

THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-36701-2018(O&M)

Date of Order: 03.10.2019

Gurvinder Singh

...Petitioner

Versus

Surinder Singh Usan

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Saurabh Arora, Advocate,
for the petitioner

Mr. Gaurav Gupta, Advocate
for the respondent.

ANIL KSHETARPAL, J.

Correctness of the order passed by learned Additional Sessions Judge Patiala, while setting aside the order passed by the learned Judicial Magistrate Ist Class, Patiala, has been assailed.

Some facts are required to be noticed.

In the criminal complaint filed under Section 138 of the Negotiable Instruments Act, 1881 by the respondent-complainant, application for recalling complainant-CW1 for further cross-examination was allowed by the Judicial Magistrate Ist Class. An application under Section 311 Cr.P.C. was filed and the reasons for recalling the complainant as stated in para 3 of the application are extracted as under:-

“3. That in fact the daughter of the applicant is having matrimonial dispute with her in laws regarding which litigation is pending between them at Delhi and the complainant is having hands in glove with the son in law of the applicant and his parents and as such the

blank cheque of applicant which was stolen by son in law of the applicant, has been misused, the applicant never came to Patial nor he knows the complainant, so the question of taking loan after coming from Delhi i.e. 250 kms or issuing cheque to the complainant does not arise at all. The applicant had supplied the copies of all cases to his previous counsel but those were not put to the complainant nor the defence version has been put properly to the complainant during his cross-examination.”

Of course, it was also stated in the application that counsel has been changed as the previous counsel has failed to defend the case properly. The application was allowed by the Judicial Magistrate Ist Class while giving following reasons:-

“Perusal of the file shows that in his cross examination dated 9.8.2017 complainant stated that he do not know the daughter of the accused is having matrimonial dispute and also do not know in-laws of the daughter of accused. He also denied the suggestion that he is in collusion with in-laws of the daughter of accused stolen the cheque in question and filed the present complaint. However the basic defence plea of accused is recorded under Section 313 Cr.PC is that his son in law Prabhjit misappropriated the cheque in question from the house of accused, as he stolen the same when he had visiting to his house and the present complainant had filed this complaint in collusion with his son in law. During the course of arguments ld. Counsel for the accused also stated that the present complainant namely Surinder Singh also appeared as witness in matrimonial dispute pending at Delhi. However in his cross examination complainant shows ignorance about the son in law of the accused. Therefore cross examination of the

complainant by putting him copies of litigation at Delhi is necessary to show his conduct on the file. So far as the question of recalling the complainant for his further cross examination on change of counsel is concerned, the same has been settled in conendrum of pronouncement that power of Section 311 Cr.PC is wide enough to do the substantial justice and in the present case I think recalling the complainant for further cross examination is necessary. The authorities cited by ld. Counsel for the accused are not applicable to the fact of the present case because in those cases further recalling the complainant is sought only on the ground of change of counsel. Therefore in view of the above discussion the present application is allowed subject to cost of Rs.500/-."

As noticed above, learned Additional Sessions Judge allowed the revision and set aside the order passed by the Judicial Magistrate Ist Class, dated 20.03.2018.

On careful reading of the order passed by the learned Additional Sessions Judge, impugned herein, it is apparent that learned Additional Sessions Judge was much impressed by two judgments passed by the Hon'ble Supreme Court. First judgment is in the case of **State(NCT of Delhi v. Shiv Kumar Yadav, (2016) 2 SCC 402**. In the aforesaid case, initially the accused had not engaged any counsel, therefore a counsel from legal aid was provided. Thereafter, they engaged private counsel. Witnesses were cross-examined. First application filed under Section 311 Cr.P.C. for re-call of the prosecutrix and PW23 was dismissed by the Court but correctness thereof was never challenged. Thereafter on change of the counsel, application for re-call of 28 prosecution witness was filed which was dismissed by the learned rial court, however, allowed by the High

Court. In those circumstances, Hon'ble Supreme Court held that such application could not have been allowed by the High Court. It may be noted here that principles to be borne in mind while dealing with section 311 Cr.P.C culled out in the judgment passed by the Hon'ble Supreme Court in the case of **Rajaram Prasad Yadav vs State Of Bihar & Anr, (2013) 14 SCC 461** are required to be reproduced:-

17. 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:

