GODREJ PACIFIC TECH. LTD. A

v.

COMPUTER JOINT INDIA LTD.

(Criminal Appeal No. 1181 of 2008)

JULY 30, 2008 B

[DR. ARIJIT PASAYAT AND HARJIT SINGH BEDI, JJ.]

Code of Criminal Procedure, 1973 – s. 311 – Object, nature and scope of – Re-examination of witness sought – rejected by courts below – On appeal, held: In the facts of the case, re-examination of the witness should have been allowed – The object of the provision is to save failure of justice on account of mistake of either party in bringing the valuable evidence – The provision gives very wide powers and applies to all the proceedings, enquiries and trials under Cr.P.C. C D

Appellant filed an application seeking re-examination of the witnesses in terms of s. 311 Cr.P.C. Trial court rejected the application. High Court upheld the rejection. Hence the present appeal.

Allowing the appeal, the Court E

HELD: 1. In view of the facts of the case, trial court ought to have permitted the prayer of the appellant. High Court should not have declined to interfere with the order of the trial court. [Para 12] [577 B-C] F

2.1 The object underlying Section 311 Cr.P.C. 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 object 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. [Paras 8 and 10] [575 E-F 576 F-G] G

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A 2.2 Section 311 Cr.P.C. 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 Cr.P.C. (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. [Para 7] [574 G- 575-B]

2.3 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. The Section is a general Section which applies to all proceedings, enquiries and trials under Cr.P.C. and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In the Section, 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. [Paras 7 and 8] [575 B-H 576-A]

2.4 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. Whether the new evidence is essential or not must depend on the facts of each case, and has to be determined by the Presiding Judge. [Paras 7 and 9] [575 C-D 576-F]

Jamatraj Kewalji Govani v. State of Maharashtra **1967 (3) SCR 415;** *Zahira Habibullah Sheikh and Anr. v. State of Gujarat and Ors.* **2006 (3) SCC 374 – relied on.**

Case Law Reference

1967 (3) SCR 415	**Relied on**	**Para 10**
2006 (3) SCC 374	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1181 of 2008

From the Judgment and Order dated 10.8.2006 of the High Court of Punjab and Haryana at Chandigarh in Crl. Misc. No. 19213-M of 2005

Raman K. Sharma, Rajesh K. Sharma and Shalu Sharma for the Appellants.

Biswajeet Bhattacharya, Ranjan Mukherjee for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the judgment of a learned Single Judge of the Punjab and Haryana High Court, rejecting the petition filed by the appellant. Before the High Court challenge was to the order passed by the learned Judicial Magistrate, Chandigarh, rejecting the application of the appellant seeking re-examination of the witnesses already examined in terms of Section 311 of the Code of Criminal Procedure, 1973 (in short 'Code').

A 3. The application was rejected by the Trial Court primary on the ground that the complaint was filed on 19.12.1996. The evidence was closed on 11.3.2004. Under Section 313 Cr.P.C. examination was over on 12.7.2004. The High Court concurred with the view of the Trial Court.

B 4. In support of the appeal learned counsel for the appellant submitted that the examination in chief of the witness Shri Deepak Jotshi was done on 29.7.2003. On that particular date, the counsel for the accused had taken an objection that the applicants counsel was asking misleading questions. Hence C the trial Court had directed the witness to give his statement and as a layman, he gave his statement. But inadvertently he had not proved the relevant documents i.e. cheques, cheque returning memos, legal notice, courier receipt, letter from complainant bank, whereas, some of the above said documents D had already been proved by other witness, other than the complainant.

5. Learned counsel for the respondents supported orders of the court below.

E 6. 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 F 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 G to the just decision of the case."

7. 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 H

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.

8. 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 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.

9. 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.

10. 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). A B

11. The above position was highlighted in *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* [(2006) 3 SCC 374].

12. In the background facts of the case we are of the view that the trial court ought to have permitted the prayer of the appellant. That being so, the rejection of the prayer by trial court was not proper and the High Court should not have declined to interfere. C

13. The appeal is allowed. The Trial Court shall fix a date within three months and call the witnesses in question and accord opportunity to the accused persons and thereafter proceed with the trial. D

K.K.T. Appeal allowed.