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Court : Punjab and Haryana

Decided On : Feb-01-2012

Judge : Rameshwar Singh Malik

Appeal No. : Criminal Misc. No. M-10806 of 2010

Appellant : Surinder Singh

Respondent : Chajju Singh

Advocate for Def. : Mr. Anish Garg

Advocate for Pet/Ap. : Mr. Manu K. Bhandari

Judgement :

Rameshwar Singh Malik, J.

Oral:

The instant petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') has been filed by the petitioner against order dated 12.3.2010 (Annexure P-7) passed by the learned Judicial Magistrate Ist Class, Patiala, vide which the application filed by the petitioner for recalling of respondent-complainant, Chajju Singh for the cross examination, had been rejected.

Facts first. Succinctly from the warps and wefts of the record of the case, for deciding the issue involved, the following facts can be woven, from the point of

view of this Court. Chajju Singh, respondent, is the original complainant. He filed his complaint dated 20.4.2006 (Annexure P-1) under Section 138 of the Negotiable Instruments Case Act, 1988 ('the Act' for short) and under Section 420 IPC ('IPC' for short). During the pendency of the complaint, the parties to the complaint entered into an out of Court settlement, by way of compromise dated 22.4.2007 (Annexure P-2). It is the further pleaded case of the petitioner that when the respondent-complainant was cross examined as CW-1 in the Court on 16.3.2009, certain documents relating to the real controversy including the above said compromise, could not be put to the complainant during his cross examination, due to inadvertence on the part of the learned counsel who was previously representing the accused-petitioner.

Faced with the above said unwarranted situation, which came to be created because of the inadvertent mistake, noted above, on the part of the previous learned counsel, petitioner moved an application (Annexure P-5), invoking the powers of learned trial Magistrate for recalling Chajju Singh, complainant-respondent, for his further cross examination. The purpose was to enable the petitioner-accused to put the remaining documents including the above said compromise dated 22.4.2007 to Chajju Singh in his further cross examination with a view to search for the truth. Chajju Singh, complainant-respondent, filed his reply (Annexure P-6). After hearing the parties, the learned trial Magistrate dismissed the application of the petitioner, vide impugned order dated 12.3.2010 (Annexure P-7).

Feeling aggrieved against the impugned order dated 12.3.2010 (Annexure P-7), the petitioner has approached this Court invoking the inherent jurisdiction under Section 482 Cr.P.C., by way of the present petition.

Mr. Manu K. Bhandari, learned counsel for the petitioner vehemently submits that the learned trial Magistrate has failed to appreciate the true facts of the case while passing the impugned order erroneously rejecting the application of the petitioner illegally refusing to exercise the jurisdiction vested in him. He further submits that in the given facts of the present case, the respondent-complainant was not going to be prejudiced in any manner as he did not specifically deny the factum of

compromise. The petitioner ought not to have been made to suffer for the lapse, if any, on the part of his counsel.

Concluding his arguments, learned counsel for the petitioner submits that the impugned order was a non speaking and cryptic one because of which the impugned order was liable to be set aside.

Per contra, Mr Anish Garg, learned counsel for the respondent, submits that the application moved by the petitioner was filed only to delay the proceedings before the learned trial court and the learned trial court rightly passed the order. He further submits that learned trial court has rightly held that the alleged compromise dated 22.4.2007 was totally irrelevant. Finally, he submits that the present petition was liable to be dismissed, being bereft of any merits.

I have heard the learned counsel for the parties and with their able assistance have gone through the record of the case.

After giving thoughtful consideration to the contentions raised and to the peculiar facts and circumstances of the present case, this Court is of the considered opinion that the impugned order is not sustainable in law and the present petition deserves to be allowed, for the reasons to be recorded hereinafter.

The basic question that falls for consideration of this Court is as to what is the object and scope of Section 311 Cr.P.C. It is appropriate to reproduce Section 311 Cr.P.C. and the same reads as under:-

"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."

