

(2013) 11 DEL CK 0233

In the Delhi High Court

Case No : Criminal M.C. 4504 of 2013 and Criminal M.A. 16125 of 2013

Inderjeet Kaur Kalsi

APPELLANT

Vs

NCT of Delhi and Another

RESPONDENT

Date of Decision : 27-11-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 397, 397(3), 482

Evidence Act, 1872 — Section 165, 60, 64, 91

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2014) 1 CCR 1 : (2013) 205 DLT 410

Hon'ble Judges : J.R. Midha, J

Bench : Single Bench

Advocate : Jyotika Kalra, for the Appellant; Karan Singh, APP., for the Respondent

Final Decision : Dismissed

Judgement

J.R. Midha, J.—Respondent no. 2 instituted a complaint u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred as NI Act) against the petitioner in respect of two dishonoured cheques dated 25th February, 2007 for Rs. 5 lakhs and Rs. 6 lakhs respectively. At the stage of complainant's evidence, respondent no. 2 moved an application dated 19th October, 2012 before the learned Metropolitan Magistrate u/s 311 Code of Criminal procedure, 1973 (hereinafter referred as Cr.P.C.) for permission to examine K.S. Kohli as a witness on the ground that the respondent had given friendly loan of Rs. 11 lakhs to the petitioner in the presence of K.S. Kohli at his office. It was further submitted that K.S. Kohli was a material witness but his name was inadvertently left out in the list of witnesses. Vide order dated 14th December, 2012, the learned Metropolitan Magistrate allowed the application and permitted respondent no. 2 to examine K.S. Kohli. The reasons given by the learned Metropolitan Magistrate are as under:

5. In the present case, the complaint has been filed u/s. 138 NI Act. In the

complaint, the complainant has stated that he had given to the accused a friendly loan of Rs. 11 lacs in cash in the office of M/s. Grandley parties of Sh. K.S. Kohli. This fact is mentioned in the legal notice sent to the accused as well as in the affidavit of CW1. Though, the name of Mr. K.S. Kohli is not mentioned in the list of witnesses. However, the name is very well mentioned in the legal notice, the complaint, and affidavit of cross examination of CW1. However, it is not specifically mentioned in any of the document that he was a witness to the above said loan. But it has to be kept in mind that the alleged loan was given in the office of Mr. K.S. Kohli. Therefore, I am of the considered opinion that his examination is necessary for just decision of the case.

6. This is not the stage where it can be presumed as to what would be statement of the witness in the witness box. Moreover, the accused shall have right to cross examine the witness. Hence, I am of the considered opinion that no prejudice shall be caused to the accused if the witness is examined.

(Emphasis supplied)

2. The petitioner challenged the aforesaid order in revision before the Sessions Court on various grounds inter alia that K.S. Kohli was not a witness to the transaction; his name was not mentioned in the list of witnesses; K.S. Kohli was not mentioned in pre-summoning evidence of respondent no. 2 dated 13th April, 2007 as well as the notice of demand dated 12th March, 2007 and respondent no. 2 wants to fill up the lacunae.

3. The learned Sessions Court dismissed the revision petition vide order dated 22nd July, 2013. The reasons given by the learned Sessions Judge are as under:

Firstly, it is an admitted fact that the name of witness K.S. Kohli which the complainant wanted to summon u/s 311 Cr.P.C. has been mentioned repeatedly by the complainant. Hence, K.S. Kohli is not a surprised name to be summoned on behalf of complainant. It may be that at the time of filing of complaint, the complainant felt that mentioning the name of K.S. Kohli as witness might not be relevant but as the case progresses, complainant might have felt him to be relevant and accordingly, filed application u/s 311 Cr.P.C.

Secondly, impugned order dated 14.12.2012 passed by the Ld. MM appears to be reasonable and to meet the end of justice.

Thirdly, Section 311 Cr.P.C. empowers the Criminal Court at any stage, to summon any person as witness, however, condition for same, is that exercise of this power should be judicious. On the face of it, the order is appear to be reasonable, judicious and to meet the end of justice.

Fourthly, even if initially the name of witness was not mentioned but later on that person has been summoned, the accused has every chance to cross examine said person/witness so as to verify his truthfulness. Endeavor of every Court is to extract the truth and if for extracting the truthfulness, an act is being done or witness is summoned, that order is no bad.

(Emphasis supplied)

4. Aggrieved against the aforesaid orders, the petitioner has approached this Court.

5. The issue involved in this case is whether K.S. Kohli is a material witness and whether the respondent should be permitted to examine him in exercise of jurisdiction u/s 311 Cr.P.C. Before considering this issue, this Court considers it necessary to examine the scope and ambit of Section 311 Cr.P.C.

Scope of Section 311 Cr.P.C.

6. Section 311 Cr.P.C. empowers the Court to summon any material witness if his evidence appears to be essential for the just decision of the case. Section 311 Cr.P.C. is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. Section 311 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.

7. The object of a trial is, first to ascertain truth by the light of reason, and then, do justice upon the basis of the truth and the Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.

8. The Judge is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. A Judge, who at the trial merely sits and records evidence without caring so to conduct the examination of the witnesses that every point is brought out, is not fulfilling his duty.

