

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Criminal Revision Case No. 1433 of 2017

ORDER:

This Criminal Revision Case, under Sections 397 and 401 of the Code of Criminal Procedure, 1973, (for short, 'the Code') by the unsuccessful petitioner/ accused is directed against the orders, dated 15.09.2016, of the learned Additional Junior Civil Judge-cum-Judicial Magistrate of First Class, Narsipatnam, Visakhapatnam District, passed in CrI.M.P.No.3249 of 2016 in C.C.No.67 of 2013.

2. I have heard the submissions of *Smt. A.Chaya Devi*, learned counsel appearing for the petitioner. The 2nd respondent/ complainant did not enter appearance, though he is served with notice. There is no representation for him at the hearing.

3. The facts, which require reference and consideration, in brief, are as follows:

The 2nd respondent/ complainant (hereinafter, 'complainant') filed a complaint before the Court of the learned Magistrate requesting to punish the petitioner/ accused (hereinafter, 'accused') for the offences punishable under Section 138 of the Negotiable Instruments Act, 1881, ('NI Act', for brevity) and Section 420 IPC. The accused is resisting the said case. When the said case is at the stage of arguments, the accused filed the aforementioned petition under Section 311 of the Code requesting to recall PW2 for cross examination on certain material aspects. The said petition was resisted by the complainant. On merits and by the order impugned in this revision, the said petition was dismissed. Hence, the aggrieved petitioner/ accused is before this Court.

4. The case of the petitioner/ accused and the submissions made on his behalf, in brief, are as follows: 'He is falsely implicated in the calendar case.

On 31.03.2016, PW2 attended before the trial Court. Though the accused also attended the Court on that day, PW2 was not cross-examined as counsel for the accused was engaged in Senior Civil Court. Hence, the learned Magistrate was pleased to close the evidence and posted the matter for examination of the accused under Section 313 of the Code. Later, the matter was posted to 03.06.2016 for hearing arguments. In the said circumstances, the petition is filed to recall PW2 for cross-examination on behalf of the accused. The accused is having a good case and fair chance of success in the calendar case. If an opportunity is not granted, he suffers serious and irreparable loss. Since the matter is pending in the trial Court, the trial Court ought to have given an opportunity to the accused by recalling PW2 for cross examination, as the law is well settled that no party shall suffer for the fault of his counsel. Since the counsel could not attend and as the accused is not well-versed with the Court proceedings and as there was no time to engage another counsel, he could not make an alternative arrangement on that day. In case, this Court is inclined to grant an opportunity to cross-examine PW2 by granting the relief, as prayed for, the petitioner/ accused is prepared to abide by any conditions that may be imposed by this Court.'

5. Per contra, the case of the complainant and the submissions made on his behalf, in brief, are as follows. 'The contentions of the accused are incorrect. Even the examination of the accused under Section 313 of the Code is completed and he had already submitted his defence version in his said examination. On 10.05.2016, the learned Magistrate dismissed Crl.M.P.no.812 of 2016 filed for recalling PWs 1 and 2. When the matter is coming for arguments, the accused once again filed the present petition to recall PW2 for cross-examination on his behalf. The accused did not avail reasonable opportunities that were afforded to him to cross examine the said witnesses. Except stating that the counsel is engaged in another Court, no other grounds,

much less valid grounds, are urged. The order impugned is a well reasoned order and it does not brook interference.'

6. At the hearing, learned counsel for the petitioner/ accused would submit that as per the instructions received by him, the calendar case is not yet disposed of and that it is still pending at the stage of arguments. The said submission of the learned counsel for the petitioner/ accused is not disputed by the learned counsel for the complainant. Since the facts and submission are already stated supra, there is no need to dilate on the said aspects.

7. It is apt to refer to the ratio in the decision in *Rajaram Prasad Yadav v. State of Bihar*¹, wherein the following propositions are postulated:

"A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us

¹ AIR 2013 SC 3081

earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.”

Further, after referring to earlier decisions on the point, the Supreme Court culled out following principles which are to be borne in mind:

- 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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.

8. Thus, the power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that

purpose the essentiality of a person to be recalled and re-examined has to be ascertained. It is needless to state that exercise of such power should be made judiciously and also with extreme care and caution. The Court has to keep in mind not only the aspect of giving a fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed on account of the delay in disposal of the case.

9. Reverting to the facts of the case, it is to be noted that the accused is facing trial for the offence punishable under Section 138 of the NI Act. His case is that PW2 was not cross-examined on the day he appeared before the trial Court, as his counsel was engaged in the Senior Civil Court. When the matter is before the trial Court and when a witness could not be cross-examined on account of the fault of the counsel, but not of the petitioner/accused, in the well-considered view of this Court, the accused shall not be penalised for the fault of his counsel and he deserves to be given an opportunity to cross-examine the said witness by recalling him.

10. On the above analysis, this Court finds that the accused can be granted one more opportunity to cross-examine PW2, subject to certain terms; as such a course would meet the ends of justice.

11. In the result, the Criminal Revision case is allowed and the order impugned is set aside. As a sequel, Crl.M.P.No.3249 of 2016 in C.C.No.67 of 2013 is allowed. PW2 is recalled for cross-examination by the accused, subject to the condition that the petitioner/accused shall pay costs of Rs.2,000/- to the complainant to compensate the hardship that would be caused on account of the delay in the disposal of the calendar case. It is made clear that the trial Court shall now fix a date for appearance of PW2 and that on the said date fixed by the trial Court, the accused shall pay the costs of Rs.2,000/- as directed supra to the complainant or his learned counsel in open Court and that

on that the trial Court shall take up the matter on the same day and record the cross-examination of PW2 and re-examination, if any.

Pending miscellaneous petitions, if any, in this Criminal Revision Case shall stand closed.

M. SEETHARAMA MURTI, J

03.07.2017
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THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI



Dated: 03-07-2017