A plain reading of section 311 Cr.P.C. leaves no manner of doubt that the legislative intent to grant wide powers to the Court was to achieve the laudable object of just decision of the case. Section 311 Cr.P.C confers a wide discretion to

the Court that it may, at any stage of any inquiry, trial or other proceeding under the Code, summon any person as a witness or recall and re-examine any person already examined, as the exigency of justice may require. One needs not to go too far to search another equally important aspect of this power which is complementary to it.

This power is conferred on the Court by Section 165 of the Indian Evidence Act, the relevant part of which reads as under:

"Judge's power to put question or order production.- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question".

The combined reading of these two sections, reproduced above, would show that wide powers have been conferred on the Court to exercise its discretionary jurisdiction for advancing the cause of justice.

The Hon'ble Supreme Court, while interpreting the scope of Section 540 of the old Cr.P.C. and Section 311 of the new Cr.P.C., being almost the reproduction thereof, in the case of *Jamatraj Kewalji Govani Vs. State of Maharashtra* (1967) 3 SCR 415, observed as under, in para 9, 10 and 14 of the judgment:-

"9. To begin with, we do not accept as sound the argument that Chapter 21 must limit the powers under Section 540. Offences under the Code of Criminal Procedure are tried in different ways according to their gravity. There are thus trials of summons and warrant cases by Magistrates, trials before High Courts and Courts of Session and summary trials. All these trials have their procedure laid down from one step to another till the stage is reached for acquittal or conviction. If the arguments advanced on the basis of the procedure laid down in Chapter 21 is accepted there would be no room for the exercise of the power under Section 540 because it would always be impossible to fit it into any chapter without doing

violence to the sequence established there.

10. Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of three ways: (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. This was laid down by Tindal, C.J, in words which are oft-quoted:

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown."

There is, however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision. This power is exercisable at any time and the Code of Criminal Procedure clearly so states. Indeed as stated by Avory J. In *Rex v. Dora Harris* (1927) 2 KB 587 at 594.

"The cases of Reg. V. Chapman (8 C and P. 558) and Reg. V. Holden (8 C and P. 606) establish the proposition that the presiding judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, if in his opinion this course is necessary in the interests of justice. It is true that in none of the cases has any rule been laid down limiting the point in the proceedings at which the judge may exercise that right."

14. It would appear that in our 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. In other words, where the court exercises 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. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

The cardinal principle of law that emerges from the observations of the Hon'ble Supreme Court, noted above, is that when any party to the proceedings points out the necessity of some more evidence to be taken, then the Court must exercise its discretionary powers in the given facts and circumstances of the case. The discretionary power, however, is to be exercised sparingly, keeping in view the principle underlying this provision, to discover and to obtain appropriate proof of relevant facts which is required for doing complete and substantial justice between the parties.

Section 311 Cr.P.C. came for interpretation before the Hon'ble Supreme Court in MohanlalShamji Soni Versus Union of India and another 1991 Supp (1) SCC 271. Observations made by the Hon'ble Supreme Court, in para 7, 8, 9 and 10 of this judgment, can be aptly followed and the same are as under:

7. Section 540 was found in Chapter XLVI of the old Code of 1898 under the heading "Miscellaneous". But the present corresponding Sections 311 of the new

Code is found among other Sections in Chapter XXIV under the heading 'General Provisions as to Enquiries and Trials'. Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old Section. This section is manifestly in two parts. Whereas the word 'used' in the first part is 'may' the word used 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, namely,

- (1) to summon any person as a witness, or
- (2) to examine any person in attendance, though not summoned as a witness, or
- (3) to recall and re-examine any person already examined.

8. The second part which is mandatory imposes an obligation on the Court-

- (1) to summon and examine, or
- (2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is

left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and 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 sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavorable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering 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. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

The Hon'ble Supreme Court of India, also referred to the various analogous provisions in the Civil Procedure Code, which enables the Civil Court to summon witnesses and examine them in the interest of justice. A reference has been made to Order 10 Rule 2, Order 10 Rule 14 and Order 18 Rule 17 of the Civil Procedure Code, in para 14 of the judgment in Mohanlal Shamji (supra), to emphasis that powers of the Court are discretionary and wide.

