

VIJAY KUMAR

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v.

STATE OF U.P. AND ORS.

(Criminal Appeal No. 1345 of 2011)

AUGUST 03, 2011

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[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

*Code of Criminal Procedure, 1973 – s.311 – Summoning of witness in a bribe case – ‘R’, the daughter of appellant, owned a piece of agricultural land – To avoid encroachment on the land, ‘R’ started constructing boundary wall thereon – However, the construction was objected to, by the Nagar Palika whereafter ‘R’ filed suit to restrain the Nagar Palika and its servants, agents, etc. from putting up any obstruction in construction of the wall – After filing of the suit, ‘R’ went to U.S.A and the case instituted by her was supervised and looked after by the appellant – Prosecution case that in order to settle the matter, respondent No.2 and ‘S’, the Chairman and Executive Officer respectively of the Nagar Palika demanded bribe from appellant whereupon appellant filed complaint pursuant to which a trap was laid and the said two accused were arrested while receiving part payment of the bribe amount – Trial against the two accused u/s.7 and s.13(2) r/w s.13(1)(d) of Prevention of Corruption Act – Respondent no.2 filed application u/s.311 CrPC requesting the Court to summon ‘R’ as a court witness – Application dismissed by trial court – Order set aside by High Court – On appeal, held: Power u/s.311 CrPC should be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously – 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 – In the instant case, ‘R’ had nothing to do with the bribe case either as a complainant or as a witness to the*

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- A *trap arranged by the police – ‘R’ was also not present at the time when the bribe was allegedly demanded – Her name did not figure as one of the witnesses to be examined by the prosecution when charge-sheet was submitted in the trial court – To prove the bribe case it was not necessary for the court*
- B *to examine ‘R’ as a court witness – Neither respondent No.2 in his application nor the High court in the impugned judgment specified the reason as to why and how examination of ‘R’ as a court witness was necessary – Power u/s.311 CrPC was exercised by the High Court arbitrarily and, therefore, the*
- C *order rendered by it directing the trial court to examine ‘R’ as a court witness set aside – Prevention of Corruption Act, 1988 – s.7 and s.13(2) r/w s.13(1)(d).*

- Code of Criminal Procedure, 1973 – s.311 – Discretionary power under – Scope and ambit of – Held:*
- D *Though s.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*
- E *of criminal law – The discretionary power conferred u/s.311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously.*

- ‘R’, the daughter of appellant, owned a piece of**
- F **agricultural land. To avoid encroachment on the land, ‘R’ started constructing boundary wall thereon. However, the construction was objected to, by the *Nagar Palika* whereafter ‘R’ filed suit praying for permanent prohibitory injunction to restrain the *Nagar Palika* and its servants, agents, etc. from putting up any obstruction in**
- G **construction of the wall. During pendency of the suit, respondent No.2, became Chairman of *Nagar Palika*. After filing of the suit, ‘R’ went to U.S.A and the case instituted by her was supervised and looked after by the appellant.**

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The prosecution case is that in order to settle the matter relating to construction of wall on the property, which was being supervised by the appellant, the respondent No. 2 and 'S', the Executive Officer of the *Nagar Palika* 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 the said two accused were arrested while receiving an amount of Rs.50,000/- as part payment of the bribe amount of Rs.2 lacs. After success of the trap, further investigation was carried out and charge-sheet was submitted against the two accused persons, for alleged commission of offences punishable under Section 7 and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act, 1988. The trial of the case was conducted before the Special Judge. Subsequently, respondent no.2 filed application under section 311 of CrPC requesting the Court to summon 'R' as a court witness. The Special Judge dismissed the application. Aggrieved, respondent No.2 filed revision petition before the High Court challenging the order by which his request to summon and examine 'R' as a court witness was rejected. The High Court allowed the revision petition. Hence the present appeal.

Allowing the appeal, the Court

HELD:1.1. Section 311 of CrPC consists of two parts, viz., (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compels 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

A 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  
B 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  
C material is not brought on record due to any inadvertence.  
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  
D 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  
E decision of the case. [Para 13] [903-A-F]

1.2. In the instant case, the record nowhere shows  
that any complaint was filed by 'R' against any of the  
accused making grievance that they had demanded any  
F bribe amount from her. After framing of charge and  
commencement of trial, several witnesses were  
examined by the prosecution, who had been cross-  
examined by the accused. 'R' 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  
G one of the witnesses to be examined by the prosecution  
when charge-sheet was submitted in the court of Special  
Judge. The High Court without specifying as to how 'R'  
is a material witness or how her evidence is essential for  
just decision of the case, directed the Special Judge to  
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summon 'R' 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 Special Judge to examine 'R' as a court witness, the High Court did not examine the reasons assigned by the Special Judge as to why it was not necessary to examine her as a court witness and gave 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 'R' 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 'R' as a court witness. Neither the respondent No. 2 in his application nor the court in the impugned judgment specified the reason as to why and how examination of 'R' as a court witness is necessary. [Paras 14, 15] [903-G-H; 904-A-B]

1.3. This Court fails to understand as to how the evidence of 'R' 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

A was arranged and laid. Without examining the relevance of evidence, which may be tendered by 'R' 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 directed the Special Judge to examine 'R' as a court witness. There is no manner of doubt that the power under Section 311 of the Code of Criminal Procedure, 1973 was exercised arbitrarily and, therefore, the impugned order rendered by the Single Judge of the High Court in Criminal Revision directing the Special Judge to examine 'R' as a court witness is hereby set aside. [Paras 16, 17] [905-C-H; 906-A-D]

*Sawal Das vs. State of Bihar* AIR 1974 SC 778: 1974 (3) SCR 74 – relied on.

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**Case Law Reference:**

**1974 (3) SCR 74**                      **relied on**                      **Para 16**

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1345 of 2011.

From the Judgment & Order dated 10.5.2010 of the High Court of Judicature at Allahabad in Criminal Revision No. 1895 of 2010.

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Jitendra Mohan Sharma for the Appellant.

Ratnakar Dash, Alka Sinha, Anuvrat Sharma, Sukhendu Pal, Jetendra Singh, S.K. Sabharwal for the Respondents.

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The Judgment of the Court was delivered by

**J.M. PANCHAL, J.** 1. Leave granted.

2. This appeal, by grant of special leave, is directed against judgment dated May 10, 2010, rendered by learned

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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. A B

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. C D E F G

4. Feeling aggrieved by the order of injunction, Nagar Palika filed miscellaneous appeal under Order 43 Rule 1 CPC H

A 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  
 B 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  
 C 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  
 D 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  
 E 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.

F 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  
 G 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  
 H 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

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."*

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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 compels 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

A 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  
B 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  
C 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  
D 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  
E 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.  
F 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  
G 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  
H 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. A

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. B

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 C  
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- A 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
- B 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.

C 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.

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18. The appeal accordingly stands disposed of.

B.B.B.

Appeal disposed of.