

S.Ramkumar Vs. State

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Court : Chennai

Decided On : Feb-15-2011

Judge : G.M. Akbar Ali, J.

Acts : Code Of Criminal Procedure (Cr.P.C) - Sections 482, 311, 294

Appeal No. : Crl.O.P.No.2625 of 2011 and M.P.No.1 of 2011

Appellant : S.Ramkumar

Respondent : State

Advocate for Def. : Mr.N.Chandrasekaran, Adv.

Advocate for Pet/Ap. : Mr.A.V.Somasundaram, Adv.

Judgement :

O R D E R

1. This petition has been filed by the petitioner under Section 482 of Criminal Procedure Code, seeking to call for the records in Crl.M.P.No.3398 of 2010 in C.C.No.24 of 2009 and to set aside the order passed by the learned XI Additional Special Judge for CBI Cases relating to Banks and Financial Institutions, Chennai in Crl.M.P.No.3398 of 2010 in C.C.No.24 of 2009 dated 11.01.2011 and to permit him to summon, at least the Inspector of Police, CBI/Mr.K.A.A.Salam to give evidence apart from marking the file seized from his office premises.

2. The petitioner is the sixth accused in the criminal proceedings in C.C.No.24 of 2009. The respondent has laid charge-sheet for the various offences and the case is of the year 1999. When the entire evidence is over and the matter was posted for arguments, the petitioner has filed an application in CrI.M.P.No.3398/2010 with specific plea u/s.311 of Cr.P.C., to re-open the case and pass orders for summoning the witnesses to speak about the defence exhibit which is in the nature and form of entire file alleged to be containing certain documents recovered during the search conducted by one of the witnesses namely, Mr.K.A.A.Salam, the Inspector of Police, CBI.

3. This petition was strongly objected by the respondent. The entire counter filed by the respondent would show that the petitioner who is only A6 has been protracting the matter without allowing to conclude the trial and to pronounce the judgment. It is also contended that A1 to A5 has already advanced their arguments and when the matter was posted for arguments on the side of A6, such application is filed which would show the intention of the petitioner. It is also contended that the alleged document can be marked as defence exhibit u/s.294 of Cr.P.C., and the prosecution has no objection to mark those documents. By a rejoinder, the petitioner would state that he was only an Auditor to the alleged accused and the officer of the respondent has searched his premises and seized certain documents which were not produced before the court below and relied on by the CBI. Hence, to prove the innocence of the petitioner, the officer who has conducted the search has to be examined as defence witness. They had also relied on the judgment reported in Chandra Sekhar v. State of Rajesthan (1992 CrI. Law Journal 4039) for the proposition and stated that the witnesses can be summoned at any time of the criminal proceedings.

4. The learned Special Judge passed a detailed order. The learned Judge has considered the submissions made on either side and dismissed the application, ultimately holding that there is other option of marking the document u/s.294 of Cr.P.C., and the witnesses need not be summoned u/s.311 of Cr.P.C.

5. Aggrieved by which, the petitioner has approached this Court after invoking the proviso to Section 482 of Cr.P.C.

6. The short point to be considered before this Court is that whether the petitioner is entitled to invoke the Sec.311 of Cr.P.C., and summon the witnesses to speak about the search conducted and the seizure of document and whether he has other option to invoke sec.294 of Cr.P.C.

7. Mr.A.V.Somasundaram, the learned counsel for the petitioner would contend that during the cross-examination of P.W.29, it was admitted that Mr.K.A.A.Salam, the Inspector of Police, CBI has conducted the search on 09.06.1997 on the office of the petitioner and a file containing 1 to 127 pages has been seized by him. The learned counsel for the petitioner has pointed out that it was also admitted that the Investigating Officer has not examined the said witness with regard to such search. He would contend that an application has been filed by the petitioner u/s.451 of Cr.P.C. for return of those documents and the learned Judge passed an order for return of documents which is under the custody of the petitioner. The learned counsel for the petitioner has pointed out that fair trial requires a fair chance to the petitioner to prove his innocence and no prejudice would be caused to the prosecution if the witnesses who conducted the search and seized the documents is called for to speak about the documents.

8. Per contra, Mr.N.Chandarasekaran, the learned Special Public Prosecutor for CBI Cases would submit that the entire exercise is nothing but protracting the trial before the proceeding officer and relied on Sec.294 of Cr.P.C. He would submit that since the prosecution has not disputed the documents, the Court need not to call the witness to speak about the document and document can be marked without any formal proof. He has also submitted that petition has been filed in the later stage and it is only in view of protracting the proceedings. He has further pointed out that allowing the witness to be called as defence witness u/s.311 of Cr.P.C., would nullify the provision u/s.294 of Cr.P.C., when there is no objection for the prosecution to mark the documents.

9. Further, the learned counsel for the petitioner has relied on the decisions reported in 1992 Cri.L.J.4039, 1991 Supplement (1) SCC 271 and 2006 (6) SC 447 for the proposition, summoning the witnesses can be done at any stage for a fair and just decision and also, for the proposition, summoning the witnesses even

after closure of the defence arguments.

10. Indisputably, in the present case which is of the year 1999. The case was posted for final arguments on 05.07.2010. Earlier an application filed u/s.311 of Cr.P.C. was allowed and now, the case is posted for arguments. Admittedly, the accused 1 to 5 have already argued the case on 30.06.2010. The petitioner has filed an application and on filing of counter, he has filed rejoinder on 04.01.2011. The learned Judge of the trial court has dismissed the application on the following grounds:

(i) There is inordinate delay in filing the application and only to protract the proceedings, the petition has been filed.

(ii) No useful purpose would be served by examining the Inspector of Police, CBI who conducted the search.

(iii) The prosecution has no objection to mark the document and therefore, the documents can be marked by invoking the Sec.294 of Cr.P.C.

