

CRM-M- 59504-2022 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M- 59504-2022 (O&M)

Date of Decision: 21.12.2022

Sushil Kumar

... Petitioner

V/s.

M/s Des Raj Ved Parkash

... Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK MANCHANDA

Present : Mr. Ashok Kumar Khunger, Advocate
for the petitioner.

DEEPAK MANCHANDA, J.(Oral)

The instant petition has been filed seeking setting aside/quashing the order dated 21.11.2022 (Annexure P-17) passed by the Judicial Magistrate 1st Class, Abohar vide which the application of the petitioner under Section 311 Cr. P.C. in criminal complaint under Section 138 of the Negotiable Instruments Act bearing No. NACT/851/2019 dated 01.07.2019 had been dismissed.

Learned counsel for the petitioner contends that the respondent

had filed a complaint under Section 138 of the Negotiable Instruments Act

bearing NACT/851/2019 whereby the petitioner was summoned to face the trial and he has been appearing on each and every date during the proceedings, however, due the COVID-19 pandemic and the restricted functioning of the Court, the matter was adjourned from time to time. Thereafter, on 15.09.2021, the statement of the respondent/complainant was recorded and the matter was adjourned to 11.10.2021 for evidence of the complainant after notice. He further submits that during the pendency of the said complaint, the matter was sent to Lok Adalat for exploring the chances of compromise. But thereafter, due to one reason or another, the case was adjourned from time to time. Then, on 07.07.2022 the JMIC, Abohar passed an order treating the cross examination of the complainant as NIL whereas after coming to know about the passing of such order, the petitioner moved an application under Section 311 Cr. P.C. for recalling the CW-1 for the purpose of cross-examination but the same was also dismissed vide order dated 22.08.2022 on the ground that once the opportunity to the cross-examination of complainant stands NIL, the Court becomes “Functus officio” and cannot proceed further.

Aggrieved with this order, the present petition has been filed with a prayer for quashing/setting aside the order dated 21.11.2022. Learned counsel for the petitioner confines himself to the limited prayer for affording one effective opportunity to conclude the cross-examination of the complainant.

I have heard learned counsel for the petitioner.

Undoubtedly, Section 311 Cr. P. C. has been enacted to enable the Court to find the truth and render a just decision, where any Court by exercising its discretionary authority at any stage of inquiry, trial or other proceedings 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 already examined who is expected to be able to throw light upon matter in dispute. The objection of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society.

The **Karnataka High Court** in case of **Sr. H. Suresh vs. S. H.**

Prema, 2022 (2) NIJ, 525 has held as under :-

9. The fact remains that the learned counsel appearing for the petitioner - accused has not been able to cross-examine the complainant at any point in time in the proceeding. Therefore, it would become a case where there is no cross-examination permitted to the petitioner and result in miscarriage of justice. Since the petitioner is the accused, all opportunity to the accused to protect himself or defend himself should be granted, this is the purport of [Section 311](#) of the Cr.P.C. [Section 311](#) of the [Cr.P.C.](#) mandates that the application can be preferred at any stage of proceedings. It is apposite to refer to the judgment of the Apex Court in the case of [V.N. PATIL V. K. NIRANJAN KUMARI](#), wherein the Apex Court holds as follows:

"13. The scope of [Section 311](#) Cr.P.C. which is relevant for the present purpose is reproduced hereunder:

"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 (2021) 3 SCC 661 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."

14. The object underlying [Section 311 CrPC](#) 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 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 the discretionary power conferred under [Section 311 CrPC](#) has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

15. The principles related to the exercise of the power under [Section 311 CrPC](#) have been well settled by this Court in [Vijay Kumar v. State of U.P.](#) [[Vijay Kumar v. State of U.P.](#), (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240] : (SCC p. 141, para 17) "

17. Though [Section 311](#) confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of [the Code](#) and the principles of criminal law. The discretionary power conferred under [Section 311](#) has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

16. This principle has been further reiterated in [Mannan Shaikh v. State of W.B.](#) [[Mannan Shaikh v. State of W.B.](#), (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547] and thereafter in [Ratanlal v. Prahlad Jat](#) [[Ratanlal v. Prahlad Jat](#), (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729] and [Swapan Kumar Chatterjee v. CBI](#) [[Swapan Kumar Chatterjee v. CBI](#), (2019) 14 SCC 328 : (2019)

4 SCC (Cri) 839] . The relevant paragraphs of *Swapan Kumar Chatterjee* [*Swapan Kumar Chatterjee v. CBI*, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] are as under: (*Swapan Kumar Chatterjee* case [*Swapan Kumar Chatterjee v. CBI*, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] , SCC p. 331, paras 10-11).

10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under *the Code* to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under *Section 311* should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. *Section 311 CrPC* is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under *Section 311 Cr.P.C.* has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

The Apex Court in its judgment rendered in *Varsha Garg vs.*

The State of Madhya Pradesh and Others, 2022 (4) RCR (Criminal) 328

has also observed the wide ambit of Section 311, which allows the power to

be exercised at any stage and held that :

43. *The Court while reiterating the principle enunciated in Mohanlal Shamji Soni (supra) stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:*

“44. *The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage, and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In **Mohanlal vs. Union of India**, this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, 'any court' or 'at any stage' or 'any enquiry or trial or other proceedings', 'any person' and 'any such person' clearly spells out that the Section has expressed in the widest-possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. 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.”*

The case in hand, the trial Court has dismissed the application only on the ground that since the opportunity to cross-examine the

became 'Functus Officio' and dismissal of the application on the said ground for cross-examination of the complainant by the accused is against the mandate of Section 311 Cr.P.C.

In light of the afore-extracted judgments of the Apex Court and as discussed above, the present petition is allowed and the order dated 21.11.2022 is set aside/quashed with a direction to the trial Court concerned to grant one more opportunity to the petitioner to cross-examine the complainant on a particular date and conclude the same on the said date subject to deposit of Rs. 10,000/- as cost in the Poor People Welfare Fund, PGIMER Chandigarh within a period of one week from the date of receipt of certified copy of this order.

However, it is made clear that the petitioner shall not avail of any further opportunity of filing an application under Section 311 Cr.P.C. seeking further cross examination of the complainant.

(DEEPAK MANCHANDA)
JUDGE

21.12.2022
seema

Whether speaking/reasoned	Yes
Whether Reportable	Yes /No