

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

**CRM-M-40210-2019
Date of Decision:26.09.2019**

Jagjiwan Kaur Sodhi

...Petitioner

Versus

State of Punjab and others

...Respondent(s)

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Deepak Aggarwal, Advocate for the petitioner.

ANIL KSHETARPAL, J.

Accused is challenging the correctness of the order dated 29.08.2019 passed by the learned Judicial Magistrate, exercising powers under Section 311 Cr.P.C. and directing re-examination of a bank official to produce and prove loan application form, account statement pertaining to Jaswinder Singh and original sale deed.

This Court has heard the learned counsel for the petitioner at length.

Learned counsel for the petitioner has submitted that in the present case final arguments were heard by the learned Court and therefore, the order passed is wrong. He has further submitted that the order passed by the Court, results in filling up lacuna in the case of prosecution, which is not permissible. He has also submitted that since the accused has been examined under Section 313 Cr.P.C., therefore, defence of the accused stands disclosed and hence the application cannot be allowed.

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 to 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
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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."*

Thus, it has been explained that Section 311 Cr.P.C. is in two parts. In first part the word used is "may", at any stage of any inquiry, trial or other proceeding under the Code, whereas second part mandates that 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. Thus, there is no limitation/restriction on the power of the Court. In the present case, learned Judicial Magistrate has held, after examining the

nature of the offence alleged to have been committed, that these documents alongwith the statement of the bank official shall be necessary for just decision of the case.

Now, let us deal with the arguments of the learned counsel for the petitioner.

With regard to first submission, it may be noted that Section 311 Cr. P.C. enables the court to exercise powers at any stage of any inquiry, trial or other proceedings. Obviously, power given under Section 311 Cr.P.C. is wide enough to include the power to exercise that power even after final arguments have been addressed before pronouncement of the judgment.

As regards second argument, it may be noted that learned counsel for the petitioner failed to disclose as to what prejudice is caused to the petitioner. He has further failed to justify his contention that accused has disclosed his defence and how, it is going to prejudice his case. It is expected that whenever learned counsel raises an argument he is expected to substantiate the same. It is not appropriate for the counsel to leave the arguments half way.

In the present case, the accused-petitioner has failed to show as to how by allowing leading of evidence at this stage is going to prejudice the trial of the case. It is the duty of the every court to make a sincere endeavour to do substantial justice between the parties. In the pursuit to achieve the goal of substantive justice, the Criminal Procedure Code enables the Court to pass such orders as may be required in the interest of justice. In the present case such power has been exercised by the Judicial Magistrate.

Hence, no ground is made out to interfere. The present petition is dismissed. Pending application(s), if any, shall also stand disposed of, in terms thereof.

26.09.2019
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No