

(2015) 01 DEL CK 0009
In the Delhi High Court
Case No : Criminal Appeal 273/2010

Acura Glass Tiles Enterprises

APPELLANT

Vs

S.S. Ray

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 281, 311, 313, 315, 378
Evidence Act, 1872 — Section 137, 138
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139

Citation : (2015) 2 BC 184 : (2015) 218 DLT 238

Hon'ble Judges : Vipin Sanghi, J.

Bench : Single Bench

Advocate : Chandrani Prasad and Virender Tarun, for the Appellant; Pawan Sharma, Advocates for the Respondent

Final Decision : Allowed

Judgement

Vipin Sanghi, J.—The present appeal under Section 378 Cr PC is directed against the judgment dated 02.06.2009 passed by Sh. Manoj Kumar, ASJ, New Delhi in CC No. 399/2009 titled as Acura Glass Tiles Enterprises v. S.S. Ray, whereby the appellants complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) was dismissed, and the respondent/accused was acquitted.

2. The aforesaid complaint had been preferred by the appellant/complainant in respect of four cheques, details whereof are as follows:

3. On the aspects not in dispute, and with regard to which no issue was raised or argued by either side, I do not consider it necessary to record the facts and the findings. The case of the complainant/appellant was that there were business transactions between the parties. This position is not disputed by the respondent. The parties entered into a settlement Exh. CW-1/A on 04.05.2006, which was executed on the letterhead of Sonifix Enterprises, which admittedly is a proprietary concern of the respondent. The same reads as follows:

To

M/s. Accura Glass Tiles Enterprises

Delhi.

This is to assure the discussion following are payment committed by me as under:

Rs. 3,50,000/- (Three lakh fifty thousand only) is lump sum amount agreed and outstanding in front of Mr. Kumar and will cleared by latest by 4th June, 2006. The said amount is outstanding till date with me.

4. The appellant claims that the aforesaid four cheques had been issued by the respondent in partial discharge of the admitted liability of Rs. 3,50,000/-. On presentation, the said cheques had been dishonoured. Consequently, after issuance of legal notice for demand, the complaint had been preferred.

5. The notice was framed against the respondent, who pleaded not guilty. Thereafter the complainant led her evidence as CW-1. She was also cross examined by the respondent/accused. The statement of the respondent under Section 313 was recorded, whereafter he appeared as his own witness as DW-1. He was cross examined by the complainant.

6. On the application of the accused, the records of the appellant company were directed to be produced. They were so produced on record as Exh. X, Y, Z and ZA-which were the statement of accounts for the period 2006-07 and 2007-08. The production of the said document was sought by the accused to substantiate its defence that the accused did not owe the amount of either Rs. 3,72,000/- or Rs. 3,50,000/- as alleged by the complainant on the basis of Exh. CW-1/A. While dismissing the complaint, the Trial Court held as follows:

24. From a reading of the complaint and the evidence led on behalf of the complainant it can be discerned that the whole edifice of the claim of the complainant is founded on the supply of the goods worth Rs. 3,72,000/- by it and subsequent settlement on 04.05.2006.

25. During the evidence on behalf of the complainant, CW1 Smt. Savita Gupta tendered document Ex CW1/A which is claimed to be a document of settlement effected between complainant Acura Glass Enterprises and the accused. During his cross examination the accused admitted his signatures on Ex CW1/A but during arguments it is contended on his behalf that the document Ex CW1/A was not executed by him.

26. A perusal of Ex CW1/A reveals that the amount of Rs. 3,72,000/- was figured out between the parties (the complainant and the accused) on account of payment of Rs. 2,42,000/- due from Ms Suyash Construction, payment of Rs. 35,000/- due from Ms Prakriti Enterprises and payment of Rs. 55,000/- and Rs. 44,000/- on some other accounts.

