

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1714 of 2023

KIP Limited

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Debasis Ray,
Mr. Avik Ghatak,
Ms. Arfeen Begum.

For the State : None.

For the Opposite Party No. 2 (In-person) : Ms. Kavita Saraff.

Hearing concluded on : 03.01.2024

Judgment on : 09.01.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an Order dated 06.04.2023 passed by the Learned Metropolitan Magistrate, 14th Court, Calcutta in connection with Complaint Case No. 34911 of 2009 which had been initiated in the backdrop of an alleged commission of an offence under Section 138 of the Negotiable Instruments Act, 1881 against the opposite party no. 2 herein, thereby rejecting the petitioner's prayer under Section 311 of the Code of Criminal Procedure for recalling of Prosecution Witness No. 1.
2. The petitioner is a private limited company and has initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 against the opposite party no. 2.
3. The case in the petition of complaint is that the petitioner was carrying on its business of mining of granites. The opposite party no. 2 approached the petitioner to provide her with financial assistance for the purpose of expanding her business, which she carried on with her other family members. The petitioner, in good faith, provided financial assistance to the Opposite Party No. 2 from time to time. The opposite party no. 2, in partial discharge of her existing debts and/or liabilities, issued to the petitioner, an account payee cheque bearing no. 713379 dated 10.11.2008, drawn on Axis Bank Limited, Burra Bazar, for a sum of Rs. 2,00,00,000/- (Two Crore Rupees only), which, upon being

deposited for encashment by the petitioner with its banker within its validity period was returned unpaid vide cheque return memo dated 04.05.2009, being dishonoured by the banker of the Opposite Party No. 2 for the reason "Funds Insufficient". A demand notice dated 19.05.2009, in terms with Section 138 of the Negotiable Instruments Act, 1881, was issued by the petitioner and the same was received by the opposite party no. 2 herein on 21.05.2009, but was not replied thereto.

4. It is further submitted that the petitioner and the opposite party no. 2 are accuseds in Special CBI Case No. 22 of 2010, initiated on two complaints dated 14.03.2009 made by the General Manager, Zonal Office, Central Bank of India, Kolkata, alleging offences punishable under Section 120B read with Sections 420/409/468/471/477A of the Indian Penal Code and Section 13(2) read with Section 13(1)(c) and (d) of the Prevention of Corruption Act, which has ended in charge sheet and now pending before the learned 3rd Special Judge, CBI, Bankshall Court, Calcutta.
5. In connection to the said case, the CBI conducted a search at the premises belonging to the Opposite Party No.2 and/or her husband located at 136, Cotton Street, 1st floor, Utkalmoni Gopabandhu Sarani, Kolkata - 700007 on 04.04.2009 at about 15:00 hrs. In the course of conducting such a search, the CBI seized multiple documents and articles from the Opposite Party No.2. A seizure list, stating therein the details of documents and the articles seized by the CBI at the said

premises on 04.04.2009 in connection with the aforementioned Special CBI Case no. 22 of 2010 was prepared.

6. The petitioner further submits that the following documents were also seized among others by the seizure list dated 04.04.2009 from the premises of the opposite party no. 2:-

Entry no. 7:	One cheque book of CA No. 277010200019761 of Axis Bank, Bara Bazar Branch held in the name of Kavita Saraff, containing cheques starting from 713317 to 713318, all signed by Kavita Saraff and issued in the name of Motilal Oswal Security Ltd., Krishna Smelters Pvt. Ltd., Bineet Saraff and Kali International.
Entry no.15:	One bunch of cheques, one of Axis Bank, Bara Bazar Branch of A/c no. 277010200019761, vide Cheque no. 713386, signed by Kavita Saraff, payable to Rajco. Steel Enterprises for Rs. 1 Crore....
Entry no. 16:	One bunch of Return Cheques containing Cheque no. 713344 of A/c no. 277010200019743 of Axis Bank Bara Bazar Branch, along with Cheque Return Memo. Cheque No. 718956 and 718952 of A/c. 277010200019752, Cheque No. 713344 of

	A/c. No. 277010200019761, along with Cheque Return Memo, Cheque No. 713331 and 71334 of 277010200019761, all of Axis Bank, Bara Bazar Branch.
Entry no. 20:	Original Income Tax Return of Kavita Saraff for Assessment Year 2008-2009, xerox of copy of Income Tax Return of Kavita Saraff for Assessment Year 2007-08, 2005-06 and 2006-07 along with enclosures (15 sheets).

