

(2004) 10 CAL CK 0012

Calcutta High Court

Case No: C.R.R. No. 1498 of 2002

Dipak Kumar Mahata and Others

APPELLANT

Vs

Susoma Mahata

RESPONDENT

Date of Decision: Oct. 6, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 313
- Penal Code, 1860 (IPC) - Section 109, 494

Citation: (2005) 2 CALLT 649

Hon'ble Judges: Pravendu Narayan Sinha, J

Bench: Single Bench

Advocate: Milon Mukherjee, Sandipan Ganguly and Aniket Mitra, for the Appellant;
Monish Sen, for the Respondent

Final Decision: Allowed

Judgement

Pravendu Narayan Sinha, J.

This revisional application has been preferred by the petitioners assailing the order dated 17.05.02 passed by the learned Additional Sessions Judge, Durgapur in Criminal Motion No. 31 of 2001 thereby setting aside the orders dated 18.06.01 and 27.06.01 passed by the learned Sub-Divisional Judicial Magistrate (in short SDJM), Durgapur in Case No. C.R. 339 of 1994.

2. Mr. Milon Mukherjee, learned advocate for the petitioners contended that the criminal case being C.R. Case No. 339 of 94 pending before the learned SDJM, Durgapur was started on the basis of complaint lodged by opposite party Susoma Mahata under Sections 494/109 of Indian Penal Code (in short IPC). It was a warrant procedure case and after evidence of witnesses for the complainant before charge and after charge the accused persons, who are the petitioners here, were also examined u/s 313 of Criminal Procedure Code. The examination u/s 313 Criminal Procedure Code was done on 11.06.01 and thereafter the learned SDJM fixed

18.06.01 as date of argument. On 18.06.01 the complainant opposite party filed an application praying for recalling PW 3 Debasish Roychowdhury and the learned SDJM by his order dated 25.06.01 rejected the said prayer and fixed 29.06.01 for hearing arguments. Before that on 27.06.01 complainant filed another petition praying for re-examination of prosecution witness No. 1, namely, complainant herself Susoma Mahata and PW 4 Pranab Bhattacharya. The learned Magistrate after considering the said prayer and after hearing both parties rejected the said prayer also. Being aggrieved by and dissatisfied with the orders dated 25.06.01 and 27.06.01 the complainant opposite party filed the criminal motion bearing No. 31 of 2001 and the learned Additional Sessions Judge, Durgapur after hearing both the parties allowed the motion and set aside the orders dated 18.06.01 and 27.06.01 passed by the learned SDJM. The accused persons have now moved this Court challenging the said order dated 17.05.02 passed by the learned Additional Sessions Judge.

3. Mr. Mukherjee further contended that Section 311 of Criminal Procedure Code empowers any Court to summon any person as a witness or recall or re-examine any person already examined at any stage of enquiry or trial but before judgment, if the Court thinks that such examination of the witness is essential for the just decision of the case. The learned SDJM rejected the prayer of the complainant after assigning reasons and made it clear in his orders that PW 3, PW 1 and PW 4 have already been examined and cross examined and in their evidence they have stated the essential ceremonies performed in the marriage between petitioner No. 1 Dipak Mahata and petitioner No. 4 Rina Mahata. Therefore, the prayer for recall or re-examination of the said three witnesses in respect of the points mentioned in the petition were not necessary at all. The learned Additional Sessions Judge did not discuss what was the evidence that the complainant and her witnesses deposed in Court and whether after such evidence there was any need for re-examination of such witnesses on the points as mentioned in the application for recall. It was not a case that evidence of the said three prosecution witnesses remained completely blank in respect of the points for recall. The learned Additional Sessions Judge did not consider that there was no need of further re-examination and after defence was disclosed and accused persons were examined u/s 313 Criminal Procedure Code there was no cogent ground to allow the prayer of complainant to fill in the lacuna of prosecution evidence. The learned Additional Sessions Judge failed to appreciate the evidence as well as facts and circumstances of the case and order of the learned Additional Sessions Judge was a product of non-application of judicial mind. Accordingly, the order of the learned Additional Sessions Judge should be set aside.

