

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL MISC. PETITION NO. 583 OF 2016

Mohan Lal Agrawal, S/o Late Madan Lal Agrawal, aged about 55 years,
R/o Seetamani, Main Road, Korba, P.S. Korba, Tahsil and District Korba
(C.G.)

... Applicant

Versus

Rudhmal Agrawal, S/o Late Bihari Lal Agrawal, aged about 62 years, R/o
Seetamani, Main Road, Korba, P.S. Korba, Tahsil and District Korba (C.G.)

... Non-applicant

For Applicant	:	Mr. Sandeep Dubey, Advocate.
For Non-applicant	:	Mr. Parag Kotecha, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

23/08/2016

1. The present petition under Section 482 of CrPC has been preferred by the Applicant assailing the order dated 25.4.2016 passed by the Sessions Judge, Korba in Criminal Revision No. 32 of 2016.
2. Vide impugned order dated 25.4.2016, the Sessions Court exercising the revisional powers dismissed the revision preferred by the Applicant against the order dated 29.3.2016 passed by the Chief Judicial Magistrate, Korba in Criminal Complaint Case No. 625 of 2014, wherein the Trial Court has rejected the application filed by the accused Applicant under Section 311 of CrPC seeking for recalling of the Non-applicant/Complainant for further cross-examination.
3. Facts of the case in brief are that the Non-applicant/Complainant, Rudhmal Agrawal, had filed a complaint case against the present Applicant who was defendant-accused before the Trial Court somewhere in June, 2014. Under the provisions of Section 138 of the Negotiable Instruments Act, 1881 (for brevity, 'the N.I. Act'), the case has been registered as

Criminal Complaint Case No. 625 of 2014 and the trial also was under progress. Meanwhile, in the course of trial, on 15.5.2015, the Non-applicant/Complainant was examined and cross-examined and later on discharged. After the conclusion of the evidence of the Complainant side, the statement of the accused Applicant was recorded on 30.5.2015 under Section 313 of CrPC. On 16.3.2016 since no evidence was adduced by the defence in spite of repeated opportunities for a considerable period of time being granted, the right to lead defence evidence was closed and the matter was fixed for final arguments. On 28.3.2016, the accused Applicant moved an application under Section 311 of CrPC and in the said application it was mentioned that the Applicant has not been able to put certain vital questions in the cross-examination made of the Non-applicant/Complainant and therefore the application may be allowed and the Complainant may be ordered to appear before the Court for further cross-examination by the accused Applicant. According to the Applicant, in the course of cross-examination of the Complainant held on 15.5.2015 the questions relating to the legally enforceable debt and the questions relating to suit property of which he is in possession and also in respect of the receipts which were issued on 23.10.2011 have not been asked in the cross-examination and which, according to the Applicant, are vital factors for his defence.

4. The Trial Court vide its order dated 29.3.2016 rejected the said application holding that since the matter is fixed at the final arguments stage, on the ground that the Applicant had on an earlier occasion already moved an application for recalling of the witness and which stood rejected and against which a revision was also preferred and which also stood rejected and from the cross-examination which was already conducted, the points which the Applicant intended to ask in the cross-examination as per

the application under Section 311 already had been asked to the Complainant as is reflected from paragraphs 13, 15 and 16. Therefore, the Trial Court rejected the same for all these reasons including the delay in filing of the application under Section 311.

5. The said order dated 29.3.2016 was put to challenge in Criminal Revision No. 32 of 2016 before the Sessions Judge, Korba who also vide the impugned order dated 25.4.2016 found no illegality or infirmity in the order passed by the Trial Court. It is these two orders which the accused Applicant has challenged in the present petition under Section 482 of CrPC.

6. Learned Counsel for the Applicant submits that in addition to the questions which have been put to the Complainant in his cross-examination held on 15.5.2015 some material questions which are relevant for his defence have not been asked and which could be ultimately detrimental to the interest of his defence and therefore the said application under Section 311 was filed. According to him, there was a subsequent development on which also the Complainant was required to be examined as pending the complaint case the Complainant and the accused Applicant has struck a compromise and there was also an Ekrarnama entered into between the two in addition to questions relating to the cheque having been lost by the Applicant which is alleged to have reached to the Complainant who in turn has tried to encash the same resulting in the initiation of the proceedings under the N.I. Act. As per the Counsel for the Applicant, rejection of the application under Section 311 and the rejection of the revision subsequently would result in the Applicant being denied the fair opportunity of defence which is otherwise contrary to all settled principles of criminal jurisprudence. Thus, prayed for allowing the petition.

