

RESERVED ON 23.5.2024

DELIVERED ON 12.8.2024

Court No. - 14

Case :- APPLICATION U/S 482 No. - 4030 of 2024

Applicant :- Ashish Kumar Maurya

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko. And
Another

Counsel for Applicant :- Jag Prasad Yadav

Counsel for Opposite Party :- G.A.,Gyanendra Singh,Manish Singh
Chauhan

Hon'ble Karunesh Singh Pawar,J.

1.The petition has been filed under Section 482 CrPC for quashing orders dated 27.2.2024, passed by Presiding Officer, Additional Court No.08, Lucknow (Annexures 2 and 3) in Complaint Case No.43423 of 2020 Mahendra Pratap Singh versus Ashish Kumar Maurya.

By first order dated 27.2.2024, application for taking affidavit on record has been allowed with a cost of Rs.300/-.

By other other order of the same date, The application under section 311 CrPC moved by the complainant has been allowed and the P.W.2 Rananjay Singh has been recalled, also on the cost of Rs.300/-.

2.Heard Mr. Jag Prasad Yadav, learned counsel

for the petitioner, learned A.G.A. for the State as well as Mr. Manish Singh Chauhan, learned counsel for respondent No.2.

3.Briefly stated, the facts of the case are that a complaint case was filed by the complainant/respondent No.2 under section 138 Negotiable Instruments Act on 21.10.2020 alleging that the complainant gave Rs.4,50,000/- to the accused for doing business, on 18.6.2019. On 16.3.2020, the accused gave cheque No.225733 dated 14.9.2020 drawn at Canara Bank, Branch Ram Nagar, Barabanki from his account number. The cheque was deposited in the account of the complainant at Union Bank of India, Clerk Awadh Branch, Lucknow on 16.9.2020. The cheque was dishonoured on 18.9.2020 for insufficient balance. A notice dated 23.9.2020 was sent through Registered Post to the accused which was received by him on 25.9.2020. Still, the amount was not paid by him. Thus, complaint was filed.

4.Statement under Section 251 CrPC was recorded by the trial court. P.W.1 and P.W.2 were examined and cross-examined. Statement under

Section 313 CrPC of the accused was recorded on 20.8.2022 by the Court below. Thereafter, examination of D.W.1, D.W.2 and D.W.3 was concluded. After arguments were partly heard and complainant filed his written arguments, the complainant/ respondent No.2 filed two applications on 6.1.2024, one was for taking affidavit on record and the other for recalling P.W.2 Rananjay Singh. Objections to these applications were filed by the petitioner on 3.2.2024. Applications were heard and vide impugned orders dated 27.2.2024, both the applications were allowed. The trial Court while allowing the first application for taking affidavit given by the complainant has passed the following order :

"दिनांक-27-02-2024

आदेश प्रार्थनापत्र बाबत लिए जाने शपथपत्र पत्रावली पर दिनांकित 06-01-2024

पसावली आदेश हेतु पेश। प्रार्थनापत्र दिनांकित 06-01-2024 संलग्न शपथपत्र में उल्लिखित, तथ्यों, कारणों एवं परिस्थितियों को दृष्टिगत रखते हुए संलग्न शपथपत्र को पत्रावली पर लिए जाने हेतु दिया गया है। संलग्न शपथपत्र में मुख्य रूप से यह कथन किया गया है कि परिवारी द्वारा विपक्षी की मांग पर विपक्षी को अपने लखनऊ स्थित आवास पर रु० 4,50,000/- व्यवसाय करने हेतु दिया था। उपरोक्त रूपए शपथी ने विपक्षी को अपने बाग व कृषि की वर्ष 2018-2019 से प्राप्त हुए धन में से दिया था। शपथी की पैतृक संपत्ति में आम की बाग जो लगभग 40 बीघे के हैं एवं कृषि योग्य भूमि ग्राम-मोहारी, परगना-फतेहपुर तहसील रामनगर जिला-बाराबंकी में स्थित है। खतौनी की सत्याणिन प्रतियां संलग्नक संख्या-01 व 02 के रूप में संलग्न हैं।

अभियुक्त की तरफ से आपत्ति पत्र संलग्न शपथपत्र में वर्णित तथ्यों , कारणों एवं परिस्थितियों के आधार पर परिवादी के प्रार्थनापत्र को अस्वीकार करने हेतु दिया गया है। संलग्न शपथपत्र में अभियुक्त की तरफ से मुख्य रूप से वर्णित किया गया है कि प्रार्थनापत्र एवं शपथपत्र की अंतरवस्तु बलपूर्वक इंकार है , गलत, झूठ तथा मिथ्या है। साक्ष्य, परिवाद में उल्लिखित तथ्यों के संबंध में प्रस्तुत किया जा सकता है, जो शपथपत्र परिवादी देना चाहत है. उसके संबंध में परिवाद में तथ्य उल्लिखित नहीं हैं। प्रार्थना पत्र अस्वीकार किए जाने योग्य है।