27. There is no evidence on record to suggest that the document Ex CW1/A,

purporting to be a settlement, pertain to the liability of the accused in respect of the goods supplied by the complainant to him as proprietor of Ms Sonifix Enterprises as asserted on behalf of the complainant in its complaint, notice Ex. CW1/K and affidavit Ex. CW1/Q. In the face of the contents of the document Ex CW1/A, the contents of paragraph no. 3 of the complaint, paragraph no. 2 of notice Ex CW1/K and paragraph no. 3 of affidavit of Ex CW1/Q appear to be false; and it has been proved that the settlement was not effected (as asserted on behalf of the complainant in its complaint, notice Ex CW1/K and affidavit Ex CW1/Q) between the complainant and the accused regarding supply of tiles and other material to him on the basis of which bill to the tune of Rs. 3,72,000/- was allegedly raised by the complainant.

28. Further according to the complainant as on 04.05.2006, the date of the settlement between the parties, the accused owed a total liability of Rs. 372,000/- towards the complainant, which was settled at Rs. 350,000/- but a perusal of the document Ex. X, which was produced by the agent of the complainant during the trial of the case on the directions of the court, reveals that as per the account maintained by the complainant in the month of April and May 2006 the accused did not owe any liability of Rs. 372,000/- or Rs. 350,000/- to the complainant instead his firm Sonifix Enterprises owed liability of Rs. 1,86,468.75 only and thus the allegation of the complainant that the accused owed liability of Rs. 372,000/- which was settled at Rs. 350,000/- is proved as false.

29. It is stated in paragraph no. 4 and corresponding paragraph of the demand notice Ex CW1/K and affidavit Ex CW1/Q that to discharge his liability the accused issued four cheques namely Ex CW1/B, Ex CW1/C, Ex CW1/D and Ex CW1/E in his favour. A perusal of the said cheques reveals that the same are dated 05.06.2006, 26.05.2006, 10.6.2006 and 02.10.2006 respectively. The assertion of the complainant is that the said cheques were issued by the accused to partly discharge the liability out of Rs. 350,000/-. However, a perusal of document Ex CW1/B/D, the contents of which have been admitted by CW1 during her cross examination, reveals that before the presentation of the said cheques for encashment in the month of November, 2006 and after the date of the last mentioned cheque i.e. 02.10.2006, the complainant got served a notice dated 22.10.2006 Ex CW1/B/D on the accused whereby having mentioned about the settlement dated 04.05.2006 a demand of Rs. 350,000/- was made on behalf of the complainant. This is something very unusual because if the accused issued and the complainant received the cheques Ex CW1/B, Ex CW1/C, Ex CW1/D and Ex CW1/E in discharge of part liability of Rs. 350,000/- and neither of the said cheque was presented by the complainant for encashment, there was no occasion for the complainant to demand the whole amount of Rs. 350,000/-. Further in Ex CW1/B/D the complainant has not mentioned about any of the said cheques, although, as per the complainant's version, all the four cheques had already been received by it from the accused. The omission to mention about the cheques in notice Ex CW1/B/D gives weight to the defence of the accused that

before 22.10.2006 no cheque was drawn by him in favour of the complainant to discharge any liability and the cheques given as security were used by the complainant after 22.10.2006. This contention of the accused is further supported by the testimony of CW1 who during her cross examination, when confronted with Ex CW1/B/D, deposed in affirmative that the notice Ex CW1/B/D was sent by her to the accused because he (the accused) had not made the payment in cash or by cheque prior to the notice (Ex CW1/B/D). If no cheque was given by the accused to the complainant prior to the notice Ex CW1/B/D then it can be treated as proved, beyond doubt, that the complainant has made false statement to the effect that the cheques were drawn by the accused to discharge his part liability arising out of Ex CW1/A.

30. As per section 139 of the Act No. 26 of 1881 the onus is on the accused to prove that the cheques were not given to discharge any liability. The onus of proof on the accused is not as heavy as on the complainant to prove its case because in a criminal trial an accused can prove any fact in his defence on the scale of preponderance of probabilities.

