

(2005) 12 CAL CK 0058
In the Calcutta High Court
Case No : C.R.R. No. 1908 of 2005

Sharmistha Gon

APPELLANT

Vs

Habib Ahmed and Another

RESPONDENT

Date of Decision : 16-12-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 107, 120B, 34, 406, 420

Citation : (2006) 2 CHN 337

Hon'ble Judges : P.N. Sinha, J

Bench : Single Bench

Advocate : Ashok Kumar Mukherjee and Krishnendu Bhattacharjee, for the Appellant; Ganesh Chandra Maity, Chandreyi Alam, Md. Aslam Khan and Runu Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Sinha, J.—This revisional application has been filed by the accused petitioner assailing the order dated 7.6.05 passed by the learned Judicial Magistrate, 2nd Court, Arambagh in Case No. C.R. 245 of 1998 thereby directing production of the original marriage register from the office of the Birth, Death and Marriage Registrar, West Bengal for proving a marriage certificate allegedly issued by P.W. 9 Mira Mukherjee, the Marriage Registrar who refused to identify her signature on the Marriage Registration Certificate produced in Court.

2. Mr. Ashok Mukherjee, learned Senior Advocate appearing for the accused petitioner submitted that the order of the learned Magistrate dated 15.9.01 framing charges against this accused petitioner and another was challenged before this Court in revisional application being C.R.R No. 2390 of 2001. This Court directed that there is no material to frame charge against the other accused Abhijit Das u/s 406 or 420 of Indian Penal Code (in short IPC) but elements of Section 494/ 107 of IPC are against him and in view of order of this

Court the learned Magistrate altered the charge and framed charge u/s 494/107 of the IPC against the accused Abhijit Das. Charge u/s 494/406/120B of IPC framed against the present accused petitioner was maintained and was not altered. During the trial that followed the Marriage Registrar Smt. Mira Mukherjee did not appear to give evidence in Court. Thereafter, the learned Magistrate by judgment and order dated 13.6.02 acquitted the accused persons. The opposite party, the complainant challenged the order of acquittal in an appeal being C.R.A No. 232/02. The Hon'ble Justice G.C. De, by his judgment and order dated 23.2.04, set aside the order of acquittal and sent back the case on remand for retrial.

3. Mr. Mukherjee submitted that this Court at the time of remanding the case for retrial directed that after keeping the evidence on record the learned Magistrate shall give opportunity to the complainant to prove the documents which are already on record and to mark those as exhibits in accordance with law. The learned Magistrate shall take appropriate steps found necessary u/s 311 of the Criminal Procedure Code (in short Code) for just decision of the case. Appropriate opportunity is to be given to the defence for adducing defence witness, including document, if found necessary. If any of the witness produced for further evidence liberty is to be given to the parties for cross-examination and on completion of evidence and after examination of accused u/s 313 of the Code and after production of witnesses u/s 311 of the Code and after defence evidence, argument is to be heard and thereafter learned Trial Court shall pronounce judgment. This Court in C.R.A. No. 232/02 made it clear that opportunity should be given to the complainant to prove the documents which are already on record and there was no scope to introduce any new document. But the complainant now wants to introduce a new document, that is, original Marriage Register. Mira Mukherjee is a new witness and she cannot be examined and this Court while disposing of C.R.A. No. 232/02 did not give any liberty to complainant to examine any new witness-After order of acquittal and on the basis of order of this Court remanding back the matter to Trial Court for fresh decision, the witness Mira Mukherjee cannot be examined during retrial. She is completely a new witness and cannot be permitted to be examined by complainant for filling in lacuna of prosecution case. The order of the learned Magistrate is wholly illegal and against the direction of this Court. The said order should be set aside and the evidence of Mira Mukherjee should be expunged and the order of the learned Magistrate directing production of original marriage register should be set aside.

4. Mr. Mukherjee further submitted that marriage certificate is one document and its description and classification is different, marriage register and marriage register book are different documents and these are not the same documents like marriage certificate. If the learned Magistrate now permits the complainant to produce original marriage register and Marriage Register book it would violate the order of this Court. Besides that, the complainant cannot avail of opportunity to examine any new witness u/s 311 of the Code. If the Court finds that any new

evidence is necessary, the Court may summon such person exercising his jurisdiction u/s 311 of the Code and can take such evidence or examine such witness as a Court witness. The order of the learned Magistrate is, therefore, wholly illegal and against the direction of this Court and accordingly it should be set aside.

5. Mr. Ganesh Chandra Maity and Mrs. Chandreyi Alam, learned Advocates appearing for the opposite party complainant submitted that in the trial 8 witnesses were examined and 36 documents came before the Court. Strange enough, the learned Magistrate did not mark any document as exhibit and did not admit those documents into evidence. The order dated 20.1.05 passed by the learned Magistrate was not challenged. In the order dated 20.1.05 the learned Magistrate after considering the direction of this Court in C.R.A. No. 232/02 and C.R.A.N. No. 1800/04 passed the direction that the certificate of alleged first marriage requires to be proved by examining the Marriage Registrar Mira Mukherjee. In the said order it was also indicated that this accused petitioner affirmed an affidavit on 26.1.96 before Notary Public Tapan Bera where she declared herself that after conversion to Islam she became Ruksar Habib in place of Sharmistha Gon. In the said affidavit Advocate Anil Kr. Bera identified her. Accordingly, the learned Magistrate issued summons against the Marriage Registrar Mira Mukherjee, the Advocate Anil Bera and Notary Public Tapan Bera for their examination in Court as witnesses.