4. Learned advocate for the complainant opposite party contended that adequacy of evidence cannot be decided by the revisional Court. Scope of this Court is very limited and this Court is to consider only whether the order of the learned Additional Sessions Judge suffers from any illegality or irregularity. The learned Additional

Sessions Judge in the order portion clearly observed that witnesses stated about some norms of marriage but further stated "etc.etc". To remove the ambiguity as to what the witnesses wanted to say by using words "etc etc" the complainant should be given opportunity to re-examine the witnesses. Therefore, the order of the learned Additional Sessions Judge was correct and proper and it requires no interference.

5. Considering the submission made by the learned advocates of the parties and pursuing the revisional application I find that the opposite party complainant lodged the complaint against her husband the petitioner No. 1 Dipak Mahata and others including the second wife Rina Mahata who is petitioner No. 4 under Sections 494/109 of Indian Penal Code. As the punishment in the said offence is above two years it was a warrant procedure case and accordingly complainant and her witnesses were examined before charge and thereafter charge was framed and after charge the witnesses were again cross examined. Thereafter, the learned Magistrate examined the accused persons u/s 313 of Criminal Procedure Code on 11.06.01 after closure of prosecution evidence and fixed 18.06.01 for hearing arguments. On 18.06.01 after the examination u/s 313 Criminal Procedure Code was over the complainant filed a petition praying for recalling PW 3 Debasish Roychowdhury who allegedly acted as a priest in the marriage between petitioner No. 1 and Rina Mahata and before marriage with the petitioner No. 1, she was Rina Misra. Learned Magistrate rejected the said prayer giving reasons and fixed 29.06.01 for argument. In the meantime on 27.06.01 the complainant again filed a petition; this time praying for recalling PW 1 Susoma Mahata, complainant herself and PW 4 Pranab Bhattacharya and the learned SDJM by his order dated 27.06.01 rejected the said prayer also. Challenging the order of the learned SDJM dated 25.06.01 and 27.06.01 complainant moved the Additional Sessions Judge in Criminal Motion No. 31 of 2001 and the learned Additional Sessions Judge by order dated 17.05.01 allowed the prayer and set aside the order of the learned SDJM dated 18.06.01 and 27.06.01.

Section 311 of Criminal Procedure Code runs as follows:

"311. Power to summon material witness, or examine person present. Any Court may, at any stage to 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 re-call 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."

6. This section manifestly makes it clear that the Court at any stage before judgment may recall and re-examine any witness who has already been examined and may summon any person as a witness if such evidence appears to the Court to be essential for the just decision of the case. The prime consideration to invoke provisions of Section 311 of Criminal Procedure Code is just decision of the case and

it cannot be used to fill in lacuna of prosecution case. If it is established that on any particular point or fact in issue evidence was already there jurisdiction of this section cannot be invoked. If it appears to Court that any evidence which was not before it and such evidence is essential for the just decision of the case relating to the offence, the Court has the power either to summon a new person to be examined as a witnesses or may recall and re-examine a witness who has already been examined in order to bring light to Court regarding that point which was not before the Court. This section cannot be invoked to summon a new witness or to recall a witness already examined relating to any point concerning the offence with which the trial was in progress and evidence was already there in respect of the said point or fact in issue.

7. The order of the learned Additional Sessions Judge appears to be not in accordance with law from the face of the order. The learned SDJM on 18.06.01 did not pass any such order which can infringe any right of the complainant amounting to invoke jurisdiction to prefer a revision against such order. In fact, learned SDJM rejected prayer of complainant to re-examine PW 3 by order dated 25.06.01 and rejected prayer of complainant to recall PW 1 and PW 4 by order dated 27.06.01. Complainant, therefore, was aggrieved, if any, by the orders dated 25.06.01 and 27.06.01, but there was no such order dated 18.06.01 by which the complainant would have been aggrieved. But the order of the learned Additional Sessions Judge reveals that the learned Additional Sessions Judge set aside the order dated 18.06.01 and of course order dated 27.06.01. The complainant did not prefer any revision challenging the order dated 18.06.01 and it prima facie shows that there was non application of mind on the part of the learned Additional Sessions Judge. Non application of mind further appears from the body of order of the learned Additional Sessions Judge itself, when the learned Additional Sessions Judge observed PW 5 stated "etc etc" and in order to remove ambiguity regarding "etc etc" there was need of re-examination. In fact the complainant did not file any application before the learned SDJM praying for recalling PW 5. Therefore, non application of mind by the learned Additional Sessions Judge is apparent on the face of the order of the learned Additional Sessions Judge.

