
(2008) 09 CAL CK 0030

In the Calcutta High Court

Case No : C.R.R. No. 1409 of 2008 with, C.R.A.N. No 1650 of 2008

Manisha Hazra

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 311, 401, 482, 91
Penal Code, 1860 (IPC) — Section 120B, 341, 383, 406, 419

Citation : (2008) 09 CAL CK 0030

Hon'ble Judges : Arunabha Basu, J

Bench : Single Bench

Advocate : S. Ganguly, for the Appellant; Arup C. Chatterjee for the Opposite Party R.S. Chatterjee for the State, for the Respondent

Final Decision : Allowed

Judgement

Arunabhu Basu, J.

The Judgment of the Court was delivered by:

1. The revisional application u/s 401 read with section 482 of the Code of Criminal Procedure (hereinafter called the Code) is directed against order dated 11th April, 2008 passed by the learned Judicial Magistrate, 3rd Court, Burdwan in connection with G.R. Case No. 862 of 2002 whereby and where under learned Court below rejected an application filed by the petitioner herein, who is the de facto complainant in connection with the criminal case now tried by the learned Court below. The petitioner herein filed an application praying for production and examination of Marriage Register from the Registrar General of Marriage for the period from 7.5.02 to 12.6.02. a copy of the application filed by the petitioner before the learned Court below in terms of provision u/s 311 of the Code is annexed along with the revisional application. The petitioner in the application u/s 311 of the Code prayed for production of the Marriage Register from the Marriage Officer who acted in that capacity for the period 7.5.02 to 12.6.02 which contains the alleged registration of marriage between Manisha Hazra and

Anupam Samanta.

2. The learned Court below by the aforesaid order dated 11th April. 2008 rejected the prayer after hearing the contention submitted by learned A.P.P. as well as the learned Advocate for defence. The learned Court below in the aforesaid order was of the view that no opportunity should be granted for filling up the lacuna caused by the prosecution, the learned Court below was of the view that the petitioner herein acted whimsically as because she filed a similar prayer before the learned Court below on earlier occasion but not-pressed the said application. The learned Court below was of the view that the prosecution did not take necessary step for production of the relevant record on earlier occasion. The learned Court below was of the view that the filing of the present application was only to cause delay and in view of the direction passed by the High Court in connection with CRR No. 3766 of 2006 the learned Court below was to conclude the trial as expeditiously as possible.

3. The learned Advocate for the petitioner, while assailing the order passed by the learned Court below drew attention to the recital in the FIR, wherein the allegation is raised in respect of forgery of record of public register for the purpose of cheating and for using as genuine the said forged document.

4. It will be appropriate to highlight that in the FIR lodged by petitioner herein it is alleged that the informant was made to sign on certain forms and papers by the O.P. No. 5 and his associates and when the informant protested, the accused persons created a scene, whereby informant was compelled, to put her signature on those papers in order to save herself from further embarrassment. It is also alleged in the FIR that O.P. No. 5 repeatedly approached the petitioner to marry him but the petitioner was not agreeable to the said proposal. Subsequently, on 16.6.02, it was disclosed to petitioner by O.P. No. 2 that petitioner is already married to O.P. No. 5. The petitioner could gather the information that on 10.6.02 the O.P. No. 5 approached the Marriage Officer Ratna Roy and deposited the forms signed by the petitioner. It is also alleged in the FIR that another woman impersonated the petitioner before the Marriage Officer. It is the categorical case of petitioner that she never gave her consent to such marriage nor she ever appeared before the Marriage Officer.

5. On the basis of the said FIR, a case being FIR No. 49/02 dated 11.7.02 was registered at Bhatar P.S. within the District of Burdwan for commission of offence punishable u/s 466/468/469/471/420/120B of the Indian Penal Code. On conclusion of investigation charge sheet was submitted against number of accused persons for commission of offence punishable u/s 466/468/469/471/420/341/383/406/419/120B of the Indian Penal Code.

6. The learned Advocate for the petitioner drew the attention of this Court to the recital in column No. 17 in the report submitted u/s 173 of the Code, which runs as follows:

I submitted prayer before the Ld. Court to direct surety of accd. Minakshi

Senapati to produce her before me for the purpose of investigation and to direct Marriage Registrar, Bwn to allow me to seize the original Marriage Register in which a Registry Marriage was solemnised in between Anupam Samanta & Manisha Hazra on 10.6.02 permission was allowed the surety failed to produce accd. Minakshi Senapati as regards seizure of original Marriage Register it is stated by the Marriage Registrar, Bwn that the same has been deposited in Head Office, Kolkata.

7. It is the contention of the learned Advocate for the petitioner that during the course of investigation attempts were made by the Investigating Officer to collect the original Marriage Register but the same could not be made available to the Investigating Officer on the ground that the Marriage Register during the aforesaid period was deposited in the head office at Calcutta. It is the contention of the learned Advocate for the petitioner that unless such evidence is produced, the entire prosecution will be seriously prejudiced as because the basis of the charge for which the trial is now conducted rests on the Marriage Register. It is clear from the recital in the charge sheet that allegation, which is the subject-matter of offence as disclosed in the FIR is that the petitioner was made to sign on certain documents/papers and subsequently the same was converted into marriage papers after producing the same before the Marriage Registrar. It is also the contention of the petitioner that the petitioner never appeared before the Marriage Registrar and she was impersonated before the Marriage Registrar by some other woman.