11. The following decisions which have been relied upon by the learned counsel for the petitioner is hereby extracted for useful reference:

(i) Mohanlal Shamji Soni .Vs. Union of India and another in 1991 Supp(1) Supreme Court Cases 271

"18. The next important question is whether Section 540 gives the court carte blanche drawing no underlying principle in the exercise of the extraordinary power and whether the said section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just

decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power any lead to undesirable results. Further, it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties." (ii)Chandra Shekhar ..Vs.. State of Rajasthan in 1992 CRI. L.J. 4039

"6. So far as the facts of this case are concerned, it cannot be said that the law cited by Shri Chaturvedi has any direct application. In the facts of the case at hand the Investigation Officer has to be examined and he was a very important and material witness, in as much as he was the witness to prove the recovery of blood-stained Bush-shirt. The prosecution had never given up this witness. It is of Course, true that this witness could not be served despite several opportunities and it is also apparent that the bailable warrant which were sent for service on this police officer to appear as a witness, the report came that his address was not available. In such circumstances, the Court rejected the request of the Additional Public Prosecutor to summon the other two witnesses namely Buniyad Ali and Brijmohan, but allowed the request of the Additional Public Prosecutor in respect of Investigation Officer Ghanshyam Dutta. It has to be agreed on all hands and it is a fact which is undeniable that Ghanshyam Dutta was the Investigating Officer and was a material witness for proving recoveries and further that this witness was never given up by the prosecution. Merely because his correct address and whereabouts were not known, his bailable warrants for his appearance as witness in the Court could not be served, could hardly enable the accused to take advantage of that situation and to say that the Court should not have passed the order to send bailable warrants for this witness to record his evidence. 1988 WLN (UC) 367 Rajkaran v. Jeewan Khan (supra) and the AIR 1991 SC 1346: (1991 Cri LJ 1521), Mohanlal Shamji Soni v. Union of India (supra) on which reliance has been placed by Shri Chaturvedi are the cases which are wholly distinguishable on facts as well as on the question of law in as much as the case at hand is not a

case in which any lacuna left by the prosecution is sought to be filled up now. So far as the arguments of Shri Chaturvedi that such order can be passed only suo motu in accordance with the later part of Section 311 Cr.P.C., but could not be passed on an application of the Addl.P.P. It may be at once observed that this submission has no merit in view of the language contained in Section 311 Cr.P.C. itself. Because at the very outset of Section 311 Cr.P.C. i.e. in the earlier part of Section 311 itself, it has been provided that the Court may pass such order at any stage of the trial and it may summon any person as a witness even if it had not summoned earlier, may recall any person already examined. In the case at the hand it has been categorically mentioned by the Additional Sessions Judge, Karauli that the transfers of the police officers are usual and the Court was of the opinion that for a just and fair decision of the case, it was necessary to examine the Investigating Officer and it was further observed that without examining the investigation officer, it was not possible to render complete justice in this case. In any opinion, merely because the arguments had been heard in this case and the case at one stage had been posted for judgment is not a ground to limit the scope of passing of the order under Section 311 Cr.P.C. As the Court can pass such orders at any stage. Therefore, it is immaterial if the order has been passed on the application filed by the Addl.Public Prosecutor and the Court has not passed the order suo motu. (iii)U.T.of Dadra & Haveli & Another ..Vs.. Fatehsinh Mohansinh Chauhan in 2006(6) Supreme 447.

"12. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. Should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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."

12. It is well settled principle that the court can summon any witness even after the closure of defence side arguments. Sec. 311 of Cr.P.C. reads as follows:

"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 it to be essential to the just decision of the case."

13. The trial court has given three reasons for rejecting the application which are denied by this Court on the following grounds:

(i)The petitioner has approached the court below in a belated state: As already stated, the delay cannot be a reason to reject the application, the provision is resorted only with the object of finding out the truth. Therefore, the delay may not be a reason to reject the application. (ii)The petitioner is only trying to protract the case: In my considered view, this may be avoided by giving a chance to call the defence witness with a specific direction to examine, within specified time without any adjournments. (iii)When the prosecution is not objecting the document with formal proof, u/s.294 of Cr.P.C. the same is to be invoked: We have no quarrel with the provision u/s.294 of Cr.P.C. However, the purpose for which a witness is called u/s.311 of the Code has to be looked into. The petitioner is a Chartered Accountant and his house has been searched and an officer of the respondent has seized certain documents. Admittedly, the Investigating Officer has not examined the said officer and the documents were also not relied on by the prosecution. Therefore, merely marking the document u/s.294 of Cr.P.C. is not enough where the petitioner wants to examine certain aspects of such search and seizure to prove his defence. Therefore, invoking the provision u/s.294 of the Code will serve only a limited purpose but examination of the witnesses is for a wider purpose. Therefore, I am of the considered view, an opportunity may be given to the petitioner to examine the officer who has conducted the search and seizure and also, the persons present at the time of conducting the search.

14. Considering the facts and circumstances of the case, I am of the considered view that the trial court is wrong in denying the opportunity to the petitioner and hence, the order dated 11.01.2011 in CrI.M.P.No.3398 of 2010 in C.C.No.24 of 2009 passed by the learned XI Additional Special Judge, for CBI Cases is hereby set aside. Accordingly, the petition is allowed and the trial court is directed to issue summons to the witnesses as mentioned by the petitioner for their appearance on a specific date and time within a week on receipt of this order and on such specific date, the petitioner is directed to examine the witnesses and thereafter, the trial court is directed to dispose of the matter within a period of two weeks. It is made clear that no adjournments will be granted to the petitioner.

The Petition is ordered accordingly. Consequently, connected Miscellaneous Petition is also closed.

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