

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

**Crl. Misc. No.M- 8715 of 2015
Date of decision : 21.04.2016**

Pratibha Mehra

.....Petitioner(s)

Versus

State of Haryana and another

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Manish Soni, Advocate
for the petitioner.

Ms. Vibha Dhiman, AAG, Haryana.

Mr. R.S. Rai, Senior Advocate with
Mr. Karan Pathak, Advocate for respondent no.2.

ANITA CHAUDHRY, J.

The petitioner assails the order dated 09.03.2015, passed by the Additional Sessions Judge, Gurgaon in complaint case no.599-A/2011 dated 31.10.2011 filed under Sections 376, 403, 417 IPC. The petitioner/complainant had filed an application under Section 311 Cr.P.C. seeking permission to examine some additional witnesses and re-examine three witnesses. The trial Court had dismissed the application.

It would be necessary to first notice the facts. The petitioner claims that she met Aman Nugyal in Mumbai in 2006. Aman was married. Aman was having problems with his wife and he shared it with the petitioner. In 2008 Aman told the petitioner

that his wife was approaching the Court and was seeking divorce from him. After a year Aman contacted the petitioner through Facebook and proposed marriage. The petitioner refused and asked him to get divorce first and only then she could consider the proposal. The accused met the petitioner in Delhi in April, 2010 and informed that he was divorced in March, 2010. The accused succeeded in pursuing the petitioner and she agreed for marriage. In May, 2010 the accused disclosed that the divorce proceedings were still going on and the second motion was to take place in November, 2010 and apologized for lying. The accused assured that he would marry the petitioner. In August, 2010 the petitioner and the accused shared a live-in relationship and started living in a apartment in Gurgaon. The accused also introduced his sister and his parents. During this relationship, the petitioner found that he was alcoholic, short tempered and was abusive. In November, 2010 he promised to arrange sufficient finances so they could marry in December, 2010. The mother of the petitioner came to know about their relationship and objected. In the presence of the petitioner's mother, the accused applied vermilion (Sindur) on her forehead. The relationship continued and the accused maintained physical relationship and assured that he would marry her. In August, 2011 he left for Africa. On the next day, his father asked the petitioner to vacate the house. The petitioner learnt that the accused had gone to Africa with his first wife and child. It then dawned on her that she was a victim of a well calculated plan. A complaint was given to the police in September, 2011. No action was taken and thereafter, a complaint was filed.

The Magistrate called for the report under Section 202 Cr.P.C. Thereafter, preliminary evidence was recorded. The case was committed and charge was framed. The prosecution examined its

entire evidence and closed the evidence on 27.02.2015. The statement of accused under Section 313 Cr.P.C. was recorded in March, 2015. An application was moved thereafter, under Section 311 Cr.P.C. The complainant wanted to re-examine three witnesses and additionally examine the MHC who had submitted the report under Section 202 Cr.P.C. as well as the SHO, P.S. Sadar regarding the inquiry made by him from Colonel Kamal Kumar. Besides these the complainant wanted to examine the Security Supervisor of AWHO Society, the State Manager of the Housing Society and the Superintendent PIO-cum-DCP, Head Quarters. The trial Court dismissed the application vide order dated 09.03.2015.

The counsel for the petitioner contends that PW5 was examined on 27.02.2015 and on the same day the complainant had filed an application for examination of PW2 Kartik Sinha, Ex-President of RWA with regard to the facts which had appeared in the cross-examination and dis-appearance of the evidence from record of the Society. It was urged that PW2 had filed a complaint to the Society's Manager on which PW2 had directed the Security Supervisor to investigate and the Security Supervisor had gone to the flat and on confirmation from the neighbours, he found the complaint of the petitioner to be true and that the petitioner was residing with respondent no.2 for the last one year and therefore, the examination of Subedar Hans Raj was essential. It was urged that ASI Surinder Kumar was to prove the inquiry report submitted under Section 202 Cr.P.C. and Partik Chauhan had to be called again as he had to be confronted with his earlier statement, which was necessary. It was urged that the report submitted under Section 202 Cr.P.C. was also necessary to be proved and their application had wrongly been dismissed and the exigencies of the situation demand that the trial

should not be foreclosed and proper opportunity should be given to the complainant to lead evidence.

The submission on the other hand was that the complainant was represented by a counsel from the very beginning as it was a complaint case and before this application, a number of applications had been moved under Section 311 Cr.P.C. The counsel had referred to the order dated 08.12.2014, passed on the application filed under Section 311 Cr.P.C. in July, 2014. It was urged that the trial Court had noted that the complainant was resorting to delaying tactics on one or other grounds to prolong the trial. It was urged that before that another application had been moved by the prosecutrix to prove some documents, which were 224 in number and those were the e-mails exchanged between the two and the trial Court recorded a finding that the attempt was only to delay the proceedings and that application was dismissed with costs. It was urged that after framing of charge this was the fifth application and the witnesses cannot be examined again to fill up the lacuna. It was contended that the first application was moved in 2012 and the ground raised was that the witnesses had been examined by the junior counsel. It was urged that another application was moved in August, 2013 and it had been mentioned by the complainant that she was not in a proper state of mind and that application was allowed and for the third time post-charge, the application was moved that on account of inadvertence some documents were left out and that included some documents which were already on record. It was urged that the Court had permitted the complainant to prove only the documents which were on record and the fourth application was moved for placing 224 documents, which were left out on account of inadvertent mistake of the counsel. It was urged that the complainant cannot be allowed to

delay the proceedings by adopting delaying tactics nor she could fill up the lacuna. It was urged that the prosecution had closed its evidence and the statement under Section 313 Cr.P.C. had also been recorded. The counsel had referred to ***U.T. Of Dadra Haveli & Anr. Vs. Fatehsinh Mohansinh Chauhan 2006(7) SCC 529.***

