

Court No. - 86

Case :- CRIMINAL REVISION No. - 771 of 2024

Revisionist :- M/S Vrindavan Associates Situated At 7/108 Swaroop Nagar Kanpur Nagar Through Its Proprietor Naresh @ Mukesh Khandelwal And Another

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Mahendra Pratap, Shashank Tripathi

Counsel for Opposite Party :- G.A., Usha Srivastava, Vinod Kumar Srivastava

Hon'ble Ram Manohar Narayan Mishra, J.

1. Heard learned counsel for the revisionist, learned counsel for the opposite party no. 2, learned AGA for the State and perused the material available on record.

2. Instant criminal revision has preferred against the impugned order dated 12.1.2024 passed by the learned Additional Session Judge, Court No. 21, Kanpur Nagar in Criminal Appeal No. 56 of 2023 arising out of judgement and order dated 13.4.2023 passed in complaint case no. 37391 of 2017, under section 138 of N.I. Act, P.S. Nazirabad, District Kanpur Nagar whereby application under section 311 Cr.P.C. has been rejected.

3. By the judgement and order dated 13.4.2023, learned trial court has convicted the revisionist for charge under section 138 N.I. Act and sentenced him to six months simple imprisonment with fine of Rs. 2,25,00,000/- payable to the complainant as compensation. During pendency an application 54Kha was filed by the applicant under section 311 Cr.P.C. wherein prayer has been made to summon the entire call record of R.T.I. information dated 5.6.2020 which got misplaced during trial of the case, the bank statement of account of complainant for the period between 1.3.2017 to 31.5.2017 along with bank employee and register of cheque deposit dated 25.3.2017 and bank memo dated 22.5.2017 along with concerned employee and bank circular concerned which was supplemented with another application dated 8.1.2024.

4. Learned counsel for the revisionist submitted that a Cheque no. 146844 amounting Rs. 2,00,00,000/- was never deposited in the Bank. Bank memorandum dated 22.5.2017 was never issued by the Bank and bank memo upon which the case proceeded is a

forged document. The parameters of section 138 N.I. Act has not been fulfilled in present prosecution of the revisionist. Neither cheque no. 146844 amounting Rs. 2,00,00,000/- was presented before the Banker nor presented before the treasurer. Bank concerned itself accepted that cheque in dispute was neither presented nor passed for process.

5. Learned counsel for the revisionist next submitted that neither revisionist received any message from the bank concerned regarding presentation or return of cheque nor any entry in this regard finds place on bank record wherein the Bank Manager had admitted that in case dishonour of cheque existing Rs. 1,00,00,000/-, the account holder was informed telephonically to ascertain the genuineness of the cheque in question. He also submitted that learned appellate court has rejected the application under section 311 Cr.P.C. without giving the record and considering significance and relevance of prayer made therein. The evidence which is sought to be tendered by 311 Cr.P.C. is relevant for case and to serve the doctrine of fair trial which is an important aspect of the criminal trial.

6. In view of rejection of the application by appellate court the right to defend the case which is available to the revisionist/accused has been jeopardize. By the impugned order dated 12.1.2024 passed by the appellate court dismissed the application under section 311 Cr.P.C. is totally illegal and arbitrary and is not sustainable.

7. He next submitted that the impugned order is not an interlocutory order but it may be turned as intermediate order because in case the application is allowed, the evidence which is sought to be adduced by the revisionist is certainly demolish the case of the prosecution/complainant and is liable to decide the case finally.

8. Learned counsel for the revisionist placed reliance on the evidence of D.W. 1 Bank Manager of the concern Branch as well as the information received by the revisionist under RTI Act from concerned branch of the Bank where it is stated no record is available regarding presentation of the disputed cheque before the Bank.

9. Learned counsel for the revisionist placed reliance on judgement of Hon'ble Supreme Court passed in ***Varsa Garg vs State of M.P. and others AIR 2020 SC 107*** wherein Hon'ble Court observed 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 of 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 the 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 any inquiry or trial or other proceeding under this Code".

10. Hon'ble Court in **Versha Garg (supra)** observed in paragraph no. 43 as under:

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence- collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."

11. Learned counsel placed reliance on judgement of Single Bench Judgement of this Court in Criminal Revision No. 1344 of 2018 wherein it is held that where application to recall P.W. 2 in terms of Section 311 Cr.P.C. was rejected by the trial court the present criminal revision against said order is maintainable. Learned counsel placed reliance on paragraph no. 21 of the judgement of Apex Court passed in **Girish Kumar Suneja vs. C.B.I. (2017) 14**

SCC 809 which reads as under:-

"21. The concept of an intermediate order was further elucidated in Madhu Limaye v.State of Maharashtra by contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reversed, it has the effect of terminating the proceedings and thereby resulting in a final order. Two such intermediate orders immediately come to mind – an order taking cognizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in nature, but when an order taking cognizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. Similarly, an order for framing of charges if reversed has the effect of discharging the accused person and resulting in a final order in his or her favour. Therefore, an intermediate order is one which if passed in a certain way, the proceedings would terminate but if passed in another way, the proceedings would continue."

