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In the Jharkhand High Court

Case No : Cr.M.P. No. 689 of 2016

Sunil Bhagat @ Sunil Gupta — APPELLANT

Vs

The State of Jharkhand — RESPONDENT

Date of Decision : 02-03-2017

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 311, Section 482

Citation : (2017) 2 ECrC 465 : (2017) 2 JCR 446 : (2017) 2 JLJR 467

Hon'ble Judges : Mr. Rongon Mukhopadhyay, J.

Bench : Single Bench

Advocate : Mr. Kaushik Sarkhel, Advocate, for the Petitioner; Mr. Sudhir Kumar Roy, A.P.P, for the State; Mr. N.P. Choudhary, Advocate, for the Informant

Final Decision : Disposed off

Judgement

Mr. Rongon Mukhopadhyay, J.—Heard Mr. Kaushik Sarkhel, learned counsel appearing for the petitioner and Mr. Sudhir Kumar Roy, learned A.P.P. assisted by Mr. N.P. Choudhary, learned counsel appearing for the informant.

2. In this application, the petitioner has prayed for quashing of the order dated 12.01.2016 passed by the learned Session Judge, Jamtara in S.T. Case No. 19 of 2013 whereby and where under the application preferred by the prosecution under Section 311 of the Cr.P.C. has been allowed and the prosecution has been directed to examine five non charge-sheeted witnesses.

3. It has been stated by the learned counsel for the petitioner that earlier an attempt was made by the prosecution to examine one of the non-charge-sheeted witness namely, Rajkishore Singh, but the same was refused by the learned court below on 13.04.2014 and on the garb of an application under Section 311 Cr.P.C. the prosecution has once again prayed for examination of five non-charge-sheeted witnesses which was allowed by the learned court below vide impugned order dated 12.01.2016 without assigning any valid reasons. Learned counsel submits that the principle which has been culled out by the Hon''ble Supreme

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Court with respect to the principles guiding an application under Section 311 Cr.P.C. in the case of Rajaram Prasad Yadav v. State of Bihar and Another reported in (2013) 14 SCC 461 has not been followed by the learned trial court. It has been stated that mere mentioning about the fact that in the interest of justice the application under Section 311 Cr.P.C. cannot be allowed as the same is not backed up with any cogent and justifiable reasons.

4. Mr. N.P. Choudhary, learned counsel appearing for the informant, has vehemently opposed the prayer made by the petitioner and has stated that five non-charge-sheeted witnesses are the material witnesses and can throw light on the prosecution case. It has been stated that since there evidence is essential for the just decision of the case, the learned trial court was correct in appreciating such fact and directing the examination of the said five witnesses. It has also been submitted that pursuant to the passing of the impugned order dated 12.01.2016 two witnesses have already been examined.

5. It appears that an application was preferred by the prosecution with respect to the examination of non-charge-sheeted witness namely, Rajkishore Singh which however was rejected by the learned trial court on 13.04.2014. Subsequently another application was filed under Section 311 Cr.P.C. with respect to the examination of five witnesses who were not charge-sheeted but who were examined under Section 161 Cr.P.C. The learned court below while passing the impugned order dated 12.01.2016 has merely accepted what has been stated in the petition filed by the prosecution while allowing such application under Section 311 Cr.P.C.

6. In order to appreciate the contention advanced by the respect parties it would be necessary to refer to the judgment passed by the Hon''ble Supreme Court in the case of Rajaram Prasad Yadav v. State of Bihar and Another (Supra) wherein the principles guiding an application under Section 311 Cr.P.C. has been laid down which reads as under :-

"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 and 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

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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

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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."

7. This view has been subsequently reiterated in the case of State (NCT of Delhi) v. Shiv Kumar Yadav and Another reported in (2016) 2 SCC 402.

8. What would thus fall from the aforesaid judicial pronouncements is that while considering an application under Section 311 Cr.P.C. the court has to have strong and valid reasons for allowing such application. It would thus mean that merely by making an observation that in the interest of justice the application under Section 311 Cr.P.C. is to be allowed cannot be by any stretch of imagination be sustainable as such observation has to be backed by sufficient, cogent and justifiable reasons which is sorely lacking in the impugned order.

9. At this juncture, learned counsel for the informant has referred to the judgments delivered in the case of Himanshu Singh Sabharwal v. State of M.P. and Others reported in [2008 (4) East Cr C 70(SC)] and Natasha Singh v. Central Bureau of Investigation (State) reported in (2013) 5 SCC 741.

10. In the case of Himanshu Singh Sabharwal v. State of M.P. and Others (Supra) while considering the power of the court below to invoke Section 311 Cr.P.C. has clearly held that such power has to be exercised with caution and should be invoked as the exigency of justice require and has to be exercised judiciously with circumspection and consistently with the provisions of law.

11. In the case of Natasha Singh v. Central Bureau of Investigation (State) (Supra) while considering an application under Section 311 Cr.P.C. the issue which is to weigh in the mind of the court is as to whether the evidence proposed to be adduced is relevant or not.

12. The judgment cited by the learned counsel for the informant does not at all support the impugned order as while allowing the application under Section 311 Cr.P.C. no consideration has been made with respect to the materials available on record or for that matter the statements which have been recorded by the said non-charge-sheeted witnesses under Section 161 Cr.P.C. The learned trial court has also not considered this aspect of the matter as to whether their examination is relevant and germane for the purpose of the trial and to arrive at a just decision of the case. Merely suggesting and allowing the said application in the interest of justice without the same being generated by any cogent reasons will not make the impugned order sustainable in the eye of law.

13. In view of what has been stated above, the impugned order dated 12.01.2016 passed by the learned Session Judge, Jamtara in S.T. Case No. 19 of 2013 in absence of any reasons is, hereby, quashed and set aside and the matter is remitted back to the learned trial court to pass a fresh order in accordance

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with law.

14. Since the trial is pending for the last more than four years and as has been stated by the learned counsel for the informant that two witnesses have already been examined pursuant to the impugned order dated 12.01.2016, it is expected that the learned trial court shall expedite the hearing of the application under Section 311 of the Cr.P.C. by affording sufficient opportunity to all the respective parties and thereafter dispose of the same in accordance with law at the earliest.

15. This application stands disposed of with the aforesaid observation.

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