

**HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT
CHANDIGARH**

CRM-M-6370-2014
Date of decision:28.8.2015

Madan Lal

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

1. To be referred to the Reporters or not ?
2. Whether the judgment should be reported in the Digest ?

Present: Mr.G.S.Sidhu, Advocate for the petitioner.
Mr.Ashish Yadav, Addl. A.G., Haryana.

RAMESHWAR SINGH MALIK, J. (Oral)

Petitioner by way of instant petition under Section 482 of the Code of Criminal Procedure ('Cr.P.C.' for short), prays for quashing of the order dated 30.1.2014 passed by the learned Sessions Judge, Sirsa, whereby an application under Section 311 Cr.P.C. moved by respondent No.2 was allowed and two persons namely Smt. Hardei Devi-respondent No.2 and one Ami Lal, were summoned as prosecution witnesses.

Notice of motion was issued and pursuant thereto, reply on behalf of respondent-State was filed and additional affidavit dated 14.7.2015 was also filed.

Learned counsel for the petitioner submits that the learned Sessions Judge fell in serious error of law, while allowing the application under Section 311 Cr.P.C., by passing the impugned order, permitting the prosecution to fill lacuna in its case. He further submits that the application at the instance of respondent No.2 was not maintainable as she was not even

the complainant. In fact the complainant, who was her son has turned hostile and in such a situation allowing the application under Section 311 Cr.P.C. summoning respondent No.2 and another witness named Ami Lal, would cause prejudice to the petitioner-accused. In support of his contentions, learned counsel for the petitioner places reliance on following judgments of this Court:-

- 1. Mauji Ram v. State of Haryana, 1985 (2) RCR (Crl.) (P&H);**
- 2. Hari Singh v. State of Haryana, 2002 (1) CLJ (Crl.) 295(P&H);**
- 3. Rajesh Kumar @ Raj Kumar Yadav v. The State of Bihar, 2012 (4) PLJR 338**

He prays for setting aside the impugned order, by allowing the present petition.

On the other hand, learned counsel for the State opposes the present petition, contending that once the complainant who is son of respondent No.2, was won over by the accused-petitioner and he turned hostile, responding No.2, being the mother of the deceased, was very much competent to move application under Section 311 Cr.P.C. and the same was rightly allowed by the learned Sessions Judge. No lacuna was sought to be filled in the prosecution case nor any prejudice was going to be caused to the petitioner-accused. In support of his contentions, learned counsel for the State places reliance on the following two judgments:-

- 1. Kewal Gupta v. The State of H.P., 1991 CriLJ 400 (HP High Court);**
- 2. Bhima Muduli and others v. State of Orissa and**

another, 1996 CriLJ 1899 (Orissa High Court);

Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that in view of the peculiar facts and circumstances of the present case, noticed hereinabove, instant one has not been found to be a fit case, warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C. To say so, reasons are more than one, which are being recorded hereinabove.

It is a matter of record that FIR in the present case was under Sections 302/201 IPC. It is also not in dispute that deceased was son of Smt.Hardei Devi-respondent No.2. It is also a matter of record that the complainant was another son of respondent No.2 who turned hostile. In such a situation, application under Section 311 Cr.P.C. moved by respondent No.2 was very maintainable. Having said that, this Court feels no hesitation to conclude that neither any lacuna was sought to be filled in the prosecution case nor any prejudice was going to be caused to the petitioner-accused, by passing of the impugned order by the learned Sessions Judge and the same deserves to be upheld.

During the course of hearing, when a pointed question was put to the learned counsel for the petitioner that what kind of prejudice he was apprehending to the petitioner, he had no answer and rightly so, because there was no prejudice which was likely to be caused to the petitioner. A bare perusal of the impugned order would show that the same is a self contained order, which has been found to be factually correct and legally

justified. It is not even the argued case on behalf of the petitioner that the impugned order was without jurisdiction. Scope of Section 311 Cr.P.C. is wide enough and the learned Sessions Judge has not exceeded his jurisdiction, while passing the impugned order, thus, the same deserves to be upheld, for this reason also.

