



IN THE HIGH COURT OF SIKKIM : GANGTOK
(CRIMINAL JURISIDITION)

SINGLE BENCH: BHASKAR RAJ PRADHAN, JUDGE.

Crl. M.C No. 02 of 2017

Anil Oberoi
Properitor M/s Anil Oberoi
M.G Marg, Gangtok,
East Sikkim

.... Petitioner

Versus

Sajan Kumar Agarwal
Propreitor M/s Anmol Enterprise,
Convey Ground,
Daragaon, Tadong,
East Sikkim

.... Respondent.

AND

Crl. M.C No. 03 of 2017

Subash Chaturvedi,
Proprietor M.s S. Chaturvedi,
A-2, Eden Apartment, Paresh Nagar,
P.O. Sevok Road, Siliguri,
West Bengal

.... Petitioner.

Versus

Sajan Kumar Agarwal
Propreitor M/s Anmol Enterprise,
Convey Ground,
Daragaon, Tadong,
East Sikkim

.... Respondent.

**PETITIONS UNDER SECTION 482 OF THE CODE OF
CRIMINAL PROCEDURE, 1973.**

Appearance:

Mr. K.T Bhutia, Sr. Advocate with Ms. Bandana Pradhan, Ms. Sarita Bhusal and Mr. Saurav Singh, Advocates for the Petitioner.

Mr. Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates for the Respondent.



ORDER
(25.10.2017)

Bhaskar Raj Pradhan, J.

This common order shall dispose of two petitions under Section 482, Code of Criminal Procedure (Cr.P.C) preferred by two petitioners against two orders, both dated 20.02.2017, rejecting two applications under Section 311, Cr.P.C seeking prayers to recall and re-examine the common Complainant, one Sajan Kumar Agarwal who had initiated Private Complaint Case No. 06/2015 and Private Complaint Case No. 10/2015 against Anil Oberoi and Subash Chaturvedi, the petitioners herein, respectively, as both the petitions raises identical issues.

2. Briefly the relevant facts are:-

(i) The petitioners in both the petitions under Section 482 Cr.P.C are facing trial for alleged commission of offence under Section 138/142 of the Negotiable Instruments Act, 1881. The records would reveal that in CrI. Misc Case No. 02/2017 the application under Section 311 Cr.P.C was preferred on 16.11.2016 after the examination of the petitioner as accused had been completed under Section 313 Cr.P.C in Private Complaint Case No. 06/2015. In Criminal Misc Case No. 03/2017 the application under Section 311 Cr.P.C was filed by the petitioner when some of the witnesses of the Complainant were yet to be examined in Private Complaint Case No. 10/2015.

(ii) The common grounds taken by both the petitioners in their applications under Section 311, Cr.P.C were that the case was conducted by one learned Counsel, Mr. Dinesh Agarwal, Advocate who due to serious illness retired from the case and in his place the present counsel was engaged by the petitioners. It



was further contended that while preparing for the case it was noticed that in cross-examination certain vital questions touching the root of the matter had not been put to the Complainant. It was also contended that the Complainant had not been confronted with a vital document in possession of the petitioner. The petitioners averred that it was the specific case of the petitioners that the cheques in question was handed over as security and vital questions on this aspect had not been put to the complainant nor had the complainant been confronted with documentary evidence on record. It was also averred that the two Private Complaints have been filed on the same set of facts and it was necessary to put common questions on some of the documents relied on by the complainant.

(iii) The said applications under Section 311 Cr.P.C was contested by the complainant. Replies with preliminary objections as well as on merits were filed praying for dismissal of the said applications. It was contended, inter alia, that sufficient time have been taken by the petitioners for cross-examination of the complainant who was examined at length by the said learned counsel, Mr. Dinesh Agarwal in the presence of the petitioners. It was also contended that relevant documents pertaining to the case was supplied well in advance and that the petitioner were trying to mis-lead the Court on the plea of being laymen and further cross-examine the complainant to fill up the lacunae in the case which is not permissible. In Private Complaint Case No. 06/2015 it was further contended that the application under Section 311 Cr.P.C had been filed at a belated stage, after more than thirteen months after the closing of the witnesses of the



complainant and the examination of the accused under Section 313 Cr.P.C.

(iv) On 20.02.2017 both the applications filed by the petitioners under Section 311 Cr.P.C in both the criminal complaints were taken up for hearing by the learned Trial Court. During the hearing a list of questions which the petitioner proposed to put to the complainant was also furnished to the learned Trial Court for its examination with a request, however, not to disclose the same to the complainant to protect the defence of the petitioners.