8. Copy of the evidence of the witnesses were shown to this Court on behalf of the petitioners. As it is a case u/s 494 of Criminal Procedure Code complainant has to prove strictly both the marriages i.e. her own marriage and also the second marriage of her husband and ceremonies performed in both the marriages must be there in the evidence before the Court. Evidence of PW 1 clearly reveals that she in her evidence stated that on 21.4.94 her husband married Rina Misra for the second time and Debasish Roychowdhury acted as priest and marriage ceremonies like "saptapadi", "malabadal", "sindurdan" were performed. PW 3 Debasish Roychowdhury in his evidence stated that on 21.4.94 he was a priest of Kalyaneswari Temple and he acted as priest in the marriage between Dipak Mahata and Rina Mahata and stated that the said marriage was performed according to Hindu

religious rites and essential ceremonies of marriage like "saptapadi", "malabadal", "sindurdan", "hastabandhan" and other performances were performed. PW 4 Pranab Bhattacharya was a chance witness who allegedly went to Kalyaneswari Temple on that day and stated that at Kalyaneswari Temple he found Dipak Mahata is going to marry Rina Misra. He raised objection stating that Dipak Mahata is already married with Susoma Mahata, but his objection was turned down by all who were present there. In the second marriage of Dipak Mahata, Debasish Roychowdhury acted as priest and all sorts of religious performance namely "saptapadi", "malabadal", "sindurdan" were performed in his presence. There was no prayer by complainant to recall PW 5 but the learned Judge without going through the order of the learned Magistrate mentioned in his order that PW 5 stated "etc etc". It appears to me that PW 5 Sahadeb Pramanik was not present in the second marriage between Dipak Mahata and Rina Misra and he did not state anything about essential ceremonies that were performed or observed in the second marriage of Dipak Mahata.

9. It is evident that the complainant wanted to recall PW 3, herself and PW 4 regarding points as to whether there was any "Homa" or "saptapadi" in the second marriage of Dipak Mahata and if those ceremonies were not performed what were the causes of a it and what were the other ceremonies i.e. "etc." were performed and what is the caste of the parties and what ceremonies were performed in marriage according to their caste. After such evidence of PW 1, PW 3 and PW 4 that the second marriage of Dipak Mahata were performed with Rina Misra according to Hindu marriage religious rites as stated by PW 1 and PW 3), and all performances of Hindu religious rites were observed as stated by PW 3, there was no need of recall or re-examination of the said witnesses. PW 4 also stated about some of the ceremonies performed in the alleged second marriage and he added "etc" were performed. After closure of prosecution evidence and examination of accused persons u/s 313 of Criminal Procedure Code there cannot be any ground to recall PW 4 to state what he wanted to mean by the word "etc" when he already stated some of the essential ceremonies performed in the alleged second marriage.

10. It is clear from the evidence that the learned SDJM appreciated the matter properly and passed a reasoned and correct order. The learned Additional Sessions Judge without applying proper mind and without considering that there was sufficient evidence that the marriage was performed according to Hindu religious rites and customs and the witnesses for whom prayer for recall were made already stated in their evidence what ceremonies were performed made mistake by setting aside the order of the learned SDJM. Learned Additional Sessions Judge in the instant case failed to realise the essential ingredients of Section 311 of Criminal Procedure Code and in the instant case after such evidence there was no ground for recalling PW 1, PW 3 and PW 4 u/s 311 of Criminal Procedure Code. I have already indicated above the non application of mind on the part of the learned Additional Sessions Judge. The order of the learned Additional Sessions Judge was, therefore,

not in accordance with law and the said order was improper, illegal and incorrect. The order of the learned Additional Sessions Judge being not in accordance with law is hereby set aside.

11. In view of the aforesaid discussion the revision application is allowed. Order dated 17.05.02 passed by the learned Additional Sessions Judge, Durgapur in Criminal Motion No. 31 of 2001 is hereby set aside. Learned SDJM, Durgapur is directed to proceed with the case as expeditiously as possible since the case is of the year 1994 and to dispose of the same after hearing arguments from both parties.

All intention orders of stay passed earlier stand vacated.

Send a copy of this order to the learned Additional Sessions Judge, Durgapur and the learned SDJM, Durgapur for information and necessary action.

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