7. It is stated that during the deposition of the sole defence witness, being Defence Witness No. 1 (hereinafter referred to as DW 1), i.e., the opposite party no. 2 herein, in the course of her examination in chief, tendered a certified copy of the said seizure list which was marked Exhibit A/3.
8. That the said DW 1/opposite party no. 2, in the course of her cross examination in connection with the instant case, sought to make out a case to the effect that in view of Entry No. 7 of the aforementioned seizure list, it would be evident that it is the CBI which had seized the cheque in question, i.e., cheque bearing no. 713379 dated 10.11.2018, and that as such she had never handed over the said cheque to the petitioner.
9. It is the specific case of the petitioner that the cheque in question was never seized by the CBI and that same would be evident upon a bare

perusal of Entry Nos. 15 & 16 of the aforementioned seizure list dated 04.04.2009, wherefrom it can be seen that the CBI, vide the very same seizure list, had proceeded to seize signed Cheques bearing nos. 713386, 713344, 713331 and 713334, i.e., Cheques bearing nos. that fall within the series of cheques referred to in Entry No. 7 of the said seizure list, wherein it had been stated that a cheque book of Account No. 277010200019761 containing cheques bearing nos. 713317 to 713388 had been seized. It is the specific case of the petitioner that the CBI, while seizing the aforementioned cheque book referred to in Entry no. 7 of the said seizure list had merely referred to the counterfoils of cheques starting from 713317 to 713388 and that the said entry can never be interpreted to mean that the CBI had seized the said cheque book along with all the cheques mentioned in the said Entry no.7.

10. It is submitted by **Mr. Debasis Ray, learned counsel for the petitioner**, that in order to reach a just decision and logical conclusion in connection with the present case, it was necessary to ascertain as to whether the subject cheque was indeed seized by the CBI on 04.04.2009 in connection with Special CBI Case No. 22 of 2010, or not and it was equally important to get the Income Tax Return of the Opposite Party No. 2 for the Assessment Year 2008-09 along with the set of balance sheet for the Financial year 2007-08/Assessment Year 2008-09, to be produced before the Learned Trial Court.

- 11.** It is further submitted that, one Vivek Gupta, being one of the Directors of the petitioner Company, namely Kali International Pvt. Ltd, and also being a co-accused person in the aforementioned Special CBI Case no. 22 of 2010, preferred an application under Section 207 of the Code of Criminal Procedure before the Learned Judge, 3rd Special Judge, CBI, Calcutta, praying therein for issuing a direction that he be served with copies of complete sets of the items/documents, including its covers and internal pages, which have been mentioned at Entry/Serial/Item Nos. 3, 7, 15, 16 and 20 of the aforementioned seizure list dated 04.04.2009, as prepared by the CBI at the time of conducting a raid at the office of the Opposite Party No. 2, being the accused no. 8 in the aforementioned Special Case. The said application was taken up for hearing by the Learned Judge, 3rd Special Judge, CBI, Calcutta on 23.02.2022, whereby the Learned Special Judge was pleased to direct the CBI to supply to the above named Vivek Gupta, copies of the documents, especially those appearing at item nos. 3, 7, 15, 16 and 20 of the aforementioned seizure list dated 04.04.2009. Accordingly, copies of the said documents appearing at item nos. 3, 7, 15, 16 and 20 of the aforementioned seizure list dated 04.04.2009, were supplied to the above named Vivek Gupta on 17.03.2022, under the cover of a detailed covering letter dated 14.03.2022, issued by the Malkhana Officer, Central Bureau of Investigation, Bank Securities and Fraud, Kolkata and also bearing his signature and stamp.

