

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

Criminal Misc. No. M-3491 of 2016

Date of Decision:-10.3.2016

Dilbag Singh alias Bagga and another

...Petitioners

Versus

State of Haryana and another

...Respondents

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. Harsh Garg, Advocate for
Mr. Rakesh Gupta, Advocate
for the petitioners.

HARI PAL VERMA J.

The petitioners have filed the present petition under Section 482 Cr.P.C. for setting aside the order dated 29.1.2015 (Annexure P-1) passed by the Judicial Magistrate 1st Class, Kaithal and the order dated 13.1.2016 (Annexure P-2) passed by the learned Additional Sessions Judge, Kaithal, whereby his revision petition was dismissed.

Vide order dated 29.1.2015 the learned Magistrate has allowed the application of the complainant under Section 311

Cr.P.C. for recalling/summoning the prosecution witness namely PW1-Ashok Kumar subject to payment of cost of Rs.2,000/-, to be paid by the prosecution to the accused. Taking into consideration the prolong and delayed trial, the prosecution was directed to bring all its witnesses for the purpose of their examination on 5.2.2015.

Against the order dated 29.1.2015 passed by learned Magistrate, the petitioners-accused have filed a revision petition before the learned Additional Sessions Judge, Kaithal. However, same was dismissed vide order dated 13.1.2016.

On the basis of complaint made by PW Ashok Kumar, FIR No.483 dated 17.7.2009, under Sections 148, 149, 323, 324 read with Section 506 IPC was registered against the petitioners and others.

Learned counsel for the petitioners has contended that after providing sufficient opportunities, the trial Court had closed the prosecution evidence vide order dated 21.1.2015. Thereafter, an application under Section 311 Cr.P.C. was filed by the prosecution. Therefore, when the evidence of the prosecution was closed by Court order, filing of an application under Section 311 Cr.P.C. amounts to revive the order passed by the trial Court, whereby the prosecution evidence was closed. The petitioners are facing prosecution for offence under Sections 323 and 324 IPC for the last about 6 years and several opportunities were

given to the prosecution to conclude their evidence but they have failed to do so. Even, non-bailable warrants were issued to the complainant but he failed to appear and it is in these circumstances the trial Court closed the evidence. Allowing the application under Section 311 Cr.P.C. tantamount review of the earlier order passed by the Magistrate. The speedy trial is a fundamental right of the accused and the present case is lingering on for the last more than five years just for prosecution evidence and, therefore, long pendency in itself was a sufficient ground to dismiss the application moved by the complainant under Section 311 Cr.P.C. He also argues that filing of application under Section 311 Cr.P.C. is nothing but an attempt to fill up the lacuna.

I have heard learned counsel for the petitioners.

It will be relevant to reproduce Section 311 Cr.P.C. 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.”

Hon'ble Supreme Court in Rajaram Prasad Yadav's case (supra) has elaborated the powers of the Court while considering the application under Section 311 Cr.PC. The Apex Court has held that the power vested under the provisions of Section 311 Cr.PC is made available to any Court at any stage in any enquiry or trial or procedure initiated in Court. The Apex Court observed as under:

“14. A conspicuous reading of Section 311 Cr.P.C. 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 reexamine 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 pre-fix 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 Cr.P.C. 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 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. 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 re-examination 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 reexamined 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.

X x x x

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 reexamine 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.”

No doubt the application under Section 311 Cr.P.C. should not be invoked for filling up lacuna in the prosecution case but at the same time if there is a justifiable reason for recalling a witness, the Court should be liberal in considering and allowing such application. The plea of the petitioners that in case application under Section 311 Cr.P.C. is allowed, it would be lead to review and recalling the earlier order, is not acceptable. In the case of **Rajaram Prasad Yadav's** (supra) the Hon'ble Apex Court has liberally interpreted Section 311 Cr.P.C.

Merely because an application under Section 311

Cr.P.C. has been allowed, it cannot be termed as recalling or review of the order of closer of prosecution evidence. The learned trial Court has already adequately compensated the petitioners for recalling the witness namely Ashok Kumar for his cross-examination. Therefore, this Court does not find any illegality in the order dated 29.1.2015 (Annexure P-1) passed by the Judicial Magistrate 1st Class, Kaithal as well as the order dated 13.1.2016 (Annexure P-2) passed by the learned Additional Sessions Judge, Kaithal.

As such, affirming the impugned orders, the present petition, being devoid of any merit, is dismissed.

March 10, 2016
Vijay Asija

(**HARI PAL VERMA**)
JUDGE