

**IN THE COURT OF THE HONBLE JUDICIAL MAGISTRATE,
FAST TRACK COURT, OMALUR.**

PRESENT: THIRU. M.A. SUVEDHARANYAN, B.A., B.L., (Hons)

Judicial Magistrate, Fast Track Court, Omalur.

Friday, this the 30th day of April, 2021

CMP.No.450/2021 In STC No.43/2020

Shanmugasundaram

... Petitioner/Complainant

Vs

Rajarajeswari

... Respondent/Accused

This petition came up before me on 23.04.2021 for both side enquiry in the presence of M.Thiyagarajan, B.A., B.L., for the Petitioner/Complainant and Tvl.R.Vijayaraghavan, B.A., B.L., Advocate for the Respondent/Accused. Records perused. Both side arguments heard, considering the records and arguments advanced, this Court delivered the following:

//ORDER//

This petition is filed U/s 311 Crpc by the Petitioner/Complainant praying for recalling the PW2 to re-examining him. The petitioner herein is the complainant in main case and the Respondent herein is the accused in main case. The parties are referred to as per their original status in the main complaint herein after.

1. The concise of Petitioner/Complainant's Application:-

The Complainant submits that the main case is filed by him against the accused under section 138 of negotiable instruments act. He further states that the original cheque was missed by the complainant during prosecution evidence and the complainant has examined his bank manager and marked the scanned copy of the cheque as Ex P1 through his bank manager on 04.02.2021. Afterwards the complainant examined himself in chief as PW2 and marked the cheque return memo, Legal notice, Acknowledge Card as Ex P2, P3 and P4 respectively. Now the missed cheque is found beneath the bureau in complainant's house. Hence it is necessary for the complainant to exhibit the original cheque before this court. The present application is filed praying to recall and reexamine the PW1.

2. The Respondent/Accused's counter in brief:-

(i) The accused denied the entire averments of the petition. The accused filed a detailed counter statement, of which the gist of it is given beneath:-

The accused submits that the instant application is not at all maintainable. The accused challenged the reason putforth by the complainant in recalling the PW2 and stated that there is no iota of truth in the version of complainant that the disputed cheque was found underneath the bureau now and it is necessary to mark the same via PW2. Further the

accused narrated the proceedings of this case from the date of filing to till date. It is mentioned that the complainant sans examining himself as PW1, has summoned the Manager of City Union Bank, Tharamangalam Branch and examined him as PW1 and marked the scanned copy of disputed cheque through him, since the original cheque was lost by the complainant.

(ii) This court has issued summons upon the process memo/Batta memo filed by the complainant, to the Manager, City Union Bank, Tharamangalam Branch summoning him to produce the scanned copy of the disputed cheque and to depose relevant grounds of return of the disputed cheque. On 04.02.2021, one Mr.B.Sathish, the Manager, City Union Bank, Tharamangalam Branch appear before this court and was examined as PW1 by the complainant and he has directly adduced oral and documentary evidence sans filing any proof affidavit and the scanned copy of the disputed cheque was allowed to be marked as Ex.P1 without providing any opportunity to the accused to rise her objection on her side as mandated U/s 294, Crpc and the said witness (PW1) was fully cross examined by the accused.

(iii) Subsequently, on 09.02.2021, the complainant examined himself as PW2 and marked the cheque return memo, statutory demand notice and postal acknowledgment card as Exhibits No.P2,P3 and P4 respectively and the case has been adjourned from time to time subjecting the PW2 for cross examination by the accused side and at one point of time, this court has closed the evidence of the complainant since the accused has not come forward for cross examination of the complainant.

(iv) Thereafter the petition filed by the accused for recalling him “**i.e., to recalling the PW-1 was allowed by this Hon'ble Court and the matter had been posted to subjecting him for Cross Examination by the side of the Respondent/accused.” (Instead of mentioning as PW2, the counter statement runs as PW1 mistakenly.)**

(v) Then the accused engaged new counsel and she further submits that the complainant has not offered any proper and acceptable explanation about the loss of original cheque in dispute and the complainant managed to mark the scanned copy of cheque in dispute through his Bank Manager.

(vi) At the time the accused argued heatedly in this aspect. The complainant counsel replied that the original cheque was missed by the complainant and a complaint had been lodged to the police authorities but no receipt was obtained for the same.

(vii) The factual matrix being thus so, the present petition is opted by the complainant to mark the original cheque by recalling him falsifies his earlier stand and it amounts to furnishing of false statement in a judicial proceeding which is punishable under sections 193 and 211 of IPC. Thus the complainant played fraud upon the court by withholding the original of vital document.

(viii) The present application has been filed to fill up the lacunae in the case of complainant and to rectify the technical flaws quoted by the accused. Hence the accused prays to dismiss the application with heavy costs.

3. The point to be determined is whether there is any ground to allow the application filed under section 311 of CrPC to recall and re-examine the PW1 at this stage?

3.1. Heard both sides. Perused the records.

3.2. The counsel of petitioner/complainant argued by reiterating the averments in the petition and submitted that the original cheque was missed by the complainant and now it is found by the complainant which is very much required to be exhibited in the present case to prove the legally enforceable debt owed by the accused towards him and prays that the present application is to be allowed to recall and re-examine the PW2 to mark the original cheque.

3.3. Percontra, the respondent/accused's counsel argued by reiterating the averments in the counter statement and submitted that the the complainant initially marked the scanned copy of the disputed cheque via his bank manager and now filed this petition to mark the original cheque just to fill up the lacunae in his case and hence to be dismissed with exemplary costs.

4. For ready reference, **Section.311 of crpc** is as below:-

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.