- 12.** It is also submitted by the petitioner that a bare perusal of the contents of the copy of the said seized cheque book, as supplied to the above-named Vivek Gupta by the CBI, would reflect that the cheque no. 713379 dated 10.11.2008 had never been seized by the C.B.I, as was contended by the Opposite party no.2 in her deposition as DW1.
- 13.** It is further stated the said Income Tax Return, as seized by the CBI, and a copy of which was supplied to the abovenamed Director of Kali International Pvt Ltd, would show that the set of Balance Sheets expected to accompany the aforementioned Income Tax Return was not seized by the CBI by way of the said seizure list dated 04.04.2009, even though the set of balance sheets for and/or in connection with other Financial Years spanning from 2005-06 to 2006-07, had been so seized.
- 14.** That, Mr. Ramesh Gupta, being an authorised signatory of the petitioner company, being a co-accused in the aforementioned instant case, filed another application under Section 207 of the Code of Criminal Procedure, praying therein for supply of certain documents which had been seized by the C.B.I. in connection with the Special CBI Case no. 22 of 2010 before the Learned 3rd Special Judge (C.B.I.), Calcutta. The copies of the said documents had been supplied to him vide order dated 06.05.2022.
- 15.** The petitioner then filed an application under Section 311 of the Code of Criminal Procedure on 06.05.2022 before the Court of the Learned Metropolitan Magistrate, 14th Court, Calcutta, thereby praying for

recalling and re-examination of the Prosecution Witness no.1 in connection with Complaint Case No. C-34911 of 2009 and permitting it to exhibit the documents that have been supplied by the CBI on 17.03.2022 pursuant to the order dated 23.02.2022, passed in connection with Special Case No. 22 of 2010.

- 16.** A supplementary petition on 23.02.2023 was filed before the Court of the Learned Metropolitan Magistrate, 14th Court, Calcutta, thereby bringing on record the facts and developments which took place subsequent to the filing of the application under Section 311 of the Code of Criminal Procedure.
- 17.** The said application under Section 311 of the Code of Criminal Procedure along with the supplementary petition filed in connection with the said application was taken up for hearing on 06.04.2023 whereby the Learned Magistrate concerned was pleased to reject the petitioner's prayer to recall and re-examine the authorised signatory of the petitioner company, namely Ramesh Gupta, who had earlier been examined as Prosecution Witness No.1 (hereinafter referred as PW1) and to exhibit the complete sets of duly stamped documents that have been supplied by the C.B.I. on 17.03.2022 and on 06.05.2022. The Learned Metropolitan Magistrate concerned was pleased to reject the said application on the ground that by allowing the said application the petitioner herein could not be permitted to fill up the lacuna of the prosecution case to the disadvantage of the accused person in the said case, being the opposite

party no. 2 herein. The Learned Metropolitan Magistrate also observed that since the case was already fixed for argument since 21.04.2021, there was no necessity to exercise the Learned Court's discretion under Section 311 of the said Code in order to recall PW1 for exhibiting the documents as prayed for.

18. Hence the revision.

19. The opposite party no. 2 in her affidavit in opposition has made out a case that the following documents are to be considered or she would suffer grave prejudice:-

- i) Photocopies of the relevant order from the date 12.08.10 to 06.04.23 passed before the Court of Learned Metropolitan Magistrate, 14th Court.
- ii) Photocopy of deposition of DW-1 dated 13.03.14.
- iii) Photocopy of the relevant portion of balance sheet and profit and loss statement of the Complainant collectively marked as Exhibit-2 in the Complaint Case No. 34911 of 2009 before the Learned Court of 14th Metropolitan Magistrate.
- iv) Photocopies of the order and judgment passed by the Learned Court of Metropolitan Magistrate 20th Court dated 31.10.14 in Complaint case No.C-34909 of 2009 and 34910 of 2009.
- v) Photocopy of the order and judgment passed by the Honourable High Court dated 06.12.21 in C.R.A. No. 424 of 2017, CRA 425 of

2017, CRA 426 of 2017 and CRA 427 of 2017 downloaded from the official website of the Court.

- vi) A copy of the order of Honorable High Court dated 23.06.15 in C.R.R. 1714 of 2015.

20. In reply the petitioner has denied the statements of the opposite party no. 2 as made in the affidavit in opposition, relying upon several additional documents.

