

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL REVISION CASE No.3267 OF 2017

JUDGMENT:

Questioning the order dated 07.11.2017 in Criminal M.P. No.1978 of 2017 in C.C. No.286 of 2016 (old C.C. No.1414 of 2016) passed by the learned XIX Special Magistrate, Hyderabad, the present Criminal Revision Case is preferred, under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short 'Code'), by the complainant viz., M/s. Bhagyanagar Chlorides Private Limited, represented by its authorized person, P. Bheema Raju.

2. The learned Special Magistrate refused to receive additional documents and dismissed the aforesaid application filed by the revision petitioner - complainant under Section 294 of the Code.

3. The stage of the proceedings before the learned Magistrate is not in dispute. In fact, the Calendar Case reached the stage of examination of respondent Nos.1 and 2 herein, who are accused Nos.1 and 2, under Section 313 of the Code, and, at that stage, the revision petitioner initially filed Criminal M.P. No.758 of 2017 for recalling PW.1 for the purpose of marking additional documents. The learned Magistrate, having made an elaborate discussion, dismissed it on 09.05.2017. Against which, the revision petitioner herein filed a petition under Section 482 of the Code, in Criminal Petition No.5318 of 2017 to quash the order dated 09.05.2017 and the same was

dismissed on 06.07.2017 as withdrawn while granting liberty to the revision petitioner.

4. The revision petitioner, in paragraph No.4, mentions the Miscellaneous Petition number as Criminal M.P. No.7584 of 2017. In fact, he mentioned it as a Criminal Revision Case. But, at page No.2, he sets out it as a 'petition to quash the proceedings'.

5. In the said earlier Criminal M.P., the learned Magistrate while dismissing it emphasised that separate petitions were not filed for recalling PW.1 and receiving additional documents, but, when he preferred Criminal Petition No.5318 of 2017, which was dismissed as withdrawn, however, permission to file a fresh application as requested was granted. That is how, Criminal Petition No.1978 of 2017 for receiving the documents, as many as 17 in number was filed. He has also filed yet another Criminal M.P. No.1979 of 2017 and both were taken up for hearing and both were dismissed by separate orders on 07.11.2017.

6. Now, the revision petitioner herein preferred the present Criminal Revision Case challenging the order in Criminal M.P. No.1978 of 2017 leaving the order of dismissal passed by the learned Magistrate in Criminal M.P. No.1979 of 2017 which was intended to recall PW.1. Thus, it is obvious that there has been a patent defect in preferring the present revision case. In fact, it appears that the revision petitioner initially filed Criminal Petition No.11596 of 2017

and again sought permission to withdraw the same. When the revision petitioner herein, does not challenge the dismissal order passed in Criminal M.P. No.1979 of 2017, refusing to recall PW.1 for marking the documents, even if, the present revision case is allowed, no purpose, at all, will be served. It is not known whether the revision petitioner, by inadvertence has not opted to challenge the order in Criminal M.P. No.1978 of 2017 filed under Section 311 of the Code to recall PW.1 or is it deliberate in not preferring the revision challenging the said order, so as to postpone the disposal of the Calendar Case itself. For the reasons best known to the revision petitioner, it did not prefer any criminal revision case challenging the orders in Criminal M.P. No.1978 of 2017.

7. Therefore, on this short ground itself, the present Criminal Revision Case is liable to be dismissed.

8. Before parting with, it is necessary to refer to the authorities relied on by him with regard to at what stage the documents can be received. He places reliance in **Rajendra Prasad v. Narcotic Cell, through its Officer In Charge, Delhi**¹ for the proposition that re-examination of the witnesses can be permitted only in exceptional cases, however, it cannot be allowed only to fill up lacuna, the power of the Court is plenary to summon or even recall any witness at any stage of the case, if the Court considered it necessary for just decision.

¹ 1999 LawSuit (SC) 654

9. The second ruling relied on by him is in **Shailendra Kumar v. State of Bihar**², wherein, the Hon'ble Apex Court laid emphasis on the object of Section 311 of the Code which empowers the Court to summon material witnesses though, not summoned as witness and to examine and recall and re-examine, if their evidence appears to it to be essential to the just decision of the case and held that a bare reading of the Section reveals, it is of very wide amplitude and if there is any negligence, latches or mistake by not examining material witnesses, the Court function to render just decision by examining such witnesses at any stage is not, in any way impaired by quoting "after all, function of criminal Court is, administration of criminal justice", held in paragraph No.11 thus:

"(11) Bare reading of the aforesaid section reveals that it is of very wide amplitude and if there is any negligence, latches or mistakes by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This court in *Rajendra Prasad v. narcotic Cell* [(1999) 6 SCC 110] observed. "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"."

² 2001 LawSuit (SC) 1548

10. The third ruling is in **Godrej Pacific Tech Ltd. V. Computer Joint India Ltd.**³ It was a case where an application filed under Section 311 of the Code for re-examination of the witness was refused by the trial Court and the High Court declined to interfere with the order of the trial Court and in that context, the Hon'ble Apex Court held in paragraph Nos.7, 8, 9, 10 and 11, thus:

“7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to be essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is

³ 2008 LawSuit (SC) 1035

the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

8. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

9. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court.

Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

10. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jamatraj Kewalji Govani v. State of Maharashtra* (1967 (3) SCR 415).

11. The above position was highlighted in *Zahira Habibullah Sheikh & another v. State of Gujarat & Ors.* [(2006) 3 SCC 374].”

11. Though, the learned counsel has taken pains to refer to the case law, requesting this Court to rely on the aforesaid decisions rendered by the Hon’ble Apex Court, the fundamental mistake cannot be ignored in not preferring the Criminal Revision Case against the order of dismissal passed by the learned Magistrate in Criminal M.P. No.1979 of 2017 which was filed under Section 311 of the Code to recall PW.1, as already observed above. Despite the fact that in the earlier round, the learned Magistrate dismissed the application under Section 311 of the Code on the main ground that separate application under Section 294 of the Code was not filed and when aggrieved by the said order, the revision petitioner preferred Criminal Petition, a learned Single Judge of this Court dismissed the petition on the same ground, affirming the order of the learned Magistrate, however, granting liberty to move separate applications, but, though, the revision petitioner moved separate applications and invited dismissal orders, but opted to prefer criminal revision case against the order in one of the applications i.e., under Section 294 of the Code only, leaving unchallenged the order passed by the learned Magistrate in other petition filed under Section 311 of the Code.

12. With the observations, as above, the Criminal Revision Case is dismissed, at the admission stage itself.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the present revision case stand dismissed.

A. SHANKAR NARAYANA, J

January 2, 2018.

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