

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

206

**CRM-M-46745-2018
Date of decision: 20.11.2019**

Rajesh Kumar

.....Petitioner

Versus

Pawan Kaushik

.....Respondent

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. Vineet Sehgal, Advocate for the petitioner.

Mr. Mohit Sadana, Advocate for the respondent.

ARUN KUMAR TYAGI, J (ORAL)

The petitioner has filed the present petition for quashing of order dated 26.09.2018 (Annexure P -4) passed in Complaint No.7402 of 2016 dated 09.06.2016 titled as 'Pawan Kaushik Vs. Rajesh Kumar' under Sections 138 & 142 of the Negotiable Instruments Act, 1881 (for short, "the N.I. Act") whereby the application filed by the respondent/complainant under Section 311 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") was allowed.

Briefly stated, the facts relevant for the disposal of the present petition are that the respondent/complainant filed complaint under Section 138 of the N.I. Act on the averments of dishonour of cheque bearing No.013660 dated 23.04.2016 drawn for an amount of ₹90,000/- on Oriental Bank of Commerce, Sector-14, HUDA Complex, Gurgaon issued by the petitioner/accused in discharge of his liability under the friendly loan, due to "insufficient funds" and failure of the petitioner/accused to pay within fifteen days in response to the notice served upon him.

During trial, while the case was fixed for evidence of the complainant, the respondent/complainant filed an application under Section 311 of the Cr.P.C. for his re-examination for producing agreement dated 09.04.2016. The application was allowed by the Judicial Magistrate 1st Class, Gurugram.

Feeling aggrieved, the petitioner has filed the present petition.

I have heard the learned counsel for the parties and gone through the record.

Learned counsel for the petitioner has argued that the statement of the respondent/complainant had been recorded by the Judicial Magistrate 1st Class. The trial Court has arbitrarily allowed the application under Section 311 of the Cr.P.C. at a very belated stage. The alleged agreement dated 09.04.2016 was not referred to in the complaint or legal notice served by the respondent/complainant. The ground put forth for recalling is that the respondent/complainant was unable to scrutinize the affidavit prepared by the previous counsel and it was observed by the counsel subsequently engaged by him that such an important evidence essential to the complaint was missing. Change of counsel did not furnish valid reason for allowing the application. The trial Court has by allowing the application in a hasty manner granted the opportunity to the respondent/complainant to fill in lacuna by tendering fresh evidence which will prejudice the rights of the petitioner/accused. Learned counsel for the petitioner has accordingly prayed for setting aside of the impugned order.

On the other hand, learned counsel for the

respondent/complainant has argued that the counsel engaged by the respondent/complainant did not bring on record crucial evidence handed over to him. The respondent/complainant being educated only upto 8th class could not scrutinize his affidavit to discover this fact which came to his notice on change of counsel. Recalling of the respondent/complainant for proving the agreement is essential for just and proper decision of the case and the same will not cause any prejudice to the petitioner/accused. The impugned order does not suffer from any illegality or irregularity. Therefore, the petition may be dismissed.

Section 311 of the Cr.P.C. which empowers the Court to summon material witness or examine person present reads as under:-

"Any court may, at any stage of any inquiry, trial or other proceedings 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 be essential to the just decision of the case."

The respondent/complainant filed the application under Section 311 Cr.P.C. in the case when the case was still at the stage of evidence of the respondent/complainant. In the complaint, the respondent/complainant had averred taking of friendly loan of ₹90,000/- by the accused from him. The respondent/complainant wanted to produce agreement dated 09.04.2016 which referred the above said transaction of friendly loan in support of averments made in his complaint and wanted to examine the notary who attested the

agreement. The application under Section 311 of the Cr.P.C. can be filed at any stage, even if the evidence of both the parties has been concluded. Therefore, the delay in filing the application is not by itself a ground for dismissing the same. The factum of agreement dated 09.04.2016 was not mentioned in the complaint or the notice but the very omission to mention the same will not be a ground to reject the application for its admission as the value of the evidence sought to be produced can be determined after its admission.

In *Mohanlal Shamji Soni Vs. Union of India and another, 1991(3) RCR (Crl.) 182*, it was held by the Hon'ble Supreme Court that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both the sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation and fair play and good sense appear to be the only safe guides and that only requirements of justice command the examination of any person which would depend on the facts and circumstances of each case. In that case it was observed by the Hon'ble Supreme Court that the Court while exercising its power under section 311 of the Code of Criminal Procedure, 1973 shall not use such power for filling up the lacuna left by the prosecution. However, in *Rajendra Prasad Vs. The Naracotic Cell through its Officer-in-charge Delhi : 1999(3) RCR (Criminal) 440*, Hon'ble Supreme Court explained that lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of

the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. In *Shailendra Kumar Vs. State of Bihar, 2002(1) SCC 655*, it was held by the Hon'ble Supreme Court that a bare reading of Section 311 of the Cr.P.C. reveals that it is of very wide amplitude and if there was any negligence, lapses or mistake by not examining material witnesses, the Court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired.

The agreement is sought to be produced in proof of the transaction of taking of friendly loan of ₹90,000/- by the petitioner/accused and the same being of evidentiary nature in no way contradicts or changes the nature of the case made out in the complaint or the notice served on the petitioner/accused. The mere omission to mention about the said agreement in the complaint or the notice or even in the affidavit of the respondent/complainant does not by itself debar the respondent/complainant from producing the material which was inadvertently not referred to or produced earlier. No prejudice will be caused to the petitioner/accused if the respondent/complainant is allowed to produce the agreement and examine the notary as the petitioner/accused will be given opportunity to cross-examine the respondent/complainant as well as the notary and will be allowed to produce evidence in rebuttal.

In these facts and circumstances of the case, I am of the

considered view that the impugned order does not suffer from any material illegality or irregularity and no ground is made out to interfere with the same in exercise of the powers under Section 482 of the Cr.P.C.

In view of the above, the petition, being devoid of any merit, is hereby dismissed.

However, the observations made hereinabove, which have been made only for the purpose of disposal of the present petition, shall not bind or influence the trial Court in adjudication of the case on merits.

20.11.2019

Vinay

(ARUN KUMAR TYAGI)
JUDGE

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