(v) The learned Trial Court while examining the issues raised, has found that the record of proceedings in both the Private Complaints reveals that an adjournment was sought on 09.11.2015 on the ground that learned Counsel, Mr. Dinesh Agarwal, had suffered brain stroke. In Private Complaint case No. 06/2015 it was contended that on 16.03.2016, 18.04.2016 and 04.07.2016 learned Counsel, Mr. Dinesh Agarwal, was himself present in the Court and continued the further proceedings and it was only on 01.09.2016 the new Counsels put their appearances. The learned Trial Court also found that on 24.02.2016, 29.03.2016, 21.04.2016, 09.05.2016 and 04.07.2016 learned Counsel, Mr. Dinesh Agarwal, was himself present and continued further proceedings and it was only on 02.09.2016 the new counsels had entered appearance in Private Complaint Case No. 10/2015 . It was thus concluded by the Trial Court that on the day of cross-examination of the complainant, the learned Counsel, Mr. Dinesh Agarwal, was not suffering from illness and the plea of the petitioners about the



illness of the learned Counsel, Mr. Dinesh Agarwal, representing the petitioners was discounted. It was held that mere change of Counsel cannot be a ground to allow the application under 311 Cr.P.C.

(vi) The learned Trial Court examined the set of questions placed by the petitioner's counsels and came to the conclusion that 16 questions out of the total 32 questions was such that the answer would be a 'yes' to all of them. Out of the remaining questions it was held by the Trial Court that answer to 8 questions were *"undoubtedly already on record when one carefully considers the cross-examination of the complainant when he admits that there are no documents to show that he in fact supplied the material, any further discussion of evidence here more than this would lead to premature discussion of evidence."* The rest of the questions were rejected on the ground that they were not required for just decision of the case.

(vii) The learned Trial Court thus held that the case was at the stage of examination of defence witness in Private Complaint case No. 06/2015 and at the stage of examination of complainant witnesses in Private Complaint case No. 10/2015, fair opportunity had been granted to the petitioners for cross-examination, cross-examination does not reveal that it was lame and grant of further cross-examination would in fact be allowing second extra opportunity to the petitioners which would be unfair. Thus holding, the applications under Section 311 Cr.P.C filed by the petitioners were rejected.

3. At the hearing Mr. K.T Bhutia, learned Senior Advocate, appearing for the petitioner would draw the attention of this Court to



Exhibit 3 (Agreement), Exhibit 4 (letter dated 01.08.2014), and Exhibit 5 (cheque no. 134104) in Private Complaint Case No. 06/2015 and Exhibit 3 (Agreement), Exhibit 4 (letter dated 20.08.2014), and Exhibit 5 (cheque no. 238856) in Private Complaint Case No. 10/2015. Mr. K.T Bhutia, would submit that in Exhibit 4 of both the Private Complaints which are letters dated 01.04.2014 and 20.08.2014 alleged to have been signed by the two petitioners he represents in the present proceedings, the type set and the handwriting on the blank space for dates are identical which would clearly reflects that the said letters were in fact letters which were typed from one and the same computer/printer and the handwriting was also of one and the same person. Similarly, the cheques marked Exhibit 5 in both the cases for different amounts payable to the same entity by the petitioners are not only of the same date but in the same handwriting of one and the same person. It is submitted by Mr. K.T Bhutia that certain vital question pertaining to this was not put in cross-examination of the Complainant which would go to the root of the matter during the cross-examination of the Complainant by the learned Counsel Mr. Dinesh Agarwal and as such, it would highly prejudice the defence if the application under Section 311 Cr.P.C are not allowed. Mr. K.T Bhutia would also argue that certain relevant questions pertaining to Exhibit 3 in both Criminal Complaints i.e. Agreement dated 30.05.2014 between Anmol Enterpirses and Anil Oberoi (accused in Private Complaint Case No 06/2015) and Agreement dated 30.05.2014 between Anmol Enterprises and M/s S. Chaturvedi & Co. (S. Chaturvedi being accused in Private Complaint Case No. 10/2015) to show the falsity of the Private Complaints based on the terms of the said Agreements were not put to the complaint by the said learned counsel, Mr. Dinesh Agarwal, while cross-examining the Complainant.



Mr. K.T Bhutia would also produced a photocopy of a receipt purportedly under the signature of the proprietor of Anmol Enterprises, the Complainant in the present proceedings and submit that it was just and necessary to confront the complainant with the said document and if not permitted best evidence in this regard would be withheld from the Court.

