

Vijay Kumar vs State Of U.P. & Anr on 3 August, 2011

Equivalent citations: 2011 AIR SCW 6236, 2012 (2) AIR JHAR R 260, 2012 CRI. L. J. 305, 2012 (1) ALJ 369, 2011 (3) CALCRILR 269, 2011 CALCRILR 3 269, (2011) 105 ALLINDCAS 8 (SC), (2011) 4 JCR 71 (SC), 2011 ALL MR(CRI) 2893, 2011 (4) RECCRIR 208, 2011 (105) ALLINDCAS 8, 2011 (50) OCR 140, 2011 (8) SCALE 221, 2011 (8) SCC 136, 2011 (3) SCC(CRI) 371, 2012 (1) GUJLH 2 NOC, (2011) 8 SCALE 221, (2012) 2 MAD LJ(CRI) 284, (2012) 1 CGLJ 554, (2011) 3 DLT(CRL) 709, (2011) 74 ALLCRIC 879, (2011) 3 CHANDCRIC 321, (2011) 3 ALLCRIR 3007, (2011) 2 ORISSA LR 658, (2011) 2 UC 1441, (2011) 3 CURCRIR 298, 2011 (3) CRIMES 147 SN

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Bench: H.L. Gokhale, J.M. Panchal

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1345 OF 2011

(Arising out of S.L.P. (Criminal) No. 6562 of 2010)

Vijay Kumar

... Appellant

Versus

State of U.P. and another

... Respondents

J U D G M E N T

J.M. PANCHAL, J.

Leave granted.

2. This appeal, by grant of special leave, is directed against judgment dated May 10, 2010, rendered by learned Single Judge of High Court of Judicature at Allahabad in Criminal Revision No. 1895 of 2010, by which the order dated April 23, 2010, passed by learned Special Judge, Bareilly below Application No. 103 Kha in Special Case No. 2 of 2003 refusing to summon Smt. Ruchi Saxena, staying in U.S.A., as a court witness, is set aside and the learned Special Judge, Bareilly is directed to summon and examine Smt. Ruchi Saxena as court witness under Section 311 of the Code of Criminal Procedure, 1973.

3. From the record of the case it is evident that Smt. Ruchi Saxena, resident of village Aonla, District Bareilly, U.P., is owner of an agricultural piece of land. She is settled in U.S.A. Her property is being looked after by the appellant Mr. Vijay Kumar, who is her father. To avoid encroachment on the land Smt. Ruchi Saxena started constructing boundary wall on the agricultural land belonging to her.

However, construction of wall was objected to, by the Nagar Palika, Aonla on the ground that Nagar Palika is the owner of the said land. Therefore, Smt. Ruchi Saxena filed a suit No. 443 of 1999 in the Court of learned Civil Judge praying for permanent prohibitory injunction to restrain the Nagar Palika, Aonla and its servants, agents, etc. from putting up any obstruction in construction of wall to be carried out on the property in question. The learned Civil Judge, before whom the suit was pending, by order dated September 24, 1999, granted an interim order directing the Nagar Palika not to interfere with the possession of Smt. Ruchi Saxena of her agricultural land and not to obstruct construction of boundary wall. It may be stated that the Nagar Palika had filed an application on September 23, 1999 under Order VII Rule 11, Civil Procedure Code, to reject the plaint, as according to it, the plaint was not disclosing any cause of action. However, the said application was rejected by the learned Judge on September 23, 1999.

4. Feeling aggrieved by the order of injunction, Nagar Palika filed miscellaneous appeal under Order 43 Rule 1 CPC as well as a civil revision application under Section 115 of the Civil Procedure Code against order rejecting application filed under Order VII Rule 11 of the Civil Procedure Code before the High Court. During the pendency of the appeal and the revision, the respondent No. 2, i.e. Tajammul Hussain became Chairman of Nagar Palika in the year 2001. At that time, one Mr. Shamim Ahmad was Executive Officer of the Nagar Palika. After filing of suit Smt. Ruchi Saxena has gone to U.S.A. and presently she is residing there. However, the case instituted by her is being supervised and looked after by the appellant Mr. Vijay Kumar, who is her father.