9. In *Rajeswar Prosad Misra Vs. State of West Bengal and Another*, , the Supreme 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 held as under:-

10. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial....

10. In *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, , the Supreme Court held that Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure, 1898 confer jurisdiction on the Judge to act in aid of justice. In 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.

11. In *Mohanlal Shamji Soni Vs. Union of India and another*, , referring to Section 165 of the Indian Evidence Act and Section 311 of the Code of Criminal Procedure, the Supreme Court stated that the said two sections are complementary to each other and between them, they confer jurisdiction on the Judge to act in aid of justice. It is a well-accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. The Court further held as under:

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.

12. In *P. Chhaganlal Daga Vs. M. Sanjay Shaw*, , the appellant completed the evidence including his own examination, cross-examination and re-examination in a prosecution launched u/s 138 of the Negotiable Instruments Act, 1881. During such cross-examination, the respondent-accused contested the service of statutory notice and disowning the signature contained in the acknowledgment card produced by the complainant. After completion of evidence, the case was posted for judgment when the complainant sought the permission of the Court to produce additional material i.e. a postal receipt. The grant of such permission by the Trial Court was held to be within the powers of the Court u/s 311 Cr.P.C. The Supreme Court held as under:-

2. It is very unfortunate that the High Court by the impugned judgment has interfered with an order passed by a trial Magistrate permitting the complainant to produce a document though at the far end of the trial.

3. In a prosecution launched by the appellant u/s 138 of the Negotiable Instruments Act, the appellant completed the evidence including his own examination, cross-examination and re-examination. During such cross-examination the respondent-accused contested the question of service of notice envisaged u/s 138 of the Negotiable Instruments Act. The acknowledgement card produced by the complainant contained a signature which the accused disowned as his. After the arguments concluded and the case was posted for judgment the complainant moved the trial court for reception of additional material (by producing a postal receipt) in exercise of the powers u/s 311 of the Code of Criminal Procedure. The trial court felt that the said material was necessary for the just decision of the case and hence allowed the same to come on record. The said order of the trial Magistrate was challenged by the accused before the High Court.

4. In the impugned judgment a learned Single Judge of the High Court held that production of the postal receipt at the said belated stage was only "to fill up the lacuna" and hence the same is impermissible in law. He, therefore, interfered with the order passed by the trial court and permission to produce the postal receipt was countermanded. Learned Single Judge has stated the following regarding that aspect:

After the trial is over, if the petitioner is permitted to produce the postal receipt, that would only prejudice the right of the accused. Further, the postal receipt is sought to be produced only to fill up the lacuna or letting in corroboration of the evidence, if any, available regarding this aspect. I consider that the respondent cannot be allowed to adopt such a course.

5. In *Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi*, , this Court has explained what is meant by lacuna in the prosecution case. The following passage of the said decision will be apposite in this context: (SCC p. 113, para 7)

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers u/s 311 of the Code or u/s 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

6. In deciding so, this Court has taken into account some of the earlier decisions

of this Court including Mohanlal Shamji Soni Vs. Union of India and another, . In the said decision this Court had observed that the power to receive evidence in exercise of Section 311 of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the court in exercise of powers u/s 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word "any" at different places. This would also indicate the widest range of power conferred on the court in that matter. It is so stated by this Court in Ram Chander Vs. State of Haryana, ."

(Emphasis supplied)

13. In Shailendra Kumar Vs. State of Bihar and Others, , the Supreme Court discussed the scope and applicability of Section 311 Cr.P.C. and held as under:-

11. Bare reading of the aforesaid section reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This Court in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, observed:

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.

14. In Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, , the Supreme Court held that Section 165 of the Indian Evidence Act and Section 311 Cr.P.C. confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The Judge can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. The power of the Court u/s 165 of the Evidence Act is in a way complementary to its power u/s 311 Cr.P.C. The Section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, essential to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. Though justice is depicted to be blind-folded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administering justice and not to ignore or turn the mind/attention of the Court away from the

truth of the cause or lie before it, in disregard of its duty to prevent miscarriage of justice. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

15. In *Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others*, , the Supreme Court extensively discussed the nature, scope and object of Section 311 Cr.P.C. and held as under:-

26....The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

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

28. As indicated above, the section is wholly discretionary. The second part of it

imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences."

(Emphasis supplied)

16. In *U.T. of Dadra and Haveli and Another Vs. Fatehsinh Mohansinh Chauhan*, , the Supreme Court held that the power of the Court to summon material witness u/s 311 Cr.P.C. can be exercised 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. The Supreme Court held as under:-

15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power u/s 311 Cr.P.C. 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 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 supplied)

17. In *Vijay Kumar Vs. State of U.P. and Another*, , the Supreme Court summarized the nature, scope and object of Section 311 Cr.P.C. The Supreme Court laid down the principles for exercise of discretionary power u/s 311 Cr.P.C. and explained the complementary nature of the power of the Court u/s 165, Evidence Act, to its power u/s 311 Cr.P.C. which confers jurisdiction on the Court to act in aid of justice. The Supreme Court held as under:-

13...This Section consists of two parts, viz., (1) giving discretion to the court to examine the witness at any stage; and (2) the mandatory portion which compels a court to examine a witness if his evidence appears to be essential to the just decision of the case. The Section enables and in certain circumstances, imposes on the Court the duty of summoning witnesses who would have been otherwise brought before the Court. This Section confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court u/s 165 of the Evidence Act is complementary to its power under this Section. These two sections between them confer jurisdiction on the Court to act in aid of justice.

