

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

CRM-M-4012 of 2014 (O&M)
Date of decision: 11.05.2015

Colonel Sudhir Sardana

----Petitioner(s)

V/s

Ram Avtar & others

-----Respondent(s)

CORAM:- HON'BLE MR. JUSTICE HARI PAL VERMA

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Atul Lakhanpal, Sr. Advocate
with Mr. Arjun Lakhanpal, Advocate
for the petitioner(s).

Mr. S.K. Bishnoi, Advocate
for respondents no1 to 4.

HARI PAL VERMA, J. (Oral)

Prayer in this petition filed under Section 482 Cr.P.C. is for quashing of order dated 17.1.2014 passed by Chief Judicial Magistrate, Hissar, whereby the application filed by the petitioner under Section 311 CrPC has been dismissed.

Briefly stated, the petitioner, who is serving in Indian Army, was getting his land cultivated through his servants. Since the petitioner was away from his home, taking benefit of his absence, respondents no.1 to 4 and other unknown persons trespassed into the land of the petitioner and demolished his house in the fields and also damaged the crops on 3.8.2006. It

has been alleged that the respondents are land mafia and have close relations with high-ups in the administration. Petitioner made number of complaints and representations to the authorities and finally, FIR No.1091 dated 3.12.2006 under Sections 147, 149, 427, 447, 511 IPC was registered at Police Station Sadar Hissar regarding the occurrence dated 3.8.2006.

During the trial, the petitioner, in addition to his own examination, examined Roshan Lal as CW2 and Parbhu Ram as CW3, who were his servants and also eyewitnesses to the occurrence. After recording the preliminary evidence, respondents no.1 to 4 were ordered to be summoned vide order dated 24.2.2011. However, during the pendency of the complaint, Roshan Lal-CW2, who was to be examined on pre-charge evidence, expired, whereas Parbhu Ram son of Birbal, who was too old and hard of hearing, was produced in Court as a witness on 12.12.2013, but was unable to depose and understand the Court proceedings.

In the aforesaid circumstances, when CW2 Roshan Lal expired during trial and CW3 Parbhu Ram was incapacitated on account of his old age, the petitioner moved an application for summoning Rajesh son of Parbhu Ram and Kuldip son of Bir Singh, brother of Roshan Lal, as they were also present in the fields when the said occurrence had taken place. Mrs. Tushar Sardana had also reached the spot after the telephone call was made to her by the servants.

It was pleaded that in order to prove his case, the petitioner wanted to examine some other material witnesses who were eyewitnesses to the present case and examination of such witnesses was essential for the just decision of the case.

The respondents-accused filed reply to the application under Section 311 CrPC filed on behalf of the complainant and have not disputed the fact that Roshan Lal son of Bir Singh was examined whereas Parbhu Ram was hard of hearing to depose on oath. It has been pleaded that the complainant has nowhere stated in his complaint or in his evidence that Rajesh Kumar son of Parbhu Ram, Tushar Sardana and Kuldeep son of Bir Singh were the eyewitnesses and were acquainted with the facts of the case at any juncture. Therefore, the complainant cannot be allowed to examine these persons as witnesses and the application filed under Section 311 CrPC deserves to be dismissed.

Learned trial Court considered the said application in the light of averments made therein and dismissed the same vide order dated 17.1.2014, with the observations that provisions of Section 311 CrPC cannot be invoked just to summon the witnesses whose names even does not find mentioned in the entire complaint or subsequent proceedings. The trial Court has further observed that even the complainant while getting his statement recorded has nowhere referred the names of these

witnesses. Finding no merit, this application filed under Section 311 CrPC was dismissed.

I have heard learned counsel for the parties.

It will be relevant to reproduce Section 311 CrPC which reads 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”.

No doubt under Section 311 CrPC, the Court may summon, any person as a witness, at any stage of any enquiry, trial or other proceedings, if his evidence appears to be essential to the just decision of the case. However, in the case in hand, initially the complaint was moved by the complainant under Sections 147/149/425/427/451/506/511/447 IPC and in the said complaint, there is no reference of the aforesaid witnesses to be summoned. Moreover, the police has conducted investigation in the compliant and has filed cancellation report and none of the witnesses, sought to be summoned, find mentioned in the report. But now, at a later stage, when both the material witnesses are not available, one having been died and the other having become

incapacitated, because of his old age, the present application under Section 311 CrPC has been filed.

Hon'ble the Apex Court in the case of **Rajaram Prasad Yadav v. State of Bihar and another** 2013(3) RCR (Criminal) 726 had the occasion to lay down principles to be borne in mind while dealing with application under Section 311 CrPC. The Hon'ble Court was considerably of the view that exercise of such 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 miscarriage of justice. The power under Section 311 CrPC must 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 and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and therefore, grant of fair and proper opportunities to the persons concerned must be ensured being a constitutional goal as well as a human right. The observations made by Hon'ble the Apex Court in the case of **Rajaram Prasad Yadav v. State of Bihar and another** (*supra*), read thus:-

“22. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State), Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

“14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. 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 great caution and circumspection.

The very use of words such as ‘any Court’, ‘at any stage’, or ‘or any enquiry’, trial or other proceedings’, ‘any person’ and ‘any such person’ clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can

a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

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

a) 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?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) 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.

d) The exercise of power under Section 311 Cr.P.C. 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.

e) 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.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) 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.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) 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.

j) Exigency of the situation, fair play and good sense should be the safe guard, 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.

k) 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.

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

m) 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.

n) The power under Section 311 Cr.P.C. 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.”

Admittedly, neither in the original complaint, as filed by the petitioner, nor in the list of witnesses, the names of the persons to be summoned as witnesses, find mentioned and therefore, these persons are altogether stranger to the incident. In the case of **Gyanendra Kumar Rawat v. State of UP (All)** 2014(7) RCR Criminal 244, the Allahabad High Court has held that where the prosecution has moved an application under Section 311 CrPC, when the names of the persons summoned as witnesses does not find mentioned in the list of witnesses, the prosecution cannot be permitted to fill up the lacuna after it has examined all the witnesses. The observations made by the Allahabad High Court in the case of **Gyanendra Kumar Rawat v. State of UP** (*supra*) read as under:-

“10. Certainly the prosecution cannot be permitted to fill up the lacunas after it has examined all its witnesses. No reason was shown in the application as to why the said witness was not examined by the Investigating Officer under Section 161 Cr.P.C. and why such application was not moved at the initial stage. The prosecution cannot be permitted to re-open its case and there was not justification to allow such application moved at the belated stage.”

Therefore, having regard to the provisions of Section 311 CrPC, the petitioner cannot be permitted to get the referred

witnesses summoned, in absence of there being any mention of their names in the complaint or even in the cancellation report furnished by the police or even in the list of witnesses so furnished. Summoning of such witnesses, whose names have come for the first time in the application under Section 311 CrPC, would lead to great prejudice to the respondents.

In view of the aforesaid, no interference is warranted in the impugned order dated 17.1.2014 passed by Chief Judicial Magistrate, Hissar and accordingly, the present petition is dismissed.

May 11, 2015
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(HARI PAL VERMA)
JUDGE