5. The case of the prosecution is that the respondent No. 2 herein and the Executive Officer Mr. Shamim Ahmed demanded a sum of Rs.2 lacs as bribe from the appellant to settle the matter. Therefore, on December 5, 2001, the appellant lodged a complaint before S.P. (Vigilance), Bareilly in respect of the same, pursuant to which a trap was arranged. On December 7, 2001 the respondent

No. 2 and Shamim Ahmed were arrested while receiving an amount of Rs.50,000/- as part payment of total bribe amount of Rs.2 lacs. On April 24, 2002, the miscellaneous appeal, filed by the Nagar Palika against the order granting interim injunction, was dismissed by the appellate court, and thereafter, the appellant has constructed boundary wall over the property in question.

6. After success of the trap, further investigation was carried out and on January 4, 2003 charge-sheet was submitted against the two accused persons, namely, the respondent No. 2 and Shamim Ahmed, who was then Executive Officer of the Nagar Palika, for alleged commission of offences punishable under Sections 7, 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The prosecution also submitted a list of witnesses. The list did not indicate the name of Smt. Ruchi Saxena as one of the witnesses to be examined in the case because she was neither examined during the investigation of the complaint lodged by the appellant nor has any concern with the criminal case.

7. On December 16, 2006 an application dated February 26, 2004 was moved on behalf of Smt. Ruchi Saxena in the suit filed by her before the trial court seeking permission to withdraw the suit with liberty to file fresh suit in case there was fresh cause of action. The said application was allowed and the record shows that the learned counsel for Nagar Palika was also present at the time when the said order was passed.

8. After framing of necessary charges against the two accused the trial of the case was conducted before the learned Special Judge, Bareilly in Special Case No. 2 of 2003. During the trial the prosecution examined witnesses. They were cross-examined on behalf of the accused. On March 18, 2010 the prosecution submitted certified copies of the orders passed by the competent court and the High Court in respect of civil litigation. The learned Special Judge, by an order dated March 22, 2010, allowed the papers to be admitted in evidence, by awarding cost of Rs.500/- to each of the accused and closed the evidence on behalf of the prosecution.

Thereafter, the case was fixed for April 2, 2010 for statements of the accused to be recorded under Section 313 of the Code of Criminal Procedure and for defence evidence, if any.

9. On April 2, 2010, three separate applications were filed by the accused. One application No. 103 Kha was filed by accused Tajammul Hussain requesting the court to summon Smt. Ruchi Saxena as a court witness. Second application being No. 104 Kha was filed to recall the present appellant Vijay Kumar, PW-8 Anoop Kumar, PW-10 Lekh Pal Lala Ram and PW-11 Investigating Officer. Third application being No. 105 Kha was moved by the accused Shamim Ahmed to recall the appellant. On April 15, 2010, objections were filed on behalf of the prosecution to the three applications submitted by the accused.

So far as application praying to summon Smt. Ruchi Saxena and examine her as a court witness was concerned, it was stated on behalf of the prosecution that the application was filed to delay the trial because the accused were fully aware of the fact that Smt. Ruchi Saxena was residing in America as a citizen of USA and it was difficult for her to appear as a witness. It was also pointed out by the prosecution that Smt. Ruchi Saxena had nothing to do with this case and neither she was examined

under Section 161 of the Code of Criminal Procedure nor her name had been listed as one of the prosecution witnesses. What was maintained by the prosecution was that the application was filed with mala fide intention and accused had failed to indicate in the application as to what was the intention of their questioning Smt. Ruchi Saxena especially when no questions and/or suggestions were put to any of the witnesses examined by the prosecution with reference to her.

10. The learned Special Judge, by order dated April 23, 2010, dismissed all the three applications.

Therefore, feeling aggrieved, the respondent No. 2 filed a revision petition being Criminal Revision No. 1895 of 2010 before the High Court challenging the order by which his request to summon and examine Smt. Ruchi Saxena as a court witness was rejected.

11. The High Court has allowed the revision petition by judgment dated May 10, 2010 giving rise to the instant appeal.

12. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal.

13. Section 311 of the Code of Criminal Procedure reads as under: -

"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."