7. Per contra, learned Counsel for Non-applicant/Complainant opposing the petition submits that a perusal of the order-sheets and the proceedings before the Court below would clearly reflect that the Applicant had in fact been granted full opportunity of defence. According to him, it is a case where the application under Section 311 has been filed only with an intention to prolong the trial as it has been filed at the stage of final arguments and the evidence of the Complainant was recorded almost about one year earlier i.e. on 15.5.2015 to be precise, and no proper justification has been given for the delay in the moving the said application. He further submits that during the trial also the Applicant had moved an application for recalling of the evidence which stood rejected and therefore the application under Section 311 is nothing but a repeat application under a different provision of law. He also submitted that so far as the reasons assigned in the application are concerned all these reasons already find place in the cross-examination of the Complainant and therefore also no strong case is made out for invoking the provisions of Section 311 of CrPC by the Court below.

8. Having considered the rival contentions put forth on either side and on perusal of the record what is clearly reflected from the proceedings drawn before the Trial Court is that the Complainant was examined on 15.5.2015 and the proceedings went on. The evidence of the defence was also closed on 16.3.2016 and the matter was fixed for final arguments. It is at that stage i.e., on 28.3.2016, the application under Section 311 of CrPC was filed. The fact which cannot be brushed aside and which in the opinion of this Court is pertinent is the fact that after the Complainant was examined on 15.5.2015 the accused Applicant had in fact moved an application for recalling of the Complainant as a witness which stood rejected on 8.7.2015. Against the said rejection order, the accused

Applicant had preferred a revision petition which came up before the Second Additional Sessions Judge, Korba in Criminal Revision No. 58 of 2015 and the said Revisional Court vide its order dated 5.1.2016 decided the same against the accused Applicant and then the accused Applicant did not challenge it further and accepting the finding of the Court below proceeded further with the trial. Further, it is also reflected that the reasons assigned in the application under Section 311 and the questions on which the witness was sought to be recalled for cross-examination find place in the cross-examination of the Complainant and therefore the said ground would not be sustainable for the reasons that the contention that the accused Applicant has not been able to cross-examine on these issues stands falsified.

9. So far as the ground of a subsequent alleged compromise between the parties is concerned, that firstly cannot be a ground for invoking Section 311 of CrPC and secondly the said ground is not reflected as the ground for recalling in the application under Section 311 and to add with it the accused Applicant could have also adduced evidence in this regard as defence evidence which too he has chosen not to do. Therefore, in the opinion of this Court, the reasons assigned by the two Courts below in rejecting the application at the first instance and the revision being subsequently cannot be said to be bad in law, arbitrary and violative of the criminal jurisprudence or for that matter denial of fair opportunity to the accused Applicant.

10. As far as the scope of invoking of the provisions of Section 311 of CrPC in the context of proceedings under Section 138 of the N.I. Act is concerned, the Supreme Court in a decision rendered in the case of **Rajaram Prasad Yadav Vs. State of Bihar & Another, AIR 2013 SC 3081**, has held as follows :

“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 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.”

11. The scope and object of Section 311 of CrPC is that of empowering the Court conducting the trial. If in the course of recording of evidence the Court finds that for the just decision a witness needs to be further examined, under such circumstances the discretion has been conferred upon the Court and under such circumstances the Court can order for recalling of a witness. However, the power under Section 311 is not to be exercised in a routine manner but only under exceptional circumstances and that too only if the Court finds that it is necessary that the power under Section 311 cannot be exercised on a request by either of the contesting party with an intention of improvement upon their case nor can it be exercised in favour of the accused for filling up the lacuna in the prosecution case.

12. In paragraph 23 of the decision made in **Rajaram** case (*supra*) the Supreme Court has laid down the broad principles which have to be borne in mind by the Courts while dealing with the application under Section 311 of CrPC. Keeping in view the said principles in mind if we look into the facts of the present case it would clearly reflect that it is not a case where the accused Applicant has not been granted an opportunity of a fair trial; the reason being when the Complainant was examined as early as on 15.5.2015 he was in fact cross-examined exhaustively.

13. Further, the accused Applicant in between had also been granted sufficient time to adduce evidence on his behalf which too he has failed. In between he has also moved an application for recalling which too stood rejected and the order stood confirmed by the Revisional Court and it is only after about a period of 10 months when the matter is fixed for final arguments before the Court below that this application under Section 311 is filed, which, in the opinion of this Court, is nothing but an attempt to prolong the proceedings. Furthermore, the questions which the accused Applicant intends to ask already stand reflected in the cross-examination. So, the reasons assigned also appear to be baseless.

14. Thus, for the foregoing reasons, this Court is of the opinion that no strong case has been made out by the Applicant for invoking the powers under Section 482 of CrPC calling for interference with the two orders passed by the Courts below.

15. The Criminal Misc. Petition being totally devoid of merit the same is accordingly dismissed.

Sd/-

(P. Sam Koshy)
Judge