

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.13766 OF 2018

ORDER:

The petitioner is A-2 in C.C.No.462 of 2012, on the file of the VIII Additional Chief Metropolitan Magistrate, at Hyderabad, where the petitioner is facing trial for the offences punishable under Sections 353 & 506 read with 34 of Indian Penal Code, which is outcome of Crime No.129 of 2009 of Moghalpura Police Station, Hyderabad.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor representing the 1st respondent State and perused the material on record.

3. P.W.3-Mohd. Moqeed Pasha is the Investigating Officer, as per the charge sheet L.W.4. A-2 filed application for recall of P.W.3, who was already cross-examined on 12.09.2018, for further cross-examination. It was dismissed by the trial Court, for the application is as vague as anything as to the area of further cross-examination and as to what necessity. Again another application CrI.M.P.No.2649 of 2018 filed by mentioning that on 10.10.2018, P.W.3 was examined and Senior Counsel was out of availability and junior counsel put some suggestions and important material part not covered with regard to scene of offence and non-examination of independent persons of locality and other important part and also omissions and contradictions that to be put to the Investigating Officer. It was heard and ultimately dismissed with observation by detailed order of the lower Court running in ten paras that earlier CrI.M.P.No.2526 of 2018 was dismissed on 01.11.2018 for no valid grounds to recall P.W.3 for further cross-examination and now again came with the self-same relief by present petition stating the aspects on which further cross-examination now to be asked saying

Court got wide powers to recall and he did not challenge the earlier application dismissal order by attain finality and for the self-same relief again cannot file, much less by making some details even under the guise that Court got ample power, that too even under Section 313 of Code of Criminal Procedure, 1973 (for short, 'Cr.P.C'), it must be shown essential of further examination and not merely at the instance of a party for sake of asking and law is very clear in this regard from the expressions in **K.Vittal Rao and others v. State of AP**¹ and **Mannan SK & others v. State of West Bengal and another**².

4. Learned counsel for the petitioner submitted that in impugning the order saying lower Court, despite the reasons mentioned for there is no *res judicata*, should have been allowed the petition in exercise of its discretion for arriving just decision and dismissal order is unsustainable, whereas learned Public Prosecutor supported the order of the Court.

5. Undisputedly best course leave open against a dismissal order for recall of a witness is to approach this Court under Section 482 Cr.P.C. for revision is not maintainable. Against the earlier dismissal order not chosen to impugn for the self-same purpose, again a second petition cannot be made without impugning the first order. No doubt, Section 311 Cr.P.C. as referred in the order of the lower Court running in two parts. First part confers discretion on showing the factual foundation, if at all a party seeks for recall and that was lacking in the first petition covered by dismissal order, dated 01.11.2018. So far as the second part of Section 311 Cr.P.C. concerned, the Court may *suo moto* recall any witness for further examination where it felt it is essential for the just decision of the case. Once such is the case, a party cannot, as of

¹ 2018 (1) ALD (CrI) 359

² Criminal Appeal No.1307 of 2014

right, after dismissal of the first petition, ask for self-same relief by filing a second petition with more details, that too without impugning that dismissal order before superior forum out of available remedies. However, that is not the end, as at least the second petition can be taken into consideration to consider whether there are any essential grounds for the just decision of the case even *suo moto* from the facts mentioned for recall of the witness though it cannot be at the instance of a party sustainable, as referred supra. That aspect not considered by the lower Court. However, coming to that aspect, even that can be considered herein by invoking the inherent power under Section 482 Cr.P.C., main submission in the second application bringing to the notice of the Court is that contradictions and omissions from the witnesses not put to the Investigating Officer, which is essential for just decision of the case and in the absence of which, accused cannot make use of the contradictions and omissions. A perusal of the cross-examination of P.W.3 done on 12.09.2018 running only in five lines and simply with two suggestions and there is a force in the submission that there was no effective cross-examination from which right of the party being prejudiced and it is for just decision of the case at least to put the contradictions and omissions, recall of the witness is essential. Thereby taking into consideration of these facts, the Criminal Petition is allowed only to put to the P.W.3 on recall only contradictions and omissions and one or two questions in relation to the scene of offence. So far as local people not examined concerned, chief examination itself is very clear of tried to secure local people as witnesses and not available, thereby but for suggestion, the question of further cross-examination on that does not arise, thereby any such suggestion, if at all on that can be permitted to be given.

6. With these observations and subject to costs of Rs.2,000/- (Rupees two thousand only) to the Army Welfare Fund and filing of proof before the lower Court within one (01) week from the date of receipt of a copy of this order, the Criminal Petition is allowed for recall of P.W.3 for further cross-examination to the limited scope supra within the purview of Part-II of Section 311 Cr.P.C. read with Section 165 of the Indian Evidence Act, 1872.

Miscellaneous petitions pending consideration, if any, in this case shall stand closed in consequence.

DR.B.SIVA SANKARA RAO, J

Date: 31st January, 2019

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