-4 to this petition no details qua the nature and contents of the annexure to the report Ex. PW-10/B, sought to be produced in evidence find mention. Not only this, but its copy was neither annexed to the application nor made available to the accused-petitioners to enable them to contest the same more effectively, particularly whether the so called annexure, sought to be produced in evidence, is part and parcel of the report Ex. PW-10/B or not and taken into possession during the investigation of the case therewith. The present, therefore, is a case where the accused petitioners have been condemned unheard and, as such, the impugned order being legally unsustainable deserves to be quashed, of course, with liberty reserved to the respondent-State to file fresh application highlighting therein all details qua the contents and nature of the "annexure" to report Ex. PW-10/B, now sought to be produced in evidence, the relevancy thereof vis-a-vis the investigation conducted and the evidence collected."

4. Consequent upon the order *ibid*, the respondent-State (prosecution) preferred fresh application Annexure P-7. The detail of the documents, i.e., Annexures to Ext. PW-10-/B has been furnished in para 4 of the application.

5. The accused-petitioner contested the application on the ground that neither the Annexures sought to be produced are on record nor any witness while in the witness box has stated about the existence of the same and as such sought the same to be dismissed. Learned Special Judge has, however, accepted the application and allowed the respondent-State to produce the documents in question by recalling PW-10 for further examination. The relevant portion of the order passed by learned Special Judge reads as follows:

"....The report Ext. PW-10/B is based upon annexures sought to be produced. Moreover, the annexures are to be produced from public record by the prosecution to falsely implicate the accused persons. Simply because the prosecution or the I.O. has not placed on record these documents, which may be due to various reasons also, is no ground for dismissal of this application. The annexures are part of the report and are necessary for just decision of the case. The defence shall have opportunity to cross-examine PW-10 when this witness will prove these annexures. Ergo no serious prejudice shall be caused to the case of the defence in case the prosecution is allowed to produce on record annexures of report Ext. PW-10/B which is already proved on record."

6. Mr. J.S. Bhogal, learned Senior Advocate, has mainly emphasized that the documents sought to be produced being not on record nor relied upon, cannot be produced in evidence under Section 311 of the Code of Criminal Procedure, as according to Mr. Bhogal the jurisdiction vested in the Court under the Section *ibid* is only to the extent of recalling a witness for further examination or to examine any other person if his evidence appears to be essential for the just decision of the case.

7. Learned Additional Advocate General has come forward with the version that report Ext. PW-10/B is a material piece of evidence in this case. The same is incomplete without annexures thereto now sought to be produced in evidence. It has, therefore, been urged that these documents are essentially required for just decision of the case and that no prejudice is likely to be caused to the accused, who will have an opportunity to cross-examine PW-10.

8. On analyzing the submissions made on both sides and taking into consideration the provisions contained under Section 311 of the Code, it is crystal clear that the Court seized of a criminal case may recall a witness for further examination or examine any person in attendance even if not summoned as a witness or recall and re-examine any person, if his evidence is essentially required for just decision of the case. The provisions thus postulate a situation where examination of any person or re-examination of a witness is required for further clarification or elaboration of the evidence available on record and the prosecution omitted to produce the same at the time when such person was in the witness box or could not be cited as a witness.

9. In the case in hand, the documents sought to be produced in evidence under Section 311 of the Code admittedly are not part of the record being not taken into possession by the Investigating Officer during the course of investigation nor relied upon in the report filed under Section 173 of the Code.

10. The explanation as set out that inadvertently the Investigating Officer omitted to take these documents on record during the course of investigation seems to be plausible, as *prima facie*, the documents which are in the form of cross-section prepared on the basis of measurement conducted by the Committee constitute to find out the irregularities committed by the accused during the course of construction of Sohal-Drabala road, form part of the report Ext. PW-10/B submitted by the Investigating Officer. The Investigating Officer for the reasons best known to him, has omitted to take the same into possession during the course of investigation. The documents on the face of it *prima facie* form the part of the report Ext. PW-10/B and coming from the official record, i.e., office of Executive Engineer, HP PWD, Kumarsain Division. True it is that the accused may have an opportunity to cross-examine the witness, however, the mode resorted to in producing the documents in evidence perhaps is not legally admissible because as noted *supra* under Section 311 of the Code a witness can be recalled to explain the evidence already on record and omitted to be proved when he was in the witness box or to be proved by a witness who could not be

cited as a witness during the course of the trial.

11. The documents which are sought to be taken on record, cannot be allowed to be produced in the exercise of jurisdiction vested under Section 311 of the Code. Learned Counsel representing the accused-petitioner has very fairly submitted that the respondent-State (prosecution) in case intends to produce these documents in evidence, should have resorted to the provisions contained under Section 173(8) of the Code, of course subject to just exceptions and rightly so because the provisions *ibid* empower the investigating agency to collect further evidence at any stage even after filing Challan and in case any evidence collected during the course of further investigation to place the same on record by way of filing supplementary Challan. The prosecution, therefore, is at liberty to resort to the provisions *ibid* in case the documents form the part of the record of this case or could not be taken into possession during the course of investigation already conducted.

12. Be it stated that learned trial Judge has passed a detailed order after taking into consideration the law laid down by the Apex Court, however, in the order emphasis is laid only with respect to the power of the Court under Section 311 of the Code in the matter of summoning any person as a witness for examination and also circumstances under which the power under Section 311 of the Code can be exercised.

13. The reference in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, that if proper evidence could not be adduced or a relevant material not brought on record due to inadvertence the Court seized of the matter should permit such mistake to be rectified, is in the context of the evidence though collected during the course of investigation, however, inadvertently or due to unavoidable circumstances could not be produced during the course of trial.

14. For the above reasons, the impugned order is not legally sustainable. The same, therefore, is quashed and set aside, of course with liberty to the respondent-State (prosecution) to resort to appropriate remedy in accordance with law and in the light of observations made hereinabove, if so advised.

15. The parties to appear in the trial Court on November 14, 2014. Record be returned immediately so as to reach in the trial Court well before the date fixed.

The petition stands disposed of.