4. *Per Contra*, Mr. Rahul Rathi, learned Counsel appearing for the Complainant would argue that there are no compelling reasons for setting aside the impugned orders dated 20.02.2017 as it does not suffer from any infirmity. The learned Counsel would also submit that the said applications under Section 311 Cr.P.C were filed after considerable delay and that the said applications were for the sole purpose of covering of the lapses, lacunae or negligence in the cross-examination which has already been completed. The learned Counsel would also submit that the said applications would, if allowed, encourage litigants to change counsels and filed applications under Section 311 Cr.P.C to cover up the lacunae, which certainly is not the object of the Section.

5. The Complainant was cross-examined on 03.10.2015 in both the cases. On 09.11.2015, on an application moved, the learned Trial Court granted an adjournment on the ground that the conducting Counsel, Mr. Dinesh Agarwal, is unable to appear and proceed with the case due to brain stroke. This unfortunate event was just a month after the cross-examination. It is also evident from record that after the new Counsels put in their appearances, Mr. Dinesh Agarwal has not conducted the case. In such circumstances, it was incumbent upon the Trial Court to examine whether the prayer for recall of the



Complainant and further cross-examination of the Complainant was essential for the just decision of the case.

6. In re: ***Hoffman Andreas v. Inspector of Customs, Amritsar***¹, was a case in which during trial three witnesses were examined by the prosecution and cross-examined by the Counsel for the accused. After the stage of cross-examination of the three witnesses the said counsel passed away and the accused engaged another who filed a petition under Section 311 Cr.P.C for recalling the three witnesses for the purpose of further cross-examination. It was urged that the previous counsel had died during the pendency of the trial and that it had now transpired that the said counsel had not been keeping well and was under some mental pressure and could not concentrate during the proceeding and fail to cross-examine the prosecution witnesses on material points. The Trial Court dismissed the said application holding that there was nothing on record to show that the previous counsel was under mental pressure or that he was not keeping well or he could not concentrate during the proceedings of the case or that he failed to cross-examine the prosecution witnesses effectively. Setting aside the conviction of the accused by the Trial Court and confirmed by the High Court, the Apex Court would hold:-

" 6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new

¹ (2000) 10 SCC 430



counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

7. In re: **Zahira Habibullah Sheikh (5) v. State of Gujarat**²,
the Apex Court would hold:-

"26. In this context, reference may be made to Section 311 of the Criminal Procedure Code which reads as follows:

"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."

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, 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 anyone as a witness, or (b) to examine any person present in the 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 not 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.

27. 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

² (2006) 3 SCC 374



supports the case of 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 the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any 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.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. 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 side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

29. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant. These aspects were highlighted in Jamatraj Kewalji Govani v. State of Maharashtra [(1967) 3 SCR 415 : AIR 1968 SC 178 : 1968 Cri LJ 231] .

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



8. The Apex Court in re: **Rajaram Prasad Yadav v. State of Bihar**³, would hold:-

"14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

Then again:

"17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

***17.1.** Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

***17.2.** The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*

***17.3.** If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

³ (2013) 14 SCC 461



17.4. *The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

17.5. *The exercise of the said power cannot be dubbed as filling in a lacuna in a 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.*

17.6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*

17.7. *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

17.8. *The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

17.9. *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

17.10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.*

17.11. *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*

17.12. *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*

17.13. *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*

17.14. *The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."*



9. In re: **State (NCT of Delhi) v. Shiv Kumar Yadav**⁴ while answering the question whether recall of witnesses, at the stage when statement of accused under Section 313 Cr.P.C has been recorded, could be allowed on the plea that the defence Counsel was not competent and had not effectively cross-examined the witnesses, the Apex Court would, after examining various judgments, hold:-

"27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

10. The search for truth is the solitary goal of any judicial trial. The scope and ambit of Section 311 Cr.P.C is well defined by the law itself and coherently articulated by judicial pronouncements of the Apex

⁴ (2016) 2 SCC 402



Court. The extracted paragraphs of the judgments of the Apex Court need no reiteration. The underlying object of Section 311 Cr.P.C is to ensure that the truth is out and there is no failure of justice on account of any reason be it a mistake, error of judgment, inadvertence, failure on the part of the client or lawyer, knowingly or unknowingly to ensure that best evidence is made available to the Court. If the evidence proposed to be adduced appears to the Court to be essential for the just decision of the case, the Court must exercise its power under Section 311 Cr.P.C with the object of finding out the truth while giving latitude and taking a liberal view in the interest of justice. The application under Section 311 Cr.P.C cannot be allowed without adequate or sufficient reason. Recall is not matter of course and the discretion given must be exercised judiciously to prevent failure of justice. The plea in such cases must necessarily be bonafide. It is only when the Court comes to the conclusion that the intention for invoking the provisions of Section 311 Cr.P.C is to fill up the lacunae in the case, would the Court be circumspect in exercising its discretionary power.

