

**AFR**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CRLMC No. 4401 of 2023**

***Jyotindriya Mohanty***

....

***Petitioner***

Mr. Nityananda Behuria, Advocate

*-versus-*

***Republic of India (CBI)***

....

***Opp. Party***

Mr. Sarthak Nayak, Advocate for CBI

**CORAM:**

**JUSTICE CHITTARANJAN DASH**

**ORDER**

**20.12.2023**

**Order No.**

02.

1. Heard Mr. N. Behuria, learned counsel for the Petitioner and Mr. S. Nayak, learned counsel for the Republic of India (CBI).

2. By means of this application, the Petitioner seeks indulgence of this Court challenging the order dated 03.08.2023 passed by the learned C.J.M. (CBI), Bhubaneswar in SPE Case No.03 of 2004, wherein the learned Court has rejected the petition filed by the Petitioner under section 311, Cr.P.C., praying to recall P.Ws.8 and 19 for further cross-examination.

3. The background facts of the case are that, the Petitioner is facing trial for the offence under Sections 120-B/420/471, I.P.C. pursuant to the F.I.R. lodged vide Chauliaganj P.S. Case No.164 of 1999. While the matter was in seisin before the Court and witnesses were examined, despite several opportunities given to the Petitioner, he did not avail the same to cross-examine the witnesses.

4. It is submitted by the learned counsel for the Petitioner that the Petitioner has been cooperating with the Court during the trial and as many as 22 witnesses have been examined so far. However, two witnesses, i.e. P.Ws.8 and 19, whom the Petitioner seeks to recall and cross-examine, are necessary for the interest of justice and just decision of the case.

5. Mr. Nayak, learned counsel appearing for the CBI vehemently objected to the contentions raised by the learned counsel for the Petitioner primarily on the ground that the application has been moved just to protract the trial when the trial is already at its fag end and the witnesses, who have been sought to be examined, are official witnesses who have simply exhibited the documents and the matter primarily relates to documentary evidence. And as such, he submits that the learned Trial Court has rightly declined to recall the witnesses for cross-examination.

6. The object underlying in Section 311, Cr.P.C. 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. These are reported in the matters of *Zahira Habibullah Sheikh and another vs. State of Gujarat and others* (2006) 3 SCC 374; *Jagat Rai vs. State of Maharashtra*, AIR 1968 SC 178; and *Iddar & Ors. vs. Aabbida & Anr.*, 2007 (11) SCC 211.

7. In the case of *Zahira Habibullah Sheikh and another vs. State of Gujarat and others* (2006) 3 SCC 374, it is held that –

*“The object underlying in Section 311, Cr.P.C. 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 direction conferred is to be exercised judiciously, as the wider the power, the greater is the necessity for application of judicial mind.”*

In the case of **Jagat Rai vs. State of Maharashtra, AIR 1968 SC 178**, it is held as follows –

*“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.”*

In the case of **Natasha Singh vs. CBI, (2013) 5 SCC 741**, it was held that –

*“the object of this Section is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. The court examines evidence under this Section neither to help the accused nor to help the prosecution. The fundamental thing to be seen is whether the court thinks it necessary in facts and circumstances of the particular case before it. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judicially and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.*

*The power conferred under section 311 Cr.P.C. 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 great caution and circumspection.”*

In the case of ***Iddar & Ors. vs. Aabbida & Anr., 2007 (II) SCC 211***, the Hon’ble Supreme Court has held that –

*“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.”*

8. The crucial point that needs to be examined by the Court while considering an application under Section 311, Cr.P.C. is, whether recall of the witness is in the interest of justice and just decision of the case. Time is not the essence in as much as the provision under section 311, Cr.P.C. is candid that at any stage of the trial either

parties to the proceeding may apply for recalling the witnesses for their cross-examination.

9. In that view of the matter, while allowing opportunity to the Petitioner, it is directed that the learned C.J.M. (CBI), Bhubaneswar shall fix date recalling the witnesses to face cross-examination. In the fitness of the circumstances, however, subject to cost of Rs.3000/-(Rupees Three Thousand) to be deposited by the Petitioner to be disbursed to the witnesses in equal. The Petitioner shall not ask for adjournment on the day when the witnesses will appear to face the cross examination and shall complete the cross examination on the very day. The Court shall make endeavour to ensure that no adjournment is granted except when the learned court feels necessary in the interest of justice and in case of any legal impediment.

10. The CRLMC is allowed and disposed of accordingly.

11. A free copy of this order be granted to the learned Counsel for the CBI for reference and compliance.

**(Chittaranjan Dash)**  
**Judge**