

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.6705 OF 2018

ORDER:

1. This Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C.'), is filed by the petitioner, challenging the order, dated 20.04.2018, passed in CrI.M.P. No.525 of 2018 in C.C. No.110 of 2016 by the Special Magistrate-I, Hyderabad (for short, 'the trial Court').

2. Heard Sri K.Surender, learned counsel for the petitioner, and learned Public Prosecutor appearing for the 2nd respondent-State and perused the material on record.

3. The case of the petitioner, in brief, is that he filed the CrI.M.P. Nos.524 and 525 of 2018, before the trial Court, under Section 254 R/w. Section 311 of Cr.P.C. to reopen the case for the purpose of examining the witnesses viz., 1) L.Muni Sreekanth Reddy, Vijayawada, 2) R.Murali Manohar Prasad, Tirupati, 3) Mohd. Sajjad, Tirupati, and 4) Hari Muralidar, Tirupati, and also to summon them for examination to speak about their arranging considerable amount through the petitioner to the 1st respondent/accused, on his personal guarantee. It is alleged in the Petitions that a cheque was issued by the respondent in favour of the petitioner for a sum of Rs.70,00,000/-. The respondent herein was the Director/Promoter of Shaili Infra Limited of which the petitioner was also a part and, during the course of business, respondent requested the petitioner to arrange considerable amount for execution of projects undertaken by the Company, on his personal guarantee. Accordingly, the petitioner himself and through various sources arranged the required amount, which fact is borne out from the Memorandum of Understandings

dated 16.07.2014 and 16.05.2015, marked as Exs.P-12 and P-13. The proposed witnesses, who are alleged to have arranged the funds, at the instance of the petitioner, to the respondent, could not be secured to examine them as they were outside the India, at the relevant point of time, and their examination as proposed witnesses is crucial to prove the transaction between the petitioner and the respondent to substantiate the factum of pooling amount from various persons including the proposed witnesses. The evidence of the petitioner was closed on 11.04.2017, after examining two witnesses; thereafter, the respondent was examined under Section 313 Cr.P.C., the calender case was posted for arguments on 03.05.2017, the petitioner filed Crl.M.P. No.1102 of 2017, under Section 311 Cr.P.C., to recall P.W.1 and the same was allowed by the trial Court and as such the respondent was again examined under Section 313 Cr.P.C., and later, posted for argument on 03.10.2017. After hearing the argument of the petitioner, since the counsel for the respondent did not advance his argument, C.C. No.110 of 2016 was posted for judgment on 29.12.2017; then the respondent filed a petition for reopening of case and to hear the argument, which petition was allowed and, after hearing the argument on either side, the calendar case was posted for judgment to 28.02.2018, on which date, the aforesaid petitions were filed by the petitioner to reopen the case and to examine the proposed witnesses respectively by producing photostat copies of few pages of the passports of Mohd. Sajjad and L.Muni Sreekanth Reddy, to prove that they were outside the India, for some time, and hence the examination of the proposed witnesses is necessary.

4. Respondent filed counter denying material allegations of the petitions *inter-alia* contending that the petitions are filed at a belated stage only to fill up the lacuna, raised during the course of argument and,

moreover, there is no evidence to show that the proposed witnesses are outside the India at the material time and sought for dismissal of the Petitions.

5. The trial Court, after hearing argument of both sides and perusing the material on record, dismissed the petitions on the ground that Mohd. Sajjad and L. Muni Sreekanth Reddy, when they were available in India for some time, were not called, nor any steps were taken for one reason or the other to examine them and with regard to other two witnesses *i.e.*, R.Murali Manohar Prasad and Hari Muralidar no document is filed to prove that they were out of India during relevant period, and hence the petitions were filed only to fill up the lacuna, and if the same are allowed it would amount to *de novo* trial.

6. Aggrieved by the order in Crl.M.P. No.525 of 2018, the present Petition is preferred on the ground that the witnesses can be summoned and examined at any stage of the proceedings to facilitate the parties, to bring the entire evidence on record so as to decide the matter in all fairness but the trial Court did not permit the petitioner to examine them, without exercising its discretion under Section 311 of Cr.P.C., and committed a grave error in dismissing the Petition and prayed to set-aside the order and permit the petitioner to reopen the case and to summon and examine the proposed witnesses to prove the factum of their arranging considerable amount through the petitioner to the respondent/accused, on his personal guarantee, and mark the documents, if any, filed along with the petition.