21. Written notes of arguments has been filed along with the judgments relied upon by both parties.

22. The following judgments have been relied upon by the petitioner:-

- i) *Varsha Garg v. State of Madhya Pradesh & Ors.*, 2022 SCC Online SC 986.
- ii) *P. Sanjeeva Rao v. State of Andhra Pradesh*, (2012) 7 SCC 56.
- iii) *Zahira Habibullah Sheikh (5) & Anr v. State of Gujarat & Ors.*, (2006) 3 SCC 374.
- iv) *Hanuman Ram V. State of Rajasthan & Ors.*, (2008) 15 SCC 652.
- v) *Mohanlal Shamji Soni v. Union of India & Anr.*, 1991 Supp (1) SCC 271.

23. The judgments relied upon by the opposite party no. 2 are as follows:-

- i) *G. Someshwar Rao Vs. Samineni Nageshwar Rao & Anr.*, (2009) 14 SCC 677.
- ii) *Swapan Kumar Chatterjee Vs. CBI*, (2019) 14 SCC 328.

- iii) *Joint Action Committee of Airline Pilots' Association of India & Ors. Vs. D.G. of Civil Aviation & Ors., (2011) 5 SCC 435.*
- iv) *Petlad Turkey Red Dye Works Co.Ltd. Vs. Deyes and Chemical Workers' Union & Ors., AIR 1960 SC 1006.*
- v) *Rajendra Prasad Vs Narcotic Cell, (1999) 6 SCC 110.*
- vi) *Girish Kumar Suneja Vs. Central Bureau of Investigation, (2017) 14 SCC 809.*
- vii) *Sethuraman Vs. Rajamanickam, (2009) 5 SCC 153.*
- viii) *Varsha Garg Vs. State of MP 2022 SCC OnLine SC 986.*

24. On hearing both the parties and on perusal of the extensive pleadings of both the parties, the following facts are evident:-

- i. The petitioner's application under Section 311 of the Cr.P.C. was preferred for being permitted to bring on record to prove that the cheque in question had not been seized by the CBI, which is the case of the opposite party no. 2. The petitioner having subsequently been supplied with the copy of the seizure list (as permitted by the Court), wanted to bring in a relevant piece of evidence (documentary) for proper adjudication and just decision of the case. But the prayer was turned down by the Court on the ground that:-

“..... A conjoint reading of Section 311 of Cr.P.C. and Section 138 of the Indian Evidence Act, it is clear that petition under Section 311 Cr.P.C. cannot be allowed to destroy the defence case.”

- ii. From the copy of the seizure list dated 04.04.2009, the following entry in the said seizure list is relevant in this case:-

“Entry No. 7: One cheque book of CA No. 277010200019761 of Axis Bank, Bara Bazar Branch held in the name of Kavita Saraff, containing cheques starting from 713317 to 713318, all signed by Kavita Saraff and issued in the name of Motilal Oswal Security Ltd., Krishna Smelters Pvt. Ltd., Bineet Saraff and Kali International.”

- iii. At this stage, the cross examination of D.W. 1 resumed on 26.10.2017 in C/34911/09 before the learned Court of 14th Metropolitan Magistrate becomes relevant.

Exhibit 8 was shown to the witness, who is the opposite party no. 2 herein. The witness has deposed as follows:-

“Exhibit- 8 is shown to the witness and on perusal of Exhibit-8 the witness stated that it appears from the documents that:-

Serial No.	Cheque No.	Date of honoured	Amounting to Rs.	In favour of
1	713320	27.06.08	50,00,000/-	Devi Ispat Pvt. Ltd.
2	791139	27.06.08	33,000/-	Motilal Oswal Securities Ltd.
3	713323	08.07.08	2,00,00,000/-	Krishna S.P Ltd.
4	713327	12.07.08	51,000/-	Motilal Oswal Securities Ltd.
5	713329	19.07.08	2,50,00,000/-	Kali International Pvt. Ltd.
6	713330	25.07.08	3,00,00,000/-	Krishna Smelters Pvt. Ltd.
7	713339	28.07.08	50,00,000/-	Indian Textile Products
8	713337	28.07.08	30,00,000/-	Krishna Smelter

