IN THE HIGH COURT OF ORISSA AT CUTTACK

DSREF No.1 of 2021

State of Odisha

Mr. Arupananda Das
Addl. Govt. Advocate

-versus-

DengunSabar& others ..... ***Condemned Prisoners/ Accused Persons***

Mr. Himanshu Bhusan Dash, Advocate

CRLA No.750 of 2021

DengunSabar& others ..... ***Appellants***

Mr. Manas Chand, Advocate

-versus-

State of Odisha ..... ***Respondent***

Mr. Arupananda Das
Addl. Govt. Advocate

CORAM:
THE HON'BLE MR. JUSTICE S.K.SAHOO
THE HON'BLE MR. JUSTICE R.K. PATTANAIK

ORDER
03.05.2024

Order No.

I.A. No.1036 of 2024 filed in CRLA No.750 of 2021

10. Both the matters are taken up for hearing through Hybrid arrangement (video conferencing/physical mode).

This interim application has been filed under

section 391 of Cr.P.C. by the appellants in CRLA No.750 of 2021 for recording of additional evidence of P.W.1 Melita Sabar, who is the informant by way of further cross-examination and allowing the questions mentioned in the questionnaire to be put to P.W.1 in the interest of justice.

It is stated in the petition that P.W.1 was examined in C.T. Case No.07 of 2017 in the Court of learned Addl. Sessions Judge, Gunupur on 31.07.2017. In the said trial, all the appellants were found guilty and death sentence was imposed on them. The learned trial Court submitted the proceeding to this Court for confirmation of the death sentence which was registered as DSREF No.01 of 2018. The appellants also preferred an appeal against the judgment and order of conviction and sentence passed by the trial Court in JCRLA No.46 of 2018 before this Court. Both the DSREF and the JCRLA were heard together and the judgment was delivered on 05.11.2019 and the matter was remanded back to the learned trial Court with a direction to add charges for the offences under sections 364 and 365 of the I.P.C. and to proceed in the trial, keeping in view the provision under section 217 of Cr.P.C.

It is further stated in the petition that on 14.11.2017, P.W.1 was examined before the Principal Magistrate, Juvenile Justice Board, Rayagada

(hereinafter 'the J.J.B.') as P.W.12 in G.R. Case No.418 of 2016 which arises out of the same F.I.R. in respect of juvenile Jamsu Sabar and that the evidence which she adduced before the J.J.B. was completely contrary to her evidence adduced as P.W.1 in the trial of the appellants.

It is further stated in the petition that after remand of the case, it was tried in the Court of learned Sessions Judge -cum- Special Judge, Rayagada in Criminal Trial No.08 of 2020 and P.W.1 was recalled and examined on 02.03.2020 and even though learned defence counsel was given an opportunity to cross-examine P.W.1 but the contradictions which are appearing in her evidence with reference to her evidence given as P.W.12 in G.R. Case No.418 of 2016 could not be confronted.

Learned counsel for the appellants submitted that in the interest of justice, this Court should exercise the power under section 391 of Cr.P.C. and allow the I.A. and permit the defence counsel to put the questions mentioned in the questionnaire of the interim application to P.W.1 in the further cross-examination.

As per the order dated 29.04.2024, learned counsel for the State has produced the written instruction dated 02.05.2024 received from the Inspector in-charge of Puttasing police station which

indicates that P.W.1 is now staying with her husband in village Tamegarjang under Seranga police station in the district of Gajapati. The written instruction is taken on record.

Learned counsel for the State has filed objection to the interim application wherein it is highlighted that the power of appellate Court to take further evidence should be exercised when the party making such request was prevented from presenting the evidence in the trial Court despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such further evidence might lead to failure of justice and that the power under section 391 of Cr.P.C. is to be exercised with great care and caution and not to fill up the gaps or lacuna of either of the parties. It is further argued that though it is submitted on behalf of the learned counsel for the appellants that the evidence given by P.W.1 as P.W.12 before the Juvenile Justice Board was not within the knowledge of the learned defence counsel for which the same could not be confronted but in the appeal memo, in ground no.M, it is stated as follows:-

> "M. For that as in the meantime, the C.C.L. namely Jamsu Sabar being faced the trial before the Children's Court, Rayagada has

been acquitted and although herein the P.W.1 has made allegation against the appellants but there in the Court has presented a different story and thus the veracity of the evidence of P.W.1 is not at all believable and thus the judgment deserves for a kind interference by this Hon'ble Court.”

It is argued by the learned State counsel that in view of the above, it cannot be said that the examination of P.W.1 as P.W.12 in G.R. Case No.418 of 2016 was not within the knowledge of the learned defence counsel and therefore, after getting the opportunity, if they have not availed the same and not cross-examined P.W.1 with reference to her evidence as P.W.12, no further opportunity ought to be granted which would delay disposal of the hearing of the appeal and DSREF.