7. During course of hearing, Sri K.Surender, learned counsel for the petitioner, reiterated the same contentions urged in the Petition and placed reliance on a decision of the Apex Court in ***U.T. of Dadra and***

Haveli and another Vs. Fatehsinh Mohansinh Chauhan¹. On the strength of the principle laid down therein at Para 12, he submits that recall of witnesses always does not amount to filling up lacuna, unless the evidence to be adduced causes any prejudice to the respondent and therefore dismissal of the petition on the ground of filling up lacuna is unsustainable and requested to quash the order under challenge, reopen the evidence and summon the proposed witnesses for their examination.

8. During course of hearing, learned Public Prosecutor, appearing for the 2nd respondent – State, placed reliance on a decision of the Apex Court in ***Natasha Singh Vs. Centra Bureau of Investigation***² and ***A.G. Vs. Shiv Kumar Yadav and Others***³, to contend that the court cannot summon the witnesses, after hearing the argument, since it amounts to filling up lacuna and requested to dismiss the Petition.

9. Admittedly, the petitioner is the complainant who filed private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act'), based on dishonour of a cheque for Rs.70,00,000/-, allegedly issued by the respondent towards discharge of his legally enforceable debt. The evidence of the petitioner was closed on 11.04.2017, after examination of two witnesses; thereafter, the respondent was examined under Section 313 Cr.P.C., the calender case was posted for arguments on 03.05.2017; at that stage, the petitioner filed Crl.M.P. No.1102 of 2017, under Section 311 Cr.P.C., to recall P.W.1 and the same was allowed by the trial Court, on merits, and attained finality. When the main case in C.C. No.110 of 2016 was finally posted for judgment to 28.02.2018, and on that date the petitioner filed the instant

¹ 2006 (2) ALD (Crl.) 574 (SC)

² 2013 (5) SCC 741

³ AIR (2015) SC 3501

petitions for reopening of the evidence and summoning of the witnesses to examine them.

10. When the main calender case is posted for judgment, normally, the Court cannot exercise power to reopen the evidence and summon the witnesses since none of the provisions contained either in Cr.P.C. or in Criminal Rules of Practice does permit the Court to reopen the case, after the arguments are over and posted the calender case for judgment. However, the reason assigned by the petitioner to prove the Memorandum of Understandings between L.Muni Sreekanth Reddy, R.Murali Manohar Prasad, Mohd. Sajjad and Hari Muralidar about transfer of the amount from their account to the account of the respondent, they are required to be examined and the reason for their non-examination earlier was that they were outside the India. To substantiate the said contention, the petitioner produced photostat copies of certain pages of the passports of the proposed witnesses; as per which Mohd. Sajjad arrived at India on 18.12.2016 from Oman and L.Muni Sreekanth Reddy arrived at India from a foreign country on 14.06.2014. No documents are filed to prove that they left India after 18.12.2016 and 14.06.2014, respectively. But, based on these documents, it is difficult for the Court to conclude that they were totally outside the India during pendency of C.C. No.110 of 2016. The entry in the passport of Mohd. Sajjad reveals that it is pertaining to 2016 *i.e.*, he is available in India prior to closure of the evidence of the petitioner on 11.04.2017 and, hence, it is irrelevant. Similarly, the entry in the passport of L.Muni Sreekanth Reddy discloses that he arrived to India on 14.06.2014 and thereafter he did not leave India. Thus, the above dates indicate that the above two witnesses are available for being examined before the Court during material time. With regard to other two witnesses *viz.*, R.Murali Manohar Prasad and Hari Muralidar, no scrap of paper is

filed to prove that they were outside the India during the relevant period. When C.C. No.110 of 2016 is pending for the last two years and the evidence of the petitioner was closed on 11.04.2017, nothing prevented the petitioner to seek examination of the proposed witnesses before closure of the evidence of the petitioner but no explanation was forthcoming for their failure to examine them before 11.04.2017, on which date the evidence of the petitioner was closed. Therefore, the contention of the petitioner that the proposed witnesses are outside India before closure of the evidence of the petitioner on 11.04.2017 is not substantiated by any material and only when the respondent pointed out the lacuna in his evidence *i.e.*, non-examination of these persons, the petitioner conveniently filed this petitions to reopen the evidence and summon the witnesses for their examination. Moreover, there is no mention of the names of the proposed witnesses either in the complaint or during the examinations of PWs.1 and 2. Hence, the petition in I.A. No. 525 of Cr.P.C., filed under Section 311 of Cr.P.C., is misconceived since Section 311 of Cr.P.C. does not confer power on the Courts to reopen the evidence or case but, at best, Section 311 confers power on the Courts to recall any witness, issue summons and re-examine and record evidence of the witness but not for reopening of the evidence or case. Therefore, filing of Petition in I.A. No.525 of 2018 under Section 254 R/w.311 Cr.P.C. to summon the proposed witnesses to adduce their evidence is misconceived and is not maintainable. On this ground alone I.A. No.525 of 2018 is liable to be dismissed. Therefore, the order passed by the learned Magistrate dismissing Crl.M.P. No.525 of 2018 cannot be interfered with by this Court.

