



2024:DHC:5755



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 24th JULY, 2024

IN THE MATTER OF:

+ CRL.M.C. 2782/2022 & CRL.M.A. 11514/2022

SARVODAYA TEXSTYLE PVT. LTD.

.....Petitioner

Through: Mr. Naushad Ahmad Khan, Mr. Seraj
Ahmad, Advocates

versus

THE STATE(GOVT. OF NCT, DELHI) & ORS.Respondents

Through: Mr. Aman Usman, APP for the State
with Mohd. Tauheen, Mr. Mayank
Shekhar, Ms. Urvi Kapoor, Mr.
Dharamveer Singh Debas, Advocates.
Mr. Ashish Upadhayay and Mr.
Siddharth Jain, Advs. for R-2 to 4.
Insp. Surender Singh, PS Kanjhawala.

+ CRL.M.C. 2783/2022 & CRL.M.A. 11517/2022

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+ CRL.M.C. 2784/2022 & CRL.M.A. 11520/2022

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versus

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Through: Mr. Aman Usman, APP for the State with Mohd. Tauheen, Mr. Mayank Shekhar, Ms. Urvi Kapoor, Mr. Dharamveer Singh Debas, Advocates. Mr. Ashish Upadhayay and Mr. Siddharth Jain, Advs. for R-2 to 4. Insp. Surender Singh, PS Kanjhawala.

+ CRL.M.C. 2787/2022 & CRL.M.A. 11598/2022

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versus

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Through: Mr. Aman Usman, APP for the State with Mohd. Tauheen, Mr. Mayank Shekhar, Ms. Urvi Kapoor, Mr. Dharamveer Singh Debas, Advocates. Mr. Ashish Upadhayay and Mr. Siddharth Jain, Advs. for R-2 to 4. Insp. Surender Singh, PS Kanjhawala.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)



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1. Aggrieved by the Order dated 08.04.2022 passed by the Ld. MM-04, NI Act, Saket Courts (South), New Delhi rejecting the applications of the Petitioner filed under Section 311 Cr.P.C read with Section 137 of the Indian Evidence Act read with Section 145(2) of the Negotiable Instrument Act, 1881 for recalling and re-examination of witness, the Petitioner has approached this Court by filing the instant petitions challenging the said Order dated 08.04.2022.

2. The present matters arises out of proceedings initiated under the Negotiable Instrument Act, 1881. Material on record indicates that the Petitioner herein is a textile trader and is engaged in sale, purchase, manufacturing and supply of high quality apparels and home fashion fabrics. The Respondent No.2 is a partnership firm and is engaged in the business of Garments Exports. Respondent Nos.3 and 4 are the partners of the Respondent No.2/firm. The Petitioner has supplied apparels and home fashion fabrics to Respondent No.2. In the complaint filed by the Petitioner, it is stated that during the course of the business, the Petitioner raised various bills/invoices over a period of time for the fabrics material supplied to the Respondent No.2. An Memorandum of Understanding (MoU) was signed between the Petitioner and the Respondent No.2 wherein the Respondent No.2 admitted their total liability of Rs.1,04,48,487/- (Rupees One Crore Four Lakhs Forty Eight Thousand and Four Hundred Eighty Seven Only) and 8 cheques were issued for repayment of the said liability. Since, four cheques were dishonoured, four different complaint cases were filed against Respondent No.2.

3. The examination of Complainant started on 10.05.2019 and on 07.09.2019, the Complainant was examined and discharged and the



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Complainant closed his witness after Admission/Denial of the documents under Section 294 Cr.P.C was conducted. Statement of the Accused Persons under Section 313 Cr.P.C was recorded on 10.01.2020. Due to outbreak of COVID-19 pandemic, no defence evidence was laid, since the matters were being taken up through video conferencing. On 02.04.2022, the matter was heard in part and the matter was adjourned to 08.04.2022. At this juncture, the application under Section 311 Cr.P.C was filed by the Petitioner herein before the Trial Court. Since the application is a very short one, the same is being reproduced below:

“APPLICATION FOR RE-CALLING AND RE-EXAMINATION OF WITNESS UNDER SECTION 311 Cr.P.C. R/W SECTION 137 OF THE INDIAN EVIDENCE ACT, 1872 READ WITH SECTION 145(2) OF THE NEGOTIABLE INSTRUMENTS ACT, 1881 OF CW-1, SH. SUNIL KAKROO, DIRECTOR AND AR OF THE COMPLAINANT COMPANY.