उभय पक्ष के विद्वान अधिवक्तागण की बहस सुनी जा चुकी है। पत्रावली का सम्यक रूप से अवलोकन किया।

परिवादी प्रस्तुत मामले में अभियुक्त को दिए गए रु० 4,50,000/- उधार के संबंध में, आय के स्रोत के संबंध में शपथपत्र मय संलग्नक खतौनी प्रस्तुत करना चाहता है। आय के स्रोत के संबंध में अभियुक्त द्वारा धारा -251 दं०प्र०सं० के प्रयान के स्तर पर कोई प्रश्न नहीं उठाया गया। परिवादी की गवाही के स्तर पर जिरह में भी आय के स्रोत के संबंध में कोई प्रश्न नहीं उठाया गया। बहस के स्तर पर दौरान बहस आय के स्रोत के संबंध में प्रश्न उठाते हुए तर्क प्रस्तुत किया गया है , जिसके बाद परिवादी द्वारा यह शपथपत्र मय खतौनी प्रस्तुत किया जा रहा है , जो आय के स्रोत के संबंध में है। आय के स्रोत के संबंध में प्रश्नगत शपथपत्र व खतौनी पत्रावली में लेकर अंतिम निर्णय करने में मदद मिलेगी। उक्त शपथपत्र मय खतौनी को पत्रावली पर * लिया जाना विधिसंगत एवं न्यायोचित है। जहां तक विलंब का सवाल है, इस संबंध में समुचित

हर्जा लगाया जा सकता है।

प्रार्थनापत्र उचित हर्ज पर स्वीकार किए जाने योग्य है। प्रार्थनापत्र रु० 300/- हर्जे पर स्वीकार किया जाता है। शपथपत्र सबखतौनी पत्रावली में लिया जाए। हर्जा दिनांक नियत तक अदा हो ।

While passing the order, above extracted, the trial Court has noticed that regarding the source of income of the complainant, the accused petitioner has not raised any objection at the stage of evidence under section 251 CrPC. At the stage of cross examination of the complainant also, source of income was not disputed by the accused.

During the course of argument, this question was raised for the first time by him. Thereafter, the complainant has filed application along with Khatauni to show his source of income. The trial Court has allowed the application on these grounds with a further reasoning that it will help in final disposal of the matter.

5. Likewise, on the same date, i.e. on 27.2.2024, another application filed by the complainant for recalling witness P.W. 2 Rananjay Singh has also been allowed on cost of Rs.300/-. It has been stated in the application that in the affidavit of Rananjay Singh, due to typographical error, date of giving cheque to the accused has wrongly been mentioned and reliance has been placed by the complainant on a judgment dated 30.7.2008 passed by Supreme Court in Godrej Pacific Tech. Limited versus Computer Joint India Limited Criminal Appeal No.1181 of 2008. The Court held that for just disposal of the case, recalling P.W.2 appears to be necessary and thus has allowed the application filed by the complainant. The order dated 27.2.2024 is extracted below :

आदेश प्रार्थनापत्र अन्तर्गत धारा-311 दं०प्र०सं० वास्ते रिकॉल करने पी०डब्लू०-02
रणंजय सिंह दिनांकित 06-01-2024

परिवादी द्वारा प्रार्थनापत्र संलग्नक शपथपत्र में वर्णित तथ्यों कारणों एवं परिस्थितियों को दृष्टिगत रखते हुए पी०डब्लू०-02 रणंजय सिंह को बयान के लिए पुनः बुलाए जाने का आदेश पारित करने हेतु दिया गया है। संलग्नक शपथपत्र में मुख्य रूप से आधार वर्णित किया गया है कि पी०डब्लू०-02 रणंजय सिंह द्वारा शपथपत्र साक्ष्य में दाखिल किया गया है, जिसमें टाइपिस्ट की एकली से अभियुक्त के द्वारा परिवादी को चेक देने की वास्तविक तिथि 16-03-2020 के स्थान पर त्रुटिवश चेक देने की तिथि टाइप करते समय परिवाद पत्र के पैरा-02 में उल्लिखित तिथि 18-06-2019 को गलती से चेक देने की तारीख (16-03-2020) लिखने के स्थान पर दिनांक 18-06-2019 लिख दिया। उपरोक्त भूल क्षमा योग्य है तथा परिवाद की कोई कमी की पूर्ति करने जैसा नहीं है।

अभियुक्त की तरफ से आपत्ति पत्र मय शपथपत्र दाखिल किया गया है तथा मुख्य रूप से शपथपत्र में कथन किया गया है। कि प्रार्थनापत्र एट्र शपथपत्र की अंतरवस्तु बलपूर्वक इंकार है। गलत झूठ तथा मिथ्या है। परिवाद पत्र अस्वीकार किए जाने योग्य कहा गया है।