The next celebrated judgment of the Hon'ble Supreme Court, on the scope of the powers of the Court under Section 311 Cr.P.C., is *ZahiraHabibullah Sheikh Versus State of Gujarat* (2006) 2 SCC 374. The Hon'ble Supreme Court, in 23 of the judgment, observed as under:-

"It was significantly said the law, to be just and fair has to be seen devoid of flaw. It has to keep promise to justice and it cannot stay petrified and sit non-challantly. The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection loose hope (See *Jennison v. Backer*, (1972)(1) All ER 1006). Increasingly, people are believing as observed by SALMON quoted by Diogenes Laertius in "Lives of the Philosophers" laws are like spiders' webs: if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away". Jonathan Swift, in his "Essay on the Faculties of the Mind" said in similar lines:"Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through."

Hon'bleSupreme Court laid down the law on the subject, in para 25 and 26 of the judgment, in the following terms:-

25. "The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, 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 any one as a witness, or (b) to examine any person present in 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 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.

26. 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 for 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 Magistrates to issue summons to any witness at any stage of such proceedings, trial and enquiry. In section 311 the significant expression that occurs is "at any stage of 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."

The observations made by the Hon'ble Supreme Court, in para 29 and 37 of the judgment, are also very relevant and the same are as under:-

29. "Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of 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.

37. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

The law laid down by the Hon'ble Supreme Court in the judgment referred above, has been reiterated in long series of judgments, at later points of time, including in the cases of Iddarand Others Versus Aabida and another (2007) 11 SCC 211, Godrej Pacific Tech. Limited Versus Computer Joint India Limited (2008) 11 SCC 108 and Hanuman Ram Versus State of Rajasthan and others (2008) 15 SCC 652.

Keeping in view this legal background, let us now turn to the challenge posed by the petitioner in the present petition. This Court has found it to be a fit case for exercising its inherent jurisdiction under Section 482 Cr.P.C. The inherent powers of the Court, whenever and where ever provided in any statute, are meant to be exercised to secure the ends of justice and for advancing the cause of justice. It is also the settled principle of law that whenever the technicalities and substantial justice are pitted against each other, it is always the substantial justice which is to be preferred.

So far as the fact situation of the present case is concerned, the complainant had not denied the material fact that the parties to the litigation, have entered into an out of Court settlement, in the form of compromise. Once that is so, the technicalities cannot be allowed to stand in the way of doing substantial justice between the parties. So far as the belated application of the petitioner, as alleged by the complainant, is concerned, it is altogether immaterial for the simple but strong reason that Section 311 Cr.P.C. empowers the Court to invoke its inherent powers at any stage, so long as the criminal proceedings are going on before the

Court, irrespective of any limitation or prohibition. This is the object and scope of Section 311 Cr.P.C. It needs no emphasis that an inquiry or trial in a criminal proceeding comes to an end only when the judgment is pronounced. Thus, till the trial Magistrate is seized of the matter and the order or judgment is pronounced, he enjoys the discretion to invoke his inherent powers under Section 311 Cr.P.C., at any stage of the criminal trial.

Section 165 of the Indian Evidence Act, as noticed above, also comes to the aid of the trial court. Section 311 Cr.P.C and Section 165 of the Indian Evidence Act, put together, clearly spell out that both these Sections aim at widest possible terms and do not limit discretion of the Court in any way. However, at the same time, it is also to be noted that the discretionary powers are expected to be exercised by the Court judiciously and with circumspection, as the exigency of the justice requires.

In view of the facts and circumstances of the present case, coupled with the reasons, aforementioned, it is held that the impugned order dated 12.3.2010, passed by the learned trial Magistrate, suffers from patent error of law. The learned trial court ought to have allowed the application of the petitioner. That being the factual and legal position, the instant petition is allowed, the impugned order dated 12.3.2010 (Annexure P-7) is set aside and application of the petitioner for recalling the complainant-respondent, is accepted, however, with no order as to costs.

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