

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.L.P. No. 198/2007**

% Date of reserve : 10.08.2009
Date of decision: 17.08.2009

MADHO SINGH CHAUHAN ...Petitioner
Through: Mr. S.S. Jain, adv.

Versus

STATE (GNCT OF DELHI) & ORS. Respondents
Through: Ms. Deepika Marwaha, adv.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? **Yes**
2. To be referred to Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

: **MOOL CHAND GARG, J.**

1. This Leave Petition has been filed by the petitioner seeking permission of this Court to file an appeal against the order dated 03.07.2007 passed by the learned MM concerned dismissing his application under Section 311 Cr.P.C. which was moved by him for leading evidence after the closure of his evidence on 06.06.2006. However, the trial Court while dismissing the application has also acquitted the respondents/accused persons of the charges since there was no evidence available on record.

2. Briefly stating the facts giving rise to filing of this petition are:

- i) That a complaint was filed by the petitioner under Section 200 Cr.P.C. on 15.10.1998 along with an application under Section 156(3) Cr.P.C. alleging that the respondents were guilty of having committed offences under Sections 341/379/406/420/425/426/448/451/452/563/464/465/468/

471/503/506/120B IPC & 112 of the Delhi Police Act and on that basis the concerned MM directed the police to register an FIR vide his order dated 02.11.1998.

3. The police registered the FIR bearing No. 20/1999 on 22.01.1999 under various sections as enumerated above but the relevant allegations made in the complaint are as under:

3. That the complainant had got every faith in the respondent/accused No.1 because of their deep intimacy with each others and discussed the whole matter regarding the poor condition of his health to the respondent/accused No.1 there the respondent/accused No.1 also suggested the complainant that he should not bother about his business as the respondent/accused No.1 shall take every care the business of the complainant and assure the complainant that in adverse circumstances the respondent/accused No.1 is always there to extend any sort of help and believing the assurances of the respondent/accused No.1 as a genuine the complainant prepared himself to shift at Panchkula and asked the respondent/accused No.1 to take every care of the business of the complainant and handed over the keys of his place of business leaving every paraphernalia in the automobiles shop

5. That in the month of August, 1997 the respondent/accused NO.3 came at Panchkula and extended a prepared rough draft of an agreement dated 15.08.1997 himself in his own hand writing with a view to get the same entered into between the respondent/accused No.3 and the complainant vide Annexure-A but the complainant never agreed to the same agreement because the complainant was never intended to part with the physical possession of the shop and finally to close his business of automobiles.

6. That the complainant was shocked and perturbed to receive a telephonic call from the respondent/accused No.1 on dated 03.11.1997 where the respondent/accused No.1 conveyed the most sorrowful message to the complainant where the respondent/accused No.1 asked the complainant to join the inauguration function of a restaurant of his son, respondent/accused No.2.

7. That the complainant had to rush at Delhi despite his poor condition of health and made a contact with the respondent/accused No.1 and got remembered the entire episode when the respondent/accused No.1 made the complainant to believe the false assurances a genuine one and induced the complainant to hand over the keys of the place of business of the complainant there the respondent/accused No.1 told the complainant that sons of the respondent/accused No.1 forced the respondent/accused No.1 to start a business at the closed place of business of the complainant, therefore, in the interest of the complainant itself the respondent/accused No.1 acceded to the proposal of the respondent/ accused No.2 and had opened a restaurant namely "CHENNAI RESTAURANT" and on the occasion of its inauguration the relatives of the respondent/accused

No.1 have already come from distance places and for the sake of their respect the complainant should not make any objection and the respondent/accused No.1 shall definitely settle everything and shall not give any chance of complainant to the complainant and shall also make every loss a good if found there. Believing the submissions and assurances of the respondent/accused No.1 the complainant allowed the respondents/accused No.1 to complete the inauguration function of the restaurant where all the respondents/accused persons were present and after the completion of the entire ceremonies the complainant asked the respondent/accused No.1 to restore the possession of the shop and the entire goods and articles which have been removed in connivance with the respondent/accused No.1 there at that very time other respondents/accused persons also gathered and promised the complainant to restore the possession of the shop including the other goods and articles of the complainant in short span of time and again the complainant believed the versions of the respondent/accused No.1 and started waiting for time when the respondent/accused No.1 could keep his words.