MOST RESPECTFULLY SHOWETH:

- 1. The above noted case is pending before this Hon'ble court and is fixed for hearing on 08.4.2022.*
- 2. That the Applicant examined Sh. Sunil Kakroo as prosecution witness on 10.5.2019 and he was cross-examined by the defence counsel on various points touching the defence version.*
- 3. That however, during preparation of the case for arguments, it has been found that certain important documents which are already on the record could not be put up on the record by the said witness.*
- 4. That re-examination of the above said witness has*



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become necessary to produce the above said documents namely Statement of Account between the parties on record to reach the root of the case and to bring the guilt of the accused before the court.

5. That the above said documents could not be produced earlier inadvertently inspite of the facts that the said documents are very much necessary for just and proper decision of the case.

PRAYER

It is therefore, prayed that above noted witness may kindly be recalled for re-examination in the interest of justice. And/or

Any other or further order as this Hon 'ble Court may deem fit and proper in the interest of justice.

4. The aforesaid application has been rejected by the Impugned Order dated 08.04.2022. The Ld. MM in the Impugned Order has noted that the purpose of filing the application is only to fill up the lacuna and gaps which will amount to re-trial and, therefore, the same cannot be permitted. Aggrieved by the same, the Petitioner has approached this Court by filing the present petitions challenging the said Order dated 08.04.2022 passed by the Ld. MM-04, NI Act, Saket Courts (South), New Delhi refusing to accept the application of the Petitioner filed under Section 311 Cr.P.C.

5. Learned Counsel appearing for the Petitioner contends that the documents are very material and relevant and the examination of the witness is necessary for the proper adjudication of the case. He states that a specific question was raised in respect of the non filing of the ledger statement of the Respondent No.2 which the authorized representative of the Petitioner was



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prepared to produce. He states that a specific question was also raised about various payments which have been received but there was a failure to point out that the said payments were received against the business transactions which started between the parties after the MoU was signed. He states that the Petitioner, therefore, wanted to produce the ledger documents and also wanted to examine the Complainant to show that the payments were not received in lieu of the cheques which had been issued.

6. Learned Counsel appearing for the Respondents vehemently contends that a perusal of the application shows that the attempt is only to fill up lacuna in the case of the Petitioner which was noticed when written submissions were being prepared. He states that the examination of the Complainant was concluded on 07.09.2019 and nothing prevented the Petitioner to produce all the documents, including the ledger statement at the time of filing the complaint. He states that nothing prevented the Petitioner to put all the questions to the AR of the Complainant regarding the receipt of payments. He contends that though the Order Sheet records that the arguments were partly concluded but the fact is that the arguments were concluded and the matter was fixed only for filing written submissions.

7. Heard learned Counsel appearing for the Parties and perused the material on record.

8. Section 311 of Cr.P.C 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 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.

[311A. Power of Magistrate to order person to give specimen signatures or handwriting.—If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.]”

9. The purpose and object of 311 of Cr.P.C 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. It is well settled that the power under Section 311 of Cr.P.C must be exercised judiciously. It is also well settled that the purpose of Section 311 of Cr.P.C is not to permit re-trial but should be permitted only to meet the ends of justice.

10. The Ld. Trial Court has placed reliance upon a Judgment passed by the Apex Court in Natasha Singh v. CBI, (2013) 5 SCC 741. The Apex Court in the said judgment has observed as under:

“8. Section 311 CrPC 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 CrPC, 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 a 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.