12. Learned counsel for the revisionist also placed reliance on the judgment of Supreme Court in **Rajaram Prasad Yadav vs. State of Bihar and another 2013(14)SCC 461** wherein ambit and scope of section 311 Cr.P.C. has been elaborately discussed.

13. Hon'ble Supreme Court held that power conferred under section 311 Cr.P.C. must, therefore, be invoked by the court only in order to meet ends of justice, for strong and valid reasons, and the same must be exercised with great caution and satisfaction. In paragraph No. 23 Hon'ble Court observed as under:-

"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

- c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.*
- d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*
- e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*
- h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
- i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*
- j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*
- k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

14. Per contra, learned counsel for the opposite party/complainant submitted that this is a case of protracted trial and the criminal appeal preferred by the revisionist following the judgement and order of trial court against which the appeal is pending. The matter relates to year 2017 and a number of applications were filed by the revisionist before trial court to delay the conclusion of trial and when the revisionist was convicted and sentenced by trial court he is again adopting delaying tactics by filing unnecessary application in criminal appeal preferred before court of session. All the issues raised in application 54 kha were addressed by the trial court in the impugned judgement against which criminal appeal has been preferred.

15. It is next submitted that the impugned order passed by the appellate court by which the application 311 CrP.C. has been filed is an interlocutory order and revision is not maintainable against that order. He further submitted that there is specific provision under section 391 Cr.P.C. that appellate court take further evidence or direct it to be taken by trial court and section 311 Cr.P.C. is not applicable at appellate stage.

16. He also submitted that the Bank Manager concerned has replied every query raised on behalf of the revisionist in cross examination and further the revisionist is reopening those issues by way of section 311 Cr.P.C. which shows that the ulterior motive of the revisionist is to delay the disposal of criminal appeal and deprive the respondent his right of redressal of his grievance by way of compensation awarded by trial court.

17. The Bank Manager has testified that in case of Kendra bank transaction charges are not deducted and in case of bank transaction it is not necessary fixation of seize of paying bank need not be done.

18. It is also submitted that those fact is proved in judgement of trial court that cheque in question bearing signature of revisionist himself and revision has taken wrong stand that the cheque was not signed by him.

19. Learned counsel for the revisionist further submitted that that revisionist had got seriously injury on 16.11.2016 and he was hospitalized during the period when the disputed cheque was alleged to be issued and he had assigned his brother DW 2 Umes chandra Khandwal to transact banking business of revisionist in Bank and on his behalf had issued a letter in this regard to the concerned branch of bank therefore no question of signing the disputed cheque had arisen. He was not in a position to sign the cheque due to injury in his hand.

20. The object underlying under section 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in valuable evidence on record or leaving ambiguity in the statement of the witnesses examined from either side. The guiding force is whether it is essential to the just decision of the case. Section 311 Cr.P.C. provides 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."

21. Learned counsel for the revisionist submitted that the word "other proceedings in this Code" used in Section 311 comprehends criminal appeal also as appeal is supposed to be continuation of trial. In Mahesh vs State of Maharashtra, Bombay High Court held that power under section 311 Cr.P.C. can be exercised by the appellate court also.

22. At appellate stage there is specific provision under section 391 Cr.P.C. which reads as under:-

"391. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate. (2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal. (3) The accused or his pleader shall have the right to be present when the additional evidence is taken. (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

23. Accordingly, section 391 Cr.P.C. deals with the appellate court's power to take further evidence or direct it to be taken by trial court whereas same provision has been covered under section 432 of recently enacted BNSS. In dealing with any appeal under Chapter 29 of the Code, the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate or when appellate court is a High Court by court of Session or the Magistrate. The power under section 391 can only be exercised if the appellant was prevented from presenting such evidence in trial despite due diligence. However on principle there are no fetters on the power under section 391 Cr.P.C. of the appellate court, the only guidance is that all powers are conferred on the Court to secure ends of justice. The appellate court can exercise the power under section 391 Cr.P.C. when it believes that additional evidence is necessary. This could be when the facts leading to tendering of additional evidence were not known during trial, or when new facts came into light later. The general rule is that the appellate court should not go outside of the lower courts' record or take evidence in criminal appeal, however, section 391 provides for institution when appellate court may take further evidence or direct it to be taken by trial court.

24. I have gone through the impugned order passed by appellate court by rejecting application 54 Kha and same is preceded by cogent reasons and all the points raised in application under section 311 Cr.P.C. have been duly addressed while dismissing the application. I find no irregularity, illegality or perversity passed by the appellate court.

25. The impugned order passed in application under section 311 Cr.P.C. by appellate court it appears to be interlocutory order and

filing an application under section 311 Cr.P.C. before appellate court is an exceptional situation. The revision is devoid of force and deserves to be dismissed. However, it is open to the revisionist to move an application under section 391 Cr.P.C. if he finds it fit and in case such application is filed the appellate court will decide the same in accordance with law.

26. With above observations, the present revision is ***dismissed.***

Order Date :- 5.12.2024

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