In re V.Mahadevan, 1964(2) Mad.L.J.587.

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Dec. 7, 2006

Citation: (2007) 1 RCR(Criminal) 992

Hon'ble Judges: Ranjit Singh, J

Advocate: Tanu Bedi, Sudhir Mittal, R.S. Mittal, Advocates for appearing Parties

Judgement

Ranjit Singh, J.

1. The sweep and scope of exercise of power under Section 311 Cr.P.C. for permitting an additional evidence is an issue in this petition. Seen

from its wording, the provisions of Section 311 Cr.P.C. apparently leave very wide discretion with Court to summon any witness at any stage of

the trial or proceedings so long as it is considered essential to the just decision of the case. Is it so elastic in nature that it can be stretched beyond

limit without fear of breaking ? Any discretionary powers are to be judicially exercised and must leave out and be free from any indication of any

arbitrariness. In this case discretionary powers appear to have been stretched to an extent that it gives an indication of arbitrary exercise of powers

and hence may call for an interference.

2. A proceeding initiated in a case of dishonour of cheque allegedly issued by the petitioner being managing partner of M/s. Kakkar Steel Forging

led to his conviction by JMIC Chandigarh and award of sentence. The petitioner filed an appeal against the order of his conviction and award of

sentence in the year 1999 and is pending before Additional Sessions Judge, Chandigarh. It is claimed that about 20 hearings have been held in this

appeal but the respondent has managed to seek adjournments on one ground or the other. When arguments were concluded in the court of Shri

Lakhbir Singh, Additional Sessions Judge, Chandigarh, complainantrespondent made an application for permission to lead additional evidence.

This of course was objected to by the petitioner on various grounds, one of which was that additional evidence at this stage specially so to

demolish the case set up by the defence should not be permitted. Besides, it was pointed out that it was a third attempt by complainantrespondent

to lead additional evidence. As is disclosed from the record, first application was moved by complainant before the trial court after appellant

Harnam Singh had produced his document showing that appellant did not owe any debt to the complainant and rather he was a debtor of the

appellant. Second application, as seen, was moved by the complainant before Appellate Court itself when the court had heard arguments of the

counsel for the appellant which was aimed at filling up the lacuna in the prosecution evidence which were pointed out during the course of

arguments by the counsel for appellant. Then came the present third application, which is stated to be nothing but to an attempt to fill up the lacunas

in the case of the prosecution. Pointed reference is made in the application that this additional evidence is needed to rebut arguments addressed by

counsel for petitioner that the claim was time barred. In this regard permission to lead in evidence three documents in the shape of

acknowledgment was made. These documents were stately being filed after 11 years of filing of the complaint. Ignoring all these apparently valid

objections, the appellate Court allowed the application while observing that no prejudice was going to be caused to the appellant. While doing so,

the lower appellate Court has referred to judgments of Sukhdev Singh v. State of Punjab, 1982(2) CLR 318; Gurmeet Kaur v. State of M.P.,

1996(1) RCR 781 and Bant Singh v. State of Punjab, 1992 RCR 172. It is viewed that the Court had unfettered discretion to allow additional

evidence at any stage of the trial when it is of the opinion that the production of this evidence is essential for just decision of the case.

3. I have heard counsel for the parties.

4. Mr. R.S. Mittal, learned Senior counsel has mainly submitted that this was the third application moved by the prosecution to fill up lacuna of its

case which has been allowed unmindful of its consequences about the right of the appellant to defend himself in a fair and legal manner. Ms. Tanu

Bedi has, however, submitted that order has been made to arrive at just decision in the case and evidence can be led at any stage of the

proceedings including the appellate stage.

5. Section 311 Cr.P.C. no doubt leaves very wide discretionary powers with the Court to summon any person as a witness or to examine any

person in attendance or to recall or to reexamine the person already examined at any stage of inquiry and trial, yet this discretion has to be

exercised governed by the principles of criminal law and is to be invoked only for ends of justice. It is to be exercised with caution and

circumspection. By its very nature, exercise of discretion under this section depends on facts in each case. Hon''ble Supreme Court in U.T. of

Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan, 2006(4) RCR(Crl.) 113 (SC) : 2006(3) Apex Crl. 132 (SC) : J.T. 2006(7)

