

THE HONOURABLE JUSTICE G. SRIDEVI

CRIMINAL PETITION Nos.245, 354, 438 and 450 of 2020

COMMON ORDER :

The present Criminal Petitions are filed under Section 482 Cr.P.C. by the petitioner/*complainant* seeking to quash the common order, dated 23.12.2019 passed in CrI.M.P.Nos.3535, 3536, 3537 and 3538 of 2019 in C.C.No.165 of 2019 on the file of the II-Special Magistrate, Hyderabad, wherein and whereunder the applications filed by the petitioner/*complainant* to recall P.W.1; to summon the Branch Manager, State Bank of India, Sripuram, Malakpet, Hyderabad; to permit the petitioner/*complainant* to file his evidence for marking medical records/bills etc., and to permit him to file additional documents, etc., were dismissed.

The facts of the case, in brief, are that the petitioner/*complainant* filed C.C.No.165 of 2019 against the 2nd respondent/accused for the offence punishable under Section 138 of the Negotiable Instruments Act. When the matter was posted for further arguments of the petitioner/*complainant*, he filed applications to recall P.W.1; to summon the Branch Manager, State Bank of India, Sripuram, Malakpet, Hyderabad, to permit the petitioner/*complainant* to file his evidence for

marking medical records/bills etc., and to permit him to file additional documents etc. It is stated in the petitions that the cheque was given for medical treatment and at the time of filing of the case, the petitioner/*complainant* could not file the photocopy of medical bills and medical records as they were mixed with the other property and business papers and also in order to prove his case, it is necessary to recall P.W.1 for marking and to receive the said documents and also to summon the Branch Manager, who is an essential witness to speak about the cheque and account details of P.W.1.

The 2nd respondent/accused filed counter opposing the petitions stating that the matter is coming up for final hearing and the petitioner/*complainant* had submitted written arguments as well as oral arguments and only to cure the defects, the present petitions are filed. It is also stated that sufficient opportunity has already been given to the petitioner/*complainant* to substantiate his case. After considering the rival submissions, the trial Court dismissed the said petitions. Aggrieved by the same, the present Criminal Petitions are filed.

Heard learned Counsel for the petitioner/*complainant*, learned Additional Public Prosecutor for the 1st respondent-

State and learned Counsel appearing for the 2nd respondent/accused.

It has been submitted on behalf of the petitioner/*complainant* that the Branch Manager, State Bank of India, Sripuram, Malakpet, Hyderabad, is very essential and important witness to prove the reasons for return of the cheque. It is also submitted that if the Court does not give an opportunity to the petitioner/*complainant* to examine the said Branch Manager and to recall P.W.1 and to permit the petitioner/*complainant* to file additional documents i.e., medical records/bills, he would be subjected to injustice.

Learned Additional Public Prosecutor appearing for the 1st respondent-State opposed the petitions.

Learned Counsel appearing for the 2nd respondent/accused would submit that though sufficient opportunity was given to the petitioner/*complainant*, he failed to avail the said opportunity and filed the present petitions at a belated stage i.e., at the stage of arguments only to protract the proceedings. It is also submitted that the present applications came to be filed only to fill up the lacunae and the trial Court has rightly dismissed the applications.

Before proceeding further, it would be appropriate to refer to Section 311 of Cr.P.C., which reads as under:

"311. Power to summon material witness, or examine person present .-

Any 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 if his evidence appears to it to be essential to the just decision of the case."

Dealing with the scope and object of Section 311 Cr.P.C., the Apex Court in *Hanuman Ram v. The State of Rajasthan and others*¹ held as under:

"6. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, 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 any one as a witness, or (b) to examine any person present in 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 it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court by duty of examining a material witness who

¹ AIR 2009 SC 69

would not be 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 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.

7. 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 for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers 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 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.

8. 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 Indian Evidence Act, 1872 (in short '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.

9. 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 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 provision 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."

In the instant case, in the complaint itself, the petitioner/*complainant* has shown the Branch Manager, State Bank of India, Sripuram, Malakpet, Hyderabad as witness No.3. Having regard to the principle laid down by the Apex Court in the judgment referred to above, Section 311 Cr.P.C. petition can be filed at any stage.

Considering the position of law laid down in the aforesaid decision of the Apex Court and having regard to the facts and circumstances of the case, I am of the considered view that no party to the trial can be denied an opportunity to adduce evidence and if the proposed witness is examined as witness, no prejudice would be caused to the 2nd respondent/

accused as adequate opportunity would be available to him to cross-examine the said witness and to lead rebuttal evidence.

Accordingly, all the Criminal Petitions are allowed. The trial Court is directed to recall P.W.1 and to receive the documents filed by the petitioner/*complainant* and to mark the same subject to proof and relevancy and also directed to issue summons to the Branch Manager, State Bank of India, Sripuram, Malakpet, Hyderabad.

Miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

JUSTICE G. SRIDEVI

06.05.2020
Gsn/gkv

