Reserved on : 11.09.2024
Pronounced on : 21.10.2024

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF OCTOBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.4877 OF 2024

BETWEEN:

1 . M/S. STEEL ROCKS INC.,
HAVING OFFICE AT:
NO.424, ASG LAYOUT,
20TH MAIN, BANASHANKARI 3RD STAGE,
BENGALURU – 560 061
REPRESENTED BY ITS PROPRIETOR
SRI R.SHAKTHI KUMAR.

2 . SRI R.SHAKTHI KUMAR,
S/O RAJSHEKAR G.S.,
AGED ABOUT 32 YEARS,
PROPRIETOR
M/S.STEEL ROCKS,
HAVING OFFICE AT:
NO.424, ASG LAYOUT, 20TH MAIN,
BANASHANKARI 3RD STAGE,
BENGALURU – 560 061.

... PETITIONERS

(BY SRI KARUNASHANKAR K.N., ADVOCATE FOR
SRI SHANKARAPPA S., ADVOCATE)

AND:

1 . M/S. BANGALORE ELEVATED
TOLLWAY PVT. LTD., (BETPL)
HAVING ITS MAIN BASE
CAMP BESIDES D-MART,
KIADB ROAD, ELECTRONIC CITY PHASE I,
BENGALURU – 560 100
REPRESENTED BY ITS
AUTHORISED SIGNATORY AND GPA HOLDER
SRI BIJU FRANCIS.

2 . SRI BIJU FRANCIS
AGED ABOUT 40 YEARS,
AUTHORISED SIGNATORY
AND GPA HOLDER OF
M/S. BANGALORE ELEVATED
TOLLWAY PVT. LTD., (BETPL)
HAVING ITS MAIN BASE CAMP
BESIDES D-MART,
KIADB ROAD,
ELECTRONIC CITY PHASE I
BENGALURU – 560 100.

... RESPONDENTS

(BY SRI SRIDHAR PRABHU, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO SET ASIDE THE ORDER DATED 16.02.2024 IN C.C.NO.1903/2017 ON THE FILE OF THE HON'BLE IV ADDITIONAL CIVIL JUDGE AND JFMC AT ANEKAL FOR THE OFFENCE P/U/S 138 OF NI ACT, 1881 .

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 11.09.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

Petitioners/accused 1 and 2 are before this Court calling in question an order dated 16-02-2024 passed by the IV Additional Civil Judge & JMFC, Anekal in C.C.No.1903 of 2017 registered for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('the Act' for short).

2. Heard Sri K.N. Karunashankar, learned counsel appearing for petitioners and Sri Sridhar Prabhu, learned counsel appearing for the respondents.

3. The facts, in brief, germane are as follows:-

1st respondent is the Company and the 2nd respondent is its General Power of Attorney holder and for the sake of convenience both will be referred to as either respondent or complainant in this order. The respondent is the complainant. A complaint comes to be registered invoking Section 200 of the Cr.P.C., in P.C.R.No.319 of 2017 for offence punishable under Section 138 of the Act. The back

drop of registering the complaint is that, the complainant is a Toll Road Maintenance and Toll Collection Private Company. It entrusted the work to the petitioners on 28-08-2016 for FOB construction activities in Hosur – Bangalore Highway road. It is the allegation that the petitioners failed to commence the work as agreed upon and the reason projected by the petitioners was demonetization. The petitioners appear to have sought financial assistance of ₹25/- lakhs as advance amount for the work to be completed and had executed a guarantee document in favour of the complainant. Incurring financial losses, the work did not get completed.

4. The petitioners are said to have issued a cheque for an amount of ₹25/- lakhs on 18-05-2017 towards what they have borrowed for completion of work. The cheque was presented by the complainant for its realization. It is returned with an endorsement ”funds insufficient”. This forms the instrument before the concerned Court. The issue in the *lis* does not concern merit of the defence of the petitioners or the allegations of the complainant. The petitioners filed an application under Section 311 of the Cr.P.C., on 04-01-2024 to recall PW-1 for further cross-examination. This

comes to be rejected by the impugned order. The rejection of the application has driven these petitioners to this Court in the subject petition.

5. The learned counsel appearing for the petitioners submits that PW-1 had been cross-examined on two occasions in the year 2019 when the earlier counsel was on record. He suffered ill-health and died on 14-04-2023. The present learned counsel for the petitioners, who has now come on record, has noticed that there is certain lacuna in the cross-examination. Therefore, the petitioners have filed the application under Section 311 of the Cr.P.C., to recall PW-1 for further cross-examination. This ought not to have been rejected is the submission of the learned counsel for the petitioners. He would seek to place reliance upon the judgment of the Apex Court in the case of ***VARSHA GARG v. STATE OF MADHYA PRADESH*** – 2022 SCC OnLine SC 986.

