

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

CRM-M-34596-2022

Date of Decision:-17.08.2022

Rajinder Trehan.

.....Petitioner.

Versus

M/s HDFC Bank Ltd.

.....Respondent.

CORAM:- HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present:- Mr. Vipin Mahajan, Advocate for the Petitioner.

JASJIT SINGH BEDI, J. (ORAL)

The prayer in the present petition under Section 482 Cr.PC is for quashing of Order dated 06.04.2022 (Annexure P-8) passed by the learned JMIC, Amritsar in complaint bearing No.NACT1780/17.04.2017 under Section 138 of the Negotiable Instruments Act, District Amritsar titled HDFC Bank Vs. EMM EMM Constructions vide which the application moved by the petitioner/accused under Section 311 Cr.PC has been dismissed.

The brief facts of the case are that the respondent-HDFC Bank filed a complaint under Section 138 against the petitioner being the authorised signatory of M/s EMM EMM Constructions with the allegations that the firm had availed a loan facility from the Bank and in order to discharge the loan amount the petitioner had issued a post date cheque in favour of the complainant Bank which on presentation was dishonoured on

the ground of insufficiency of funds. Based on the said complaint the trial Court summoned the petitioner to face the trial for an offence under Section 138 of the Negotiable Instruments Act.

Initially the complaint was filed through Bhupinder Singh, Manager Legal as authorised signatory of the bank. Subsequently the complainant moved an application dated 5.7.2017 for substituting Rajinder Parshad, Deputy Manager to pursue the complaint in place of Mr. Bhupinder Singh. The said application for substitution was allowed by the Trial Court vide order dated 26.07.2017. During the course of trial Rajinder Parshad appeared as CW-1 and tendered his affidavit. He was cross examined by the earlier counsel for the petitioner.

After the statement of the accused-petitioner was recorded under Section 313 Cr.PC, he moved an application under Section 311 Cr.PC for further cross examination of CW-1 Rajinder Parshad lawful attorney of the bank. In the said application the prayer of the petitioner/accused was that there was a change of counsel and further cross examination of the complainant officer of the bank was required on two issues (i) *Whether proper notice had been served on the accused or not* & (ii) *Whether the complaint had been filed by a lawful attorney of the bank*. It was the contention in the application that these facts had come to the notice of the new counsel for the accused and, therefore, re-cross examination was necessary and may be allowed.

The reply to the application was submitted by the bank. It was contended that the officer of the Bank had been cross examined at length. The moving of the present application was just a delaying tactics as the accused had challenged every order of the Trial Court and had filed a

number of applications at various stages of the proceedings which had been dismissed by the trial Court. Further the complaint had been filed in the month of January 2016 and both the accused had been declared proclaimed offender vide order dated 1.7.2016. Pursuant to being grant bail from April 2017 onwards the hearing was prolonged on one pretext or the other. It was thus contended that even otherwise the complaint was pending since January 2016 for more than 06 years and change of counsel was no ground for further cross examination/re-cross examination.

Based on the respective pleadings of the parties, the application under Section 311 Cr.PC came to be dismissed vide order dated 06.04.2022 (Annexure P-8). It is this order which is under challenge before this Court.

The Counsel for the petitioner contends that he seeks only one opportunity to further cross examine/re-cross examine the complainant on two vital aspects of the matter i.e. *Whether notice had been served and whether the complainant had been properly authorised by the bank to pursue the complaint against the petitioner/accused.* He contends that moving of the present application has been necessitated because of a change of counsel as it was only him who later on realised after he had been engaged as the new counsel that certain material question had not been put to the witness during the course of cross examination. He contends that under Section 311 Cr.PC this Court has ample powers to re-summon the witnesses for cross examination even though he has been examined and cross examined earlier. It would be in the interest of justice if the present application is allowed and an opportunity is granted to the petitioner for the same.

I have heard the learned Counsel for the petitioner at length.

Before proceeding further it would be necessary to examine the relevant provisions of law:-

“Section 311 Cr.P.C. 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 provisions of Section 311 Cr.P.C. have been interpreted in a number of decisions of the Hon'ble Supreme Court and this Court.

In ***“Mannan Sk. And others versus State of West Bengal and Another, 2014 (13) SCC 59***, the Supreme Court of India held as under:-

“ 10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word ‘shall’. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words ‘essential to the just decision of the case’ are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it’s exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise

of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

11. Rather than referring to all the judgments which are cited before us, we would concentrate on Mohanlal Soni which takes into consideration relevant judgments on the scope of Section 311 and lays down the principles. Mohanlal Soni is followed in all subsequent judgments. In Mohanlal Soni this Court was considered the scope of Section 540 of the Code of Criminal Procedure, 1898 (the old code) which is similar to Section 311 of the Code. This Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. The relevant observations of this Court are as under:

“... ..In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on

inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

This Court further observed as under:

“... .. Though Section 540 (Section 311 of the new Code) is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.”

12. While dealing with Section 311 of the Code in *Rajendra Prasad* this Court explained what is lacuna in the prosecution as under: *“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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.”

13. Reference must also be made to the observations of this Court in Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors., 2004(2) RCR (Criminal) 836 : 2004(4) SCC 158 where this Court described the scope of Section 311 of the Code as under:

“Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

In the case of “***Randhir Singh versus State of Haryana and others, 2020(1) RCR (Criminal) 778***”, this Court held as under:-

“5. Learned Counsel for the petitioner has argued that the occurrence took place on 14.06.2010. After giving numerous opportunities, the prosecution closed its evidence on 02.02.2016. When the case was fixed for arguments, application under Section 311 of the Cr.P.C. Was filed at a highly belated stage. Dr. Priyanka was not cited as a witness in the list of prosecution witnesses and could not be allowed to be

examined to fill up the lacuna. Therefore, the impugned order suffers from material illegality and the same may be quashed. In support of his arguments learned Counsel for the petitioner has placed reliance on the observations made in judgments rendered by this Court in CRM-M-21919 of 2008 titled Harish Kumar and others Vs. State of Haryana and another decided on 18.04.2009 and CRM-M-17282 of 2014 titled Harbinder Singh and others Vs. Jaspal Singh and others decided on 06.01.2015.