SC 419 while referring to the case of Mohanlal Shamji Soni v. Union of India and another, 1991(3) RCR(Crl.) 182 (SC) : J.T. 1991(3) SC 17

observed as under :

It is a cardinal rule in the law of evidence that the best available evidence should be brought 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''. It is the duty of a court not

only to do justice but to ensure that justice is being done. It was further held that 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. It is emphasized that power is circumscribed by the principle that underlines Section 311 Cr.P.C., namely, 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. Further, that the power must be used

judicially and not capriciously or arbitrarily. It was further observed that evidence should not be received as a disguise for a retrial or to change the

nature of the case against either of the parties and the discretion of the court must obviously by dictated by exigency of the situation and fair play

and good sense appear to be the safe guides and that only the requirement of justice command the examination of any person which would depend

on the facts and circumstances of each case.

6. In Raghunath Prasad v. State of Rajasthan, 1997(3) Crimes 86, it was held that discretion vested in the court is to be exercised judicially and

not arbitrarily. The principle, as held by Hon''ble Supreme Court in U.T. of Dadra & Nagar Haveli''s case (supra) is well settled that the exercise

of powers under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts

which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or reexamining a witness

already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as

filling in a lacuna in prosecution case'''' unless the facts and circumstances of the case make it apparent that the exercise of power by the court

would result in causing serious prejudice to the accused resulting in miscarriage of justice. Basically, it is left for the parties to establish their

respective cases by adducing the best available evidence and the court cannot compel the parties to examine any particular witness on their

respective sides. It is only the second part of the section which binds the court to allow any evidence or to take fresh evidence for just decision of

the case. As observed above, the power cannot be used to change the nature of the case against either of the parties and is to be exercised

dictated by exigency of the situation and fair play and good sense, which, as per Hon''ble Supreme Court is the safe guide.

7. In Mohanlal Shamji Soni''s case (supra), Hon''ble Supreme Court had also given a word of caution while talking about Section 311 Cr.P.C. The

Court said thus :

The very usage of the words such as `any Court'', `at any stage'', or `or any inquiry, trial or other proceedings'', `any person'' and `any such

person'' clearly spells out that this section is expressed in the widest possible terms and does 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.

8. In fact Hon''ble Supreme Court in the case of Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 Supreme Court 178 while

determining the sweep of powers under Section 540 of old Code (equivalent to Section 311 Cr.P.C.) said that there would be two aspects of the

matter, which must be distinctly kept apart in this regard. The first is that prosecution cannot be allowed to rebut defence evidence unless the

prisoner brings forward something suddenly and unexpectedly. In this regard, Hon''ble Supreme Court noticed the observations of Tindal, C.J.,

which are often quoted and these are as follows :

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.'''' [Reg. v. Forst, 1840(4) St. Tr. (NS) 85 at p. 86].

9. Other aspect is that this power is exercisable at any time and the Code so states.

10. Cases of K.V.R.S. Mani, KLR 1951 Mad 986 : AIR 1951 Mad. 707; Shreelal Kajaria v. The State, ILR 1963 Bom. 698 : AIR 1964 Bom.

165 and in re V. Mahadevan, 1964(2) Mad. L.J. 587 were referred to in the case of Jamatraj Kewalji Govani (supra). It was urged on the basis

of these judgments that powers under Section 540 of the old Code, wide though they may be, must not be exercised to the disadvantage of the

accused particularly after his defence is over. Hon''ble Supreme Court noticed that there is nothing new in these cases and they in the sense had

followed the decision in Reg. v. Frost as applied in Dora Harris case, 1927(3) KB 587. Dealing with the issue, Hon''ble Supreme Court observed

that it is difficult to limit the powers under our Code to the cases which involve something ex improviso which no human ingenuity could foresee in

the course of the defence. Hon''ble Supreme Court further observed that our Code does not make this a condition of the exercise of powers and

that it would not be right to embark on judicial legislation. As per the Hon''ble Supreme Court, it can always be seen whether the new matter is

strictly necessary for a just decision and not intended to give an unfair advantage to one of the rival sides. Even in England where the rule in Dora

Harris case obtains, the powers of the Courts have not been held to be wrongly exercised, when fresh evidence has been let in for a just decision.

After making reference to the law as aforementioned, Hon''ble Supreme Court went on to hold :

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.

