

14.06.2022

C.R.R 2540 of 2008

Banshidhar Majhi

Vs.

The State of West Bengal & Anr.

For the Petitioner: Mr. Abhra Mukherjee, Adv.,
 Mr. Sauradeep Dutta. Adv.

For the State:
 Mr. Narayan Prasad Agarwala, Adv.,
 Mr. Pratick Bose, Adv.

1. This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure challenging legality, validity and propriety of the order dated 19th May, 2008 passed by the learned Judicial Magistrate, 3rd Court at Purulia in Case no. C-121 of 2005 under Section 138 of the Negotiable Instrument Act thereby allowing the petition dated 26th December, 2007 filed by the private opposite party No.2 directing PW2 Fazal Ahmed to give evidence as a defence witness and to produce documents mentioned in the petition of the opposite party no.2.

2. For proper adjudication of the instant revision the filing factual circumstance are required to be brought on record:

“The petitioner as complainant filed an application under Section 138 of the Negotiable Instrument Act on 30th August, 2005. The case was initially tried by the learned Judicial Magistrate, 1st Court at

Purulia. On 2nd February, 2006 the complainant and another witness namely, Fazal Ahmed were examined as PW1 and PW2 respectively. Their cross examination was concluded and the said witnesses were discharged on 15th February, 2006. Subsequently, the accused/opposite party No.2 filed an application for direction upon PW2 to produce certain documents. The said application was allowed by the trial court vide order dated 15th February, 2006. The legality, validity and propriety of the said order was challenged before this Court in CRR No.751 of 2006. The said criminal revision was disposed of by a Coordinate Bench of this Court on 22nd March, 2006. In the said order this Court clearly observed:-

“It is not understood as to how all those documents are also necessary for the purpose of the adjudication of the dispute under Section 138 of the Negotiable Instrument Act.”

Accordingly the order dated 15th February, 2006 was modified to the extent that the direction upon PW2 to produce the said documents as referred to earlier be set aside and the learned trial judge was directed to allow the petitioner to file an objection to

the said application. This Court also directed the learned court below to dispose of the said application within a period of two weeks thereafter. The petitioner accordingly filed a written objection against the application filed by the accused for direction upon PW2 for production of documents. The application along with written objection were taken up for hearing by the trial court and the court below passed the same order on 20th May, 2006. The petitioner again challenged the order in revision before this Court which was registered as CRR No.2695 of 2006. On the prayer made by the petitioner complaint Case No.C121 of 2005 was withdrawn from the file of the learned Judicial Magistrate, 1st Court at Purulia and transferred to the file of the learned Judicial Magistrate, 3rd Court, Purulia for disposal in accordance with law.

3. After the case being transferred, the petitioner examined another witness as PW3, the accused was examined under Section 313 of the Cr.P.C. Subsequently, the accused filed another application praying for examination of PW2 as a defence witness, the learned Magistrate allowed the application and directed PW2 to produce certain documents. The opposite party was also permitted to examine PW2 as a defence witness.

4. Be it mentioned here that the documents as referred to were lease agreement, royalty receipts, cash register, cash memo book and income tax assessment report.

5. At the outset, it is submitted that the opposite party No.2 is not represented when the matter is taken up for hearing. This Court heard Mr. Abhra Mukherjee, learned Advocate for the petitioner.

6. Section 362 of the Code of Criminal Procedure states that no court shall alter or review its judgment or final order except clerical or arithmetical error, save and otherwise provided by the Code or by any other law for the time being in force.

7. Section 405 of the Code of Criminal Procedure states that when a case is revised by the High Court or a Sessions Judge, it or he shall, in the manner provided by Section 388, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified: and, if necessary, the record shall be amended in accordance therewith.

8. This court in CRR No.751 of 2006 clearly held that it is not understood as to how the above mentioned documents are necessary for the purpose of the adjudication of the dispute under Section 138 of the Negotiable Instrument Act.

9. It is submitted by Mr. Mukherjee referring to a decision of the Hon'ble Supreme Court in **State of M.P vs. Badri Yadav and Another** reported in **2006 3 SCC (Cri)337** that "Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as to provided under Section 311 CrPC, was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 CrPC the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as a defence witness. In the present case PW8 and PW9 were juxtaposed as a DW1 and DW2. This situation is not one what was contemplated by sub-section (3) of Section 233 CrPC."

10. In paragraph 15 of the aforesaid report it is observed by the Hon'ble Supreme Court:

-“15. When such frivolous and vexations petitions are filed, a judge is not powerless. He should have used his discretionary power and should have refused relief on the ground that

it is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by the prosecution as eyewitnesses on 18th December, 1990, cross-examined and discharged. Thereafter, an application under Section 311 CrPC was rejected. They were recalled purportedly in exercise of power under sub-section (3) of Section 233 CrPC and examined as DW1 and DW2 on behalf of the accused on 17th July, 1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law. (emphasized supplied)”

11. Thus the witness who is already been examined as PW2, cannot be recalled for giving evidence as DW1. He also cannot be directed to produce and prove certain documents in support of the defence case.

12. In view of the above discussion, this Court holds that the order dated 19th May, 2008 passed by the learned Judicial Magistrate, 3rd Court at Purulia in Case No. C-121 of 2005 suffers from illegality and material irregularity. The impugned order is liable to be set aside.

13. Accordingly the instant revision is allowed.

14. The order dated 19th May, 2008 passed by the learned Judicial Magistrate, 3rd Court at Purulia in Case No. C-121 of 2005 is set aside.

15. The learned Magistrate is directed to hear out the argument and dispose of the case within one month from the date of communication of the order.

(Bibek Chaudhuri, J.)