

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Misc.-M-8408 of 2017

Date of Decision: September 26, 2019.

Raghubir Singh Samdhyani

.....Petitioner

versus

Ravinder Kumar Dhiman

.....Respondent

CORAM: HON'BLE MR.JUSTICE ANIL KSHETARPAL.

Present: Mr.Surinder Mohan Sharma, Advocate, for the petitioner.
Mr.Vishal Gupta, Advocate, for the respondent.

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Anil Kshetarpal, J. (Oral)

Challenge is to the order dated 02.03.2017 passed by the learned Judicial Magistrate 1st Class, Ambala, dismissing the application under Section 311 Cr.P.C. filed by the complainant for permission to examine Hand-writing and Finger Print Expert. Accused has defended the complainant under Section 138 of the Negotiable Instruments Act on the strength of Settlement/Deed of Compromise Exhibit D-2. No doubt, the aforesaid Compromise Deed was put to the complainant in cross-examination. However, he denied execution and genuineness of the aforesaid Deed of Compromise. The evidence of the complainant was recorded on 30.08.2016 and evidence of the prosecution was closed on 16.09.2016. In defence evidence, respondent has examined a Hand-writing and Finger Print Expert in order to prove the signatures of the complainant. The petitioner-complainant thereafter filed an application under Section 311 Cr.P.C. for permission to examine the Hand-Writing and Finger Print Expert. The learned Court has dismissed the application on the ground that petitioner was well aware about the document Exhibit D-2 at the time of

leading his evidence but he failed to examine any expert.

This Court has heard learned counsel for the parties at length with their able assistance and perused the order passed by the Court.

Learned counsel for the petitioner contends that the entire dispute now revolves upon the Exhibit D-2-alleged Deed of Compromise. He submits that this document was put to the petitioner-complainant on 30.08.2016 and execution thereof was denied by the petitioner. He further submits that the evidence was closed within 16 days thereafter. He further submits that Section 311 Cr.P.C. enables the Court to summon any person as a witness or examine any person in attendance or re-examine any person already examined. The only condition is that his evidence appears to be essential for the just decision of the case. Section 311 Cr.P.C. is extracted 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”.

Power under Section 311 Cr.P.C. has been very beautifully explained 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. 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

XXX XXX XXX XXX

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."

Thus, it has been explained that Section 311 Cr.P.C. is in two parts. First part uses the word 'may' whereas second part uses the word 'shall'. Fundamental requirement is "if it appears to the Court that it is essential for just decision of the Court", the Court shall summon any person as a witness or examine or recall and re-examine such person in evidence.

On the other hand, learned counsel for the respondent while referring to the judgment passed by this Court in **Jagjit Singh versus Satinderjit Singh, 2013 (8) RCR (Criminal), 3010**, submits that handwriting and finger print expert cannot be permitted to be examined by way of rebuttal evidence.

This Court has carefully gone through the aforesaid judgment in the case of **Jagjit Singh (supra)** which is with reference to a document which was produced by the complainant. Hence, the aforesaid judgment would have no applicability. In the present case, the dispute is with regard to correctness and genuineness of a document Exhibit D-2 produced by the accused. In fact, the entire complaint is to be decided on the strength of the aforesaid document. Hence, the Court has committed error in taking narrow view in the matter.

Accordingly, this petition is allowed and the order dated

02.03.2017 passed by the learned Judicial Magistrate, 1st Class, Ambala is

set-aside. Petitioner be granted opportunity to examine the hand-writing and finger print expert.

September 26, 2019
mohinder

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned

:

Yes/No

Whether Reportable

:

Yes/No