6. The petitioner instead of challenging the said order dated 20.1.05 has now challenged a much later order and accordingly the revisional application has no legal force. The marriage certificate was produced by the complainant and it was in the record but, due to inadvertence or non-application of mind of the learned Magistrate it was not admitted in evidence and was not marked exhibit. In order to prove the said marriage certificate the evidence of the Marriage Registrar is necessary. This Court in C.R.A. No. 232/02 passed the direction for giving opportunity to complainant to prove the documents which are already on record. The marriage certificate which was on record was shown to the Marriage Registrar Mira Mukherjee but, for reasons unknown to the complainant, she to some extent declined to identify her signature on the marriage certificate. The Marriage Registrar Mira Mukherjee in her evidence stated that unless the original marriage register is produced it is difficult for her to identify her signature on the marriage certificate. Accordingly, the learned Magistrate was compelled to pass order on 7.6.05 for production of the original marriage register from the office of the Birth, Death and Marriage Registrar, West Bengal. In order to prove the marriage certificate which is already on record, Marriage Registrar is to be examined and when she declined to identify her signature on the marriage certificate production of original marriage register is necessary. It is not a new document and production of marriage register has become necessary to prove the marriage certificate which document complainant produced much earlier in the Court and which document is required to be proved in view of direction of this Court in C.R.A. No. 232/02. The order of the learned Magistrate being

correct, legal and proper requires no interference.

7. After hearing the submissions of the learned Advocates for the parties, I find that the O.P. No. 1 Habib Ahmed lodged the complaint against the petitioner and one Abhijit Das arraying them as accused persons for alleged offence u/s 494/406/420/34 of the Indian Penal Code (in short IPC). The complainant's case was that, he was earlier married with the accused petitioner Sharmistha Gon out of love between them and the marriage was solemnised in view of provisions of Special Marriage Act on 29.11.96. Thereafter, the accused Sharmistha Gon left his house misappropriating jewellery and other valuables and started mixing with the other accused Abhijit Das and thereafter, she married Abhijit Das on 18.9.97 under the Special Marriage Act. When the complainant came to know about second marriage of his wife Sharmistha Gon, he lodged the complaint against both the accused persons. Against the order of framing charge by the learned Magistrate the accused petitioners moved this Court. This Court in a revisional application bearing No. C.R.R.2390/01 indicated that there is no material for framing charge against accused Abhijit Das u/s 406 or 420 of IPC but indicated that there are materials of Section 494/107 of IPC against him. Charge u/s 494/406/120B of IPC against the present accused petitioner was maintained. The trial that followed thereafter ended in acquittal of both the accused persons by judgment and order dated 13.6.02.

8. It is evident that challenging the order of acquittal the O.P. complainant filed Criminal Appeal No. 232/02 in this Court. This Court disposed of the appeal on 23.2.04 and thereafter there was another order on the basis of an application on 14.12.04. It was indicated by this Court that there was no scope of adducing fresh evidence by complainant. Liberty was granted to the complainant to prove the documents which are already on record and to mark the documents as exhibits in accordance with law. There was also indication in the order that the accused would be entitled to cross-examine the witnesses. There was further indication that learned Magistrate shall take appropriate steps u/s 311 of the Code, if necessary for just decision of the case.

9. Proper construction of the directions of this Court passed in C.R.A. No. 232/02 would reveal that this Court prevented introduction of any new document and, complainant was given opportunity to prove the documents which are already on record. The complainant earlier during trial produced both the marriage certificates showing his marriage with the present accused petitioner and also the marriage certificate showing marriage between accused petitioner and Abhijit Das. If the accused petitioner gave consent that the marriage certificates may be admitted in evidence without objection, the present problem could have been avoided and no question of examination of Marriage Registrar would have been there before the learned Magistrate. In order to prove the marriage certificates there was need of examination of Marriage Registrar Mira Mukherjee. Mira Mukherjee was a witness for complainant but during the trial she did not appear in Court for giving evidence. The marriage certificate was in the record but, the

learned Magistrate did not mark it as exhibit and did not admit the said document into evidence. In order to prove the marriage certificate showing the marriage between complainant and accused Sharmistha Gon evidence of Marriage Registrar Mira Mukherjee was necessary.

