

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

CRR No.3090 of 2018 (O&M)

Date of decision : 13.09.2018

Gurdev Singh and another

.....Petitioners

Versus

State of Punjab and others

...Respondents

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. R. S. Bains, Advocate for the petitioners.

* * *

DAYA CHAUDHARY, J.

The present revision petition has been filed to challenge the impugned order dated 04.08.2018 passed by learned Special Judge, CBI, Mohali, whereby the application for summoning and examining prosecution witnesses No.9 and 11 in the list of the witnesses in the charge-sheet under Section 173 Cr.P.C., moved by the present petitioners, has been dismissed.

Briefly, the facts of the case as made out in the present petition are that accused Jaspal Singh, Harjinder Pal Singh, Avtar Singh, Bachan Dass, Harji Ram and Karnail Singh are facing trial and statements of all prosecution witnesses have been recorded. Thereafter, statements of accused Harjinder Pal Singh, Karnail Singh, Harji Ram and Avtar Singh under Section 313 Cr.P.C. have also been recorded, wherein they opted to lead evidence in their defence. Thereafter, the case was fixed by the trial

Court for recording the statements of remaining accused under Section 313 Cr.P.C. Application was moved under Section 311 Cr.P.C. by applicants namely Gurdev Singh and Tej Kaur (prosecution witnesses), which was dismissed vide order dated 04.08.2018, which is subject matter to challenge in the present petition.

Learned counsel for the petitioners submits that said witnesses were given up by the prosecution as unnecessary without assigning any reason and thereafter they were never summoned by the Court to record their statements as witnesses. Learned counsel further submits that no adequate/proper opportunity was given to the petitioners to participate in the proceedings. Neither they received any summons nor any orders from the trial Court. Rather they were given threats. They were considered as unnecessary witnesses without putting any question to them. They were under threat and, therefore, their statements could not be recorded. Both the petitioners appeared before the trial Court on various occasions during the year 2003-04 but they were pressurised by the police without making them understand as to whether they had to appear or not. Learned counsel also submits that petitioners were not having any idea that the documents which were signed by the family members would be considered against them. Learned counsel also submits that no instruction was given to their Advocate from District Court and none of their family members appeared before the Notary Public to get said affidavits attested, which were sent to CBI by their Advocate. At the end, learned counsel for the petitioners submits that the evidence of the petitioners is necessary for just decision of

the case and they be given an opportunity to get themselves examined.

Heard arguments of learned counsel for the petitioners and have also perused the impugned order and other documents available on the file.

Admittedly, the prosecution witnesses namely Gurdev Singh and Tej Kaur who were at Sr. No.9 and 11, respectively, were given up by the prosecution as unnecessary. The application under Section 311 Cr.P.C. was moved by said witnesses when statements of all PWs were recorded and even the statements of four accused namely Harjinder Pal Singh, Karnail Singh, Harji Ram and Avtar Singh were recorded under Section 313 Cr.P.C. Said application has been dismissed by learned Special Judge, CBI, Mohali on the ground that PW Gurdev Singh was present in the Court on 07.07.2004 and on 20.08.2004 but he was given up being unnecessary. Similarly, PW Tej Kaur was present in the Court on 08.01.2004 and she was given up being won-over by the accused. It is also mentioned that the case was continued for recording statement of prosecution witnesses till 11.05.2007 but no such application was ever moved by the petitioners. The proceedings of the case were stayed by the High Court on 08.05.2007 and, thereafter, the case was listed for prosecution evidence on 31.08.2016 for 07.09.2016. The prosecution evidence was closed on 28.10.2016. Application under Section 311 Cr.P.C. was moved thereafter. The only ground which has been mentioned in the application is that they were threatened and due to fear, they did not depose before the trial Court. Although an argument has also been raised by learned counsel for the

petitioner that the petitioners were never summoned by the trial Court, whereas they were duly summoned and appeared before the trial Court and thereafter, they were given up being unnecessary.

Section 311 Cr.P.C. is relevant which is reproduced 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.”

On perusal of aforesaid provision, it is clear that the Court may at any stage of any inquiry, trial or other proceedings, summon any person as a witness in case his evidence appears to be essential for just decision of the case. However, in the present case the application has been filed under Section 311 Cr.P.C. after a long unexplained delay. Section 311 Cr.P.C. is manifestly in two parts. In the first part, the word “may” has been used, whereas in the second part, the word “shall” has been used. Consequently, the first part gives purely discretionary authority to a criminal Court and enables it at any stage of an inquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to be essential for the just decision of the case. This is a

supplementary enabling provision, and in certain circumstances imposing on the Court the duty of examining a material witness who could not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court is to be exercised, or with regard to the manner in which it is to be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The purpose/object of provision of Section 311 of the Code is that there may not be any failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is as to whether it is essential for the just decision of the case. However, the Section is not limited only for the benefit of the accused but it will not be an improper exercise of the powers of the Court to summon a witness under this Section merely because the evidence supports the case for the prosecution and not that of the accused. The Section is a general Section which applies to all proceedings, inquiries and trials under the Code. It empowers the Court to issue summons to any witness at any stage of such proceedings, trial or inquiry. It is clear from the words "at any

stage of any inquiry or trial or other proceeding under this Code". It is to be kept in mind that this Section confers a very wide power on the Court to summon any witness but the discretion is with the Court to exercise it judiciously, as it has been held that wider the power the greater is the necessity for application of judicial mind.

No doubt the Section is wholly discretionary and this power is to be exercised by the Court when it appears that the evidence is necessary/essential for just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. It is to be left to the parties. It is for the Court to decide as to whether the evidence of said witnesses is necessary for the just decision or not.

In the present case, the application was moved by the petitioners after an inordinate delay without mentioning any ground or relevancy of evidence. Simply, it has been mentioned that the petitioners were not informed and no summonses were sent to them, whereas the summonses were issued to them and they appeared on two occasions and were given up being unnecessary. The petitioners remained not only negligent but lethargic and application was moved by them after a long delay of years together. Allowing the application for recalling prosecution witnesses at such a belated stage would amount to allow the prosecution to

fill up the lacuna which is not permissible as it would cause prejudice to the accused. Statements of PWs have been recorded and, thereafter, statements of some of the accused under Section 313 Cr.P.C. have also been recorded.

The application was filed on 04.07.2018 simply by mentioning that they were at Sr. No.9 and 11 in the list of PWs but they were given up by the prosecution being unnecessary without assigning any reason. Both of them wish to be examined as prosecution witnesses. It is also mentioned that they were never summoned by the trial Court to get their statements recorded. The contents of the application to the extent that they were never summoned is contrary to record as both of them have appeared on two occasions and were given up. The impugned order has been passed by considering the provisions of law as well as the application and by recording the findings that in the application nowhere it was mentioned that they were threatened and due to that reason they could not depose in the Court. Even it is not mentioned that due to some other reason they could not depose in the Court. The application has been moved by wrongly mentioning the facts which are contrary to record.

Accordingly, I find no ground to interfere with the impugned order and the present petition being devoid of any merit is hereby dismissed.

13.09.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No