Learned counsel for the State has placed reliance in the case of **Rambhau and another -Vrs.- State of Maharashtra reported in (2001) 4 Supreme Court Cases 759**, **Ajitsinh Chehuji Rathod -Vrs.- State of Gujarat and another reported in (2024) SCC OnLine SC 77** and **Purna Chandra Samal -Vrs.- State of Orissa and other reported in (2017) SCC OnLine Ori 59**.

The use of expression 'previous statement' in section 145 of Evidence Act would mean and refer to the statement made by a witness earlier in time of his/her deposition in Court.

In the case of **Brahma Naik -Vrs.- Ram Kumar Agarwal reported in 1974 Criminal Law Journal 567**, Hon'ble Chief Justice Mr. Justice Gati Krushna Misra (as his Lordships then was) has held that the statement of the prosecution witnesses recorded by the predecessor Asst. Sessions Judge are former statements of the witnesses who were subsequently examined after the de novo trial, though in the same proceeding. These statements can be used for contradiction under section 145 of the Evidence Act. There is no logic in the contention that because there was a de novo trial, those statements must be treated as if non-existent or inadmissible.

In the case of **Kali Pada Das and others -Vrs.- State reported in A.I.R. 1958 Calcutta 186**, it is held that if the records of the previous trial are before the Magistrate, there is nothing to prevent the parties to proceeding making use of the original records. As a matter of fact, in such cases, only the original records should be used, and they can be dispensed with only when it is proved that secondary evidence is allowable. It is not necessary to require the party to produce

certified copies of the statement before Court.

In the case of **State of Kerala -Vrs.- Babu and others reported in (1999) 4 Supreme Court Cases 621**, it is held that any previous statement recorded during course of trial would be treated as a 'previous statement' and can always be used for contradicting the witness or to prove omissions.

In the case of **Santosh -Vrs.- State of Chhattisgarh reported in 2002 Criminal Law Journal 1180**, it is held that a previous statement of a witness recorded during the course of trial continues to be a previous statement and in accordance with section 145 of the Evidence Act, the accused is entitled to contradict the maker of such statement with his previous statement.

Since after the remand of the case, P.W.1 Melita Sabar was examined on 02.03.2020 before the learned trial Court, the statement which she had given as P.W.12 on 14.11.2017 in G.R. Case No.418 of 2016 before the J.J.B. can be taken as 'previous statement' and therefore, it was legally permissible for the defence at that stage to confront the statement of P.W.1 recorded as P.W.12 in G.R. Case No.418 of 2016 on 14.11.2017 before the J.J.B. However, the learned defence counsel has not put any questions in that respect.

The question that crops up for consideration as to whether the prayer for recall of P.W.1 to put the questions with respect to her evidence given as P.W.12 in G.R. Case No.418 of 2016 is to be denied merely because the defence counsel did not bring such contradictions while cross-examining P.W.1 on 02.03.2020.

In the case of **Rambhau and another** (supra), the Hon'ble Court held as follows:-

> "2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of *Rajeswar Prasad Misra* v. *State of W.B.* [AIR 1965 SC 1887 : 1965 Cri LJ 817] in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in

that regard.

3. Be it noted that no set of principles can be set forth for such an exercise of power under section 391, since the same is dependent upon the fact situation of the matter and having due regard to the concept of fair play and justice, well-being of the society.

4. Incidentally, section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code.

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6. Before going into the factual score further, it is convenient to note at this juncture that

during the course of hearing of this appeal, the High Court thought it fit to conduct an additional examination of both the accused persons with a reasoning as below: "We have examined them to rectify the irregularity as cropped up and pointed out by the defence." The word "irregularity" in common English parlance means and implies contrary to rule. This Court in the case of *Martin Burn Ltd.* v. *Corpn. of Calcutta* [AIR 1966 SC 529] while explaining the meaning of irregularity observed: (AIR p. 534, para 13)

> "A point was, however, made that Section 131(2)(*b*) applies only to a cancellation on the ground of irregularity, that is, a procedural defect such as, absence of notice, omission to give a hearing, etc. There is, however, no reason to restrict the ordinary meaning of the word 'irregularity' and confine it to procedural defects only. None has been advanced. Such a contention was rejected, and we think rightly, in *Corpn. of Calcutta* v. *Chandoolal Bhai Chand Modi* [(1952-53) 57 CWN 882 : AIR

1953 Cal 773] . That word clearly covers any case where a thing has not been done in the manner laid down by the statute, irrespective of what that manner might be."

