

(2023) 08 CAL CK 0014
In the Calcutta High Court
Case No : Criminal Revision No. 955 Of 2020

Sanjoy Kumar Saha @ Sanjoy Saha

APPELLANT

Vs

M/S. French Motor Car Company

RESPONDENT

Date of Decision : 09-08-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 311, 313
Negotiable Instruments Act, 1881 — Section 138

Citation : (2023) 08 CAL CK 0014

Hon'ble Judges : Shampa Dutt (Paul), J

Bench : Single Bench

Advocate : Navanil De, Rajeshwar Chakraborty, Soumya Banerjee, Sucheta Banerjee

Final Decision : Dismissed

Judgement

Shampa Dutt (Paul), J

1. The present revision is against an order dated January 27, 2020 passed by the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, in Criminal Motion No. 30 of 2018, thereby allowing the prayer of the complainant to further examine P.W. 1 under Section 311 of the Code of Criminal Procedure and setting aside the order passed by the Court of the Learned Judicial Magistrate, 10th Court at Alipore, South 24 Parganas in connection with Case No. C-8309 of 2008 under Section 138 of the Negotiable Instruments Act now pending before the Court of the Learned Judicial Magistrate, 10th Court at Alipore, South 24 Parganas.

2. The petitioner/accused's case is that the opposite party herein through its authorized representation on December 16, 2008 filed a complaint against the petitioner under Section 138 of the Negotiable Instruments Act before the Court of the Learned Judicial Magistrate, 10th Court at Alipore.

3. The Learned Magistrate after taking cognizance of the case issued summons

upon the petitioner.

4. The petitioner states that on April 30, 2013 plea was recorded and the petitioner pleaded 'not guilty' and claimed to be tried.

5. On July 08, 2016, the petitioner was examined following the provisions of Section 313 of the Code of Criminal Procedure.

6. On March 02, 2017 the learned lawyer for the opposite party filed a petition under Section 311 of the Code of Criminal Procedure.

7. On February 08, 2018 the petition under Section 311 of the Code of Criminal Procedure was taken up for hearing by the Learned Trial Court and the Learned Trial Court was pleased to reject the same.

8. The opposite party preferred a criminal revisional application before the Court of the Learned Additional Sessions Judge, 18th Court, South 24 Parganas, Alipore, challenging the order dated February 08, 2018 passed by the Learned Judicial Magistrate, 10th Court at Alipore.

9. On January 27, 2020 the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, set aside the order under revision and allowed the prayer of the opposite party.

10. The above referred order was communicated to the Learned Trial Court and the next date for further recording of the evidence of P.W. 1 has been fixed on May 19, 2020.

11. Mr. Navanil De, learned counsel for the petitioner has submitted that the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, failed to appreciate that after examination of the accused under Section 313 of the Code of Criminal Procedure if the complainant is allowed to cross-examine the witness further, then such act and/or acts of the complainant would end in filing up the lacunas of the case. As such the impugned order being bad in law is liable to be set aside.

12. It is further submitted that the complainant cannot be allowed to fill up the lacunas of the case after a period of 1 (one) year and as such allowing the complainant to cross examine P.W. 1 on specific questions should not have been allowed by the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas.

13. The power under Section 311 of the Code of Criminal Procedure is to 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.

14. That the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, ought to have taken into consideration that undoubtedly an application filed under Section 311 of the Code of Criminal Procedure must be allowed if

fresh evidence is being produced to facilitate a just decision. However, in the instant case, the learned Revisional Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the petitioner as regards his defence, which tantamount to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C.

15. That the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, by allowing the petition of the opposite party has caused grave miscarriage of justice because of the reason that the Negotiable Instruments Act itself is a very technical act and filling up the lacunas of the case would cause prejudice to the defence of the case. Thus, the impugned order passed by the Learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas, should be set aside.

16. Mr. Soumya Banerjee, learned counsel for the opposite party has submitted that Section 311 of the Code of Criminal Procedure permits such examination till the judgment in a case is delivered.

