

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRL.P.No.17181 OF 2016

ORDER:

This criminal petition is filed under Section 482 of Cr.P.C to quash the order dated 21.11.2016 passed in CrI.M.P.No.1370 of 2016 in C.C.No.363 of 2015 by the Special Magistrate-V, Hyderabad.

The petitioner herein filed a petition under Section 311 Cr.P.C. to recall PW.1 for further cross examination alleging that the petitioner cross examined PW.1 and the matter is coming for defence evidence, but on thorough verification, it came to the notice that the some questions on material points were not put to the respondent/complainant with regard to the relationship of the respondent/complainant with the petitioner factory and also contended that there were disputes between the petitioner factory and the respondent/complainant and it covered by Industrial Disputes Act. It is also contended that there is no relationship of debtor and creditor and question of issuing cheque under Section 138 of the Negotiable Instruments Act does not arise and to put certain questions, the witness has to be recalled and prayed to allow the petition.

The respondent filed lengthy counter running into four pages raising several contentions mainly contending that the cheque dated 31.12.2013 for Rs.77,000/- drawn on Axis Bank Limited, Dr A.S.Rao Nagar Branch issued towards discharge of the legally enforceable debt. When it was presented for encashment, the same was returned on 02.01.2014 with an endorsement that 'the account was blocked'. The petitioner cross examined PW.1 at length in the month of March, 2016 and that PW.2 also examined after several

adjournments and that the matter was posted for examination of the accused under Section 313 Cr.P.C. Therefore, there are no grounds to recall PW.1 for further cross examination.

The trial Court after hearing both sides, dismissed the petition holding that the law of the land or the rules of local administration need not be elicited from the mouth of the witness and that the Court can take judicial notice of law of the land or other rules as well as provisions of the special Act. Therefore, denied to recall PW.1 in exercise of power under Section 311 Cr.P.C.

Aggrieved by the said order, the present criminal petition is filed on various grounds mainly contending that the order passed by the trial Court is not supported by specific reasoning and the petitioner posed certain questions regarding relationship of employee and employer, which is covered by the Industrial Disputes Act, 1947 and to elicit those aspects PW.1 has to be recalled and finding of the trial Court is against the principles of law laid down by the Supreme Court in **P.Chhaganlal Daga v M.Sajaysahu**¹ and prayed to set aside the order by recalling PW.1 for further cross examination to put certain questions, which the petitioner mentioned in the petition.

During hearing, learned counsel for the petitioner submitted that the order passed by the trial Court is not in consonance with the law laid down by the Apex Court referred above and in the absence of any reason, the order is liable to be set aside and prayed to set aside the same. Learned counsel placed reliance in **P.Chhaganlal Daga's** case referred supra, **Rajendra Prasad v Narcotic Cell**² and **State (NCT of Delhi) v Shivkumar Yadav and**

¹ (2003)11 SCC 486

² (1996) 6 SCC 110

another³. Basing on the principles laid down in **Rajendra Prasad's** case 2nd supra he contended that the witness can be recalled to complete justice to both parties and set aside the order passed by the Court.

The reasons assigned by the petitioner to recall PW.1 is that so far he has to put certain questions relating to relationship of employer and employee, which is covered by the Industrial Disputes Act while admitting the other contentions, Section 311 Cr.P.C. gives general power to the Court to summon material witness or examine any person as a witness if the evidence is essential for just decision of the Court and the object of the section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence it is necessary for a just and proper disposal of the case. The section consists of two parts. First part is to summon the witness at any stage of enquiry, trial or other proceedings under the Court on the application of the party is discretionary and the second part is mandatory and the Court is required to summon or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

The present case falls within the first part of Section 311 Cr.P.C. and not second part. As the case on hand would attract first part of Section 311 Cr.P.C., the allegations made in the petition are relevant. The only ground raised for recall of PW.1, is to put certain questions relating to relationship of employer and employee, which is governed by Industrial Disputes Act. Moreover, from the beginning the respondent stated that the cheque was issued

³ (2016) 2 SCC 402

towards legally enforceable debt and there is a presumption under Section 139 of Negotiable Instruments Act. When the said cheque was issued the Court shall presume that it was issued towards discharge of legally enforceable debt, till it is rebutted by eliciting anything in the cross examination or by examining any independent witness. Thus, the petitioner did not explain the reason of failure to put such question with regard to the debt. At the initial stage of cross examination, PW.1 made a bald allegation that on scrutiny the petitioner is required to put certain questions to the witness. At the same time, the petitioner contends that there was relationship between them as employer and employee, but questions were not put in the cross examination of PW.1 and no reasons were assigned why those questions were not put to PW.1 and even the petitioner did not issue any reply notice to the notice issued by the respondent in compliance of Section 138 of the Negotiable Instruments Act and having maintained silence for all these years invented a story of relationship of employee and employer suddenly as if he verified the material when the matter was posted for defence evidence and entitled to receive amount as he did not work during the particular period. But these questions were not germane to decide the issue before the Court.

However, learned counsel for the petitioner drawn the attention of this Court in **Rajendra Prasad's** case 2nd cited where the Supreme Court held as follows:

“A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage “to err is human” is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

It cannot be said as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered lacks only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at.”

In **P.Chhaganlal Daga’s** case 1st cited the Apex Court held that the power to receive evidence in exercise of Section 311 of the Code could be exercised “even if evidence on both sides is closed” and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word “any” at different places. This would also indicate the widest range of power conferred on the Court in that matter.

In the above two judgments, the Supreme Court held that the power to recall any witness, who is already examined can be exercised only to do complete justice to the parties, but such power cannot be exercised permitting the parties to fill up the lacunas and

then what is lacuna is a matter of question. In the present case, the trial Court dismissed the petition that the relationship can be considered by the Court taking judicial notice. In another judgment of the Apex Court in **State (NCT of Delhi)'s** case 3rd cited at para 29 made certain guidelines as to when the power under Section 311 Cr.P.C. can be exercised. They are as follows:

- “(i) The trial Court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross examination. They were under no handicap.*
- ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel.*
- iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice.*
- iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;*
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;*
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;*
- vii) Mere change of counsel cannot be ground to recall the witnesses;*
- viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;*
- ix) The High Court has not rejected the reasons given by the trial Court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;*
- x) There is neither any patent error in the approach adopted by the trial Court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”*

Guidelines 4, 5 and 10 are relevant for deciding the present issue. But curiously, in the present case, the trial Court did not record any reasons except holding that the Court can take judicial notice of such facts. The order of the trial Court is erroneous on the

face of record and it is not inconsonance with the power conferred on the Court under Section 311 Cr.P.C. Therefore, the order passed by the trial Court is liable to be set aside.

With the above observations, the criminal petition is allowed setting aside the order dated 21.11.2016 passed in CrI.M.P.No.1370 of 2016 in C.C.No.363 of 2015 by the Special Magistrate-V, Hyderabad with a direction to the Special Magistrate to pass appropriate orders confining to Section 311 Cr.P.C. afresh after affording reasonable opportunity to both parties within a period of (15) days from the date of receipt of a copy of this order.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

28.12.2016
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M.SATYANARAYANA MURTHY,J