6. Per contra, the learned counsel appearing for the respondent Sri Sridhar Prabhu would vehemently refute the submissions. He would contend not once but twice PW-1 has been

cross-examined, may be by the earlier counsel. Five years after cross-examination, the subject application comes to be filed, on the change of counsel. Change of counsel cannot be a ground for allowing the application under Section 311 of the Cr.P.C. The alleged offence is the one punishable under Section 138 of the Act. For the last 7 years, the proceedings are pending only on the ground of seeking unnecessary adjournments by filing applications. He would submit that application under Section 311 of the Cr.P.C. cannot be used for the purpose of making the proceedings an abuse of the process of law.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

8. The afore-narrated facts are not in dispute. The transaction between the two is a matter of record. The proceedings are instituted by the respondent in the year 2017. Since then the proceedings are on. It is also a matter of record that the petitioners have been given opportunity to cross-examine PW-1 not once but

twice. The subject application comes about for cross-examination of PW-1 for the third time. A perusal at the order sheet maintained by the concerned Court would be indicative of the fact that on 4 dates the case was posted for cross-examination of PW-1 i.e., on 25-06-2019, 23-07-2019, 11-09-2019 and 14-10-2019. The cross-examination happens on 05-11-2019 and 29-11-2019. Again on 24-02-2021, 28-04-2021, 28-07-2021, 13-10-2021 and 08-12-2021. The witness has been extensively cross-examined by the counsel who was on record at the relevant point in time. It appears that PW-1 resigned from the Company on 05-05-2022. The letter of resignation is appended to the documents produced by the respondent. Therefore, he is not even available in the country is what is said.

9. The issue is not with regard to impossibility of securing the witness for further cross-examination. Whether in the teeth of aforesaid cross-examination already made on several occasions, should PW-1 be permitted to be further cross-examined on the change of counsel who represents the accused? It becomes necessary to notice the order impugned. It reads as follows:

"COMMON ORDERS ON APPLICATION FILED U/S 311 OF CrPC BY THE ACCUSED DATED 06-04-2023 AND 4-01-2024 TO RECALL PW-1 AND TO PERMIT THE ACCUSED TO LEAD DEFENCE EVIDENCE.

The counsel for accused has filed applications U/s 311 of Cr.P.C to recall PW-1 for further cross-examination and to permit the accused to lead defence evidence. The counsel for the complainant has filed objection to the said application.

It is the contention of the accused that, the case if posted for the judgment. The senior counsel of the accused is suffering from liver disease and he is admitted in hospital. Hence, he was unable to appear before the Court. Proxy counsel has appeared before the Court, but the court has rejected his prayer and has taken defence evidence as nil. That the accused intends to lead defence evidence to disprove the case of the complainant. Hence, it is very much necessary to allow the application.

Further, the accused has filed another application U/s 311 Cr.P.C praying to recall PW-1 for further cross-examination. The accused has contended that, he was represented by Sri K.Venkataramanna he was suffering from ill-health from 2021 and he has died on 14-04-2023. That in the absence of his previous counsel the accused was not represented and even the cross-examination of PW-1 on material documents was not effectively done and Ex.P1 to 11 was not confronted. Hence, it is necessary to recall PW-1.

The counsel for the accused has filed objection contending that, the application is not maintainable. That the accused without utilizing the time given to him has filed the present application only with an intention to drag on the proceedings, hence prayed to reject the application.

Heard and perused the materials available on record. On perusal of records, it is found that, the counsel for the accused has cross-examined PW-1 in length on two vacations that to in the year 2019 and 2021. Thereafter the statement of accused was recorded U/s 313 of Cr.P.C. and case was posted for defence evidence. Even after giving enough opportunity the accused has not lead evidence, hence case was posted for judgment.

> The accused has not given any specific reason as to why PW-1 has to be recalled. Moreover, he has been cross-examined on two occasions. Hence, this court is of the opinion application dated 04-01-2024 filed to recall PW-1 is filed only with an intention to drag on the proceedings.
>
> Further, the accused has filed another application U/s 311 praying to permit him to lead evidence. No doubt even after giving enough opportunity accused has not lead evidence, but even then an opportunity is to be given to the accused to put forth his defence. Hence, application filed on 06-04-2023 U/s 311 needs to be allowed. Hence, I proceed to pass the following order:
>
> **ORDER**
>
> Application filed by the accused U/s 311 of Cr.P.C to recall PW-1 dated 04-01-2024 is hereby dismissed.
>
> Application filed by the accused U/s 311 of Cr.P.C to lead defence evidence dated 06-04-2023 is hereby allowed.
>
> The accused is directed to lead evidence without taking further adjournments.
>
> For defendant evidence as last chance by 02-04-2024."

