

(2018) 08 MP CK 0017

In the Madhya Pradesh High Court

Case No : Criminal Miscellaneousellaneous Case No.28916-2018

Ajay Garg

APPELLANT

Vs

M/S Reliance Agro Chemicals A Partnership Firm

RESPONDENT

Date of Decision : 02-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 294, 323, 376, 450
Code Of Criminal Procedure, 1973 — Section 311, 315
Negotiable Instrument Act, 1881 — Section 138, 139
Evidence Act, 1872 — Section 138

Citation : (2018) 08 MP CK 0017

Hon'ble Judges : Rajendra Kumar Srivastava, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

This application has been instituted on an application under Section 482 of Cr.P.C to quash and set aside the impugned order dated 26/09/2017 which

is passed by Judicial Magistrate First Class, Bhopal in RT No.11049/2009 and order dated 29/05/2018 which is passed in criminal revision

No.496/2017 passed by 19th Additional Sessions Judge, Bhopal.

Respondent filed a petition under Section 138 of Negotiable Instrument Act. Respondent/complainant is a partnership firm which was constituted on

22/09/2007. In the said partnership some amount was given to the petitioner and same was not returned and, therefore, for payment of liability the

petitioner has issued a cheque to the respondent, which has been dishonoured.

During the pendency of petition some facts have come on record that the firm is already dissolved and there is no authority of Rakesh Kumar Patel to

file the present case. Cheques were given as a security and same was also informed by the petitioner vide letter dated 02/01/2008. Because the work

of account has been given to the petitioner, therefore, the disputed cheque were taken as security. The petitioner filed an application under Section 311

of Cr.P.C for recalling of the complainant as he has received the original documents from different departments after some lapse of time and the

original were not exhibited in the case. Petitioner had also filed an application under Section 315 Cr.P.C to adduce additional evidence.

Learned trial Court vide order dated 26/09/2017 dismissed the application under Section 311 and Section 315 of Cr.P.C. Learned trial Court has stated

in its order that the case is pending since long and the petitioner has filed the application to delay the case. There is presumption under Section 139 of

Negotiable Instrument Act and therefore the burden lies on the petitioner/accused to rebut the presumption that is only possible when the

petitioner/accused proves the same by the evidence.

It is argued by the petitioner that, the documents are same in the present case and also in other revision application filed by him and in one revision has

been allowed and other revision has been dismissed and therefore there are two contrary views and orders.

The documents clearly show that the cheques were given as security and further the petitioner is a partner at the relevant time and therefore

application ought to have been allowed by the learned Courts below. So petitioner has prayed to quash and set aside the impugned orders.

I perused the record and impugned orders. It is not disputed that Respondent/complainant filed a case under Section 138 of Negotiable Instrument Act

which is criminal case No.11049/2009. It is also evident that the case was fixed for the defence since 11/10/2012. After that the petitioner/accused

has filed different applications, petitioner/accused has been examined on 02/03/2017 under Section 315 of Cr.P.C. Petitioner/accused filed an

application of 311 of Cr.P.C and 315 of Cr.P.C during the trial. The Trial Court dismissed these applications due to delay tactics. Petitioner/accused

filed an application against this order and his revision is also dismissed. But it is evident that petitioner/accused wants to prove his defence that he had

given the cheque as security.

Section 139 of Negotiable Instrument Act provides that :

Presumption in favour of holder- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature

referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

In this petition, under Section 139 of Negotiable Instrument Act there is legal presumption that the cheque was issued for discharging liability and that

presumption can be rebutted only by the person who drew the cheque. Therefore, the burden lies on the petitioner/accused to rebut the presumption

which is possible when he proves the same by the evidence. Petitioner/accused filed an application under Section 311 of Cr.P.C. In this application he

described these documents on the basis of which he wants to prove his case and he has also specified those documents.

The Apex Court in the case of Rajram Prasad Yadav V. State of Bihar and another reported in (2013) 14 SCC 461 has held as under:-

A conspicuous reading of Section 311 Cr.P.C. 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 pre-fix 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 Cr.P.C.

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 Cr.P.C. It is, therefore, imperative that the

invocation of Section 311 Cr.P.C. 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.

In these circumstances and in view of the aforementioned judgment of the Court, it would be justiciable to provide one opportunity to the

petitioner/accused to call the complainant for re-examining him and he should further be allowed to again present himself as defence witness under

Section 315 of Cr.P.C. Accordingly, this petition is allowed with cost of Rs.5,000/-

It is directed that petitioner/accused shall deposit Rs.5,000/- cost with District Legal Aid Authority within 7 days of presenting copy of this order to the

learned Trial Court. In view of this, order of Trial Court and revisional Court is set aside and the present petition is accordingly disposed of.