

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

**C.R.R. No. – 2481 of 2018
with
CRR No- 2482 of 2018
with
CRR No.-2483 of 2018**

**In the matter of
Mahima Management Services Pvt. Ltd.
Vs.
Creative Property Developers Pvt. Ltd. & Anr.**

**With
CRR No. 2484 of 2018
In the matter of
Cindrella Management Services Pvt. Ltd.
Vs.
M/s. Trend Bags & Anr.**

**+
I.A CRAN 3 of 2019(Old No. CRAN 3928 of 2019)**

**For the Petitioner : Ms. Aiswariya Gupta, Adv.,
Ms. Priyanka Saha Adv.**

**For the Opposite Party : Mr. Agnibesh Sengupta, Adv.,
Mr. Tirthankar Dey, Adv.,
Ms. Atasi Sarkar Adv.**

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

Heard on : 27.07.2023

Judgment on : 01.02.2024

Subhendu Samanta, J.

1. All the 04 Revisional Applications involved similar facts and issues thus, they are taken up together for brevity of discussions.

2. This is an application u/s 397/401 read with Section 482 of the Code of Criminal Procedure 1973 against an order dated 22.06.2018 passed by the Learned Metropolitan Magistrate, 20th Court Calcutta in complaint case Nos. CS-24873/2015, CS- 24865/2015, CS- 24869/2015, CS-24871/2015 u/s 138 read with Section 141 of Negotiable Instrument Act thereby rejecting the petitioner's application u/s 311 Cr.P.C.

3. The brief fact of the case is that the petitioner has preferred a complaint case against the present opposite parties alleging thereby for commission of an offence punishable u/s 138 read with Section 141 of NI Act.

4. In a nutshell brief fact of the complaint is that, the opposite parties herein had approached to the petitioner for a loan. The petitioner had provided that loan, subsequently the Opposite parties issued cheques in order to pay the loan along with interest thereon, but, when the petitioner tried to encash the cheques issued by the Ops the cheques were dishonoured because of "insufficient funds" in the account of the Opposite parties. However, the fact of the petitioner was denied by the opposite party. The petitioner had filed a list of document as well as the list witnesses before the initiation of the trial. During the trial PW-1 Mr. Mahabir Prasad Ramani was examined-in-chief and cross-examined by the opposite parties in part. Thereafter the petitioner filed an application u/s 311 of the Code of Criminal Procedure. Praying that the petitioner may be allowed to recall PW- 1 for re-examination to prove the

computerised Bank statements of the petitioner's bank account with Allahabad Bank from which the petitioner transferred the alleged loan amount to the opposite parties.

5. The said application was heard by the Learned Metropolitan Magistrate and rejected by passing the impugned order.

6. Being aggrieved by the impugned order of rejection the petitioner has filed the instant revision before this court.

7. Learned Advocate for the petitioner submits that the Learned Magistrate has committed error in holding that the complainant did not agitate the alleged fact and the time of filing of the petition of complaint and after a lapse of 07 years and also after his examination and cross-examination he tried to fill up the lacuna of this case by filling the proposed additional evidence on affidavit which is barred by law. Whereas the complainant case is at the stage of examination of PW 1 and as such the claim of the petitioner cannot be barred by law of limitation. He further argued that Learned Magistrate ought to have considered that by way of additional evidence the petitioner only prays that recall and re-examine PW 1 to prove the computerise bank statement of the petitioners banker Allahabad Bank from which the petitioner transfer the said loan amount on different dates through RTGS to the account of opposite parties. He further argued by virtue of provision u/s 145 (1) of the NI Act. The petitioner may be allowed to file affidavit on such facts.

8. He further argued that the observation of Learned Magistrate is totally erroneous and the petitioner never tried to fill up his lacuna rather by way of additional evidence the truth would be elicited. There are no latches or mistake on the part of the petitioner to delayed the proceeding; unless the petition u/s 311 Cr.P.C. is allowed the petitioner's case cannot be clarified properly.

9. He further argued that Learned Magistrate while rejecting the petitioner's application u/s 311 Cr.P.C ought to have considered that this is not a new fact which is petitioners tried to bring out by the said application. The petitioner in spite of all the efforts could not produce those documents earlier to consider that a lacuna in the prosecution is not to be equated with the fall out of an oversight committed by a prosecutor during trial, either in producing relevant materials or in eliciting the relevant answers from witnesses. Moreover, the corollary of such latches or mistake during the conducting of a case cannot be understood as a lacuna which a court cannot fill up. Specially when the petitioner only prayed for to show that how the said huge amount of loan was released to the accused persons/opposite parties.

