

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-50233 of 2019 (O&M)

DECIDED ON: 21st July, 2022

Dharam Pal Yadav

.....PETITIONER

VERSUS

Deepak Yadav

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN.

Present: Mr. Sudhir Aggarwal, Advocate for petitioner.

Mr. Gaurav Aggarwal, Advocate for respondent.

AVNEESH JHINGAN, J (ORAL)

This petition is filed seeking quashing of order dated 17th September, 2019 passed by the Judicial Magistrate Ist Class, Gurugram, allowing application filed by the respondent under Section 311 Cr.P.C.

The brief facts are that on dishonouring of cheque bearing No. 034473 dated 6.4.2017 for a sum of Rs.10,84,237/-, with the remarks "Insufficient funds" the respondent filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') . The case set up was that petitioner had taken a loan of Rs.10,84,237/- from the respondent for business purposes. The petitioner took defence that no debt or other liability was due on the date of presentation of cheque.

In the application filed under Section 311 Cr.P.C. it was pleaded that the loan transaction was reduced in writing and was attested by two witnesses. The loan agreement is an important document but could not be produced earlier. The respondent in his cross-examination had mentioned about the fact of the written agreement. The application was opposed on the ground that agreement was with the complainant and he had not produced it at an earlier

stage. The application was allowed. Hence, the present petition.

Learned counsel for the petitioner submits that the fact of there being a written agreement for advancing loan was not mentioned in the complaint. The application for producing the agreement was filed after the closure of the evidence of the complainant.

Learned counsel for respondent defends the impugned order. The submission is that the loan agreement is a necessary document for fair decision of the complaint. The document is not only signed by the petitioner but also by the attesting witnesses.

Before proceeding further it would be appropriate to quote following decisions of the Supreme Court:

In ***U.T. of Dadra and Haveli and another v. Fatehsinh Mohansinh***, reported as 2006(4) R.C.R.(Criminal) 113, it is held as under :-

"12. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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."

In ***T. Nagappa v. Y.R. Muralidhar***, AIR 2008 SC 2010, the Supreme Court has held as under:

"What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-

section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.”

Supreme Court in *Natasha Singh Versus CBI (State) 2013(5) SCC*

741 considering its earlier decision in *T. Nagappa's case (supra)* held that the application under Section 311 Cr.P.C. for fresh evidence should be allowed if its facilitate just decision.

In *Rajaram Prasad Yadav Versus State of Bihar and another*

2013 (14) SCC 461, it is held as under:

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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."

There is no dispute on the proposition that in proceedings under Section 138 of the Act, the presumptions under Section 118 and 139 are in favour of the holder of the cheque, the presumptions are rebuttable. That on rebuttal of presumption by the accused, the onus shifts on the complainant. The loan agreement, in the facts of the case, is a material document for just and fair decision of the complaint. The complainant cannot be denied a fair opportunity to discharge the onus casted upon him. The prayer cannot be rejected on the ground of non-mentioning of the agreement in the complaint and its non production at an earlier stage. More so, when the Court is *prima-facie* satisfied with regard to relevance of the document to be produced.

It is settled law that the Court can exercise its power under Section 311 Cr.P.C., even after the closure of the evidence of complainant provided that the additional evidence is necessary for the decision of the case.

No case is made out for interference in the impugned order.

The petition is dismissed.

Since the main case has been decided, the pending application, if any is rendered infructuous.

(AVNEESH JHINGAN)
JUDGE

21st July, 2022

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<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether reportable</i>	<i>Yes</i>