

\*

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

+

**CRL. REV. P. No. 563/2008**

**Reserved on : 18.08.2009**

**Date of Decision : 18.02.2010**

**Subash Chand Barjatya**

**..... Petitioner**

Through: Mr. H.S. Bhullar, Adv.

Versus

**Madhu Mishra & Anr.**

**..... Respondents**

Through: Mr. Pawan Bhal, APP for the State.

**CORAM :**

**HON'BLE MR. JUSTICE V.K. SHALI**

- |    |                                                                       |     |
|----|-----------------------------------------------------------------------|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not ?                               | No  |
| 3. | Whether the judgment should be reported in the Digest ?               | No  |

**V.K. SHALI, J.**

1. By virtue of the present petition under Section 482 read with section 397 Cr.P.C. the petitioner has challenged the order dated 8<sup>th</sup> July, 2008 passed by Sh. Sudesh Kumar, the learned Metropolitan Magistrate, New Delhi titled **M.S. Mishra Vs. Subhash Chand Barjatya** in complaint filed under Section 138 of the Negotiable Instruments Act.

2. Briefly stated the facts of the case are that the respondent no. 2 herein filed a complaint through Power of Attorney under Section 138 of the Negotiable Instruments Act against the present petitioner. After recording the statement of the petitioner under Section 313 Cr.P.C. he was given an opportunity to adduce his evidence in his defence. The petitioner entered into

the witness box in pursuance to the provisions of Section 315 Cr. P.C. and after testifying on oath the petitioner was cross examined on behalf of the respondent no.2. On 15<sup>th</sup> March, 2007 and the matter was adjourned to 1<sup>st</sup> June, 2007. Thereafter the respondent no. 2 filed an application under Section 311 Cr.P.C. stating therein that as the accused /petitioner Subhash Chand Barjatya had appeared in the witness box as DW-1. He testified that an investment of Rs.75,00,000/- was made by one Abhishek Verma of M/s Infocom Digital out of which a sum of Rs.14,00,000/- was paid to the respondent no.2 and his wife Kiran Mishra on account of the fact that this was considered to be a lucrative investment as it would get a higher return. Accordingly, the respondent no. 2 filed an application to enter into the witness box himself and rebut the evidence adduced by the accused petitioner making the statement to the effect that certain payment have been made by Sh. Abhishek Verma, M/s Infocom Digital to the respondent no.2. This application was allowed by the learned Metropolitan Magistrate on the ground that earlier the respondent no. 2 had filed a complaint through his power of attorney and since the power of attorney holder had only testified, therefore, it was necessary in the interest of justice and a just decision of the case, to permit the respondent no. 2 to enter into the witness box as a court witness. The learned Metropolitan Magistrate relied upon the cases of the Apex Court in **B. Chhagan Lal Dagar Vs. State** 2004 SCC (Crl.) 183 and **Edar & Ors. Vs. Abid JT** (2007) (IX) SC 552. It was also observed by the learned Metropolitan Magistrate that so far as the petitioner is concerned, he will have an opportunity to cross-examine the witnesses and accordingly the application was allowed subject to payment of cost of Rs.5,000/- to the present petitioner.

3. The petitioner/accused feeling aggrieved by the aforesaid order has challenged the same by virtue of the present petition.

4. I have heard the learned counsel for the parties as well as perused the record.

5. The main contention of the learned counsel for the petitioner is to the effect that the impugned order is permitting the present petitioner to fill up the lacuna in as much as he has earlier chosen to testify through power of attorney and, therefore, the present respondent no. 2 cannot turn around and contend that he be permitted to examine himself as a court witness. So far as rebutting the testimony of petitioner is concerned, who himself testified as DW-1, it has been urged that what has been testified by DW-1 is not something new but this was already known to the respondent no. 2 and therefore, the respondent no. 2 should have been vigilant enough to cross examine the witness namely the petitioner when he was testified as DW-1.

6. I do not agree with the contention of the learned counsel for the petitioner that the impugned order suffers from any irregularity, illegality and impropriety. Section 311 Cr.P.C. read 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.”

7. A bare perusal of the aforesaid Section clearly show that it consists of two parts while as the first part is discretionary and the second part is

mandatory. No doubt, there may not be a specific provision permitting the complainant to adduce evidence in rebuttal but that does not prevent the Court from exercising the power under Section 311 Cr.P.C. and recall for re-examination or summon any person as a witness either on application or suo moto of its own, if it is of the opinion that the examination or re-examination or cross examination of the said witness will be very essential for an arrival at a just decision of the case. In this regard, the observation passed by the learned Metropolitan Magistrate is perfectly justified and valid that the hallmark of exercise of power under Section 311 Cr.P.C. is as to whether such an examination or re-examination is for just decision of the case or not. There may be various other terminologies used for the same phrase namely 'just decision of the case', 'interest of justice' or 'arriving at a truth' but the fundamental principle of exercise of power would remain the same whether it would help the Court in deciding the case involving the real issue in arriving at the truth.

8. In the instant case also the learned Metropolitan Magistrate has already formed an opinion and observed that the examination of the witnesses is necessary for the just decision of the case. This power which essentially has to be exercised by the Trial Court which is in-charge of the case as a whole and knows the facts of the case. In the present case the learned Metropolitan Magistrate keeping the facts and circumstances of the case has chosen to exercise the discretion in favour of the respondent no. 2 for permitting his examination on the point which have been brought on record for the first time through the testimony of DW-1 by permitting cross examination of the complainant. I feel that no serious prejudice is likely to be caused to the present petitioner because not only he will have a right of cross-examination but

also this will help the Court in arriving at a just decision. In **P. Chhaganlal Daga Vs. M.Sanjay Shaw** 2003 (11) SCC 486, the Supreme Court observed that the power to receive evidence in exercise of Section 311 Cr.P.C. of the Court could be exercised even if evidence on both sides is closed and such jurisdiction of the Court is directed by exigency of situation and fair play. The only factor which should govern the Court in exercise of power under Section 311 should be whether such material is essential for the just decision of the case. I, therefore, do not find any infirmity, illegality or impropriety in the order passed by the learned Metropolitan Magistrate allowing the application of the respondent no. 2 to examine the complainant/respondent no. 2 as a court witness. Accordingly, the revision petition is totally misconceived and the same is dismissed.

**February 18<sup>th</sup>, 2010**  
**KP**

**V.K. SHALI, J.**