8. That when the complainant found himself with recovering health and wanted to resume his business the complainant made another contact with the respondent/accused No.1 and asked him specifically to restore the possession of the shop and other goods and articles with the complainant. The respondent/accused No.1 started raising a quarrel with the complainant and did not restore the possession of the shop and the other goods and articles and the complainant was not allowed to enter into his shop and was restrained by the respondents/accused No.3 and 4.

10. That when the complainant found himself in dark the complainant was constrained to register his written complaint with the Commissioner of Delhi Police, SHO, Police Station Anand Parbat etc.

11. That the complainant was again shocked and perturbed to receive a notice from the Hon'ble Court of Shri Sanatan Parsad: Civil Judge: Delhi as the respondent/accused No.3 filed a false and frivolous suit for permanent injunction against the complainant wherein the respondent/accused No.3 gave every false evidence before the Hon'ble Court of law and also submitted that the complaint had issued a no objection certificate in favour of the Chennai Restaurant. It is pertinent to mention here that the respondent/accused No.3 also submitted in the said suit that "when the plaintiff opened the Restaurant, he also applied for a water connection in the name of landlord & plaintiff is paying the water bills presently. It is pertinent to mention here that in the same suit the respondent/accused No.3 also submitted that "that once the restaurant started functioning there were good collection and the plaintiff is having a good reputation in the area."

4. With the aforesaid allegations the petitioner alleged that the respondents/accused in connivance with each others have hatched a criminal conspiracy and have committed various offences like theft after taking away the goods, articles and the Sign Board of the

complainant, criminal breach of trust, cheating, mischief, criminal trespass, forgery, making false documents, forgery for purpose of cheating, using as genuine and forged document, criminal intimidation etc. and wanted his prosecution accordingly.

5. A report dated 01.05.1999 under Section 173 Cr.P.C. was filed by the Police after investigating the FIR against the respondents/accused persons and it was stated that only offences under Section 406/34 IPC were made out. The MM concerned, however, summoned the petitioners to face charges only under Section 448/34 IPC.

6. A revision petition (Revision Petition No.616/2001) filed against the said order was dismissed by this Court vide order dated 22.07.2004. Being dissatisfied with the aforesaid order, the petitioner moved the MM for leading evidence so as to frame charges against the respondents/accused persons even under the other sections also. The Magistrate permitted the petitioner to lead evidence in this regard and it is thereafter the Magistrate framed charges against the respondents/accused persons under Sections 406/34 IPC instead of charges under Section 448 IPC vide order dated 27.08.2001. Thus, the nature of case had changed. Now, it became a complaint case because it proceeded on the basis of the evidence led by the petitioner despite filing of a chargesheet by the concerned police earlier and, thereafter, the case was listed for recording the evidence of the petitioner for the first time on 24.05.2003. Thereafter, the petitioner was granted number of opportunities to lead the evidence but he failed to lead his evidence and finally his evidence was closed on 06.06.2006. He, thus, moved an application under Section 311 of the Code of Criminal Procedure (Cr.P.C.) on 26.03.2007. The said application has been dismissed by the trial Court by passing the following order:

Immediately after passing of the impugned order dated 27.8.2001, the matter was posted for recording of

evidence on 27.11.2001, on which date both the parties had jointly taken an adjournment on the pretext of negotiating some compromise. Same situation continued on subsequent dates as well. Even by order dated 24.05.2003, it was made clear that in the absence of any stay order from the Hon'ble High Court of Delhi, there was no bar in proceeding further with this case on its merits and the matter was listed for evidence again, but no evidence was brought by the complainant despite availing 8 opportunities in this regard since 24.5.2003 and it was the complainant alone who had taken all the aforesaid adjournments on each and every occasion. So far as the transfer of cases from Tis Hazari to Rohini Courts and vice versa is concerned, it was only for three dates of hearings when the matter was listed before Id. MM Rohini, New Delhi, otherwise same had always remained in Tis Hazari courts.