- 17.1) 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?*
- 17.2) 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.*
- 17.3) 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.*
- 17.4) 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.*
- 17.5) 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.*
- 17.6) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- 17.7) 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.*
- 17.8) 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.*

- 17.9) *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.*
- 17.10) *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.*
- 17.11) *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.*
- 17.12) *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*
- 17.13) *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.*
- 17.14) *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.*

The second judgment which the learned Additional Sessions Judge has heavily relied upon in the case of **State of Haryana vs. Ram Mehar and others (2016) 8 SCC 762**. In the aforesaid case, learned Additional Sessions Judge rejected the prayer for re-call. This is a case where official of Maturi Suzuki were attacked by the workers. There was already a direction by the Hon'ble Supreme Court to expedite the examination of witnessed vide order dated 17.02.2018. Bihari Lal-PW8 and DSP-Om Parkash PW99 were already permitted to be recalled. Thereafter,

two applications for recall of as many as 18 witnesses was filed. It was stated that important questions could not be put to the witnesses. Manner and circumstances pertaining to how the incident took place has also not been put to the witnesses and important suggestions regarding injuries received by the prosecution witnesses have also been left out. Learned trial court dismissed the application but High Court allowed while taking note of the facts that accused-worker have engaged a senior lawyer. In the aforesaid judgment itself, Hon'ble Supreme Court in para 40 has held that the court must pose itself a question before allowing re-call application as to why re-calling of the witness is necessary or important to arrive at the truth.

Section 311 Cr.P.C. enables the courts to summon material witness or examine person present. Section 311 Cr.P.C. is in two parts. The first part uses the word 'may' whereas the second part uses the word 'shall'. In other words, by making a provision in the second part, it is made obligatory on the court to record evidence which is necessary/essential to do the justice. In other words, paramount consideration before the courts should be whether the evidence sought to be lead, appears to be essential to the just decision of the case or not.

This aspect has been examined by the Hon'ble Supreme Court in the case of **Zahira Habibullah Sheikh and Another vs. State of Gujarat and others, (2006) 3 SCC 374**, wherein it has been explained what is the scope of Section 311 Cr.P.C. Paras 26, 27 and 28 of the judgment are relevant for the decision of the present case, which are extracted as under:-

“26.XXX XXX XXX XXX XXX
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The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses

"shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in 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 it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would 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 should be exercised, or with regard to the manner in which it should 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.

27. The object underlying Section 311 of the Code is that there may not be 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 whether it is essential to the just decision of the case. The section is not limited only for the benefit of the

accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the 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, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the 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 Indian Evidence Act, 1872 (in short, 'Evidence Act') 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. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part

of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge."

Now let us examine the fact of the present case.

Surinder Singh-respondent had filed a complaint that the petitioner-accused has committed offence under Section 138 of the Negotiable Instruments Act. When Surinder Singh appeared in evidence, in cross-examination stated that he does not know daughter of the accused is having matrimonial dispute and also do not know the in-laws of the accused. He also denied the suggestion that he in collusion with the son in-law of the accused had stolen the cheque in question. Accused while appearing under Section 313 Cr.P.C has pleaded that his son-in-law Prabhjeet Singh has misappropriated the cheque in question from the house of the accused after stealing the same. Now, through present application, accused-petitioner has prayed for re-calling Surinder Singh for further cross examination on the ground that daughter of the accused is having matrimonial dispute with his in-laws regarding which litigation is pending at Courts at Delhi and the complainant is having nexus with the son in law of the accused. As noticed above, in the application, this fact has been properly highlighted. In fact complainant has appeared as a witness in aforesaid litigation. It was on the basis of the aforesaid assertions the learned Judicial Magistrate found that further cross-examination of the complainant is necessary. In other words, the court found that the evidence appears to be essential to the just decision of the case. As has been noted

above, the paramount consideration while deciding application under Section 311 Cr.P.C should be to do the substantive justice between the parties and if such evidence appears to be essential to the just decision of the case, there is no restriction on the power of the Court to summon material witness or recall any material witness. Such powers is available at any stage of any enquiry, trial or other proceedings.

In view of the aforesaid, reasons, the order passed by additional session judge 02.07.2018 is set aside and that of learned Judicial Magistrate dated 20.03.2018 is restored.

Petition allowed.

03rd October, 2019
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(ANIL KSHET ARPAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No