11. The other Petition filed in Crl.M.P. No.524 of 2018 to reopen the case for the purpose of examining proposed witnesses was also

dismissed. The petition in Crl.M.P. No.525 of 2018 filed to summon the witnesses, the Court can exercise such power under Section 311 of Cr.P.C. to summon the proposed witnesses or to recall and re-examine any witness either on the application or *suo moto* if the Court finds that the evidence of proposed witnesses is necessary for adjudication of the dispute effectively.

12. In the present case, the petitioner filed the petition under Section 311 of Cr.P.C. to summon the proposed witnesses on the ground that they were outside India before closure of the evidence of the petitioner on 11.04.2017 but the material produced before the Court, more particularly, the photostat copies of the passports of Mohd. Sajjad and L.Muni Sreekanth Reddy are not sufficient to establish that they were outside India before 11.04.2017; moreover, L.Muni Sreekanth Reddy is readily available since 14.06.2014 *i.e.*, even before filing of the complaint he is in India and non-examination of those witnesses for one reason or the other during trial disentitled this petitioner though available to seek relief under Section 311 of Cr.P.C.

13. According to Section 311 of Cr.P.C., the 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.

14. Thus, it is clear from the section that the Court is empowered to summon any person as a witness at any stage of enquiry, trial or proceeding and the power is not confined to any particular class of person.

15. In ***Mohonlal Shamji Soni Vs. Union of India***⁴, the Apex Court held that the power to summon and examine any witness can be exercised at any stage, however, opportunity is to be given to the parties to rebut the evidence.

16. The Apex Court dealt with the aspect of power to summon a witness in ***Rama Paswan Vs. State of Jharkhand***⁵. In the said case, a rape victim has been examined and cross-examined. At the stage of argument, a prayer has been made to recall her on the ground that the parties have settled the dispute outside the Court and the informant could not have properly identify the accused cannot be entertained and the Apex Court held that summoning, recalling or re-examining the witnesses cannot be allowed in order to fill up the gap or to remove the lacuna in the evidence of the prosecution.

17. In ***Sister Mina Lalita Baruwa Vs. State of Orissa and Others***⁶, the Apex Court held that, in criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and, therefore, it is imperative for the state and the prosecution to ensure that no stone is left unturned - It is also the equal, if not more, the duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it - details stated. It can also be said that in that process the Court should be conscious of its responsibility and at times when the prosecution either deliberately or inadvertently omit to bring forth a notable piece of evidence or a conspicuous statement of any witness with a view to either support or prejudice the case of any party, should not hesitate to interject and prompt

⁴ AIR 1991 (SC) 1346

⁵ 2007 (Cr.L.J) 2750

⁶ AIR (2014) SC 782

the prosecution side to clarify the position or act on its own and get the record of proceedings straight. Neither the prosecution nor the Court should remain as a silent spectator in such situations.

18. Thus, from the law laid down by the Apex Court in catena of decisions referred *supra*, it is clear that the Court not only exercises such discretionary power on the application filed by either the defence or accused, the Court can also recall any person by exercising such discretionary power on its own motion.

19. In **Natasha Singh**², the Apex Court in Para 15 held that the scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred 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 great caution and circumspection. The very use of words such as “any Court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and

“any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case. Only after recording its satisfaction the Court can exercise such power.

20. Therefore, from the law declared by the Apex Court in **Natasha Singh²**, the witness cannot be summoned or recalled to fill up the lacuna in the case of prosecution, or of the defence and to the disadvantage of the accused and to cause serious prejudice to the defence of the accused or to give an unfair advantage to the opposite party.

21. Learned counsel for the petitioner contended that unless the prejudice going to be caused to the opposite party is shown, adducing evidence by summoning of witnesses would not amount to filling up lacuna in the prosecution case, placed reliance on a decision of the Apex Court in **U.T. of Dadra and Haveli¹**.

22. There is no dispute with regard to the law declared by the Apex Court in **U.T. of Dadra and Haveli¹**. In the present facts of the case, the petitioner did not plead the Memorandum of Understandings between the parties and transfer of the amount from the proposed witnesses to be examined, through the petitioner, to the account of the accused and such additional evidence must not be received as a disguise because, in such case, this Court cannot permit such retrial by receiving additional evidence at a belated stage when the C.C. No.110 of 2016 is posted for judgment.

23. In ***Abdul Rehman Antulay Vs. R.S. Nayak and another***⁷, the Apex Court made it clear that when a petition is filed to protract or delay the litigation, the Court can decline to recall a witness by exercising power under Section 311 Cr.P.C.