				<i>Pvt. Ltd.</i>
9	713338	29.07.08	3,00,00,000/-	<i>Rajco Steel Enterprise</i>
10	713333	02.08.08	3,00,00,000/-	<i>Krishna Smelter Pvt. Ltd.</i>
11	713341	04.08.08	70,000/-	<i>Bineet Sarafe</i>
12	713342	04.08.08	70,000/-	<i>Bineet Sarafe</i>
13	713345	13.08.08	5,00,000/-	<i>Withdraw</i>
14	713346	16.08.08	15,96,767/-	<i>Motilal Oswal Securities Ltd</i>
15	713347	19.08.08	1,00,00,000/-	<i>Motilal Oswal Securities Ltd</i>
16	713348	23.08.08	1,50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
17	713349	28.08.08	50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
18	713354	29.08.08	5,10,000/-	<i>Withdraw</i>
19	713351	29.08.08	2,50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
20	713352	29.08.08	50,0000/-	<i>Variety Museum</i>
21	713353	30.08.08	1,00,00,000/-	<i>Motilal Oswal Securities Ltd</i>
22	713350	01.09.08	13,98,634	<i>Bengal NRI Complex Ltd</i>
23	713355	02.09.08	75,00,000/-	<i>Motilal Oswal Securities Ltd</i>
24	713356	05.09.08	10,00,000/-	<i>Saraju Associates</i>
25	713357	11.09.08	1,00,00,000/-	<i>Motilal Oswal Securities Ltd</i>
26	713359	13.09.08	2,00,00,000/-	<i>Motilal Oswal Securities Ltd</i>
27	713358	16.09.08	2708/-	<i>Variety Museum</i>
28	713365	23.09.08	1,00,00,000/-	<i>Kali International Pvt. Ltd.</i>
29	713367	26.09.08	10,00,000/-	<i>Saraju Associates</i>
30	713366	26.09.08	13,98,634/-	<i>Bengal NRI Complex Ltd.</i>
31	713362	01.10.08	50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
32	713368	01.10.08	1,00,00,000/-	<i>Motilal Oswal Securities Ltd</i>
33	713369	03.10.08	1,00,00,000/-	<i>Motilal Oswal</i>

				<i>Securities Ltd</i>
34	713370	04.10.08	50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
35	713372	10.10.08	1,50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
36	713371	10.10.08	50,00,000/-	<i>Motilal Oswal Securities Ltd</i>
37	713373	11.10.08	1,00,00,000/-	<i>Motilal Oswal Securities Ltd.</i>
38	713375	20.10.08	1,50,00,000/-	<i>UTIBH082940 06674-RTGS- KAVITA SARAFE</i>
39	713385	03.11.08	1,00,00,000/-	<i>Rajco Steel Enterprises</i>
40	713387	05.11.08	50,00,000/-	<i>Rajco Steel Enterprises</i>
41	713376	05.11.08	2,00,00,000/-	<i>Kali International Pvt. Ltd.</i>
42	713377	06.11.08	2,00,00,000/-	<i>Kali International Pvt. Ltd.</i>

The C.B.I raid was conducted at the office of my husband on 04.04.09 and as per the documents all those cheques were honoured before the CBI raid.”

- iv. **All these 43 cheques (duly honoured) barring serial no. 3, were part of the same cheque book as the one containing the cheque in the present case being no.713379 dated 10.11.2008.**
- v. The witness (DW 1), the opposite party no. 2 herein has stated on oath that:-

“....as per the documents all those cheques were honoured before the CBI raid”.

So admittedly these cheques were not part of the cheque book at the time of seizure thus negating entry no. 7.

- vi. That being the case, then the entry at no. 7 in the seizure list dated 04.04.2009 appears to be prima facie incorrect and considering that 43 cheques out of the said cheque book containing cheques from 713317 to 713388 were honoured, prior to the raid conducted and seizure made by the CBI on 04.04.2009, it can be presumed that it was the cheque book and not the cheque book containing cheques as stated which was seized.
- vii. Exhibit 8 shows that 43 cheques out of the said cheque book were honoured prior to the seizure. The cheque in question in the present case being dated 10.11.2008 is also dated prior to the seizure and is part of the same cheque book.

25. In *Varsha Garg vs State of Madhya Pradesh & Ors.*, 2022 SCC OnLine SC 986, the Supreme Court examined Section 311 of the Cr.P.C.

by holding as follows:-

“31. Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court “may”:

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and

(ii) Recall and re-examine any person who has already been examined.

