

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

CRM-M-47153-2018
Date of Decision: 19.10.2022

PARDEEP SINGH & ANR.

... Petitioners

Versus

STATE OF HARYANA & ANOTHER

...Respondents

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. S.S. Dinarpur, Advocate for the petitioners.

Mr. Kanwar Sanjiv Kumar, Asstt. A.G., Haryana.

Mr. Namit Khurana, Advocate for respondent No.2.

JASJIT SINGH BEDI, J.

The prayer in the present petition under Section 482 Cr.P.C. is for setting aside the order dated 08.10.2018 (Annexure P-5) passed by the Judicial Magistrate, 1st Class, Yamuna Nagar at Jagadhari in Criminal Complaint No.312 dated 16.05.2013 registered under Sections 406, 420, 120-B IPC titled as Kamlesh Versus Pardeep Singh & another whereby the application filed by the complainant/respondent No.2 under Section 311 Cr.P.C. has been allowed.

2. The brief facts of the case are that the respondent No.2/complainant filed a complaint in the Court of Chief Judicial Magistrate, Yamuna Nagar at Jagadhari with the allegations that she had purchased a plot at Shiv Colony Mauja Chandpur, Yamuna Nagar, Tehsil Jagadhari District Yamuna Nagar as per sale deed No.3990 dated 27.09.1988. Pursuant to the purchase of plot additions and alterations were made in the construction on

the said plot. Taking advantage of the faith that she and her husband placed upon that the petitioners/accused, they fraudulently got executed a General Power of Attorney dated 17.08.2010 in favour of Pardeep Singh (petitioner No.1/accused No.1) and on the basis of the said General Power of Attorney, Pardeep Singh (accused/petitioner No.1) executed a sale deed in favour of petitioner No.2/accused No.2-Reena Devi his wife on 14.03.2012.

Based on these allegations, the aforementioned criminal complaint came to be filed in which the petitioners (accused) came to be summoned to face trial by the said Court.

3. During the course of proceedings and after the closing of the evidence in the complaint case, the petitioner No.1-Pardeep Singh appeared as a witness in a civil suit arising out of the same transaction as DW-5 and in the said case he is said to have made certain admissions which were stated to be relevant for the first decision of the present complaint.

4. Due to this reason, an application for permission to produce additional evidence was moved to bring on record the testimony of petitioner No.1-Pardeep Kumar recorded in the said civil suit titled Kamlesh Versus Pardeep & another with the averments that the said statement was relevant for the just decision of the present complaint case. The accused/petitioners filed a reply to the petition contending that the application had been filed just to delay proceeding and to fill up a lacuna which the applicant (respondent No.2-complainant) was not entitled to do since the arguments in the case had already been advanced and the case was at the final stages and producing the additional evidence would amount to reopening of the trial. In addition it was contended that the said statement in another case could not be read in

evidence in this case since the previous statement of a witness could be relevant only if it had been put to the witness in his cross-examination which was not so in the present case.

5. On considering the rival contentions of both the parties, the Trial Court came to the conclusion that the statements sought to be produced on record in the present was germane to the controversy inasmuch as the civil proceedings and the the present criminal proceedings arose out of the same transaction of the execution of a power of attorney and subsequent sale deed. The Court also found that the admissibility of the statement of the petitioner No.1-Pardeep Singh recorded in civil proceedings would be a matter of adjudication during the trial in the present case. It was further held that as the petitioner No.1-Pardeep Singh (accused) had not been examined as a witness in the present case, there was no question of confronting him with his statement recorded in the civil case as had been contended by the petitioners/accused and even otherwise, any additional evidence sought to be produced by respondent No.2/complainant at that stage would be put to the petitioners/accused at the time of recording of their respective statement under Section 313 Cr.P.C. where they could furnish their explanation. It was thus held that the application under Section 311 Cr.P.C. ought to be allowed subject to payment of cost.

It is this order (Annexure P-5) which is under challenge in the present petition.

6. The learned counsel for the petitioners contend that the respondent No.2/complainant had closed his oral evidence on 04.01.2018 and his statement under Section 313 Cr.P.C. was recorded and on 22.01.2018. It

was only when the case was fixed for defence evidence and arguments that respondent No.2/complainant moved an application under Section 311 Cr.P.C. on 20.08.2018 with a prayer that she be permitted to produce the evidence of petitioner No.1-Pardeep Singh recorded before the Civil Court in case titled as Kamlesh Versus Pardeep Singh & another where he had appeared as DW-5. He contends that the said application has been allowed without giving due regard to the settled proposition of law as envisaged under Section 311 Cr.P.C. and set out in the judgments of the Hon'ble Supreme Court in the case of *Hanuman Ram Versus The State of Rajasthan & others, 2008(4) R.C.R. (Criminal) 823* and *Mannan SK. & others Versus State of West Bengal & another, 2014(4) R.C.R. (Criminal) 617.*

He further contends that it is settled proposition of law that the evidence recorded in one case cannot be read in evidence in another case until and unless the witness has been confronted with his deposition in the other/earlier case and therefore, it was strange as to how the Trial Court could have allowed the application of respondent No.2/complainant.

