

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

Crl.MC.No. 5330 of 2014 ()

PETITIONER(S)/PETITIONERS/ACCUSED:

1. PARKSON ESTATE & INDUSTRIES
A P BUILDING, G G IYER ROAD, WELLINGTON ISLAND
COCHIN-682003, REP BY ITS MANAGING PARTNER
VARGHESE P MATHEW
2. VARGHESE P MATHEW
MANAGING PARTNER, PARKSON ESTATE & INDUSTRIES
A P BUILDING, G V IYER ROAD, WELLINGTON ISLAND
COCHIN-682003

BY ADVS.SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

1. M/S.TRINITY TRADING
LAKSHMI HOUSE, WILLINGTON ISLAND, KOCHI-682003
REP BY ITS PARTNER, P BAVADASAN
2. STATE OF KERALA
REP BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM-KOCHI-682031

R1 BY ADV. SRI.M.P.RAMNATH
R1 BY ADV. SRI.P.RAJESH (KOTTAKKAL)
R1 BY ADV. SEI.M.VARGHESE VARGHESE
R1 BY ADV. SMT.UMA R.KAMATH
R1 BY ADV. SMT.S.SANDHYA
R1 BY ADV. SRI.BEPIN PAUL
R1 BY ADV. SRI.SHALU VARGHESE
R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 23-11-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.MC.No. 5330 of 2014 ()

APPENDIX

PETITIONER(S)' EXHIBITS

ANNEXURE I:-A TRUE COPY OF THE ORDER DTD 13/6/2014 IN CMP 427 OF 2014 IN CC
1760 OF 2010 OF JFCM COUT V, ERNAKULAM

RESPONDENT(S)' EXHIBITS:NIL

/TRUE COPY/

P.A. TO JUDGE

SKV

'CR'

K.RAMAKRISHNAN, J.

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Crl. M.C. No.5330 OF 2014

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Dated this the 23rd day of November, 2015

JUDGMENT

This application is filed by the petitioner who is the accused in CC No.1760/2010 on the file of the Judicial First Class Magistrate's Court-V, Ernakulam challenging the order passed by the Magistrate in CMP No.427/2014 under Section 482 of the Code of Criminal Procedure.

2. It is alleged in the petition that the petitioners were arrayed as accused in CC No.1760/2010 on the file of the Judicial First Class Magistrate's Court-V, Ernakulam alleging commission of offence under Section 138 of the Negotiable Instruments Act. It is alleged in the complaint that the complainant and first accused are partnership firms and second accused is the Managing Partner of the 1st accused firm and the complainant and first accused firm were involved in business transactions in connection with Tea trade. In view of the business relationship, second accused approached the complainant for a loan of

Rs.5,00,000/- and the complainant arranged a loan accepting the promise of the accused to repay the amount within a short time. Contrary to the promise, the amount was not paid. When the complainant insisted for return of amount, the accused issued a cheque dated 5.12.2006 drawn on Vijaya Bank, Wellington Island for Rs.5,00,000/-. When the cheque was presented, it was dishonoured for the reason insufficient fund and inspite of the notice sent, he did not pay the amount nor had he sent any reply. So the accused committed the offence punishable under Section 138 of the Negotiable Instruments Act and the respondent filed a complaint.

3. On receipt of the summons, the accused entered appearance. The case was posted for evidence on many occasions and when the case was posted on 5.10.2012, on that day the junior counsel attached to the office of the accused requested for an adjournment for cross examination of the complainant. Since the case was adjourned for evidence on many occasions earlier, the Magistrate insisted the junior counsel to conduct the cross

examination. Though the junior counsel conducted cross examination in accordance to the court's direction, certain crucial questions were omitted to be put to the complainant during cross examination. The Magistrate closed the evidence of the complainant and posted the case for 313 examination of the accused. Thereafter the accused sought to engage a new counsel and the counsel on finding that certain questions with regard to the accounts maintained by the complainant which were omitted to be asked during cross examination were crucial as far as the defence of the accused was concerned and submitted an application under Section 311 of Code of Criminal Procedure to recall PW1 for further examination of the complainant. The learned Magistrate dismissed the application by impugned Annexure-A1 order. This order is being challenged by the petitioner by filing this petition.