10. In support of his Citation Learned Advocate for the petitioner cited some decisions reported in State represented by the **Deputy Superintendent of Police Vs. T.R.N. Srinivasangan 2011 SCC Online SC 212.**

13. In our view, having regard to the nature and ambit of Section 311 of the Cr.P.C. it was appropriate and proper that the

applications filed by the prosecution ought to have been allowed. Section 311 provides that any Court may, at any stage of any inquiry, trial or other proceedings under the Cr.P.C, 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". The true test, therefore, is whether it appears to the Court that the evidence of such person who is sought to be recalled is essential to the just decision of the case.

14. In Manju Devi v. State of Rajastha, a two Judge bench of this Court noted that an application under Section 311 could not be rejected on the sole ground that the case had been pending for an inordinate amount of time (ten years there). Rather, it noted that "the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness". Speaking for the Court, Justice Dinesh Maheswari expounded on the principles underlying Section 311 in the following terms:

"10. It needs hardly any emphasis that the discretionary powers like those under Section 311 Cr.P.C. are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 Cr.P.C. and amplitude of the powers of the court thereunder have been explained by this Court in several decisions:.....

"8. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the

case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

15. 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 CrPC 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 CrPC 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.”

11. He also cited a decision of Hon’ble Supreme Court reported in **Mannan SK Vs. State of West Bengal.**

12. While dealing with Section 311 of the Code in Rajendra Prasad (AIR 1999 SC 2292 in para 7) this Court explained what is lacuna in the prosecution as under:

“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.”

13. Reference must also be made to the observations of this Court in Zahira Habibulla H. Sheikh And Anr. V. State of Gujarat and Ors. where this Court described the scope of Section 311 of the Code as under:

“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.”

12. Learned Advocate appearing on behalf of the opposite party submits that the Learned Magistrate has properly gone through the application u/s- 311 Cr.P.C. filed by the petitioner and after thorough discussion the, Learned Magistrate has passed the impugned order of rejection. There are no errors apparent in the said order. The complainant had possession of the Bank's statements since long 06 years, the bank statement was sought to be filed in January 15th ,2018 i.e. after more than 06 years from the date of filing of the complaint. The Bank Statements which is sought to be introduced after several years of filing of the complaint. They were not filed earlier because the petitioners deliberately choose not to file it earlier. No explanation whatsoever has been provided for this long delay for more than 06 Years. The Learned Magistrate has rightly rejected the application filed by the petitioner. The Learned Magistrate has also been correctly opined that the petitioner was trying to make out a new case at a belated stge. Under the provision of Section 311 Cr.P.C, a party is not permitted to make out a new case. The petitioner intends to fill all the lacuna and deficiency in its case thus the Learned Magistrate has rejected the petitioner u/s 311 Cr.P.C. by assigning correct reasons.

13. In support of his contention he submitted their decisions of Hon'ble Supreme Court on the principal that the rejections of application u/s 311 Cr.P.C is of order of interlocutory in nature and by virtue of bar u/s 397(2) Cr.P.C., the High Court cannot interfere the order of rejection by way of

its revisional jurisdiction. He further argued that which is not legally permitted cannot be permitted otherwise by virtue of inherent power of Hon'ble High Court enumerated u/s 482 of the Code of Criminal Procedure. The order which is barred u/s 397(2) Cr.P.C. cannot be entertained.

14. In support of his contention he cited a decision of Hon'ble Supreme Court reported in **Girish Kumar Suneja Vs. CBI (2017) 14 SCC 809.**

24. The second reason why Amar Nath is important is that it invokes the principle, in the context of criminal law, that what cannot be done directly cannot be done indirectly. Therefore, when Section 397(2) Cr.P.C. prohibits interference in respect of interlocutory orders, Section 482 Cr.P.c. cannot be availed of to achieve the same objective. In other words, since Section 397(2) Cr.P.C. prohibits interference with interlocutory orders, it would not be permissible to resort to Section 482 Cr.P.C. to set aside an interlocutory order. This is what this Court held: (SCC p. 140, para 3)

"3. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject matter. Where there is an express provision,

barring a particular remedy, the Court cannot resort to the exercise of inherent powers.

25. This view was reaffirmed in Madhu Limaye when the following principles were approved in relation to Section 482 CrPC in the context of Section 397(2) thereof. The principles are: (SCC p. 555, para 8)

“(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;

(2) That it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice;

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.”

Therefore, it is quite clear that the prohibition in Section 397 Cr.P.C will govern Section 482 thereof. We endorse this view.

15. **Sethuraman Vs. Raja Manickchand (2009) 5 SCC**

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5. Secondly, what was not realised was that the orders 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 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.