11. The Trial Court while examining the applications under Section 311 Cr.P.C filed by the petitioner has erred in failing to examine whether the evidence sought to be adduced was essential for the just decision of the case save some questions which were rejected by stating so. The Trial Court has come to the conclusion that the answer to 16 out of 32 questions proposed by the petitioners would be 'yes' and out of the remaining the answer to 8 questions were already on record. However, the Trial Court has not rendered any finding as to whether those questions were essential for the just decision of the case. Further, if the answer to those 16 questions were likely to be 'yes' and if the



questions had a vital bearing to the issues involved, the answers would definitely be crucial for the just decision of the case.

12. It is seen that both the Private Complaint Cases are still pending trial. In Private Complaint Case No. 06/2015 the petitioner had been examined under Section 313 Cr.P.C and defence witnesses was yet to be examined when the application under Section 311, Cr.P.C was filed. In Private Complaint Case No. 10/2015 some of the Complainant witnesses were yet to be examined when the application under Section 311 Cr.P.C was filed.

13. On examination of the letter dated 01.08.2014 (Exhibit 4) in Private Complaint Case No. 06/2015 and letter dated 20.08.2014 (Exhibit 4) in Private Complaint Case No. 10/2015, it is quite evident that in the previous cross-examination no questions have been put to the Complainant regarding the similarity in the handwriting of the dates scribed therein or of the similarity in the type set of the two documents exhibited by the Complainant. Similarly, on examination of the cheque number 134104 (Exhibit 5) in Private Complaint Case No. 06/2015 and cheque no. 238856 (Exhibit 5) in Private Complaint Case No. 10/2015 it is also evident that in the previous cross-examination no questions have been put to the Complainant regarding the similarity in the handwriting. The answer to the similarity and commonality of the said two letters, both exhibit 4, as well as the two cheques, both exhibit 5, in the two Private Complaint cases and who was the scribe of the handwriting in all the aforesaid documents exhibited by the Complainant in the two cases filed against two different persons, the petitioners herein would definitely assist the Court in search of the truth. The said documents being exhibited by the Complainant in the Private Complaint Cases, it is quite evident that the ambiguity regarding the same if left



unanswered, the only casualty would be the truth. The answers thereof would therefore be essential for the just decision of the case. This Court has also perused the photocopy of the receipt dated 12.07.2014 produced by the learned Senior Counsel for the petitioners during the hearing of the present cases which were adverted to in the applications under Section 311 Cr.P.C filed in Private Complaint Case No. 10/2015 and on the face of it, it is quite evident that the said document relates to the transaction in issue and therefore, relevant for the just decision of the case. No question had been put to the complainant during his cross examination. Resultantly the answers regarding the said receipt would necessarily elucidate the truth which would have a direct bearing to the case. This would definitely help in clearing the ambiguity which would not amount to filling up the lacunae.

14. In view of the aforesaid the impugned orders both dated 20.02.2017 in Private Complaint Case Nos. 06/2015 and 10/2015 are set aside. The evidence already brought on record shall necessarily continue as part of the evidence in the respective Private Complaint Cases. The learned Trial Court is directed to recall the Complainant in both the cases on common dates as per the calendar of the Trial Court and permit the cross-examination of the said Complainant on the aforesaid documents restricted, however, to elucidating the truth regarding the commonality and similarity of the two letters, both numbered exhibit 4 and the two cheques, both numbered exhibit 5, in the said Private Complaint Cases and questions directly connected therewith. The Trial Court shall also permit the petitioner to confront the Complainant with the receipt dated 12.07.2014. While doing so, the learned Trial Court shall keep in mind the contours of Section 311 Cr.P.C and the guidelines laid down by the Apex Court and quoted



hereinabove. The learned Trial Court shall be free to examine and determine the relevancy of the questions proposed to be put by the petitioners to the Complainant and conduct and regulate the trial as per law keeping in mind that the sole purpose of allowing the present petitions preferred by the petitioners is to ensure that the truth is out. While doing so, the learned Trial Court shall ensure no attempt is made to fill up any lacunae in the two Private Complaint Cases. After the defence Counsel further cross-examines the Complainant, if the Complainant desires to adduce further evidence, it is open to the Trial Court to grant such permission. Needless to say, the Trial Court shall not be trammelled by any finding or observation made in this Order while finally deciding on the merits of the case.

15. In view of the aforesaid, Crl. M.C No. 02/2017 and Crl. M.C No. 03/2017 are both allowed accordingly.

16. The Trial Court records in Private Complaint Case Nos. 06/2015 and 10/2015 shall be remitted to the Trial Court forthwith.

(Bhaskar Raj Pradhan)
Judge
24-10-2017

Approved for reporting: yes.
Internet: yes.

Avi/