6. *On the other hand, learned Counsel for the injured and learned State Counsel have submitted that Dr. Priyanka was not cited as witness in the list of prosecution witnesses due to oversight. Examination of Dr. Priyanka is necessary for just decision of the case and the same will not amount to filling up of any lacuna. The impugned order does not suffer from any material illegality or irregularity. Therefore, the present petition may be dismissed. In support of their arguments learned Counsel for the injured and learned State Counsel have placed reliance on the observations made by Hon'ble Supreme Court in Mohanlal Shamji Soni Vs. Union of India and another: 1991(3) RCR (Criminal) 182; Mannan Sk. And others Vs. State of West Bengal and another : 2014 (4) RCR (Criminal) 617 and Manohar Prajapat Vs. State of Madhya Pradesh : 2014 (6) RCR (Criminal) 163.*

7. *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."

8. *In Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd. 2008 (4) Criminal Court Cases 162 (Supreme Court) Hon'ble Supreme Court analyzed the provisions of Section 311 of the Cr.P.C. as under :-*

"7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, 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 anyone as a witness, or (b) to examine any person present in the 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.

8. *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 of 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 the 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 any 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."

9. *It is now well settled that application under section 311 of the Cr.P.C. for summoning of witnesses can be filed at any stage of trial even after final arguments but before the pronouncement of judgment and mere delay is not decisive of the question of summoning of witnesses. In Mohan Lal Shamji's Case (Supra) it was held 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.*

10. *In Shailendra Kumar Vs. State of Bihar : 2002 (1) S.C.C. 655 it was held 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, laches 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.*

11. *In Mohanlal Shamji Soni's Case (Supra) 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.*

12. *In Rajaram Prasad Yadav Vs. State of Bihar and another, 2013(3) R.C.R.(Criminal) 726 Hon'ble Supreme Court referred to the earlier decisions and in para No.23 of its judgment culled out certain principles which are to be kept in mind while exercising power under Section 311 Cr.P.C. which is reproduced 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 needed 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.

13. In Mannan Sk. and others Vs. State of West Bengal and another : 2014(4) R.C.R.(Criminal) 617 it was held by Hon'ble Supreme Court that justice must not be allowed to suffer because of the oversight of the prosecution and in that case witness was recalled for examination after 22 years and his examination was also held not to amount to filling of the lacuna.

14. In the present case, Dr. Priyanka conducted radiological examination of the injured and examination of Dr. Priyanka was necessary to prove the same at the time of recording of prosecution evidence. However, Dr. Priyanka was not cited in the list of prosecution witnesses by the Investigating Officer due to oversight and the omission could not be noticed by the Assistant Public Prosecutor at the time of recording of the prosecution evidence. As observed by Hon'ble Supreme Court in Rajendra Prasad's Case (Supra) an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No benefit can be allowed to the accused due to omission of the name of Dr. Priyanka in the list of prosecution witnesses and the prosecution can not be foreclosed from correcting the error/remedying the omission. Examination of Dr. Priyanka is necessary

for obtaining proper proof of such facts which will lead to a just and correct decision of the case. No prejudice will be caused to the accused if Dr. Priyanka is allowed to be examined as the accused will be entitled to cross-examine her and also to produce evidence in rebuttal.”

A perusal of Section 311 Cr.PC along with the law cited (supra) would clearly establish that the Court has vast powers which can certainly be invoked to secure the ends of justice, if it is essential to summon and examine or recall and re-examine any person, if his evidence appears to be essential to the just decision of the case.

In the present case a perusal of the application and reply filed thereon would clearly establish that the moving of the present application is a delaying tactic on the part of the petitioner/accused. The complaint under Section 138 of the Negotiable Instrument Act is pending since 2016 and has not been decided uptill now. As per the reply, virtually every interim order has been challenged by the petitioner-accused. A number of applications have been filed during the course of proceedings, all of which have delayed the conclusion of trial.

Be that as it may, in the present application the recall, re-cross examination of the complainant is sought by the petitioner-accused on account of change of counsel. Firstly, the change of counsel is no ground for recall of witness. The Hon'ble Supreme Court in **AG Vs. Shiv Kumar Yadav & Anr. 2015(9) Scake 649: 2015 Cri.L.R. (SC) 1007** has held so. Even otherwise as per the cross examination of the witnesses concerned, with regard to the service of legal notice it may be mentioned here that as per Annexure P-5 (the cross examination of CW-1 Rajinder Parshad) it is apparent that the question regarding service of notice had been put by the

earlier counsel to the witness. Secondly, so far as the complaint not having been filed by a lawful attorney is concerned, it would be relevant to mention here that the complaint has been filed by a Bank which is a juristic person being a company. A bank/company can deputy any officer of his choice to represent the bank with permission of the Court. The attorney holder Rajinder Parshad was allowed by the court to represent the bank vide order dated 26.07.2017. Once the court had already allowed the application for substitution of the attorney of Rajinder Parshad in place of the previous attorney then the question of complaint not having been filed by a lawful attorney and that question being needed to be put to the witness in re-cross examination does not arise. Apparently the application seems to have been filed with a view to further delay the proceedings.

In view of the aforesaid discussion, I find no merit in the present petition, which is hereby dismissed.

(JASJIT SINGH BEDI)
JUDGE

August 17, 2022
Vinay

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>