31. In the light of the evidence led by the parties this court is satisfied that the accused has succeeded in proving his defence. From the document Ex CW1/A itself it has been proved that the accused did not owe liability of Rs. 350,000/- on account of goods supplied by the complainant to the accused as proprietor of Ms Sonifix Enterprises. From the document Ex. X and Ex. Y, which are statements of account for the year 2006-07 and 2007-08 and produced by the agent of the complainant, it has also proved that the accused did not owe liability of Rs. 372,000/- or 350,000/- in the month of April and May 2006. From the testimony of CW1 and document Ex CW1/B/D it has also been proved that the cheques Ex CW1/B, Ex CW1/C, Ex CW1/D and Ex CW1/E were not issued by the accused prior to notice dated 22.10.2006 Ex. CW1/B/D. The cumulative effect of these proved facts is that the accused has succeeded in proving that the cheques were not issued by him to discharge any enforceable debt or liability. The cheques were given for other purpose and in all probability, as claimed by the accused, as security for payment of money.

7. The submission of learned counsel for the appellant is that in the present case, the legal debt had been admitted by the respondent/accused in Exh. CW-1/A. The respondent/accused had admitted to have executed the settlement Exh. CW-1/A. The submission is that the accused neither disowned the said settlement, nor claimed that the same had been got executed by exercise of coercion, duress, inducement or the like. The respondent had deposed in relation to the aforesaid settlement as follows:

I have seen Ex. CW1/A on record. I identify my signatures at point A on Exbt. CW1/A.

8. Counsel for the appellant submits that in the light of the said admission of debt and liability to the tune of Rs. 3,72,000/- and the lump sum settlement of

Rs. 3,50,000/-, it was not open to the accused to fall back on some statement of accounts, namely, Exh. X, Y, Z and ZA to claim that the debts/liability to the tune of Rs. 3,72,000/- was not outstanding as on 04.05.2006, when the said debt/liability was negotiated and a lump sum settlement was arrived at between the parties, whereunder the accused had agreed to pay Rs. 3,50,000/- by 04.06.2006.

9. Counsel for the appellant further submits that the accused had admitted the issuance of the aforesaid four cheques, namely, Exh. CW-1/B, C, D and E by him during his cross examination conducted on 01.05.2009. In this regard, the cross examination of the accused DW-1 reads as follows:

I have seen four cheques on record Exbt. CW1/B, Exbt. CW1/C, Exbt. CW1/D and Exbt. CW1/E. It is right to suggest that cheque Exbt. CW1/B, Exbt. CW1/D and Exbt. CW1/E are issued on ICICI Bank and cheque Exbt. CW1/C issued on the National Cooperative Bank Ltd. All the aforesaid four cheques are issued by me.

10. Learned counsel submits that the accused thereafter sought to resile from his admission under the garb of re-examination, which was permitted by the trial court despite an objection being raised by the complainant. Learned counsel submits that the objection of the complainant to reexamination was overruled without recording any justification or reasons. It is further submitted that even though the re-examination was sought, and permitted, on the two points "namely, the dates of cheques Exh. CW-1/B, Exh. CW-1/C, Exh. CW-1/D, Exh. CW-1/E and the nature deposed to have been recorded by the witness", the said re-examination was permitted even to resile from the admission earlier made by the DW-1. In his reexamination, DW-1, inter alia, stated:

I have not issued cheques Exbt. CW1/B, Exbt. CW1/C, Exbt. CW1/D and Exbt. CW1/E on that dates which dates are mentioned in the above cheques.

11. Learned counsel submits that upon further cross examination, it was suggested to DW-1 that he had deposed falsely. Lastly, she submits that since the debt had been admitted by the accused and, admittedly, the cheques had been issued by him, the dismissal of the complaint was unwarranted as the presumption under Section 118 of the Negotiable Instruments Act had not been dislodged in the facts of this case.

12. On the other hand, learned counsel for the respondent/accused has sought to support the impugned judgment. He submits that in the cross examination of the complainant, she was not able to state as to where from Exh. CW-1/A-the settlement had come about. He further submits that upon a perusal of Exh. X, Y, Z and ZA, it is clear that the amount of Rs. 3,72,000/- was not outstanding in the account of the firm M/s. Sonifix Enterprises. He further submits that in her cross examination, CW-1 had admitted that a legal notice dated 22.10.2006 Exh. CW-1/B/D had been got issued by the complainant through her advocate Sh. C.P. Vig.