32. *This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad terms.*

The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

33. *The first part of the statutory provision which uses the expression “may” postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case”. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.*

34. *A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed:*

“16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.”

35. *Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the “evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means.” In that context the Court observed:*

“18 ...Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

36. *Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra, the Court held:*

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”

37. *The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the*

court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

* * * * *

43. *Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.*

44. *In the decision in Zahira Habibullah Sheikh (5) v. State of Gujarat, which was more recently reiterated in Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd., the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:*

*“28. 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.*

(emphasis supplied)

45. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in *Mina Lalita Baruwa (supra)*, while reiterating *Rajendra Prasad (supra)*, the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In *Rajendra Prasad (supra)*, the Court had held that:

“8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. **No party in a trial can be foreclosed from correcting errors. 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.** 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.

(emphasis supplied)

47. Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on *Swapan Kumar (supra)*, a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in *Swapan Kumar (supra)* observed:

“11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or

further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.”

49. *The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in Zahira Habibulla H. Sheikh (supra) while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:*

*“43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. **They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully***

or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.”

(emphasis supplied)

50. Further, in *Zahira Habibullah Sheikh (5) (supra)*, the Court reiterated the extent of powers under Section 311 and held that:

“27. 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.”

(emphasis supplied)

51. The Court while reiterating the principle enunciated in *Mohanlal Shamji Soni (supra)* stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

“44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. : (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. **The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.**

(emphasis supplied)

52. *While reiterating the decisions of this Court in Karnel Singh v. State of M.P., Paras Yadav v. State of Bihar, Ram Bihari Yadav v. State of Bihar and Amar Singh v. Balwinder Singh this Court held that the court may interfere even at the stage of appeal:*

“64. It is no doubt true that the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorised witnesses, it is no acquittal in the eye of the law and no sanctity or credibility can be attached and given to the so-called findings. It seems to be nothing but a travesty of truth, fraud on the legal process and the resultant decisions of courts — coram non judis and non est. There is, therefore, every justification to call for interference in these appeals.”

26. In the present case, the documents sought to be brought on record by the petitioner by way of additional evidence are documents “essential” and thus relevant for arriving at a just decision in the case. The prayer under Section 311 Cr.P.C. has been made in this case as soon as the documents were made available to the petitioner and the same are essential to aid in the discovery of truth. The documents in this case are necessary only with the object of proper proof of relevant facts in order to meet the requirement of justice. The reason for not being able to bring the present materials on record at the relevant stage has been satisfactorily explained and as such the Trial Court should have allowed the prayer under Section 311 Cr.P.C., considering the materials on record, while carrying out its function of administration of criminal

justice to meet the ends of justice. **The accused/opposite party herein shall have ample opportunity and the liberty to counter the materials to be brought on record by the petitioner.**

27. Thus the findings of the learned Trial Judge rejecting the prayer of the petitioner vide order dated **06.04.2023** is clearly, not in accordance, with the view of the Hon'ble Appex Court in ***Varsha Garg vs State of Madhya Pradesh & Ors. (Supra)*** decided on **August 8, 2022**.
28. 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. (***Zahira Habibullah Sheikh (5) & Anr. vs State of Gujarat & Ors., Appeal (Crl.) 446-449 of 2004, on 8th March, 2006***).
29. In the present case, the documents sought to be brought on record are essential for arriving at a just decision in the case as discussed earlier in this judgment and as such is to be allowed for the ends of justice.
30. **CRR 1714 of 2023 is thus allowed.**
31. The order under revision dated 06.04.2023 passed in C. Case No. 34911 of 2009 by the learned 14th Court of Metropolitan Magistrate, Kolkata not being in accordance with law is set aside.

- 32.** The petition under Section 311 Cr.P.C. filed by the petitioner on 06.05.2022 and the supplementary petition dated 23.02.2023 are allowed.
- 33.** The learned Metropolitan Magistrate 14th Court is directed to dispose of the case, on permitting the petitioner to bring in the documents on record as prayed for in the petition under Section 311 Cr.P.C., dated 06.05.22 and the supplementary petition dated 23.02.23, as per the said provision, **within six months** from the date of this order.
- 34.** All connected Applications, if any, stand disposed of.
- 35.** Interim order, if any, stands vacated.
- 36.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 37.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)