During the course of arguments, Id. cl. for complainant has also stated that it was due to Asthama attack that the complainant could not lead evidence. However, neither this submission has been made in this application nor any medical certificate to this effect has been furnished on record, hence I do find it to be a frivolous plea raised by the complainant. Since the complainant has failed to assign any good and sufficient reason for not examining even a single witness till date hence the application in hands is devoid off any merits. Same is accordingly dismissed with an exemplary cost of Rs.3,000/-

Since no incriminating evidence has been put forth by the complainant against the accused persons hence both accused are acquitted in this case. Their BBSB stands cancelled and discharged. Endorsements, if any be cancelled. Originals, if any of the surety lying on record be returned or released after due and valid acknowledgment and receipt thereof.

7. It is against the aforesaid order, the petitioner has filed the present petition. It is his case that:

"2. That the relevant facts leading to file this petition are detailed in the accompanying appeal. The same are not repeated here for the sake of brevity and the same be read as part and parcel of this petition.

3. That the petitioner has a very good case in the appeal and his appeal is most likely to be accepted by this hon'ble Court as the learned Trial Court has committed the grave legal error while acquitting the respondents No.2 and 3 and imposing the cost of Rs.3000/- in the aforesaid case.

P R A Y E R

It is, therefore, prayed that the special leave to appeal may kindly be granted to the petitioner and accompanying appeal may kindly be allowed."

8. However, a perusal of the appeal goes to show that the petitioner has not given any justification as to why he could not lead the evidence despite several opportunities granted to him. Even

though, on his request he was permitted to lead pre-summoning evidence after the filing of a chargesheet and it is after recording his evidence that the respondents/accused persons were summoned and charges were framed against them under Section 406/34 IPC instead of charges under Section 448/34 IPC which were framed earlier on the basis of report submitted by the SHO. In view of that the case ceased to be based upon the police report and the cognizance of the charges under Section 406/34 IPC were taken by the Magistrate based upon the evidence led by the petitioner as complainant.

9. In his written submissions, the petitioner has submitted that he could not lead his evidence because he was a sick and infirm person and a chronic patient of Asthama and allied diseases but as observed by the MM concerned he did not file any medical document in this regard though he has tried to file those documents before this Court. None of these documents goes to show that the petitioner was not in a position to lead his evidence. His written submissions show that the petitioner had come to know that respondent No.2 was running a restaurant in the shop, subject matter of the dispute, yet he did not take any civil action against the said respondent whereas respondent No.2 had filed a civil suit (C.S. 334/2000) on 15.09.2009 against the petitioner seeking permanent injunction against him for causing any interference in respondent's running a business of restaurant, which had been decreed on 15.02.2005. It is also a matter of record that a no objection certificate was given to the respondent, Mohan Das, by the petitioner himself for running a restaurant. It is also an admitted fact that the petitioner was present at the time of inauguration of the restaurant which had been set up by the said respondent after spending lot of money.

10. As stated above, charges against the respondents/accused persons were framed under Sections 406/34 IPC only after the petitioner led evidence to pursue his complaint despite filing of a challan by the police and thus, the Magistrate proceeded ahead with the case by treating it as a complaint case. There is no dispute that despite availing of several opportunities the petitioner failed to lead his evidence. It is also a matter of record that a Civil Suit has already been filed by the petitioner for obtaining possession of the subject property, which is pending in this Court.