This Section consists of two parts, viz., (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compells a court to examine a witness if his evidence appears to be essential to the just decision of the case. The Section enables and in certain circumstances, imposes on the Court the duty of summoning witnesses who would have been otherwise brought before the Court. This Section confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court under Section 165 of the Evidence Act is complementary to its power under this Section. These two sections between them confer jurisdiction on the Court to act in aid of justice. There is no manner of doubt that the power under Section 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power under Section 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a

witness is essential for just decision of the case.

14. The record nowhere shows that any complaint was filed by Smt. Ruchi Saxena against any of the accused making grievance that they had demanded any bribe amount from her. The case of the prosecution is simple that in order to settle the matter relating to construction of boundaries on the disputed property, which is being supervised by the appellant who is father of Smt. Ruchi Saxena, the respondent No. 2 and another accused had demanded a sum of Rs.2 lacs as bribe amount from the appellant as a result of which the appellant had filed complaint pursuant to which a trap was laid and accused were arrested while receiving an amount of Rs.50,000/- as part payment of the bribe amount of Rs.2 lacs. As is evident from the facts of the case after success of the trap, FIR in the case was lodged by Mr. V.K. Bhardwaj, Inspector U.P. Vigilance Establishment. After framing of charge and commencement of trial several witnesses were examined by the prosecution, who had been cross-

examined by the accused. Smt. Ruchi Saxena had nothing to do with the bribe case either as a complainant or as a witness to the trap arranged by the police. Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the court of learned Special Judge. The High Court without specifying as to how Smt. Ruchi Saxena is a material witness or how her evidence is essential for just decision of the case, has directed the learned Special Judge to summon Smt. Ruchi Saxena as a court witness under Section 311 of the Code of Criminal Procedure and to examine her. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason. The High Court failed to consider the case of the prosecution that the application was submitted by the respondent No. 2 only to delay the trial and no case was made out by the respondent No. 2 as to why direction should be given to examine Smt. Ruchi Saxena as a court witness. In a bribe case what is required to be proved by the prosecution is that there was a demand of bribe by the accused from the complainant and that pursuant to the said demand, bribe amount was accepted by the accused. To prove this case it was not necessary for the court to examine Smt. Ruchi Saxena as a court witness.

15. Neither the respondent No. 2 in his application nor the court in the impugned judgment has specified the reason as to why and how examination of Smt. Ruchi Saxena as a court witness is necessary.

16. At this stage, it would be advantageous to refer to decision of this Court in Sawal Das vs. State of Bihar AIR 1974 SC 778. In the said case the appellant, his father and his mother were charged for murder of appellant's wife. Immediately after the wife was pushed inside the room and her cries of "Bachao Bachao" came from inside the room, her children were heard crying and uttering words

that their mother was either being killed or had been killed. But the children were not produced as witnesses in the trial court. There was some evidence in the case that the appellant's children had refrained from revealing any facts against the appellant or his father or his step-mother when they were questioned by the relations or by the police.

The argument before this Court was that they should have been summoned as court witnesses for examination under Section 540 of the Code of Criminal Procedure, 1898, which is in pari materia with same as Section 311 of Code of Criminal Procedure, 1973. This Court has held that the court could have rightly decided in such circumstances not to examine the children under Section 540 of the Code of Criminal Procedure. If this is the approach to be made while deciding application under Section 311 of the Code of Criminal Procedure, this Court fails to understand as to how the evidence of Smt. Ruchi Saxena was relevant in the instant case and why direction should be given to examine her as a court witness, as she was neither present at the time when the bribe was demanded or even at the time when the trap was arranged and laid. Without examining the relevance of evidence, which may be tendered by Smt. Ruchi Saxena or the necessity of examining her as a court witness or examining the question of prejudice if at all which is likely to be caused to the defence, if she is not examined, the High Court has directed the learned Special Judge to examine Smt. Ruchi Saxena as a court witness. There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure, 1973 is exercised arbitrarily and, therefore, the impugned judgment is liable to be set aside.

17. For the foregoing reasons the appeal succeeds. The impugned order dated May 10, 2010, rendered by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Revision No. 1895 of 2010 directing the learned Special Judge to examine Smt. Ruchi Saxena as a court witness is hereby set aside.

18. The appeal accordingly stands disposed of.

.....J. [J.M. Panchal]J. [H.L. Gokhale] New Delhi;

August 03, 2011.