अभय पक्ष के विद्वान अधिवक्तागण की बहस सुनी जा चुकी है। पत्रावली का सम्यक रूप से अवलोकन किया।

परिवादी द्वारा पी०डब्लू०-02 रणंजय सिंह को पुनः साक्ष्य में को जाने हेतु गथनापत्र दिया गया है। पी०डब्लू०-02 रणंजय सिंह के शपथपत्र साक्ष्य में टाइपिस्ट की गलती के कारण चेक देने की तिथि गलत टाइप किया जाना कहा गया है। परिवादी की तरफ से गोदरेज, पैसीफिक लिमिटेड बनाम कंप्यूटर ज्वाइंट इण्डिया लिमिटेड क्रि० अपील संख्या-1181/2008 निर्णीत दिनांकित 30-07-2008 मा० उच्चतम न्यायालय व सुमित्रा देवी बनाम कपूर चन्द्र मा० उच्च न्यायालय हिमाचल प्रदेश, 2023 लॉ सूट (एच०पी०) 223 निर्णय विधि दाखिल की गई। उक्त निर्णय विधियों में धारा -311 दं०प्र०सं० के संबंध में जो सिद्धांत प्रतिपादित किया गया है , उसके प्रकाश में प्रस्तुत भामले के न्यायसंगत दिनिश्चय के लिए पी०डब्लू०-02 रणंजय सिंह को पुनः परीक्षा हेतु बुलाए जाने हेतु आवश्यक प्रतीत होता है। पी०डब्लू०-02 रणंजय सिंह को पुनः परीक्षा हेतु बुलाया जाना विधिसंगत एवं प्रयाप्त आधार है। प्रार्थनापत्र उचित हर्ज पर स्वीकार होने योग्य है। प्रार्थनापत्र रू० 300 हर्ट्ज पर स्वीकार किया जाता है। पी०डब्लू०-02 रणंजय सिंह को पुनः परीक्षा हेतु रिकाल किया जाता है। पी०डब्लू०-02 रणंजय सिंह की पुनः परीक्षा में शपथपत्र साक्ष्य प्रस्तुत किया जाए। पत्रावली वास्ते पुनः परीक्षा शपथपत्र साक्ष्य पर दिनांक 13-03-2024 को पेश हो। हर्जा दिनांक नियत तक अदा हो। "

6.Learned counsel for the petitioner submits that the trial court has failed to consider the fact that the evidence of respondent No.2 is closed way back and the complainant has not explained the reason for moving the application under Section 311 CrPC at belated stage. In this context, learned counsel has relied on **Swapan Kumar Chatterjee** versus **Central Bureau of Investigation** Criminal appeal No.15 of 2019 (Arising out of S.L.P. (Cri) No.7748 of 2017) (relevant paras 12 and 13).

7.A perusal of provisions of Section 311 CrPC shows that the Court has power under Section 311 CrPC to recall and re-examine any person already examined if his evidence appears to it to be essential to the just decision of the case. Since there was a typographical error in the affidavit of Rananjay Singh regarding date of providing the cheque to the accused, on this reason, the learned court was competent enough to recall P.W.2 Rananjay Singh for his re-examination under the Code of Criminal Procedure to arrive at a just decision.

In the case of Swapan Kumar Chatterjee (supra),

law has been reiterated that in the interest of justice and to meet the ends of justice, power conferred under section 311 CrPC should be invoked by the Court. In the case in hand, learned trial Court has given adequate reasons while relying on judgment of Supreme Court in Godrej Pacific Tech. Limited (supra).

8. Likewise, as regards other application, the complainant has been permitted to take on record the affidavit along with Khatauni filed by the complainant for the reason that for the first time, during arguments, the accused raised this objection that the complainant is not having any source of income. He did not raise any objection at the stage of statement under section 251 CrPC or at the stage of evidence of the complainant regarding his source of income. Since he raised it for the first time during the course of argument, therefore, for this reason, this application has also been allowed. Both the applications have been allowed on the cost of Rs.300/-. The learned trial court has relied on the case of Godrej Pacific Tech. Limited (supra). Supreme Court in the said case while introducing section 311 CrPC has held in paras 6, 7, 8 and 9 as under :

"6. In this context, reference may be made to Section 311 of the Criminal Procedure Code which reads as follows:

"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. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

8. 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". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

9. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court.

Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge."

Supreme Court has held that the first part of the section is discretionary. Second part of section 311 CrPC imposes upon the Magistrate an obligation and cast a duty upon the Court to recall and re-examine any person whose evidence has already been recorded and whose evidence appears to be essential for arriving a just decision in the case.

Law is settled in this regard. The best evidence available should be brought before the Court. It has been held that the Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section which is mandatory.

9.Considering the argument advanced, perusal of

the record, reasons assigned in the impugned orders as also the judgment(s) referred to above, I find no illegality in the orders impugned. The petition, being devoid of merit, is dismissed.

Order Date :- 12.8.2024
kkb/