

SWAPAN KUMAR CHATTERJEE

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v.

CENTRAL BUREAU OF INVESTIGATION

(Criminal Appeal No. 15 of 2019)

JANUARY 04, 2019

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[A. K. SIKRI AND S. ABDUL NAZER, JJ.]*Code of Criminal Procedure, 1973:*

s. 311 – Power under – Scope of – Held: The power should be exercised with great caution and circumspection and should be invoked by the court only to meet the ends of justice – In the facts of the present case, the application for summoning the witness, ought to have been rejected.

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Allowing the appeal, the Court

HELD: 1. The power conferred under Section 311 Cr.P.C. should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law. [Para 12][716-F-H]

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2. In the instant case, the case was registered in the year 1983. 29 prosecution witnesses have already been examined. The application of the prosecution to examine the handwriting expert was allowed in the year 2004. However, prosecution has failed to call him in court for his examination. Thereafter, multiple applications have been filed to summon him and all of them have been allowed. However, the prosecution has failed to procure his attendance in the court. [Para 14][717-B-C]

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3. Despite the orders dated 28.07.2011 and 15.09.2014 passed by the High Court in criminal revision applications,

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- A **whereby prosecution was given last opportunity to procure attendance of the witness and it was observed that since the trial is pending for a long time, steps must be taken by the trial court to conclude the trial as expeditiously as possible, the trial court has allowed the application filed by the prosecution for summoning the witness, which order has been confirmed by the High Court.**
- B **The High Court ought to have rejected the application of the prosecution for summoning the witness. [Paras 15 and 16][717-D-F]**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 15 of 2019.

- C From the Judgment and Order dated 04.05.2017 of the High Court of at Calcutta in CRR No. 440 of 2015.

P.S. Datta, Sr. Adv., Ms. Anwesha Saha, Fuzail Ahmad Ayyubi, Advs. for the Appellant.

- D Vikramjeet Banerjee, ASG, V. D. Makheja, Sr. Adv., Sachin Sharma, P. K. Dey, T. A. Khan, A. K. Sharma, Mukesh Kumar Maroria, Advs. for the Respondent.

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J. 1. Leave granted.

- E 2. The appellant- Swapan Kumar Chatterjee has challenged the order dated 04.05.2017 in CRR No. 440/2015 passed by the High Court at Calcutta, whereby the High Court confirmed the order dated 05.12.2014 passed by the Trial Court permitting the examination of one witness Mr. H.S. Tuteja.

- F 3. Brief facts necessary for disposal of this appeal are as under:

4. A complaint was lodged by one Mr. P.N. Khanna before the Superintendent of Police, Central Bureau of Investigation (for short 'CBI'), Economic Offences Wing, Church Lane Calcutta, where the present appellant with others was arrayed as accused in CBI case No.7/E/83 dated 20.08.1983 under Sections 477A/471/468/420/120B of the

- G Indian Penal Code, 1860. After completion of the investigation, investigating agency filed chargesheet under the aforesaid sections and also under Section 5(1)(c)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 against the appellant and three others. The case was put on trial. Twenty nine prosecution witnesses were examined.

- H The Public Prosecutor filed a petition praying for examination of

handwriting expert Mr. H.S. Tuteja, which was allowed and a date was fixed on 24.03.2004 and then to 26.03.2004 for his examination. Prosecution was directed to issue summons to the witnesses well in advance of the date of evidence. However, Mr. H.S. Tuteja failed to appear before the Court due to which Prosecutor further sought time for fixing of a schedule till next day for his examination. This request of the Prosecutor was accepted by the Magistrate with a direction that the schedule is fixed on and from 10.05.2004 to 12.05.2004, and prosecution was directed to summon all the witnesses including Mr. H.S. Tuteja. The said witness yet again failed to turn up. The Prosecutor did not pray for re-issuing of summons and bailable warrant, but a separate petition was filed by the Prosecutor for re-summoning the witnesses including Mr. H.S. Tuteja. Such prayer was considered by the Magistrate as a last chance. From then onwards, whenever a date is fixed for examining Mr. H.S. Tuteja, he would fail to turn up and the prosecution would invariably come up with a petition either praying for time or for adjournment of the matter.

5. Interestingly, this practice has been going on unopposed for a period of thirteen years starting from the year 2004. It is necessary to notice here that the High Court of Calcutta in CRR No. 3436 of 2006 disposed of on 28.07.2011 gave a last opportunity to the CBI to procure attendance of Mr. H.S. Tuteja. It was observed that in case of failure on the part of the CBI to procure his attendance, and the attendance of other witnesses and get them examined, the Trial Court will proceed further with the trial without granting any further adjournment to the CBI keeping in mind that the case is still pending from the year 1985.

6. However, the Trial Court still allowed the prosecution time to present their witness Mr. H.S. Tuteja on 03.02.2012, who by now was nothing short of a creature of fiction and whose presence has been warranted yet unattained for over a decade. Despite summon was duly served upon, he was not present on that date also. Again, the matter was adjourned to 24.02.2012 for his evidence. Even thereafter on several dates, the CBI failed to produce the said witness.

7. Again, the High Court of Calcutta in Criminal Revision Application No.2696 of 2014 dated 15.09.2014 observed that since the trial is pending in the Trial Court for a long time, all steps must be taken by the Trial Court to conclude the trial as expeditiously as possible, preferably within coming six months.

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A 8. On 25.11.2014, the appellant was examined as DW-1. On the same day the prosecution again filed an application to examine Mr. H.S. Tuteja. This application was allowed by the Magistrate on 05.12.2014 and said order has been confirmed by the High Court.

B 9. We have heard learned senior counsel and learned ASG appearing for the parties.

10. Section 311 of the Code of Criminal Procedure, 1973 (for short ‘the Code’) provides for the power of the court to summon material witness or examination person present. It reads as follows:

C “**311. Power to summon material witness, or examine person present.**—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.”

E 11. The first part of this Section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

F 12. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

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13. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.

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14. In the instant case, the case was registered in the year 1983. 29 prosecution witnesses have already been examined. The application of the prosecution to examine Mr. H.S. Tuteja was allowed in the year 2004. However, prosecution has failed to keep him in court for his examination. Thereafter, multiple applications have been filed to summon him and all of them have been allowed. However, the prosecution has failed to procure his attendance in the court.

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15. As mentioned earlier, on 28.07.2011 the High Court of Calcutta gave the prosecution a last opportunity to procure his attendance and declared that in case of failure on the part of the CBI to procure the attendance of witnesses and get them examined, the Trial Court will proceed further with the trial without granting any further adjournment to the CBI. Even thereafter, the applications filed by the CBI have been allowed.

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16. On 15.09.2014, yet again, the High Court in a criminal revision application observed that since the trial is pending for a long time, steps must be taken by the trial court to conclude the trial as expeditiously as possible, preferably within six months. Even thereafter, the trial court has allowed the application filed by the prosecution for summoning Mr. H.S. Tuteja, which order has been confirmed by the High Court. In our view, the High Court ought to have accepted the appeal and rejected the application of the prosecution for summoning the witness, Mr. H.S. Tuteja.

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17. In the result, the appeal succeeds and it is accordingly allowed. The orders of the High Court dated 04.05.2017, as well as of the Trial Court dated 05.12.2014 are hereby quashed and the application filed by the Prosecutor for summoning Mr. H.S. Tuteja is hereby dismissed.

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