The concerned Court rejects the application on the ground that, on perusal of records it was found that the learned counsel for the petitioners had cross-examined PW-1 at length on several occasions in 2019 and 2021 which are all noted hereinabove. The statement of the accused under Section 313 of the Cr.P.C., was also recorded and the matter was posted for defence evidence. Even after granting several opportunities, the accused did not lead evidence.

The matter was posted for judgment. The application was filed by the new counsel who had entered appearance when the matter was posted for its judgment. Therefore, the concerned Court rejects the application filed by the petitioners seeking recall of PW-1 for further cross-examination and allows the application filed on 06-04-2023 to lead further defence evidence.

10. A perusal at the order sheet, as observed hereinabove, is indicative of the fact that the learned counsel for the petitioners, then on record, had extensively cross-examined PW-1. There is no new material projected by the petitioners even before this Court necessitating further cross-examination of PW-1. The petitioners have placed heavy reliance on the judgment of the Apex Court in the case of ***VARSHA GARG*** *supra*. There is no qualm about the principle so laid down by the Apex Court in interpreting the purport of Section 311 of the Cr.P.C. That was in the fact circumstance. In the case at hand, it is an issue which is of 7 years vintage. It is not a case where PW-1 has not been cross-examined at all. He has been extensively cross-examined and on 4 dates the petitioners have been granted opportunity to further cross-examine PW-1.

Therefore, the said judgment in the case of ***VARSHA GARG*** would not become applicable to the case of the petitioners.

11. It becomes apposite to refer to the judgment of the Apex Court in the case of ***RAJARAM PRASAD YADAV v. STATE OF BIHAR***[1] wherein it is held as follows:

> "…. …. ….
>
> **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.
>
> **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.

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[1] **(2013) 14 SCC 461**

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."

(Emphasis supplied)

Again, the Apex Court in the case of ***STATE (NCT OF DELHI) v. SHIV KUMAR YADAV***[2], has held as follows:

"…. …. ….

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

[2] **(2016) 2 SCC 402**

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.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 CrPC has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court [Jasbir Singh v. State of Punjab, (2006) 8 SCC 294 : (2006) 3 SCC (Cri) 470, paras 10 to 14] . A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer

for recall nor any clear injustice if such prayer is not granted."

(Emphasis supplied)

In yet another judgment rendered in ***RATANLAL v. PRAHLAD JAT***[3], the Apex Court has held as follows:

"…. …. ….

16. That brings us to the next question as to whether the High Court was justified in setting aside the order of the Sessions Judge and allowing the application filed by PWs 4 and 5 for their re-examination. For ready reference Section 311 CrPC is as under:

> "**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."

17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection.

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[3] **(2017) 9 SCC 340**

Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."

(Emphasis supplied)

12. On a coalesce of the law elucidated by the Apex Court what would unmistakably emerge is that, it is not a matter of course that an application under Section 311 of the Cr.P.C., should be permitted. Mere change of counsel cannot be a ground to recall the witness. The application must contain details as to why the witness is required to be recalled. Recalling of witnesses should not be permitted at the fag end of the trial. These are the broad principles laid down by the Apex Court in the aforesaid judgments. Therefore, consideration of the application under Section 311 of the Cr.P.C. can be only on a case to case basis, depending upon failure of justice that would emerge, if the witness is not recalled. I fail to see any of the postulates enunciated by the Apex Court being preset in the case at hand. It is not a case where PW-1 was not cross-examined or further cross-examined. It has been done extensively. It is not the case where the application was filed at an earlier point in time. When the case was posted for its judgment,

the subject application is filed by the petitioners. The reason projected by the learned counsel for petitioners before this Court is that the earlier counsel had fumbled and the change of counsel has led to filing of application. The Apex Court has held that change of counsel will not be a ground to allow the application under Section 311 of the Cr.P.C.

13. Therefore, finding no merit in the petition and no warrant of interference with the order passed by the concerned Court, I proceed to pass the following:

O R D E R

(i) The Criminal Petition stands **rejected**.

(ii) Since the case is of 7 years vintage, I deem it appropriate to direct the concerned Court to conclude the proceedings within an outer limit of 4 four months from the date of receipt of a copy of this order.

Interim order of any kind operating shall stand dissolved.

Sd/-
(M. NAGAPRASANNA)
JUDGE

bkp
CT:MJ