He contends that the application had been moved at a delayed stage after the statement under Section 313 Cr.P.C. had been recorded and the case was fixed for arguments. In fact by passing the impugned order dated 08.10.2018 (Annexure P-5), a *de novo* trial had been initiated which was impermissible in law and even otherwise, an attempt has been made to fill up the lacuna which is not permissible in the attending facts and circumstances of the case in view of the penultimate stage of the trial.

7. On the other hand, the learned counsel for respondent No.2/complainant contends that undoubtedly, the statement under Section 313

Cr.P.C. was recorded on 22.01.2018. However, only thereafter was the statement of petitioner No.1-Pardeep Singh recorded as DW-5 in the civil proceedings and as he had made certain admissions in the said statement it was necessary to exhibit the said statement on the records of the present case for the just decision of the present complaint. He contends that the question of the said statement being inadmissible in evidence as the same was not put in cross-examination to petitioner No.1-Pardeep Singh is completely fallacious. Pardeep Singh (petitioner No.1/accused No.1) was examined as DW-5 in the civil proceedings. However, in the present case he is an accused and has not been examined as a defence witness therefore, the question of confronting petitioner No.1-Pardeep Singh with his previous statement as DW-5 in the civil proceedings does not arise. Even otherwise, his statement as DW-5 was recorded after the complainant's evidence had been closed in the present case, the statement of the accused/petitioners recorded under Section 313 Cr.P.C. and the case was posted for arguments. He further contends that no loss whatsoever shall be suffered by the petitioners by the said statement coming on record on the file of the present case as the accused/petitioners would have opportunity to clarify their position under Section 313 Cr.P.C. It is also contended that if allowing of the application amounted to filling up of a lacuna, that by itself would not be a circumstance to dismiss the application as the test while adjudicating upon an application under Section 311 Cr.P.C. is the 'essentiality of evidence' as has been set out by this Court in the cases of Sucha Singh Versus Dharam Singh, CRM-M-42030-2021, decided on 29.08.2022 and Gaurav Singh Versus Avtar Singh, CRM-M-6993-2019, decided on 11.10.2022.

8. I have heard the learned counsel for the parties at length.
9. Before proceeding further, it would be apposite to examine Section 311 Cr.P.C., reads 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.”

10. The Hon'ble Supreme Court and this Court have dealt with the issue in hand in a number of cases and the relevant judgments in that regard are as under:-

In **Rajaram Prasad Yadav Versus State of Bihar & another, 2013(3) R.C.R. (Criminal) 726**, it was held as under:-

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

- a) 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?*
- b) The exercise of the widest discretionary power under Section 311 Criminal Procedure Code 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.*

- c) 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.*
- d) The exercise of power under Section 311 Criminal Procedure Code 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.*
- e) 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.*
- f) The wide discretionary power should be exercised judiciously and not arbitrarily.*
- g) 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.*
- h) The object of Section 311 Criminal Procedure Code simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
- i) 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.*
- j) 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.*
- k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) The power under Section 311 Criminal Procedure Code 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.”

[emphasis supplied]

In **Gaurav Kumar Versus Avtar Singh, CRM-M-6993-2019,**

decided on 11.10.2022, it was held as under:-

“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.”

[Emphasis supplied]

A similar view has been expressed in the case of **Sucha Singh**

Versus Dharam Singh, CRM-M-42030-2021, decided on 29.08.2022.

11. A perusal of Section 311 Cr.P.C. along with the judgments would establish that if allowing of an application under Section 311 Cr.P.C. amounts to filling up of a lacuna then that by itself would be a subsidiary factor and the Courts determination of the application should be based only on the test of 'essentiality of the evidence'. On the other hand, so far as the judgments cited by the learned counsel for the petitioners are concerned, they do not further the case of the petitioners in the facts and circumstances of the present case.

12. Coming back to the facts of the present case, it may be pointed out that after the statement of the accused were recorded under Section 313 Cr.P.C. on 22.01.2018, the statement of Pardeep Singh-petitioner No.1 (accused) was recorded as DW-5 in the civil proceedings emanating out of the same transaction. It was in that situation that an application under Section 311 Cr.P.C. was moved to produce the certified copy of the testimony of Pardeep Singh (petitioner No.1) by way of additional evidence in the present complaint. The question of Pardeep Singh being confronted with the said

statement would not arise as in the present case Pardeep Singh was not examined as a witness but in fact was an accused. Even otherwise, the parties have a right to prove their case in the manner that they think fit and what evidence is sought to be produced cannot be disputed by either party. Of course, the evidentiary value of the additional evidence sought to be brought on record would be a subject matter of appreciation during the course of Trial. Further, the stage of moving of an application under Section 311 Cr.P.C. or the same amounting to the filling up of a lacuna would be subservient to the larger context of the 'essentiality of evidence' sought to be produced. In the present case, the accused/petitioners would certainly have the right to clarify their position with respect to the statements/deposition sought to be produced in terms of Section 313 Cr.P.C. as has been rightly pointed out by the Trial Court and therefore it cannot be said that the exercise of powers by the Trial Court had resulted in causing serious prejudice to the accused resulting in miscarriage of justice.

13. In view of the above, I find no merit in the present petition. Therefore, the same is hereby dismissed.

(JASJIT SINGH BEDI)
JUDGE

19.10.2022
JITESH

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No