11. The main thrust of the arguments addressed on behalf of the petitioner is that in the present case the procedure adopted by the trial Judge was not proper inasmuch as once there was a challan filed by the police under Section 173 Cr.P.C. and there was also a complaint filed by the petitioner on which evidence was also led by him, the trial Judge should have tried the case as a case arising out of a police report in exercise of the powers under Section 210 Cr.P.C. Having not done so, the entire proceedings taken out by the trial Judge are liable to be quashed. The petitioner also submits that merely because the disputes between the parties also involve disputes of the civil nature it would not denude the criminal courts of the jurisdiction to try the case under the criminal law, if a case is made out.

12. It is also the case of the petitioner that the power under Section 311 Cr.P.C. can be exercised by the Court at any stage and, therefore, even though the petitioner could not lead his evidence earlier, once a request was made under Section 311 Cr.P.C. the trial Judge should have allowed the petitioner to lead his evidence. In this regard he has referred to a judgment delivered by the Supreme Court in Mohanlal Shamji Soni Vs. Union of India **1991 Cr.L.J. 1521 (SC)** where it has been held:

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions S.540 of the Code (S.311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. The very usage of the words such as 'any Court' 'at any stage' or 'of any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that this Section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

13. I have given my thoughtful consideration to the rival submissions.

14. The record of the case goes to show that the litigation between the parties is going on ever since 1998. The record further shows that the possession of the premises in question was voluntarily handed over by the petitioner to the respondent, even though, the respondent claims that it was in pursuant to an agreement to sale. Even if it is presumed for the sake of arguments that it was a mere entrustment of the property, the conduct of the petitioner goes to show that he had no grievance in the respondent running a business therein. In any event, when the parties are before the Civil Court where the issues raised by both the parties can be looked into and, in fact, has already been looked into in the suit filed by the respondent for permanent injunction

wherein the petitioner was enjoined from interfering with the respondent's possession of the premises in question. Thus, the dispute which stands settled between the parties and which is in the nature of civil dispute cannot be converted into criminal proceedings. The record makes it apparent and clear that the complaint filed by the petitioner was only an abuse of the process of Court because the relationship between the parties goes to show that the possession of the shop was given voluntarily by the petitioner to the second respondent who then opened a restaurant. The petitioner/complainant was very much present at the time when the restaurant was opened. Even thereafter he took no action except for filing a complaint. There is no justification as to why the suit has been filed now and was not filed earlier. More so, when a civil suit filed by the respondent against him for injunction stands decreed.

15. Insofar as the plea taken by the petitioner that the procedure prescribed under Section 210 Cr.P.C. was not followed in this case, it would be appropriate to take note of the provisions under Section 210 Cr.P.C.:

210 - Procedure to be followed when there is a complaint case and police investigation in respect of the same offence:- (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by

him, in accordance with the provisions of this Code.

16. In the present case once the report was filed by the police, the petitioner was not happy with the said report and wanted the complaint to be proceeded with and for that purpose led his evidence and it is thereafter, fresh charges were framed. Thus, the filing of the report came to a naught and the case remained only as a complaint case. However, even if for the sake of arguments it is assumed that the case should have proceeded on the basis of police challan then also despite several opportunities, the complainant, who was a star witness, failed to lead evidence and has also not been able to justify his absence. Even if it was to be taken as a police case, the petitioner would not have been successful and the respondent was in any case entitled to acquittal. In that view of the matter also it is not a case where any interference be caused by this Court to grant leave to file an appeal to the petitioner.

17. It will not be out of place to mention that the object underlying Section 311 of the 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. In the present case, the petitioner has availed more than 8 opportunities to lead his evidence but he failed to do the needful. Thus, he cannot be allowed to misuse the provisions of law.

18. Taking all these facts into consideration, I do not find any reason to interfere with the order passed by the Magistrate and therefore there is no occasion for granting leave for filing of appeal by the petitioner against the said order. Accordingly, the petition is dismissed.

19. Trial Court Record be sent back.

MOOL CHAND GARG, J.

AUGUST 17, 2009
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