14. There is no manner of doubt that the power u/s 311 of Code of Criminal Procedure is a vast one. This power can be exercised at any stage of the trial. Such a power should be exercised provided the evidence which may be tendered by a witness is germane to the issue involved, or if proper evidence is not adduced or relevant material is not brought on record due to any inadvertence. It hardly needs to be emphasized that power u/s 311 should be exercised for the just decision of the case. The wide discretion conferred on the court to summon a witness must be exercised judicially, as wider the power, the greater is the necessity for application of the judicial mind. Whether to exercise the power or not would largely depend upon the facts and circumstances of each case. As is provided in the Section, power to summon any person as a witness can be exercised if the court forms an opinion that the examination of such a witness is essential for just decision of the case.

17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said Section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred u/s 311 has to be exercised judicially for reasons stated by the Court and not arbitrarily or capriciously...

18. In *Natasha Singh Vs. CBI (State)*, , the Supreme Court discussed the scope and object of Section 311 of the Code of Criminal Procedure, 1973 and held that the discretionary power of the Court should be exercised judiciously and not arbitrarily so as to enable the Court to determine the truth and render a just decision. The Supreme Court held 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.

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 u/s 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 u/s 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."

(Emphasis supplied)

19. In *Rajaram Prasad Yadav Vs. State of Bihar and Another*, , the Supreme Court laid down the following principles u/s 311 Cr.P.C.:-

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in u/s 311 is noted by the Court for a just

decision of a case?

b) The exercise of the widest discretionary power u/s 311 Cr.P.C. 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 u/s 311 Cr.P.C. 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 Cr.P.C. 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 u/s 311 Cr.P.C. 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.

20. Findings

20.1 At the outset, this Court is of the view that having availed the remedy of revision before the Sessions Court u/s 397 Cr.P.C., the petitioner cannot be allowed to re-agitate the same point before this Court in a petition u/s 482 Cr.P.C. as it would amount to a second revision which is specifically barred by Section 397(3) Cr.P.C. This petition amounts to a second revision petition in the garb of Section 482 Cr.P.C.

20.2 Although the power of this Court u/s 482 Cr.P.C. is very wide, it has to be used sparingly and cautiously to prevent the abuse of process of any Court or otherwise to secure the ends of justice. The petitioner has also not been able to make out any case of abuse of process of Court or otherwise to secure the ends of justice. This Court is, therefore, not inclined to exercise jurisdiction u/s 482 Cr.P.C.

20.3 That apart, this Court does not find any infirmity in the concurrent findings of the two courts below. This Court is of the view that K.S. Kohli is a material witness and it is necessary to examine him to find out the truth and reach to a just decision of the case. The name of K.S. Kohli has been mentioned in the pre-summoning evidence by affidavit dated 11th August, 2009 of the father of respondent no. 2, notice of demand dated 12th March, 2007 by respondent no. 2 to the petitioner as well as the complaint u/s 138 of the Negotiable Instruments Act instituted by respondent no. 2 against the petitioner. This case is squarely covered by the catena of judgments mentioned above.

21. Imposition of Costs

21.1 Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to

contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. The parties raise fanciful claims and contests because the Courts are reluctant to order prosecution. The relevant judgments in support of this preposition are as under:-

21.2 In *Rameshwari Devi and Others Vs. Nirmala Devi and Others*, , the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-

52. ...C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. ...

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees two lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.

(Emphasis supplied)

21.3 In *Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria (Dead) through L. Rs.*, , the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences as under:-

82. This Court in a recent judgment in *Rameshwari Devi and Others Vs. Nirmala Devi and Others*, , aptly observed at p. 266, para 43 that unless wrongdoers are

denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least can be minimised if exemplary costs is imposed for instituting frivolous litigation. The Court observed at pp. 267-68, para 58 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

(Emphasis supplied)

21.4 In *Padmawati and Others Vs. Harijan Sewak Sangh*, , this Court imposed costs of Rs. 15.1 lakhs and noted as under:

6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.

9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong

doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts.

(Emphasis supplied)

Conclusion

21.5 There is no merit in this petition. This petition amounts to gross abuse and misuse of process of law. The petition is consequently dismissed with cost of Rs. 25,000/-. CrI. M.A. 16125/2013 is also disposed of. The cost be paid by the petitioner to the Delhi High Court Legal Services Committee within two weeks. The petitioner is directed to submit the proof of deposit of costs before the learned Trial Court within one week of deposit.

21.6 Considering the delay that may have been caused by the petitioner in this matter, the learned Trial Court shall endeavour to complete the trial within six months.

21.7 Copy of this judgment be sent to both the parties.

21.8 Copy of this judgment be also sent to the learned Trial Court through a special messenger.