4. Heard Shri. V.G. Arun learned counsel appearing for the petitioner and Shri. C.S.Ramnathan counsel appearing for the first respondent and Smt. Seena Ramakrishnan learned Public Prosecutor appearing for the

state.

5. The counsel for the petitioner submitted that certain crucial questions relating to the transaction were not put to the complainant when he was cross examined by the junior counsel who appeared earlier. The junior counsel had not prepared the case and junior counsel was compelled to cross examine the witness due to the insistence of the learned Magistrate denying adjournment on the ground of personal inconvenience of the Senior lawyer appearing for the petitioners. Further Section 311 of the Code of Criminal Procedure has to be construed liberally so as to provide fair trial for the purpose of adjudicating the case in an effective manner and court should not narrow down the scope and deny the opportunity of fair trial to the accused. By dismissing the application by the court below, the opportunity to have fair trial to the accused has been denied. He had relied on the decisions reported in *Natasha Singh v Central Bureau of Investigation* [(2013) 5 SCC 741] and *Rajaram Prasad Yadav v State of Bihar and Others* [AIR 2013 SC 3081] in support of his case.

6. On the other hand, the learned counsel for the 1st respondent submitted that sufficient opportunity has been given to the accused to cross examine the complainant and the counsel appearing for the accused had utilised the opportunity and thoroughly cross examined PW1 the complainant in the case. Further what are the crucial questions to be considered and what is the nature of evidence sought to be brought out by recalling the witness whether that is relevant for the purpose for proper adjudication of the case etc. were not made out in the petition. There is only a vague allegation that the junior counsel failed to put certain relevant questions and that is required to be supplemented by recalling the witness by the senior counsel now appearing, which is not a ground for recalling the witness under Section 311 of the Code of Criminal Procedure. He had relied on the decisions reported in State of MP v Pattu alias Pratap Singh [2001 CRI. L.J. 794], Johnson v State of Kerala [1997 CRI. L.J. 1228], Popatlal Jethabhai Shah v State of Maharashtra [2002 CRI. L.J.794], Premraj v State of Rajasthan and Others [1999 CRI.

L.J.819] and Natasha Singh v Central Bureau of Investigation [(2013) 5 SCC 741] in support of his case.

7. Heard the Public Prosecutor also.

8. It is an admitted fact that the first respondent herein filed a complaint under Section 138 of the Negotiable Instruments Act against the accused alleging that they had committed offence under Section 138 of the Negotiable Instruments Act. It is also an admitted fact that when the petitioners herein appeared, the particulars of offences were read over and explained to them and they pleaded not guilty. Thereafter the complainant was examined as PW1 and the documents were marked and even according to the counsel for the petitioners, the prayer for adjournment was rejected by the court below and junior counsel was made to cross examine the witness. It is also in a way admitted that after the complainant's evidence was over, the case was posted for 313 examination of the accused and inspite of several postings, the examination under 313 examination could not be conducted and according to the counsel for the petitioner, there was no sitting on some days and that was

also a reason for non-conducting of examination of the accused under Section 313 of the Code of Criminal Procedure. It is thereafter that another counsel was engaged by the accused and thereafter the present application has been filed.