In this background, the Division Bench of this Court in Sukhdev Singh''s case (supra) observed that question of permitting further evidence by the

Court whether after the entire evidence of prosecution and defence is over will depend upon facts of each case. It cannot be laid down that in no

case can additional witnesses be called by the Judge at the suggestion of he prosecution before the close of the trial of the case where the defence

has been closed or the arguments have been heard.

11. The present is a case which appears to be peculiar so far as the facts are concerned. Here is a case where the petitioner, who is convicted and

sentenced, is in appeal. It is thus clear that prosecution had succeeded in proving the offence against the petitioner. Appeal is pending adjudication

since 1999. A prayer for leading additional evidence was first time made before the trial Court by the prosecution once it had concluded its

evidence. As already noticed, the present one is a third application moved at the stage of pendency of the appeal. The second application was also

filed before the appellate Court. The order allowing application and permitting the respondent to produce additional evidence on behalf of

prosecution has been granted unmindful of its effect on the defence. It is not clear from the record if second application moved at the appellate

stage was allowed or not. If prosecution is allowed to lead additional evidence at appellate stage, then its effect on the right of the accused to lead

any further evidence cannot be ignored. Nothing has been mentioned in the judgment if any right or liberty is left with the accusedappellant to say

anything in rebuttal of the evidence now allowed. Though not pleaded in this manner by the petitioner but grant of this permission would have to be

seen with its resulted effect on the right of the accused to lead additional evidence in defence once the prosecution has been so permitted to lead

this evidence. Would it not mean that it is virtually a reopening trial that too at the appellate stage. The appellate Court appears to have passed the

order unmindful of this aspect of the case. Apart from the other considerations while granting permission under Section 311 Cr.P.C., the court is

required to keep in mind the stage of proceedings. Of course basic requirement in his regard would remain the `just decision". This obviously

would not mean that any party is to be helped in filling up the lacuna also. In Mohd. Iqbal Ahmad v. State of Andhra Pradesh, AIR 1979 Supreme

Court 677, it was observed that in a criminal case, Court should not ordinarily order fresh evidence to fill up a lacuna deliberately left by the

prosecution. The relevant observations in this regard read as under :

xx xx The prosecution had been afforded a full and complete opportunity at the trial stage to produce whatever material it liked and it had chosen

to examine two witnesses but for reasons best known to it did not produce the note which formed the subject matter of the Resolution of the

Sanctioning authority Exh. P16. It is well settled that in a criminal case this Court or for that matter any court should not ordinarily direct fresh

evidence to fill up a lacuna deliberately left by the prosecution. The liberty of the subject was put in jeopardy and it cannot be allowed to put in

jeopardy again at the instance of the prosecution which failed to avail of the opportunity afforded to it xx xx.

12. In view of the position as noticed above, it can be said that though this section leaves a very wide discretion with the Court to summon and

examine any witness at any stage of the proceedings, yet these are required to be exercised with caution and only when the exigency of justice

require that too with circumspection and consistent with the provisions of the Code. Additional fact, which may also be kept in view, is that it

should not ordinarily be directed to fill up the lacuna left in prosecution case. While putting a person to trial certainly his liberty is put to jeopardy

and as observed in Mohd. Iqbal Ahmad"s case (supra), it cannot be allowed to be put in jeopardy again at the instance of the prosecution which

had failed to avail of the opportunity afforded to it. In this case, it cannot be discounted that allowing additional evidence at this state would not

only permit the prosecution to fill up the gaps in its case but this would also operate rebuttal of the case set up by defence after prosecution case

had been closed. In this regard, a reference may be made to the Division Bench judgment in the case of Sukhdev Singh (supra). It was said that :

There is no doubt that the object of the section is not to enable anyone or the other party to fill up the gaps of its case. The section is not to be

used to enable the prosecution either to improve its version at a later stage or enable it to repair the lacuna. The sole criterion in such a case should

be whether the exercise of power under this section is necessary in the interest of justice. While exercising this discretion the Court has to keep in

its mind the well known principle of law that the order should not operate as a rebuttal of the case set up by the defence after the prosecution case

is closed.

13. Applying the above said principle, the impugned order in this case cannot be sustained. The present petition is, accordingly, allowed and

impugned order is set aside. The case is remanded back to appellate Court for deciding the appeal.