Iddar & Ors vs Aabida & Anr on 25 July, 2007

Equivalent citations: AIR 2007 SUPREME COURT 3029, 2007 (11) SCC 211, 2007 AIR SCW 5490, 2008 (1) AIR JHAR R 619, 2007 ALL MR(CRI) 2073, 2007 (9) SCALE 358, (2007) 57 ALLINDCAS 47 (SC), 2007 (57) ALLINDCAS 47, (2007) 2 CRILR(RAJ) 608, (2007) 3 JCC 2050 (SC), 2007 CRILR(SC&MP) 608, 2008 (1) SCC (CRI) 22, (2007) 3 ALLCRIR 3190, (2007) 59 ALLCRIC 517, (2007) 3 CHANDCRIC 167, (2007) 2 MAD LJ(CRI) 1172, (2007) 2 MARRILJ 252, (2007) 38 OCR 341, (2007) 5 SUPREME 688, (2007) 4 EASTCRIC 51, (2007) 4 KER LT 652, (2007) 2 ORISSA LR 689, (2008) 1 RAJ LW 493, (2007) 3 RECCRIR 909, (2007) 3 CURCRIR 176, (2007) 9 SCALE 358, (2007) 4 ALLCRILR 385, (2007) 3 CRIMES 277, 2007 CRILR(SC MAH GUJ) 608, 2007 CHANDLR(CIV&CRI) 134, 2008 (1) ALD(CRL) 282, 2007 (3) ANDHLT(CRI) 401 SC

Author: Arijit Pasayat

Bench: Arijit Pasayat, D.K. Jain

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           CASE NO.:
Appeal (crl.)  934 of 2007

PETITIONER:
Iddar & Ors.

RESPONDENT:
Aabida & Anr.

DATE OF JUDGMENT: 25/07/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
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J U D G M E N T CRIMINAL APPEAL NO. 934 OF 2007 (Arising out of SLP (Crl.) No.1805 of 2006) Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Rajasthan High Court, Jaipur Bench dated 20.2.2006 passed under Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code') and order dated 2.3.2006 refusing to recall the said order i.e. 20.2.2006.

3. Background facts need to be noted in brief.

On 17.2.2005 the elder sister of the complainant lodged a complaint before the police station alleging that she was married to one Shri Sakeel. After sometime, the family of the husband of her sister started demanding dowry and torturing her. When the complainant went to meet her sister, she saw several wounds on her person. It was stated that both sisters were beaten and the complainant was raped by her family members and friends of in-laws. First Information Report (in short the 'FIR') was lodged for alleged commission of offences punishable under Section 498A, 406 of the Indian Penal Code, 1860 in short the 'IPC'). Since no case was found for alleged commission of offence punishable under Section 376 IPC, the said offence was not registered.

4. Another complaint was lodged on 24.4.2005 in respect of the same alleged event in another police station where the case was registered for alleged commission of offence under Section 376 read with Section 120B IPC. The appellants were arrested and an application for bail was moved. The High Court rejected the bail application. According to the appellant matter was amicably settled and the complainant appeared before the trial court and her statement was recorded. Her statement was at variance with the statement recorded during investigation. Thereafter an application in terms of Section 311 of the Code was filed requesting for recording statement of the complainant afresh. This according to the appellants was at the behest of some local persons and enemies of the appellants. The trial court by Order dated 13.1.2006 held that it was a case where prosecution was trying to fill up lacunae of prosecution version and it was rejected.

5. Respondent No.1 preferred application under Section 482 of the Code for setting aside the order of the trial court.

6. On 20th February, 2006 the application was allowed. Thereafter an application was filed to recall the said order as no notice was issued to respondents in the petition. They also filed an application to be impleaded. The High Court by order dated 2.3.2006 rejected the application filed to recall the order dated 20.2.2006.

7. In support of the appeal, learned counsel for the appellants submitted that the High Court's orders cannot be maintained because no reason has been indicated as to why the order of the trial court rejecting the prayer in terms of Section 311 of the Code was set aside. It was also submitted that since no notice has been issued to the appellants before the order was passed, the High Court erroneously rejected the prayer to recall the order.

8. Learned counsel for the respondent No.1 however submitted that this is a case where the High Court's order cannot be faulted even though when the first order was passed on 20th February, 2006, no notice had been issued to the appellants. They had sought to be impleaded on their own motion before the order rejecting the prayer for recalling the order was passed.

9. In this context, reference may be made to Section 311 of the Code which reads as follows:

> "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."

10. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code : (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched 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 it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

12. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the

evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not, must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

13. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jagat Rai v. State of Maharashtra AIR 1968 SC

178.

14. It is undisputed that the appellants were not heard before the order dated 20.2.2006 was passed. A specific ground taken in application to recall the order was that even no notice was issued and they were not impleaded as parties. It appears to have been brought to notice of the High Court that the appellants were heard before the trial court when the application in terms of Section 311 of the Code was decided by the trial court. It is true that the High Court has no power to review/recall its order. But in view of the peculiar factual scenario highlighted above, we set aside the order dated 20th February, 2006. The petition filed by the respondent No.1 shall be heard on merits.

15. It is stated that the appellants have already been impleaded in the application. If that is so, there shall be no need of respondents being impleaded. If it has not been done, the same shall be done. We make it clear that we do not express any opinion on the merits of the case.

16. Appeal is allowed.