24. In ***Shiv Kumar Yadav***³, the Apex Court culled out following principles to be borne in mind for exercising power under Section 311 Cr.P.C, and they are as follows:

1. 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?
2. 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 and speculative presentation of facts, as thereby the ends of justice would be defeated.
3. 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.
4. 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.
5. 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.
6. The wide discretionary power should be exercised judiciously and not arbitrarily.

⁷ AIR (1992) SC 1701

7. 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.

8. 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.

9. 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.

10. 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 material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

11. 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.

12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

13. 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.

14. 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.”

25. In the present case, only purpose mentioned in the Petition is that to prove transfer of amount from the account of the proposed witnesses, who were allegedly outside of India during the course of trial, and it is almost a new case set up for the first time after completion of arguments, only when the learned counsel for the respondent pointed out such lacuna in the evidence of the petitioner – complainant. In such case, if the petition is allowed and permitted to summon the witnesses by exercising power under Section 311 Cr.P.C., it would certainly cause prejudice and would amount to *de novo* trial in view of the principal laid down in Para 15 of **Natasha Singh**². Therefore, such power cannot be exercised at this stage and this Court only can exercise such power under Section 482 Cr.P.C. when the trial Court failed to exercise the discretion that conferred on it or exercised power prejudicial to the case of any one of the parties or manifestly perverse.

26. Moreover, the order under challenge is interlocutory in nature, no revision is maintainable against such an order, in view of the law laid down by the Apex Court in **Sethuraman Vs. Rajamanickam**⁸, to get over the difficulty contained in Section 397(2) Cr.P.C, the petitioner invoked inherent jurisdiction of this Court under Section 482 Cr.P.C, circumventing the law, wherein the Apex Court in paragraph 4 held as follows:

"4. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that

⁸ 2009 (Cri.L.J) 2247

the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e., one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed.”

27. The ***Girish Kumar Suneja Vs. C.B.P.***⁹, full Bench of the Apex Court had an occasion to decide the similar subject and held as follows in paragraphs 24, 25, 27, 28 & 29:

“Therefore, when Section 397(2) prohibits interference in respect of interlocutory orders, Section 482, cannot be availed of to achieve same objective. In other words, since Section 397(2) prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482. To set aside an interlocutory order prohibition in Section 397 will govern Section 482 thereof. In the present case, although, appellants might have an entitlement (not a right) to file a revision petition in High Court but that entitlement can be taken away and in any event, High Court is under no obligation to entertain a revision petition – such a petition can be rejected at threshold. If High Court is inclined to accept revision petition it can do so only against a final order or an intermediate order, namely, an order which if set aside would result in culmination of proceedings. There appear to be only two such eventualities of a revisable order and in any case only one such eventuality is before Supreme Court. consequently result of paragraph 10 of

⁹ AIR (2017) SC 3620

order dated 25.07.2014 passed by Supreme Court is that entitlement of appellants to file a revision petition in High Court is taken away and thereby High Court is deprived of exercising its extraordinary discretionary power available under Section 397 of the Cr.P.C. However, it does not mean that appellants have no remedy available to them – paragraph 10 of order dated 25.07.2014 does not prohibit appellants from approaching Supreme Court under Article 136 of Constitution. Therefore all that has happened is that forum for ventilating grievance of appellants has shifted from High Court to Supreme Court. Mere fact that Supreme Court could dismiss petition filed by appellants under Article 136 of Constitution without giving reasons does not necessarily lead to conclusion that reasons will not be given or that some equitable order will not be passed. Thus, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) that cannot be circumvented by resort to Section 482”.

28. In view of the law declared by the Apex Court in **Girish Kumar Suneja**⁹, where no revision is maintainable against interlocutory order, in view of bar under Section 397(2) Cr.P.C, similarly petition under Section 482 Cr.P.C is also not maintainable. Hence, the Criminal Petition is liable to be dismissed on this ground also.

29. In the present facts of the case, there is nothing to establish that the evidence of proposed witnesses is essential for just decision in the case and it appears after completion of entire trial the petitioner intended to fill up the lacuna by examining the proposed witnesses to substantiate his case.

30. In view of the law declared by the Apex Court in **Shiv Kumar Yadav**³, I find that the trial Court rightly exercised its discretion in dismissing the Petition and the impugned order does not call for interference of this Court, at this stage.

31. Accordingly, with the above observations, the Criminal petition is dismissed.

32. In consequence, miscellaneous petitions, if any, pending in this Petition shall stand dismissed.

M.SATYANARAYANA MURTHY, J

Date: 29.08.2018.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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CRIMINAL PETITION No. 6705 OF 2018

Date. 29.08.2018

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