13. Learned counsel submits that had the cheques in question been issued by the accused on the dates mentioned therein, there was no question of the complainant claiming in the said legal notice (Ex. CW1/B/D) that the accused had failed to make payment of the settled amount of Rs. 3,50,000/- in terms of the settlement dated 04.05.2006. In this notice, the complainant had made a demand for Rs. 3,50,000/- along with 24% interest per annum. Learned counsel submits that this demand notice (Ex. CW1/B/D) was concealed in the complaint. The same had been put to the complainant in her cross examination by the accused, which was admitted by her. He further submits that the complainant (CW1) had admitted during her cross-examination that the notice (Ex. CW1/B/D) dated 22.10.2006 was sent to the accused because he had "not made the payment in cash or by cheque prior to this notice.

14. Learned counsel for the respondent further submits that no recovery suit has been filed till date by the complainant for recovery of the amount of Rs. 3,50,000/- or even the balance amount, since the cheques in question aggregate to Rs. 1,97,500/- only. Learned counsel submits that the aforesaid four cheques had been obtained by the complainant towards security and had been misused subsequently by filling up the same to falsely claim that they had been issued in partial discharge of the debt allegedly admitted in Exh. CW-1/A. He submits that since the cheques in question had not been issued to discharge the liability, the complaint was liable to fail.

15. Having heard learned counsel and perused the impugned judgment as well as the trial court record, I am of the view that the learned trial court was seriously misdirected in its approach. There are serious infirmities in the impugned judgment which have resulted in acquittal of the respondent/accused and consequential failure of justice. The factum of issuance of the four cheques in question by the respondent/accused; the factum of the said cheques being dishonoured upon presentation; the factum of the complainant sending the statutory notice of demand which was received by the accused; the factum of the accused not making any payment in terms of the demand, and; the factum of the complaint being preferred within the statutory period of limitation of non-payment of the demanded amount, are not in dispute and, therefore, need not be elaborated upon. The laconic approach of the trial court is, firstly, evident from para 25 of the impugned judgment which has been extracted hereinabove. Even though the accused admitted his signatures on Ex. CW1/A-the settlement arrived at between the parties on 04.05.2006, the trial court noticed that the accused had claimed that Ex. CW1/A had not been executed during his arguments-a fact which is of no relevance. The trial court proceeds on the basis that no evidence was led by the complainant to suggest that settlement (Ex. CW1/A) pertained to the liability of the accused in respect of goods supplied by the complainant to the accused as proprietor of M/s. Sonifix Enterprises. Ex. CW1/A is clear in its terms. It is of no relevance as to whether, or not, the entities which are acknowledged to be indebted to the complainant, namely, M/s. Suyas Construction, M/s. Prakruti Enterprises, 371, and Adhersi were so indebted