8. Section 311 of the Code deals with the power of the Court to summon material witness or to examine person present. Section 311 of the Code runs as follows:

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.

9. Bare reading of the section will show that such power can be exercised by the Court at any stage of enquiry or trial. The very language of the section clearly indicates that the power can be exercised by the Court at any stage of trial before the final delivery of judgment. However, whether the said power shall be exercised shall depend on the fact situation of the case in which such a prayer u/s 311 of the Code is submitted. So far as the present case is concerned, it is evident that in the formal FIR under column 13 it is recorded that the allegation reveals commission of offence of forgery of records or public record for the purpose of cheating and for using as genuine a forged document. The entire allegation rests on the Marriage Register which according to the case of the prosecution was created without the physical appearance of the informant before

the said Marriage Registrar. I have already pointed out that during investigation the said document i.e. the marriage register for the period from 7th May, 2002 to 12th June, 2002 could not be collected by the officer conducting the investigation in spite of his attempt, on the ground that the said register was already dispatched to the head office at Calcutta by the Marriage Registrar at Burdwan. So it is evident that the most important document which the prosecution relies in support of the charge could not be produced during trial. In such contingency the application filed by the petitioner herein u/s 311 of the Code should have been considered by the learned Court below. Learned Advocate for the petitioner in support of his contention has referred to the decision of P. Chhaganlal Daga vs. M. Sanjay Shaw, reported in 2004 SCC (Cri) 183. In this case two Judges Bench of Supreme Court considered a case under the Negotiable Instruments Act where the accused denied service of statutory notice and denied his signature contained in the acknowledgement card produced by the complainant. After completion of evidence and when the case was posted for judgment, the complainant moved the Court u/s 311 of the Code permitting him to produce additional material (postal receipt). The said prayer was allowed by the Trial Court. The Supreme Court held that High Court erred in interfering with the order on the assumption that production of the said document at that belated stage is only to fill up lacuna.

10. The learned advocate for the petitioner also referred to the decision of Supreme Court is Mohanlal Shamji Soni vs. Union of India & Anr., reported in 1991 SCC (Cri) 595, where two-Judges Bench of the Supreme Court Held 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. In order to enable the Court to find out the truth and render a just decision, the statutory provision of section 540 of the old Code (section 311 of the new Code) are enacted. In this case, the Supreme Court also held that section 540 is manifestly in two parts, whereas the word used in the first part is "may". The word in the second part is "shall". In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it "at any stage of enquiry, trial or other proceedings" under the Code to act in one of the three ways, mentioned therein. However, the very width requires corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provision of the Code. The second part, on the other hand, is mandatory and imposes an obligation on the Court of summoning or recalling or reexamining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential in the just decision of the case.

11. The learned Advocate for the petitioner also referred to the decision of the Supreme Court in Rajendra Prasad vs. Narcotic Cell, reported in 1999 SCC (Cri) 1062, where the two Judges Bench of Supreme Court held that a lacuna in the prosecution is not to be equated with the fall out 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 laches or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up. The Supreme Court also held that no party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the Criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

12. In view of the decisions of the Supreme Court as referred to above and in the fact situation of the case, if the matter is considered, then it will be clear that learned Court below approached the matter from a wrong angle. So far as the question that the petitioner filed earlier application but the same was not pressed, it is evident that petitioner explained in the application that earlier application was not in proper form and as the evidence by prosecution was not closed the earlier application was not pressed. In my view, sufficient reason was advanced for not pressing the application and in such circumstances the learned Court below should not have condemned the de facto complainant that she filed the earlier application "whimsically" and did not press the same.

13. So far as the question of filling the lacuna is concerned, the same does not and cannot arise in this case as because the most important document on which the entire prosecution case is based cannot be collected by the Investigating Officer on the ground that the same was already despatched to the head office at Calcutta. Importance of the said document was understood by the Investigating Officer in view of the recital in the charge sheet. Merely because the said document could not be seized on earlier occasion due to inaction on the part of the Investigating Officer, the same does not necessarily mean that this evidence cannot be produced at a subsequent stage. Learned Court below should have considered the application in its proper perspective and should have decided that for the purpose of just decision of the case the marriage register is probably the most important documentary evidence. The main allegation is forgery of public document and public record, which is being tried by the learned Court below and as such the application should not have been rejected on the ground that the High Court on earlier occasion directed expeditious disposal of the case. Direction to expeditious disposal of the case does not necessarily mean that learned Court below shall decide the trial in such hurry that important evidence which is required for just decision of the case would not be allowed to be produced.

14. In view of my above discussion the revisional application is disposed of with the direction that the order dated 11th April, 2008 passed by learned Judicial Magistrate, 3rd Court, Burdwan in G.R Case No. 862 of 2002 is hereby set aside. The learned Court below is directed to allow the application filed on behalf of

prosecution u/s 91/311 of the Code and then to proceed with the trial in accordance with law, as expeditiously as possible.

15. In view of disposal of the revisional application no separate order is required to be passed on application being CRAN No. 1650 of 2008, the same stands disposed of along with the revisional application.

16. I make myself clear that I have not entered into the merit of the trial or the evidence in connection with the trial and the learned Court below shall proceed in terms of the direction passed by this Court without being influenced by any of the observation recorded in the body of the order.

17. Criminal Section is directed to forward a copy of the order to the learned Court below.

18. Criminal Section is also directed to supply urgent photostat copy of the order to the parties as and when applied for.