It was not disputed before me that this is the fifth application which had been moved by the petitioner. Two applications had been filed at the pre-summoning stage. The third application was moved post-framing of charge. After the prosecution had closed its evidence, an application was moved by the petitioner and she wanted the three witnesses examined by her to be called again for further examination. It had been pleaded that PW2 was to be re-examined with regard to the inquiry regarding the dis-appearance of the record from the RWA and Surender Kumar, ASI was to be examined with respect to the report under Section 202 Cr.P.C. and PW5 was to be examined as to what had transpired in police station on 10.11.2011. The petitioner had also given a list of five more witnesses.

The trial Court dismissed the application and noted the following:-

4. From perusal of facts of the case it has come on record that applicant is seeking to produce additional evidence fifth time by virtue of such application. There is not a single word mentioned in the application itself as to why this additional evidence was not earlier sought for. Rather from the averments of the application itself it is evident that after examination of the witnesses prosecutrix is now trying to fill up the lacunae of the case.
5. Though during course of arguments it was contended that on account of mistake of previous counsel prosecutrix could not bring the entire evidence. However, that itself is not a ground to seek additional

evidence specially in the backdrop of given facts when after charge sheeting the accused it has become a state case and prosecution has already moved two applications for additional evidence after the charge sheet. What can be inferred in the given circumstances is that prosecution is trying to fill up the lacunae of the case by moving application after application under section 311 of Code of Criminal Procedure which is not permissible under law.

6 Law is fairly settled that prosecution cannot seek to fill up the lacunae of the case by virtue of additional evidence Apex court of land in case Rajaram Parsad Yadav versus State of Bihar 20133 RCR Criminal 726 has laid down the principles which will have to be borne in mind while dealing with application under section 311 of Code of Criminal Procedure read with section 138 of Indian Evidence Act It was observed in that case that the exercise of power under section 311 of Code of Criminal Procedure should be resorted to only with the object of finding out the truth of obtaining proper proof for such facts which will lead to just and correct decision of the case It was further held that the exercise of said power cannot be dubbed as filling in lacunae in a prosecution case.

7. In the backdrop of given facts wherein there is no explanation given as to why earlier this additional evidence was not sought for and there is no reason given as to why the witnesses now sought to be reexamined were not properly examined earlier it can be inferred that under disguise of this application prosecution is just delaying the trial of the case which need expeditious disposal as per mandate of Apex Court of the Land.”

It is necessary to first notice the provisions contained in Section 311 Cr.P.C. which confers power on the Court to summon a material witness and re-examine person already examined. Section 311 Cr.P.C. reads as under:-

Section 311 in The Code Of Criminal Procedure

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.

The Section manifestly is contained in two parts, the first part gives pure discretion to the criminal Court and the second part does not allow any discretion and it binds the Court to examine fresh evidence and the only condition prescribed is that the evidence is essential to the just decision of the case. The question then arises is whether the fresh evidence would amount to filling up the lacuna in the prosecution case. This issue was examined in ***Mohanlal Shamji Soni Vs. Union of India and another - 1991 Suppl.(1) SCC 271.***

In *U.T. of Dadra & Haveli's* case (supra) the Apex Court was examining the proposition as to whether the Court has the power to re-examine witness who has already been examined. It was held as under:-

"A conspectus of authorities referred to above would show that the principle is well settled that 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 of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined

for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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."

In *Rajaram Parsad Vs. State of Bihar and another* 2013 AIR (SC) (Cri) 1746, the Apex Court had culled out the following principles:-

"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."

Keeping the above principles in mind and when I examine the case in hand, it can be said that the application moved by the complainant is merely to delay the proceedings and fill up the lacuna.

The petitioner wants to recall the witness as she wants to clear some facts from the witnesses and confront the others with some other material. The witnesses cannot be recalled and re-examined to fill up the lacuna. A lacuna in the prosecution must be understood as the inherent weakness and cannot be filled up by the prosecution/complainant. The power under Section 311 Cr.P.C. is circumscribed by the principles that underlies the provisions. The complainant could only succeed if it could appear to the Court that it was essential for the just decision of the case. The petitioner has been moving one application or the other and delaying the proceedings. She had been unable to show that the evidence now sought to be brought on record was necessary.

The petitioner cannot be allowed to lead/re-examine the witnesses as a disguise for a retrial. The exigencies of the situation do not demand that any further evidence should be called in, nor it is essential to the just decision of the case.

The petition is dismissed.

21.04.2016

sunil

(ANITA CHAUDHRY)
JUDGE