or not, and if so, to what extent. It is also of no relevance whether the said entities had any connection with the accused. All that is relevant is that the accused voluntarily-without any coercion, undue influence, inducement or the like (none of which is set up as a defence by the accused) acknowledged the aggregate liability of the aforesaid four concerns of Rs. 3,72,000/-, and the accused undertook to settle the said outstanding dues for a lump sum amount of Rs. 3,50,000/- and clear the same latest by 04.06.2006. He, inter alia, stated, "the said amount is outstanding till date with me ". It is well settled, that the liability of A owed to B may be paid, or undertaken to be paid by C. If C, in discharge of the said liability makes payment either in cash or by cheque to B, the same constitutes a valid discharge of the debt of A owed to B. Thus, B cannot enforce the debt against A after receiving the amount, as settled, from C. Similarly, after paying the debt of A to B, C cannot claim a refund of the amount paid to B on the ground that he personally owed no liability to B. Similarly, if C tenders a cheque to B in settlement of the dues of A, owed to B, in favour of B, the same would be for payment and the same would be for the discharge, in whole or in part, of any debt or other liability" as contemplated under Section 138 of the Act. Thus, there was no need or occasion, for the complainant to establish that Ex. CW1/A was a settlement "pertaining to the liability of the accused in respect of goods supplied by the complainant to him as proprietor of Ms Sonifix Enterprises", as observed by the trial court. In fact, the complainant could not have established that the entire liability of M/s. Sonifix Enterprises was Rs. 3,72,000/-. This is for the reason that the said liability was of four different concerns mentioned in Ex. CW1/A. Reference made to the complaint, notice (Ex. CW1/K) and affidavit (Ex. CW1/Q) to say that they do not accurately reflect the position as found in Ex. CW1/A, to my mind, is neither here nor there. The crux of the matter is that the accused entered into a lump-sum settlement with the complainant, acknowledging the liabilities of the aforesaid four entities of Rs. 3,72,000/-, and undertook to pay a sum of Rs. 3,50,000/- in settlement of the said liabilities latest by 04.06.2006. The discrepancy pointed out by the trial court in para 27 of the impugned order is immaterial and irrelevant in the face of Ex. CW1/A-the execution whereof was admitted by the accused. Obviously, the said settlement (Ex. CW1/A) did not pertain to supply of tiles or other material to the accused in the name of his sole proprietary firm M/s. Sonifix Enterprises. This is obvious from the admitted settlement (Ex. CW1/A). For the same reason, it is obvious that there could not have been a bill for Rs. 3,72,000/- raised by the complainant against the accused or his firm M/s. Sonifix Enterprises. At this stage, I may also note that the trial court seems to have completely over-looked the position that a sole proprietary concern has no legal standing of its own. It is merely a trade name adopted by the proprietor. The legal entity is the sole proprietor himself and not his sole proprietary firm.

16. Exs. X, Y, Z and ZA, which are the statements of accounts of the complainant for the period 2006-07 and 2007-08, in the aforesaid background, would obviously not show the outstanding liability of M/s. Sonifix Enterprises as Rs.

3,72,000/-. The said documents were wholly irrelevant. Since the parties had mutually settled their accounts and arrived at the total outstandings owed by the four firms to the complainant at Rs. 3,72,000/- which was settled at Rs. 3,50,000/- lump-sum, in my view, it was not open to the trial court to go behind Ex. CW1/A and undertake an inquiry whether the liability acknowledged by the accused in Ex. CW1/A was accurate or not. This is so because the accused did not disown Ex. CW1/A. Rather, he admitted the said document in his cross-examination. Thus, the findings returned by the learned trial court in paras 27 and 28 of the impugned judgment are wholly unsustainable, as the trial court has completely failed to appreciate the purport and effect of Ex. CW1/A.

17. The trial court has given much weightage to the fact that though the four cheques in question are dated 26.05.2006, 05.06.2006, 10.06.2006 and 02.10.2006, while issuing the notice Ex. CW1/B/D, dated 22.10.2006, there was no mention of the said cheques by the complainant. The trial court also observes that the complainant did not produce the said cheques for encashment before issuance of the notice Ex. CW1/B/D dated 22.10.2006, and despite holding the said cheques, demanded the whole amount of Rs. 3,50,000/- as settled with the accused. The trial court observes that the omission of the complainant to mention about the four cheques in question, in the notice Ex. CW1/D, gives credence to the defence of the accused that before 22.10.2006 (date of Ex. CW1/B/D), no cheque was drawn by the accused in favour of the complainant to discharge any liability and that the cheques given as security were used by the complainant after 22.10.2006. The trial court also relies on the testimony of CW1 in her cross-examination by observing that CW1 (during her cross-examination when confronted with Ex. CW1/B/D) deposed in the affirmative that the notice (Ex. CW1/B/D) was sent by her to the accused because he (the accused) had not made the payment in cash or by cheque prior to the notice (Ex. CW1/B/D).

18. A perusal of the record shows that during the cross-examination of CW1, the following question and the answer thereto was recorded in respect of the notice (Ex. CW1/B/D):

Q: This notice was sent by you to the accused because he had not made the payment in cash or by cheque prior to his notice. Is it correct or not.

A: It is correct.