17. By the order under revision, the Learned Sessions Judge allowed the prayer, which had been rejected by the Learned Magistrate on the ground that, only delay, could not be the ground for rejecting a prayer under Section 311 Cr.P.C.

18. The questions in the petition under Section 311 Cr.P.C. are as follows:-

(i) As per whose instruction, the petition of complaint was drafted? (showing the petition of complaint to the witness).

(ii) Have you signed on each page of the Complaint?

(iii) Is these your Signatures?

(iv) What document you intend to tender before the Ld. Court as per your deposition dated 24/02/2016 regarding resolution from your company which empowers you to take all legal steps against the accused on behalf of the complainant company?

(v) Who had certified the said document as true copy?

(vi) Had the said document (Resolution) been signed on the said copy in your presence?

(vii) Do you know his signature?

(viii) What documents you intend to tender before the Ld. Court as per your deposition dated 24/02/2016 regarding responsibility of accused?

(ix) Whom signature bear those documents?

(x) Do you know these signatures?

(xi) Can you tender any copy of complaint, dated 12/05/2008 which was lodged

against accused before Police Station? When it was lodged?

(xii) Who signed the documents?

(xiii) Do you know his signature?

19. The judgment of the Supreme Court in *Natasha Singh vs. Central Bureau of Investigation*, Criminal Appeal No. 709 of 2013, on May 8, 2013, the Court held:-

"18. Undoubtedly, an application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned Trial Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW.40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case."

20. The Supreme Court in *Varsha Garg vs. The State of Madhya Pradesh* in Criminal Appeal No. 1021 of 2022 dated 08.08.2022 held as follows:-

"28. Having clarified that the bar under Section 301 is inapplicable and that the applicant is well placed to pursue this appeal, we now examine Section 311 of Cr.P.C. Section 311 provides that the Court may :

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and

(ii) Recall and re-examine any person who has already been examined. This power can be exercised at any stage of any inquiry, trial or other proceeding under the Cr.P.C. The latter part of Section 311 states that the Court – shall

summon and examine or recall and re-examine any such person – if his evidence appears to the Court to be essential to the just decision of the case. Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively to achieve the intent of the statute to aid in the discovery of truth.

29. The first part of the statutory provisions which uses the expression – may postulates that the power can be exercised at any state of an inquiry, trial or other proceeding. The later part of the provision mandates the recall of a witness by the Court as it uses the expression – 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. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

30. A two Judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Procedure Code, 1898 observed :

16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision – either discretionary or mandatory – depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice. Justice S Ratnavel Pandian, speaking for the two Judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the – evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. In that context the Court observed :

18.....Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by 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 rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

31. Summing up the position as it obtained from various decisions of this Court, namely *Rameshwar Dayal v. State of U.P.*, *State of W.B. v. Tulsidas*, *Jamatraj Kewalji Govani v. State of Maharashtra*, *Masalti v. State of U.P.* , *Rajeswar Prosad Misra v. State of W.B.* and *R.B. Mithani v. State of Maharashtra*, the Court held :

27. The principle of law that emerges from the views expressed by this Court in the above decisions is that 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. The power of the court is not constrained by the closure of evidence.

Therefore, it is ample clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quit to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.....”

21. The evidence sought to be brought in by the petition under Section 311 Cr.P.C. in the case before the Trial Court is essential for a just and proper adjudication in this case. The evidence if permitted to be adduced, will also not prejudice the accused/petitioner in any manner whatsoever.

22. The order under revision dated 27.01.2020 in Criminal Motion No. 30 of 2018 passed by the learned Additional Sessions Judge, 18th Court, Alipore, South 24 Parganas being in accordance with law requires no interference by this Court and is thus affirmed.

23. The revisional application being CRR 955 of 2020 is accordingly dismissed.

24. All connected applications, if any, stands disposed of.

25. Interim order, if any, stands vacated.

26. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

27. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.