ITEM NO.25 COURT NO.14 SECTION II

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 3910/2024

(Arising out of impugned judgment and order dated 19-01-2024 in CRLP No. 561/2021 passed by the Gauhati High Court)

NEHA BEGUM & ORS. Petitioner(s)

VERSUS

THE STATE OF ASSAM & ANR. Respondent(s)

Date : 02-09-2024 This petition was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA
HON'BLE MR. JUSTICE SANDEEP MEHTA

For Petitioner(s) **Mr. Kaushik Choudhury, AOR**
Mr. Sidhant Dutta, Adv.
Mr. Saksham Garg, Adv.
Mr. Jyotirmoy Chatterjee, Adv.

For Respondent(s) **Mr. Shuvodeep Roy, AOR**

Mr. Krishanu Barua, AOR

UPON hearing the counsel the Court made the following
O R D E R

1. This special leave petition preferred on behalf of the accused petitioners takes exception to the judgment and order dated 19th January, 2024 passed by the learned Single Judge of the Gauhati High Court in Criminal Petition No. 561 of 2021 whereby, the petition preferred by the petitioners under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter being referred to as 'CrPC') was dismissed thereby, affirming the order dated 9th March, 2021 passed by the learned Sessions Judge, Dibrugarh in Petition No. 1869 of 2019

filed in Sessions Case No. 202 of 2018.

2. The petitioners are facing trial for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter being referred to as 'IPC') before the Sessions Judge, Dibrugarh. The trial of the case had proceeded significantly, whereafter the petitioners filed an application under Section 231(2) read with Section 311 CrPC being Petition No. 1869 of 2019 with a prayer to further cross examine the prosecution witnesses No. 1, 2, 3, 6, 7 and 8. The said application came to be rejected *vide* order dated 9th March, 2021.

3. Learned counsel for the petitioners vehemently and fervently contended that the trial Court as well as the High Court proceeded on a total wrong premise that the petitioners were simply praying for further cross-examination of the witnesses which prayer could not be accepted as further cross-examination obviously follows re-examination and the prosecution had never re-examined the witnesses, thus, the defence could not be allowed to re-cross examine the prosecution witnesses.

4. Having gone through the impugned order passed by the High Court, we find that the said submission is fallacious on the face of the record. It is true that the trial Court has made a passing observation in the order dated 9th March 2021 that unless the witness(s) have been

re-examined by the prosecution, no opportunity of re-cross-examination can be given to the defence. However, on going through the order passed by the High Court, we find that the High Court has duly considered the factual aspects in context to the statutory provisions and held that the prayer made on behalf of the petitioners by way of the application under Section 311 CrPC was to recall the abovementioned witnesses and to permit the defence to conduct further cross-examination from them. Upon apropos examination of the entire material available on record, the High Court held that the grounds set out in the application praying for an opportunity of further cross-examination of the witnesses were vague and unsubstantiated.

5. The thrust of the submissions made on behalf of the accused petitioners in support of the prayer to recall and allow further cross-examination of the prosecution witnesses was that their erstwhile engaged lawyer had not properly cross examined the witnesses.

6. We may note that Section 311 CrPC operates in two parts, the first part clothes the Court with a power to summon or examine any person in attendance or recall or re-examine any person already examined. The second part mandates that the Court shall summon and examine or recall and re-examine such person, if his evidence appears to be essential to the just decision of the case.

7. Thus, first part of section gives a discretionary power to the Court to summon any person as a witness or to recall or re-examine the person already examined. Such a course of action is only permissible if the Court is satisfied that the prayer to recall and re-examine the witness is not made to fill in the lacuna and that the non-summoning of the witnesses would cause a serious prejudice to the accused. In this regard, we are benefitted by the judgment of ***Rajaram Prasad Yadav vs State of Bihar and Anr.***[1] wherein this Court culled out the principles to be borne in mind while exercising the power under Section 311 CrPC. The relevant extract is reproduced hereinbelow: -

> **"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 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**

1 [(2013) 4 SCC 461]

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 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."''

(emphasis supplied)

8. On a perusal of the subject application filed by the petitioners in the trial Court by invoking the provisions under Section 231(2) read with Section 311 CrPC, we find that other than a vague aspersion that the erstwhile lawyer engaged by the petitioners did not conduct proper cross-examination of the witnesses, no such specific ground was alluded on behalf of the accused petitioners which could be considered to be a valid ground for the trial Court to invoke the power under Section 311 CrPC.

9. Apparently thus, the prayer made by the petitioners in the application to recall and re-examine the witnesses was nothing but an attempt to fill in the lacuna. There is nothing on record to suggest that non summoning of the witnesses for further cross examination could cause grave prejudice the accused and that such a cause of action was essential for a just decision of the case.

10. The impugned order does not suffer from any infirmity. Hence, the special leave petition being meritless is dismissed as such.

11. Pending application(s), if any, shall stand disposed of.

(GEETA JOSHI)
SENIOR PERSONAL ASSISTANT

(NIDHI WASON)
COURT MASTER (NSH)