19. The aforesaid question put to CW1 pertains to the "payment" not being made either in cash or by cheque. Pertinently, the said question does not pertain to the aspect of "issuance" of the cheques, or their presentation for payment. Pertinently, the complainant during further cross-examination had denied the suggestion that the cheques in question were in her possession for the last 4-5 years. Mere non-disclosure of the issuance of the said cheques (which, admittedly had not been sent for encashment till the issuance of the notice Ex. CW1/B/D) cannot lead to the inference that the said cheques had not even been issued till the date of issuance of Ex. CW1/B/D i.e. 22.10.2006. Since the

complainant had not received any part of the amount of Rs. 3,50,000/- till issuance of Ex. CW1/B/D, the complainant was justified in demanding the whole amount of Rs. 3,50,000/- in Ex. CW1/D. As to under what circumstances, the four cheques aforesaid were not banked by the complainant before issuance of the notice (Ex. CW1/B/D) dated 22.10.2006 has neither been disclosed by the complainant, nor by the accused. While the accused claims that the said cheques had been given towards security, nothing has been brought on record to substantiate the said defences. No forwarding letter, or any other recording contemporaneously made when the said cheques were allegedly given as security to the complainant, has been produced by the accused. To my mind, it is not enough for the accused to merely state that the cheques in question were given as security, particularly when he has admitted his liability and quantified the same and also undertaken to make payment thereof vide V.S. Yadav Vs. Reena, , this Court observed:

5..... In the present case, the accused in his statement stated that he had given cheques as security. If the accused wanted to prove this, he was supposed to appear in the witness box and testify and get himself subjected to cross examination. His explanation that he had the cheques as security for taking loan from the complainant but no loan was given should not have been considered by the Trial Court as his evidence and this was liable to be rejected since the accused did not appear in the witness box to dispel the presumption that the cheques were issued as security. Mere suggestion to the witness that cheques were issued as security or mere explanation given in the statement of accused under Section 281 Cr.P.C., that the cheques were issued as security, does not amount to proof.

20. Reliance placed by learned counsel for the accused on the reexamination of the accused to say that the accused had denied having issued the cheques in question on the dates which are mentioned therein is of no avail. This is for the reason that, firstly, the learned trial court does not record reasons while permitting re-examination of DW1 as to why reexamination should be permitted in the given circumstances. No doubt, the power of examination, including the power to re-examine a witness under Section 311 Cr.P.C. has been construed widely by the courts. However, that does not mean, that the said power can be exercised without even recording some reasons. The Supreme Court in Rajaram Prasad Yadav Vs. State of Bihar and Another, , as observed as follows:

14. A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding" "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was

required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Code of Criminal Procedure where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Code of Criminal Procedure. In the decision reported in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, , this Court held as under in paragraph 14:

14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.

(Emphasis added)

16. In the decision reported in Mohanlal Shamji Soni Vs. Union of India and another, , this Court again highlighted the importance of the power to be exercised under Section 311 Code of Criminal Procedure as under in paragraph 10:

10... In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted where under any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

17. In the decision in Raj Deo Sharma Vs. The State of Bihar, , the proposition has been reiterated as under in paragraph 9:

9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

18. In U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan, , the decision has been further elucidated as under in paragraph 15:

15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Code of Criminal Procedure should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice.

(Emphasis added)

19. In Iddar and Others Vs. Aabida and Another, , the object underlying under

Section 311 Code of Criminal Procedure, has been stated as under in paragraph 11:

11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

(Emphasis added)

20. In *P. Sanjeeva Rao Vs. The State of A.P.*, , the scope of Section 311 Code of Criminal Procedure has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:

13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in *Hoffman Andreas Vs. Inspector of Customs, Amritsar*, . The following passage is in this regard apposite:

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.

16. 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. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, 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 prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself

(Emphasis added)

21. In a recent decision of this Court in Sheikh Jumman Vs. State of Maharashtra, , the above referred to decisions were followed.

22. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh v. CBI (State) Criminal Appeal No. 709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

14. 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 Code of Criminal Procedure 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 Code of Criminal Procedure 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.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the

person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, ; Zahira Habibullah Sheikh and Another etc. Vs. State of Gujarat and Others etc., ; Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others, ; Mrs. Kalyani Baskar Vs. Mrs. M.S. Sampornam, ; Vijay Kumar Vs. State of U.P. and Another, ; and Sudevanand Vs. State, .

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Code of Criminal Procedure read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

- a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?
- b) The exercise of the widest discretionary power under Section 311 Code of Criminal Procedure should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.
- c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.
- d) The exercise of power under Section 311 Code of Criminal Procedure should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
- e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.
- g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
- h) The object of Section 311 Code of Criminal Procedure simultaneously imposes a duty on the Court to determine the truth and to render a just decision.
- i) The Court arrives at 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Code of Criminal Procedure 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

21. Thus, the discretion vested in a Court to permit re-examination of a witness under Section 311 Cr.P.C. has to be exercised on the broad principle that the same is considered necessary to meet the ends of justice and if not so permitted, may lead to injustice. The said wide discretionary power has to be exercised judiciously and not arbitrarily. The said power should be exercised by the court after satisfying itself that it was essential to examine a witness or to recall him for further examination in order to arrive at a just decision of the case. The purpose of exercise of the power to permit reexamination of a witness is to prevent failure of justice. At the same time, the additional evidence must not be received as a disguise, or to change the nature of the case against any of the parties. The said power 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 care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and,

therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

22. In the present case, a perusal of the evidence of DW1 shows that before permitting re-examination of DW1, the trial court, inter alia, recorded as follows:

After cross-examination of the witness it is submitted by the counsel for the accused that he wants" to re-examine the witness on two points, namely, the date of cheques Ex. CW1/B, Ex. CW1/C, Ex. CW1/D and Ex. CW1/E and the nature deposed to have been recurred by the witness.

Counsel for the complainant has objection on reexamination of witness. It is submitted that in view of Section 315 Cr.P.C. and Section 137 of the Indian Evidence Act, 1872, the (sic accused) cannot get himself re-examined through his counsel. It is also submitted that the accused cannot be allowed to be examined on the points which he ought to have deposed in his examination in chief.

Having heard both the parties the objections raised by counsel of the complainant are over-ruled and the witness is permitted to be re-examined.

The aforesaid does not disclose any reasons for permitting reexamination of DW1. DW1 did not state in his examination-in-chief that the four cheques in question were not given on or about the dates they bear. In his cross-examination DW1, he admitted to having issued the said cheques. Even at that stage he did not seek to volunteer that the said cheques were not dated when issued by him. A witness cannot be permitted to resile from his admission upon re-examination being permitted by the Court.

23. Therefore, in my view, the re-examination of DW1, particularly, in relation to the four cheques (Ex. CW1/B, Ex. CW1/C, Ex. CW1/D and Ex. CW1/E) could not have been permitted and the said re-examination cannot be read or looked into. Secondly, it is pertinent to note that the accused, while claiming that the four cheques (Ex. CW1/B, Ex. CW1/C, Ex. CW1/D and Ex. CW1/E) had not been issued on the dates that they bear, thereby implying that the dates had been filled up by the complainant, did not chose to lead any evidence. In this respect, neither a report of a handwriting expert was produced, nor the accused sought the reference of the said cheques to the CFSL for their report. This conduct of the accused clearly militates against the defence set up by the accused.

24. Thus, in my view, the complainant has succeeded in establishing the commission of the offence under Section 138 of the Act by the accused in respect of the four cheques (Ex. CW1/B, Ex. CW1/C, Ex. CW1/D and Ex. CW1/E) beyond reasonable doubt. The defence set up by the respondent cannot be said to be a probable one. The fact remains that there was admitted liability to the tune of Rs. 3,50,000/- of the accused and he had issued the four cheques in question in partial discharge of the said liability.

25. Thus, the appeal is allowed. The respondent is convicted for the offence

punishable under Section 138 of the Act.

26. List on 02.02.2015 for pronouncement of the sentence. The respondent shall personally remain present in Court on the next date.