Coming to the judgments, relied upon by the learned counsel for the petitioner, there is no dispute about the law laid therein. However, on close perusal of the cited judgments, none of them has been found of any help to the petitioner, being distinguishable on facts. Further, it is the settled principle of law that peculiar facts of each case are to be examined, considered and appreciated first, before applying any codified or judgemade law thereto. Sometimes, difference of one circumstance or additional fact can make the world of difference, as held by the Hon'ble Supreme Court in **Padmausundra Rao and another Vs. State of Tamil Nadu and others,** 2002 (3) SCC 533

Learned Sessions Judge, while passing the impugned order, has discussed each and every relevant aspect of the matter, before arriving at his judicious conclusion. The relevant observations made by the learned Sessions Judge in the impugned order, which are available at page 23 of the paper-book, deserve to be noticed and read as under:-

“The power to examine witnesses is not unfettered. If the Court is of the opinion that any matter has arisen improviso which could not have been contemplated by the prosecution, then certainly court can exercise the power. The court is empowered to summon any person as a witness at any stage of any inquiry, trial or other proceedings under the Code. The power is not limited to any particular class of persons. The power is conferred to further ends of justice. Holding the

balance of scales of justice in its hand, Court keeps an open mind. Any party to the proceedings may point out to the Court the desirability of some evidence, and the Court has to weigh the pros and cons. By using the word 'essential' and qualifying the word 'decision' by the adjective 'just' Legislature has clearly indicated that the power should be exercised judiciously and only where Court thinks that the evidence is necessary for just decision of the case."

Once the learned trial Court came to the conclusion that summoning of the two more witnesses named above, was essential for the just decision of the case, the learned trial Court committed no error of law in passing the impugned order. In fact this is the true import of Section 311 Cr.P.C.

The above-said view taken by this Court also finds support from the following judgments:-

- 1. Rajaram Prasad Yadav Vs. State of Bihar and anr., 2013 (14) SCC 461;**
- 2. Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178;**
- 3. Mohanlal Shamji Soni Vs. Union of India and anr., 1991 SCC (Crl.) 595;**
- 4. U.T. of Dadra and Nagar Haveli and anr. Vs. Fatehsinh Mohansinh Chauhan, 2006 (7) SCC 529;**
- 5. Iddar and ors. Vs. Aabida and anr., 2008 (1) SCC (Crl.) 22;**
- 6. P. Sanjeeva Rao Vs. State of Andhra Pradesh, 2012 (7) SCC 56;**
- 7. Sheikh Jumman Vs. State of Maharashtra, 2012 (12) SCC**

486;

8. **Natasha Singh Vs. CBI (State), 2013 (5) SCC 741 and**

9. **Kewal Gupta v. The State of H.P., 1991 CriLJ 400;**

10. **Bhima Muduli and others v. State of Orissa and another,**
1996 CriLJ 1899 and

11. **Ranjit Singh v. Boota Singh (CRM-M-2860-2015),**
decided on 4.8.2015 (P&H).

The relevant principles of law laid down by the Hon'ble Supreme Court in para 13, 14 & 23 of its judgment in **Rajaram Prasad Yadav's** case (supra), which can be gainfully followed in the present case, read as under: -

“Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 Criminal Procedure Code, as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure 311

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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case.

Section 138, Evidence Act

*138. **Order of examinations** - witnesses shall be first examined-in- chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

***Direction of re-examination** - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*

A conspicuous reading of Section 311 Criminal Procedure Code 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 pre-fix 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. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Criminal Procedure Code 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 Criminal Procedure Code. It is, therefore, imperative that the invocation of Section 311 Criminal Procedure Code 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, the Court must necessarily consider and ensure that

such recall and reexamination 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.

From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code 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 Criminal Procedure Code 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 reexamine any such person.

d) The exercise of power under Section 311 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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.”

Reverting back to the facts of the case in hand and keeping the above principles in mind as well as respectfully following the law laid down by the Hon'ble Supreme Court, it is unhesitatingly held that the learned Additional Sessions Judge was fully justified on facts as well as in law, while passing the order and the same deserves to be upheld, for this reason as well.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noticed above, coupled with the reasons aforementioned, this Court is of the considered view that since the impugned order passed by the learned Sessions Judge has been found a legally sustainable order, the same

deserves to be upheld. The instant petition has been found to be a wholly misconceived, bereft of merit and without any substance, thus, it must fail.

No case for interference has been made out

Resultantly, with the above-said observations made, the present petition stands dismissed, however, with no order as to costs.

28.8.2015
mks

(RAMESHWAR SINGH MALIK)
JUDGE