

Ashish Services Vs. State and ors.

Ashish Services Vs. State and ors.

SooperKanoon Citation : sooperkanoon.com/1099340

Court : Delhi

Decided On : Nov-26-2013

Judge : Sunita Gupta

Appellant : Ashish Services

Respondent : State and ors.

Advocate for Def. : Mr. Navin K. Jha

Advocate for Pet/Ap. : Mr. M.A. Niyazi

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI DATE OF DECISION:

26. h NOVEMBER, 2013 + CRL.M.C. 305/2013 ASHISH SERVICES Through:
Petitioner Mr. M.A. Niyazi and Mr.Manish Kumar, Advocates versus STATE &
ORS. Through: Respondents Mr. Navin K. Jha, APP for the State. None for R-
2 & 3. CORAM: HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: SUNITA GUPTA, J.

1. This is a petition under Section 482 of Code of Criminal Procedure, 1973 (for short Cr.P.C.) for setting aside the order dated 6th October, 2012 passed in complaint under Section 138 NI Act, being C.C. No.7770/2002 titled as M/s Ashish

Services v. Laxmi Petroleum pending in the Court of Ms. Ankita Lal, learned Metropolitan Magistrate, Saket Courts, Delhi whereby application under Section 311 Cr.P.C. moved by the petitioner/complainant was dismissed.

2. The petitioner is a partnership firm which was running a petrol pump at 31/3 Village Behlulpur Khaddar, outer ring road, opposite ISBT Sarai Kale Khan, Delhi in the name of M/s Ashish Services and deals in petrol and petroleum products. A complaint under Section 138 of Negotiable Instruments Act, 1881 (for short NI Act) was filed by the petitioner in the name of partnership firm through its Power of Attorney holder Mr. Rohit Jain with respect to bouncing of cheque amounting to Rs.14,70,053/-. Mr. Rohit Jain was duly authorized by the partnership firm vide Special Power of Attorney dated 22nd July, 2008 to file a complaint. During cross-examination of Mr. Rohit Jain it was revealed that due to inadvertence and oversight SPA Ex.CW1/1 was not notarized. After the cross-examination of the attorney holder the petitioner closed its evidence. Statement of respondent was recorded under Section 313 Cr.P.C. The respondent sought time to lead defence evidence, however, on the next date respondent closed its evidence without leading any defence evidence. The matter was fixed for final arguments. In order to avoid any technical difficulty, petitioner moved an application under Section 311 Cr.P.C. seeking an opportunity for further additional evidence in the form of evidence of Nishi Gupta (one of the partners) with respect to the power of attorney dated 22nd July, 2008 and another special power of attorney dated 5th September, 2011 duly notarized and ratifying the earlier power of attorney.

3. The application was, however, dismissed by learned Metropolitan Magistrate with the observation that the application has been made only to fill lacuna in the prosecution. Feeling aggrieved by the dismissal of the application, a revision was preferred, however, it was submitted that the impugned order being interlocutory order, therefore, same was barred under Section 397(2) Cr.P.C. After seeking liberty to take appropriate remedies, the revision was withdrawn and the present petition has been filed challenging the impugned order inter alia on the ground that the procedural errors can be rectified at any stage. No prejudice would be caused to the respondent if an opportunity is granted to the petitioner to bring on record new power of attorney ratifying the earlier power of attorney. Hence this petition.

4. Counsel for respondent No.2 had appeared on 26th July, 2013, however, none appeared on his behalf on 6th November, 2013 when the matter was listed for hearing.

5. I have heard Mr. M.A. Niyazi, learned counsel for the petitioner.

6. Application under Section 311 Cr.P.C. was dismissed by learned Trial Court primarily on the ground that application of this kind cannot be used to fill lacuna.

7. Section 311 Cr.P.C provides for power to summon material witness, or examine person present. This Section 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.

8. A bare perusal of this Section goes to show that at any stage of proceedings, the Court has ample power to summon and examine a person as a witness or recall or re-examine any person already examined.

