

**(202) IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-6993-2019

Date of decision : 11.10.2022

GAURAV KUMAR

... Petitioner

Versus

AVTAR SINGH

...Respondent

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. S.K. Singla, Advocate
for the petitioner.

Mr. Mohd. Salim, Advocate
for the respondent.

JASJIT SINGH BEDI, J. (ORAL)

The present petition under Section 482 Cr.P.C. has been filed seeking quashing of the order dated 18.01.2019 (Annexure P-3) (colly) passed by the learned Judicial Magistrate, 1st Class, Malerkotla in a complaint under Section 138 of the Negotiable Instruments Act No.259 of 2018 instituted on 27.03.2018 titled as “Gaurav Kumar Versus Avtar Singh” (Annexure P-1), whereby the application of the petitioner-complainant for summoning a witness under Section 311 Cr.P.C. has been dismissed.

2. The brief facts of the case are that the petitioner-complainant filed a complaint under Section 138 of the Negotiable Instruments Act against the respondent/accused alleging that the respondent had borrowed a sum of Rs.3,90,000/- from the petitioner-complainant on 09.02.2018 and had issued a post-dated cheque No.892667 dated 22.02.2018 in favour of the petitioner-complainant.

When the petitioner presented the said cheque for encashment, it was

dishonoured leading to the filing of the complaint and the subsequent summoning order.

3. Thereafter, the petitioner-complainant appeared and examined himself as CW-1 and during the course of his cross-examination on a question being asked, the petitioner-complainant stated that the respondent-accused had borrowed the said amount in the presence of one Pankaj Goyal. Thereafter, an application under Section 311 Cr.P.C. for seeking permission to examine Pankaj Goyal son of Inderjit Goyal was moved. The said application came to be dismissed vide order dated 18.01.2019 (Annexure P-3) wherein, it was held that merely because the name of Pankaj Jain had appeared in the cross-examination, the invocation of Section 311 Cr.P.C. was not warranted.

It is this order which is impugned before this Court.

4. The learned counsel for the petitioner-complainant contends that the necessity arose for moving the application under Section 311 Cr.P.C. only on account of the fact that during the course of cross-examination, it transpired that the accused/respondent had borrowed the amount from the petitioner-complainant and issued the cheque in question to the petitioner-complainant in the presence of Pankaj Goyal. He thus, contends that the petitioner-complainant has not delayed the proceedings in any manner and allowing of the application would not amount to filling up of a lacuna as the said witness would be subjected to cross-examination.

5. On the other hand, the learned counsel for the respondent-accused contends that the petitioner-complainant had availed many opportunities to lead his evidence but had failed to produce Pankaj Goel

as a witness and the attempt was only to fill up the lacuna in the case of the petitioner-complainant and therefore, the petition was liable to be dismissed.

6. I have heard the learned counsel for the parties at length.

7. Admittedly, the list of witnesses attached to the complaint itself mentions that the complainant could examine any other witness, if required. In the present case, the necessity arose to move the application under Section 311 Cr.P.C. only because the name of Pankaj Goel figured in the cross-examination of the petitioner-complainant as the witness in whose presence the transaction took place. The question of filling up of a lacuna would be irrelevant as what is required to be seen is the test of the essentiality of the evidence. Meaning thereby that if the evidence was essential for the just adjudication of the case in terms of Section 311 Cr.P.C., then any witness could be examined, even though the said examination/cross-examination/re-examination would amount to the filling up of a lacuna.

The Hon'ble Supreme Court in the case of **Varsha Garg Versus The State of Madhya Pradesh & others, 2022(4) R.C.R. (Criminal) 328**, held as under:-

“29. The first part of the statutory provision which uses the expression 'may' postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “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”. Essentiality of the evidence of the person who is to be

examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

38. Having dealt with the satisfaction of the requirements of [Section 311](#), we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under [Section 311](#)."

[Emphasis supplied]

This Court in the case of **Sucha Singh Versus Dharam Singh, CRM-M-42030-2021, decided on 29.08.2022, held as under:-**

"10. A perusal of Section 311 Cr.P.C. along with the judgments (supra) would clearly establish that if allowing of an application under Section 311 Cr.P.C. amounts to the filling up of a lacuna then that fact in itself is a subsidiary factor and the Court's determination of the application should be based only on the test of the essentiality of the evidence. While, it is true that the right of the accused to a fair trial is constitutionally protected under Article 21 of the Constitution of the India, it is the duty of the Court to allow the prosecution/complainant or for that matter the accused to correct an error in the interest of justice. In the present case, apparently, the non-production of the bank statement was an oversight. Since it is a matter of record available with the bank and not something which can be prepared at a subsequent date by the complainant, it cannot be argued that since it was not exhibited earlier, it

cannot be permitted to be exhibited now. Even if allowing of the application amounts to the filling up of a lacuna that fact would remain subsidiary to the larger issue of the essentiality of the evidence and fairness in the trial to all sides. If the exhibiting of the document is permitted, the accused would challenge its veracity or evidentiary value by cross-examination. Therefore, no irreparable loss shall be suffered by the accused, if the said document is permitted to be placed on record/exhibited. Even otherwise the exhibiting/placing on record of the said document is essential for the just adjudication of the case.”

[Emphasis supplied]

8. In view of the above-said discussion as also the law enumerated by the Hon'ble Supreme Court in the case of Varsha Garg (supra) and this Court in the case of Sucha Singh (supra), it is apparent that the evidence of Pankaj Goel is necessary for the just adjudication of the case and in any case his name as a witness came up only during the course of cross-examination.

9. In view of the above, the present petition is allowed and the order dated 18.01.2019 (Annexure P-3) (colly) passed by the learned Judicial Magistrate, 1st Class, Malerkotla is hereby quashed and the prayer of the petitioner-complainant in terms of his application 311 Cr.P.C. (Annexure P-2) is allowed.

10. The Trial Court is directed to conclude the Trial within a period of 02 months from the next date fixed before it.

(JASJIT SINGH BEDI)
JUDGE

11.10.2022
JITESH

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