9. In Mir Mohd. Omar v. State of W.B. [(1989) 4 SCC 436 : 1989 SCC (Cri) 750 : AIR 1989 SC 1785] this Court examined an issue wherein, after the statement of the accused under Section 313 CrPC had been recorded, the prosecution had filed an application to further examine a witness and the High Court had allowed the same. This Court then held, that once the accused has been examined under Section 313 CrPC, in the event that liberty is given to the prosecution to recall a witness, the same may amount to filling up a lacuna existing in the case of the prosecution and therefore, that such an order was uncalled for.

10. In Mohanlal Shamji Soni v. Union of India [Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346] this Court examined the scope of Section 311 CrPC, and held that it is a cardinal rule of the law of evidence, that the best available evidence must be



brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 CrPC, wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

11. *In Rajeswar Prasad Misra v. State of W.B. [AIR 1965 SC 1887 : (1965) 2 Cri LJ 817] this Court dealt with the ample power and jurisdiction vested in the court, with respect to taking additional evidence, and observed, that it may not be possible for the legislature to foresee all situations and possibilities and therefore, the court must examine the facts and circumstances of each case before it, and if it comes to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered, and if such an action on its part is justified, then the court must exercise such power. The Court further held as under : (Mohanlal Shamji Soni case [Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595 : AIR 1991 SC 1346] , SCC p. 283, para 27)*

“27. ... 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.”

(emphasis added)

12. *In Rajendra Prasad v. Narcotic Cell [(1999) 6 SCC 110 : 1999 SCC (Cri) 1062 : AIR 1999 SC 2292] this Court considered a similar issue and held as under : (SCC p. 113, para 8)*

“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 added)

13. *Similarly, in P. Sanjeeva Rao v. State of A.P. [(2012) 7 SCC 56 : (2012) 3 SCC (Cri) 1 : AIR 2012 SC 2242] this Court examined the scope of the*



provisions of Section 311 CrPC and held as under : (SCC pp. 63-64, paras 20 & 23)

“20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs [(2000) 10 SCC 430 : 2001 SCC (Cri) 1488] . The following passage is in this regard apposite : (SCC p. 432, para 6)

‘6. ... In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.’

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. ... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

(emphasis in original)

14. In T. Nagappa v. Y.R. Muralidhar [(2008) 5 SCC 633 : (2008) 2 SCC (Cri) 677 : AIR 2008 SC



2010] , this Court held, that while considering such an application, the court must not imagine or assume what the deposition of the witness would be, in the event that an application under Section 311 CrPC is allowed and appreciate in its entirety, the said anticipated evidence. The Court held as under : (SCC p. 637, para 9)

“9. What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.”

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 prejudiceto 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. A perusal of the aforesaid judgment shows that the Apex Court was of the opinion that the application filed under Section 311 Cr.P.C must not be allowed to fill up a lacuna in the case of 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 and the additional evidence must not be received as a disguise for a re-trial or for change in the nature of the case. Applying the said law to the facts and circumstances of the present case, this Court finds that in Paragraph No.3 of the application filed under Section 311 Cr.P.C, the Petitioner has



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categorically stated that during preparation of the case for arguments, it has been found that certain important documents which are already on the record could not be put up on record by the witness and, therefore, re-examination of the said witness has become necessary. Nothing prevented the Petitioner to put all the questions to the Complainant and only during the preparation of submissions, the lacuna has been noticed by the Petitioner that certain questions have been omitted to be put to the Complainant. The Complainant was discharged on 07.09.2019. The statement of accused under Section 313 Cr.P.C was recorded on 10.01.2020. The arguments were heard on 08.04.2022. The present petitions have been filed by the Petitioner after more than two years. The contention of the Counsel for the Respondents that the lacuna was observed by the Counsel for the Petitioner during preparation of written submissions and the application has been filed by the Petitioner only to fill up lacuna is correct. The view taken by the Ld. Trial Court is the correct view and therefore, it does not call for any interference from this Court while exercising its revisional power. It cannot be said the Impugned Order dated 08.04.2022 passed by the Ld. Trial Court is so perverse which warrants interference by this Court.

12. Resultantly, the petitions are dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JULY 24, 2024

S. Zakir