10. It should be remembered that this Court in C.R.A. No. 232/02 gave liberty to the learned Magistrate to consider jurisdiction of Section 311 of the Code, if it is necessary for just decision of the case. Scope of Section 311 of the Code is limited, but very wide, and it can be exercised at any stage before pronouncement of judgment. The only criteria is whether fresh evidence or further evidence u/s 311 of the Code is necessary for the just decision of the case. In the present complaint the main allegation of the complainant is that the accused petitioner Sharmistha Gon is his first wife with whom he was married on 26.11.96. His case is that his wife subsequently developed intimacy with one Abhijit Das and left his house taking away jewellery and other articles and subsequently she married that Abhijit Das. His specific case is that the subsequent marriage of his wife with Abhijit Das was also under Special Marriage Act and there was marriage certificate in both the marriages. In order to prove the marriage certificates which were already on record of the learned Magistrate examination of Marriage Registrars as witnesses have become essential for just decision of the case. Accused Sharmistha Gon did not give consent for admission of the marriage certificates into evidence and, she definitely cannot agree to the admission of the marriage certificates into evidence to put herself into peril. Therefore, in view of the direction of this Court passed in C.R.A. No. 232/02 in order to prove the documents, complainant must be given opportunity to examine the Marriage Registrar. For that purpose P.W. 9 Mira Mukherjee, one of the Marriage Registrars was examined and the marriage certificate issued by her was produced before her in Court at the time of her evidence. But, for the reasons best known to her P.W. 9 declined to identify her signature on the marriage certificate which she herself issued after registering the marriage. She stated categorically that unless the original marriage registers are produced before her she cannot properly identify her signature. The learned Magistrate thereafter rightly applied his mind and very rightly exercised jurisdiction to summon for production of the original marriage register to prove the marriage certificate.

11. There was one affidavit affirmed by the accused petitioner before the Notary Public and that affidavit was in the record of the learned Magistrate, but it was not admitted in evidence. Learned Magistrate rightly summoned the Notary Public and the learned Advocate who identified the present accused petitioner before Notary Public at the time of affirming affidavit to give evidence in Court for proving the said affidavit. Question of summoning the Notary Public and the learned Advocate would have been avoided, if the present accused petitioner admitted that it was the said affidavit affirmed by her. This Court is sure that the present accused will not admit the affidavit, and naturally, complainant should be given opportunity to prove the said affidavit and must summon the persons in

whose presence the affidavit was affirmed and before whom it was affirmed and who identified her at the time of affirmation of affidavit.

12. The aim, object and scope of Section 311 of the Code is to allow examination of material witness or to summon witness and to produce document before Court which appears to the Court to be essential for the just decision of the case. Such a power can be exercised by the learned Magistrate at any time before pronouncement of the judgment. That power can be exercised even after completion of argument but before delivery of judgment. Very recently in a reported case u/s 138 of the Negotiable Instruments Act the complainant, when the case was posted for judgment, wanted to produce additional material which was a postal receipt in the said case. It was allowed by the learned Magistrate but in revision the order of the learned Magistrate was set aside by the High Court. The Hon''ble Supreme Court interfered into the matter and held that grant of permission by the learned Magistrate to adduce additional material even at the stage when case was pending for judgment was proper and within powers of the Court as the said document was necessary for the just decision of the case. The Supreme Court made it clear that which is relevant before the Court is whether the said evidence or material or document is necessary for just decision of the case. The Supreme Court expressed the above view in *P. Chhaganlal Daga v. M. Sanjay Shaw* reported in 2004 SCC 183.

13. Section 311 of the Code nowhere lays down that when any witness is summoned by a Court exercising jurisdiction under this section the said witness must be examined by Court as a Court witness. Scope and object of Section 311 of the Code is to allow material witness or valuable document to be introduced into evidence for the just decision of the case. Exercising power u/s 311 of the Code, the Court may allow either the complainant or prosecution to bring material evidence and may allow accused also to introduce important evidence for just decision of the case. Court may also summon any person as a Court witness for just decision of the case to remove ambiguity, if the Court finds that some grey portion is there in evidence over which neither prosecution nor accused led proper evidence.

14. When the Marriage Registrar Mira Mukherjee (P.W. 9) denied to identify her signature it was incumbent upon the learned Magistrate to summon the original marriage register for proving the marriage certificate. In my opinion, in the present case u/s 494/ 420 of IPC examination of Marriage Registrar, production of original marriage register and proof of the marriage certificates are necessary and the same would bring proper light to the Court for the just decision of the case. The learned Magistrate rightly applied his mind and exercised his jurisdiction appreciably well. There would have been denial of proper justice, if the learned Magistrate did not examine the Marriage Registrar to prove the marriage certificate and did not call the original marriage register to prove the marriage certificate or certificates.

15. In view of the discussion made above I find no material at all in the

revisional application. It is nothing but an attempt to drag and delay disposal of the case. The revisional application having no merit fails and is dismissed.

16. All interim orders passed earlier stand vacated.

17. Learned Judicial Magistrate, 2nd Court, Arambagh is directed to proceed with the trial as expeditiously as possible and to dispose of the same preferably within four months from the date of communication of this order without granting any undue adjournment to either of the parties.

18. I make it clear that the observations made above are tentative and made only for the purpose of disposal of the present revisional application and the learned Magistrate would arrive at his own decision on the basis of evidence and materials before him without being influenced in any way by the observations of this Court.

19. Criminal Section is directed to send down the Lower Court Record along with a copy of this order to the learned Judicial Magistrate, 2nd Court, Arambagh for information and necessary action.

Later:

20. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.