Black's Law Dictionary defines the word as "not according to rule and not regular" i.e. which stands contrary to rule. As noticed above, the purpose of introduction of Section 391 (earlier Section 428) in the statute-book has been for the purpose of making it available to the court, not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer. The High Court itself records "to rectify the irregularity", the issue therefore, is whether this rectification by an additional evidence is a mere irregularity or goes to the root of the issue and instead of subserving the ends of justice, the same runs counter to the concept of justice."

In the case of **Ajitsinh Chehuji Rathod**(supra), the Hon'ble Court held as follows:-

"9. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record

additional evidence under Section 391 Cr.P.C should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice."

In the case of **Purna Chandra Samal** (supra), in which one of us (S.K. Sahoo, J.) was presiding over the Bench, this Court held as follows:-

"11. Law is well settled that whenever the Appellate Court thinks it necessary in the interest of justice to take additional evidence in order to arrive at a just decision of the case or it feels that there would be failure of justice if the additional evidence is not taken, it has to record its reasons and either take such evidence itself or direct it to be taken by the lower Court. The Appellate Court however should not exercise such power to fill up the gaps in the prosecution case or if it feels that it would be prejudicial to the defence of the accused. If either of the parties had fair

opportunity before the Court below for adducing such evidence and in spite of that they did not avail the same, no such order for adducing additional evidence shall be provided to the parties by the Appellate Court unless the requirement of justice so demands. Therefore, the discretion of the Appellate Court under section 391 of Cr. P.C. either to take further evidence itself or to direct it to be taken by the lower Court should be exercised in a judicious manner where the admission of such further evidence to the Appellate Court's record is considered essential for arriving at the truth of the matter. It applies not only to oral evidence but also to documentary evidence. Such power can be invoked by the Appellate Court on the prayer of either side or even suo motu. The same principle applies to the revisional Court when a party seeks for adducing the additional evidence."

After hearing learned counsel for the respective parties and upon going through the ratio laid down in the aforesaid cases, we are of the humble view that in the interest of justice and to arrive at the just conclusion of the case, if additional evidence is required

to be taken which would not cause prejudice to any of the parties, the Appellate Court can take such evidence or cause such evidence to be recorded by the learned trial Court.

Criminal justice is not one-sided. It has many facets and the Court has to draw a balance between conflicting rights and duties. The victim of offence or the accused should not suffer for laches or omission of Public Prosecutor or the defence counsel respectively and even of the Court. The right to speedy trial in criminal case which includes disposal of criminal appeal preferred by the accused against conviction is a valuable and important right of the accused, but for the sake of speedy trial, there should not be denial of justice or grave miscarriage of justice.

In this case, when the appellants have been sentenced to death, even though the defence counsel has failed to cross-examine P.W.1 on 02.03.2020 with reference to the previous statement made by her on 14.11.2017 before P.M.J.J.B., Rayagada, after going through the questionnaire, we deem it proper to provide an opportunity to the appellants through their counsel to put the questions as mentioned in the questionnaire to P.W.1 in the cross-examination. What would be the evidentiary value of the answers elicited after taking such further evidence of P.W.1 is to be

decided during hearing of the criminal appeal and DSREF.

Accordingly, the prayer is allowed.

The original trial Court records in C.T. Case No.08 of 2020 which has been received by this Court along with a copy of the interim application (I.A. No.1036 of 2024) be sent to the learned Sessions Judge -cum-Special Judge, Rayagada and the learned trial Court shall issue summons to P.W.1 Melita Sabar and allow the learned counsel for the appellants to put only the questions which are mentioned in the questionnaire to this interim application. No other questions shall be permitted to be put to P.W.1 in the cross-examination. The prosecution is at liberty to request re-examination of the witness (P.W.1), if necessary only with reference to the further evidence adduced which shall be duly considered by the learned trial Court in accordance with law.

Needless to say that the trial Court shall call for the original trial Court records in G.R. Case No.418 of 2016 which is available in CRLA No.08 of 2018, pending in the Court of learned Addl. Sessions Judge, Gunupur in order to avoid delay for the purpose of being used in taking further evidence.

The summons on P.W.1 be served through the Inspector in-charge of Puttasing police station who shall

ensure her attendance on the date fixed.

It is expected that the learned trial Court shall record the evidence of P.W.1 at any time before the ensuing summer vacation.

After taking the additional evidence, the learned trial Court shall certify such evidence to this Court along with the original trial Court records of C.T. Case No.08 of 2020. Needless to say records of G.R. Case No.418 of 2016 shall be sent back to the Court of learned Additional Sessions Judge, Gunupur for disposal of CRLA No.08 of 2018.

I.A. is accordingly disposed of.

The DSREF along with CRLA be placed for further hearing on 24.06.2024.

A free copy of the order be handed over to the learned counsel for the State.

Issue urgent certified copy as per Rules.

(S.K. Sahoo)
Judge

(R.K. Pattanaik)
Judge

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