4.1. The section allows recalling and reexamining of any person who has been already examined, at any stage of the case for it's just decision. But it should not be done as a matter of course. Recall could be permitted if it is essential for the just decision of the case.

5. Having considered both side arguments, for perceiving the concept underlying in section 311, Crpc this court lays it's reference to **Zahira Habibullah Sheikh and Anr .vs. State of Gujarat and others, 2006 (3) SCC 374** as under:

5.1. 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.**

5.2. *"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 proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of any enquiry 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."*

6. Arriving to the facts of the instant case in hand, the complainant has filed the application to recall himself[Pw2] to exhibit the original of the cheque in dispute.

Admittedly he has submitted before this court that after filing of the main case and sworn statement being taken, he has obtained the original cheque with an undertaking that he would return and mark the said original cheque at the time of trial. But at the time of trial he has submitted before the court that he has missed the original cheque somewhere and could not trace the same and has filed a memo to mark the scanned copy of the disputed cheque via his bank manager. For this he had filed a process memo stating the said reason and the complainant's banker- CUB, Tharamangalam branch manager was summoned and Ex.P1- the scanned copy of disputed cheque was marked via him. Later he has found the same and now opted the present petition to recall himself to mark the original of the disputed cheque.

6.1. The accused at that time did-not raise any objections and after the CUB manager appears and lead his chief examination, the accused has fully cross-examined him. Hence the accused cannot raise the contention that she was not given any opportunity to raise her demur u/s.294,Crpc.

6.2. Though the accused counsel was rendered opportunity, he did not object and he proceeded with his cross examination of Pw1 and even in the Pw1 cross examination the accused counsel did not specifically challenge the validity of secondary evidence[scanned copy of the cheque] as it is not admissible and cannot be marked. The accused counsel just cross examined pertaining to the difference between the original cheque and the scanned copy of the cheque. For that the bank manager[Pw1] rendered his explanation. The accused counsel not even whispered any objections or put forth any suggestions regarding the inadmissibility of the marking of the scanned copy of the cheque[secondary evidence]. Thus the accused side has not at all availed the opportunities to raise her objections both at the time of issuing summons to the complainant's bank manager and also at the time of Pw1 cross examination. Having failed to do so, the accused cannot merely verbalize that she was not rendered any opportunity to raise her demur to mark the scanned copy of the disputed cheque.

7. Further it is the vehement contention of the new counsel of the accused that a proper application has to be filed by the complainant before the court to lead secondary evidence. For this point to be clarified, the Honble Supreme court's recent judgment is to be looked. In **Dhanpat -vs- Sheo Ram[Deceased] through Lrs & Ors decided on 19.03.2020 : 2020 SCC Online SCC 606**, the Honble Apex court has observed by referring two judgments of Supreme court reported in AIR 1922 PC 56 and 1979 [4] SCC 500. It is observed that ,

"As per terms of Section.65[c], Indian Evidence Act, there is no requirement to file an application during the production of secondary evidence to put on record. Further it observes that, the court cannot deny the consideration of the secondary evidence on the basis that the application for permission to lead the secondary evidence was not filed."

7.1. Gaining robust from the aforementioned precedent, this court views that the contention of accused counsel that a proper application has to be filed by the complainant before the court to lead secondary evidence lacks significance.

8. The Hon'ble Supreme court in **State (NCT of Delhi) Vs Shiv Kumar Yadav and another, 2016 (2) SCC 402** has laid down *certain parameters for recall of witness under section 311 CrPC* . In the said Judgment, it was held thus as: *"Certainly recall could be permitted if essential for the just decision. 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.”

9. On an intense orientation to the determinant factor of section 311 CrPC that whether this application is essential to just decision of the case, this court finds that there is such material warranting to invoke section 311 CrPC in this case since the petitioner has proved the factor which leads to just decision of the case by mentioning the tangible reasons to show how the fair trial suffered without recall of PW2. Sans the original cheque being exhibited, the complainant may not be able to prove the legally enforceable debt attached to it, beyond all reasonable doubts.

10. It is trite that all the best and possible evidence to be brought before the court by the parties to prove their case. And too, it is trite that the way in which the evidence is acquired need not be necessarily looked over by the court. The way in which the particular evidence is fruitful to a case in reaching a fair decision alone is to be looked upon. Here the complainant makes an attempt to put his best evidence[i.e] exhibiting the original cheque. The court views that a reasonable chance cannot be denied to him to put-forth his best evidence.

11. Further, needless to discuss the shaggy contentions raised by the accused counsel that the complainant must be punished u/s.193 and 211 of IPC in the present order since this is all about deciding the application u/s.311,Crpc. The accused has the right to proceed as per law pertaining to this contention in separate proceedings. What the accused have to put-forth before the court is that the present application is not needed to reach the fair decision in the case. But the accused has staged some other reasons and failed to convince the court that this application is not necessary to reach a just and fair decision in the case.

12. Bearing in mind, the aforecited Judgments of the Hon'ble Supreme court, and the concept under section 311 CrPC, this Court finds that the present application is necessarily to be allowed to reach the just decision in the case.

13. This court, having regard to aforesaid discussions, concludes that there is sufficient ground to justify the recall of PW2 who was already been examined.

14. Discovering adequate factors to allow the application and to reach fair and just decision in the case, this court allows *the application. No costs.*

This Order directly dictated to the Steno-Typist and typed by her in computer and taken print out and after rectification of mistake, Pronounced by me in open court, this the 30th day of April 2021.

**Sd/ M.A.Suvedharanyan,
Judicial Magistrate,
Fast Track Court,
Omalur.**