16. Learned Advocate for the OP also argued that the application u/s 311 for recalling of witnesses is not permissible always.

17. In support of his contention he cited decisions of Hon'ble Supreme Court reported in **State (NCT of Delhi) Vs. Shib Kumar Yadav and Anr.**

27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross-examination or should not have been put to them, would in my view result in prejudging as to what are the material portions of the evidence and would also amount to reappraising the entire cross-examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court under Section 311 Cr.P.C. I am supported in my view by the observations of the Hon'ble Delhi High Court in its order dated 20.02.2008 in Raminder Sing v. State. Where it has been held as under:

"In the first place, it required to be noticed that scope of Section 311 Cr.P.C. does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is filed under Section 311 then not only would it be prejudging what according to it are "material portions" of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 Cr.P.C No judgment has been pointed out by the learned counsel for the petitioner in support of such a

contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.

18. **Mani Majumder Vs. State of West Bengal and Anr.**

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26. It is settled law that under Section 311 Cr.P.C since the power is wide it's exercise has to be done with circumspection. It added that the exercises of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. Section 311 of the code is not meant for putting the accused in a disadvantageous position. 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.

29. Having regard to the principles laid down in the above cited decisions and judging the factual matrix of the case as discussed above when the petitioner has been examined and cross-examined at length and for the reason that no sufficient explanation for delay in filing application was given for the recall of PW 1 and no question enumerated in the petition under Section 311 of the Code, I am of the opinion and accordingly hold that the learned Trial Judge was right in rejecting the application bearing in mind the settled principle of law on that

count. However, since the Court is empowered to recall a witness under Section 311 Cr.P.C. at any stage of the trial, the learned Trial judge may allow the prosecution after the rest of the CS witnesses are examined and cross-examined in full, if for the ends of justice, such recourse is imperative by giving full opportunities to the prosecution and to the defence.

19. Heard the Learned Advocates.

20. Perused the materials on record; also perused the impugned order passed by the Learned Magistrate. I have also perused the application filed by the present petitioner before the Learned Magistrate u/s 311 Cr.P.C. along with the connected Bank statements sought be introduced/filed in the present petition of complainant. The case of complaint is initiated u/s 138 read with Section 141 of NI Act alleging the commission of offence by the present Ops on the ground stated therein. The Learned Magistrate has taken cognizance of an offence and proceeded to heard the matter. The list of witnesses and list of document had already been filed before the Learned Magistrate at the time of filing of the complaint case. Trial has already been initiated. The examination in chief of the PW 1 has been concluded. Now the dates are fixed for cross-examination of PW 1. At this stage, the petitioner intends to introduce some more documents. The Learned Magistrate is of view that the prayer of the petitioner in the application u/s 311 Cr.P.C. contained a prayer of introduction of the computerised bank statement and “other documents”. The “other documents” were not specifically explained by the

present petitioner before the Learned Magistrate. However it is the only purpose of the petitioner to substantiate the fact that the how the loan amount was received by the OPs through their bankers. However, from entire merits of the case it does not appear that any point of time the OPs have ever disputes about the delivery of the cheques. More over it is true that the order of rejection of an application u/s 311 Cr.PC is truly an interlocutory order. According to the provision of Section 397 (2) Cr.P.C. of a criminal revision is not maintainable against an interlocutory order.

21. By virtue of decision of Hon'ble Apex Court passed in **Sethuraman (Supra) and Girish Kumar Suneja (supra)**. The instant revisional application is not at all maintainable.

22. Section 311 permits any court at any stage of an enquiry, trial or other proceeding summon any person as a witness, or examined any person in attendance, though not summoned as a witness, or recall and re-examine, any person already examine; and the court shall summon and examine or recall and re-examine in such "if his evidence appears to be essential to the just decision of the case". So the true test, therefore, is whether the evidence of such person which sought to be recalled is essential to the just decision of the case. In this case the Learned Magistrate has opined that the recall or re-examination by PW 1 is not required and if it is allowed the petitioner would be permitted to fill up lacuna of his case. Learned Magistrate has put his emphasis upon the term "other documents" which was not disclosed properly by the petitioner.

23. It appears to me that the observation of the Learned Magistrate is not appears to me unjustified.

24. Considering the entire aspect in my view the Learned Magistrate has not committed no error in passing the impugned order, accordingly I find no merit to entertain. The instant criminal revisions are hereby dismissed.

25. CRR is disposed of.

26. Connected CRAN applications, if pending, are disposed of. Any order of stay passed by this Court during the pendency of the instant criminal revision is also vacated.

27. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)