9. There is no dispute regarding the power of the court under Section 311 of Code of Criminal Procedure to recall any witness who has already been examined or summon further witnesses if the court is satisfied that recalling and examining the witnesses are necessary for the purpose of proper adjudication of the case. This power can even be exercised by the court suo moto if such power has to be exercised by the court to arrive at a just conclusion of the allegations made and to find out the truth of the allegations made by both parties. Further in the decision reported in *Rajaram Prasad Yadav v State of Bihar and Others* [AIR 2013 SC 3081], relying on several decisions of the Apex court as well as various courts, the Apex court has formed certain guidelines under what circumstances court can invoke Section 311 of Code of Criminal Procedure in

paragraph 23 of the judgment which read as follows:–

“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 safeguard 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 materials 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 sage to err in favour of the accused getting an opportunity rather than protecting at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may led 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."

10. In all the decisions relied on by both the counsel the same principle has been reiterated. Further in the decision reported in *Natasha Singh v Central Bureau of Investigation* [(2013) 5 SCC 741], the Apex Court also held that the power under Section 311 of the Code of Criminal Procedure is to be exercised judicially and not arbitrarily so as to enable the court to determine the truth and to render a just decision. Further in the decisions relied on by both

the sides cited supra, the courts have held that merely because certain questions were not put to the witness by an earlier counsel and the subsequent counsel found that as a lacuna in the conduct of the case which according to him is likely to affect the defence is also not a ground for recalling the witnesses already examined. Further it is also settled in these decision that mere filing of the application without making a sufficient foundation for filing such application to recall the witness, the application should not be allowed for mere asking only on the ground that liberal view has to be taken under Section 311 of the Code of Criminal Procedure which practice has been deprecated by the Supreme Court of allowing the application under Section 311 of the Code for mere asking on the ground of change of counsel failure to put relevant questions by previous counsel without proving any specific injustice caused, if such a prayer cannot allowed in the latest decision reported in *Ali v Shivkumar Yadav and Others* [2015 (9) scale 649].

11. In this case, in the application filed for recalling filed as CMP 427/2014 in paragraph one of the petition it is

only mentioned that due to the busy schedule, the senior counsel could not attend the matter personally and therefore he directed the accused to approach the present lawyer after giving up the vakalath and in the mean while there was no sitting for a short while in court. Further in paragraph two it is mentioned that in order to prove the innocence of the accused, PW1 has to be cross examined further in respect of the material particulars of the alleged transaction. It is essential and inevitable for just decision of the case. However it is not possible to point out the question that has to be put to PW1 at that stage due to the reason that such disclosure will destroy the purpose of recalling PW1. So it is clear from this that there is no specific ground made out for recalling the witness. Further the purpose for which recalling has to be allowed unless it is made out in the petition, it is not possible for the court also to consider as to whether it is necessary in the interest of justice and also for proper adjudication of the case recalling the witness is necessitated and that has to be allowed. So the dictum relied down by the counsel for the petitioner

where the Apex court in some cases exercised the power under Section 311 of the Code of Criminal Procedure allowing recalling, though dismissed by the lower court and confirmed by the High Court but allowed by the Apex court will not be applicable to the facts of this case. Even before this court, there is no material for this court also to come to a conclusion as to the purpose for which recalling is required is also not established so as to exercise the power under Section 311 of the Code of Criminal Procedure by this Court on satisfaction that the recalling of PW1 is necessary to meet the ends of justice as well. The court below had considered all these aspects in detail in the order passed and rightly come to the conclusion that the attempt of the petitioner is only to prolong the matter and it was with that view that such a petition has been filed. Further the grounds alleged as a defence for giving Ext.P1 the disputed cheque can be established by the accused by adducing other evidence as well even without recalling PW1. So under the circumstances, this court feels that there is no infirmity in the impugned order passed by the court below, so as to

interfere invoking power under Section 482 of the Code of Criminal Procedure and the petition is liable to be dismissed.

In the result the petition fails and the same is hereby dismissed. The interim order of stay granted by this court and extended from time to time is hereby vacated and Crl.MA 8928/2014 is dismissed.

Office is directed to communicate this order to the court below at the earliest.

Sd/-
K.RAMAKRISHNAN, JUDGE

SKV