9. It is stated by learned counsel for the petitioner that by inadvertence power of attorney remained to be notarized, thereafter, by virtue of application under Section 311 Cr.P.C. the petitioner wanted to place the same on record the fresh power of attorney ratifying the earlier power of attorney executed in favour of Mr. Rohit Jain and to examine the partner of the petitioner and to prove this fact. Reliance was placed on *Grafitek International v. K.K. Kaura & Others* 96 (2002) DLT385 for submitting that merely because power of attorney is not duly notarized does not mean that the concerned person was not authorized to institute suit. Importance of power of attorney without notarization cannot be undermined. Reliance was also placed on *Rajendra Prasad v. Narcotic Cell* (1999) 6 SCC110 for submitting that oversight or mistake during conducting of case cannot

be understood as lacuna and so can be corrected.

10. Application under Section 311 Cr.P.C. was primarily dismissed by the learned Trial Court on the ground that application of this section cannot be used to fill up lacuna and *Grafitek* (supra) does not vouch for the argument that previous power of attorney which was not duly notarized can be ratified by filing fresh power of attorney.

11. Dealing with the aspect of lacuna in prosecution case, in *Rajendra Prasad* (supra) it was observed as under:

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case'. A lacuna in 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 proved. A corollary of any such latches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. 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.

9. The very same decision *Mohanlal Shamji Soni v. Union of India* which cautioned against filling up lacuna has also laid down the ratio thus: (AIR Headnote) It is

therefore clear 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.

10. Dealing with Corresponding Section in the old Code Section 540. Hidayatullah J speaking for a threejudge bench of this Court had said in *Jamatraj Kewalji Govani v. The State of Maharashtra* MANU/SC/0063/1967 :

1968. riLJ231 as follows:

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage or 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. In other words, where the court exercise the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case.

11. Chinnappa Reddy, J.

has also observed in the same tone in *Ram Chander v. State of Haryana* 1981 CriLJ609.

12. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.

12. In view of the above, the mere fact that it was discovered by complainant after cross-examination of this witness that power of attorney was not notarized which led to the filing of the present application, it cannot be said that the Court cannot exercise power of re-summoning the witness or allowing the power of attorney ratifying the earlier power of attorney to be placed on record because it is settled law that procedural law is handmade of administration of justice and should not be allowed to come in the way of doing substantial justice to the parties. Moreover, a perusal of the impugned order reflects that even counsel for the accused had no objection to the filing of fresh power of attorney, his only objection was regarding ratifying of previous power of attorney which remained to be notarized.

13. The complaint in question has been filed for dishonor of cheque of Rs.14,70,053/- given by the accused. The complainant does not wish to lead any further evidence regarding the main substratum which may go to the root of the matter or may cause any prejudice to the respondent. He only wants to rectify the procedural defect i.e. ratification of the power of attorney which was not notarized.

14. In *Grafitek* (supra) it was held as under:

9. Merely because the power of attorney is not duly notarised does not mean that the concerned person was not authorised to institute the suit. Notarization raises presumption as to its authentication and no more. Notarization of power of attorney is a matter of procedure and raises the presumption of authority of the person to institute the suit. In other words it does not mean that power of attorney executed in favor of a particular person but not duly notarised does not confer power upon the person to institute the suit. The objection taken by the learned counsel is that the said power of attorney does not bear any authentication by a Notary Public and therefore Mr. Maggon had no authority to file the present suit and as a consequence such a suit was never properly instituted.

10. The importance of power of attorney without Notarization cannot be undermined but at the same time if such a defect is removed subsequently during the pendency of the suit and that too is followed by ratification of the authority of a person who has been authorized to institute the suit, it is not such a fatal infirmity that would hit at the maintainability of the suit itself. XXX XXX XXX¹³ However,

any provision which governs the procedure should not be subjected to strict legal interpretation but should be interpreted in a manner so as to meet the interests of justice and not scuttle them.

15. In view of the above and in the interest of justice, the impugned order is set aside and the petition is allowed, subject to payment of costs of Rs.10,000/- to be paid to the respondent.

16. Parties are directed to appear before the Trial Court on 9th December, 2013.
SUNITA GUPTA (JUDGE) NOVEMBER26 2013 AK

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com