

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-11335-2016
Reserved on: 21.04.2023
Date of Decision:28.04.2023

Soma Devi

...Petitioner

Versus

State of Punjab and Another

...Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present:- Mr. Mandeep S. Sachdev, Advocate for the petitioner

Mr. Amish Sharma, AAG, Punjab

Mr. Sachin Kalia, Advocate for

Mr. R.S. Bajaj, Advocate for respondent No.2

JAGMOHAN BANSAL, J.

1. The petitioner through instant petition under Section 482 Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') is seeking quashing of order dated 04.01.2016 (Annexure P-1) whereby Additional Sessions Judge, Jalandhar has dismissed application under Section 311 Cr.P.C. of the prosecution seeking summoning of Raj Kumar son of Jit Ram, Ashok Kumar son of Rattan Lal and Jagmohan son of Bhajan Lal as prosecution witness in FIR No.119 dated 11.06.2014 under Section 306 of Indian Penal Code, 1860 (for short 'IPC') registered at Police Station Adampur, Jalandhar.

2. The brief facts emerging from the record and necessary for the adjudication of present controversy are that on the statement of Soma Devi wife of late Shri Bhajan Lal, an FIR No.119 dated 11.06.2014 came to be registered. The complainant-Soma Devi in her complaint alleged

that her daughter was 30 years old and one year back, she got married to Gopal Ram son of Jagan Nath and out of this wedlock, two children were born. Due to bad habits of her son-in-law, there was dispute in the family. Her daughter informed her about the dispute but she advised her to settle in matrimonial home. Her son-in-law used to give beatings to her daughter. Her daughter got fed up from the behaviour of her husband and committed suicide on 10.06.2014 after consuming poisonous substance. Her daughter was cremated on 11.06.2014 without informing them.

3. The police conducted investigation and after completing investigation, in terms of Section 173 Cr.P.C., filed its report. The trial commenced before Additional Sessions Court and during the course of trial, Soma Devi-complainant was examined as well as cross-examined. The complainant through Additional Public Prosecutor moved an application under Section 311 Cr.P.C. seeking summoning of Raj Kumar, Jeet Ram and Jagmohan as prosecution witnesses. The application of the complainant came up for consideration before Additional Sessions Judge, Jalandhar who vide impugned order dated 04.01.2016 dismissed the same on the ground that persons named in the application were neither disclosed by complainant in her statement before police nor while recording her testimony before Court nor they were present at the time of investigation, thus, they at this stage to fill up the lacuna cannot be examined as prosecution witnesses.

4. Learned counsel for the petitioner *inter alia* contends that recording of statements of witnesses under Section 161 Cr.P.C. by police is not required. Filling of lacuna cannot be ground to reject application moved under Section 311 Cr.P.C. The marriage of the deceased with the accused was a love marriage and accused did not permit family members of the deceased to meet her. One proposed witness is neighbour of the deceased, another is cousin of the deceased and third is brother of the deceased.

The learned counsel for the petitioner in support of his contentions relied upon judgment of Single Bench of this Court in ***Saroj versus State of Haryana 2006(4) R.C.R. (Criminal) 1017***, and Andhra Pradesh High Court in ***M/s. Chemo Steel Ltd. and Others versus State of A.P and Others 2005(1) CCR 483***, and Rajasthan High Court in ***Om Prakash versus State of Rajasthan 2004(1) R.C.R.(Criminal) 690***.

5. *Per contra*, learned counsel for the respondent contended that complainant/petitioner is trying to create false evidence in the form of statements of proposed witnesses. Admittedly, marriage of the deceased was a love marriage and she was 30 years old at the time of love marriage. The family members of the deceased were against her love marriage, thus, post marriage they never came to meet the deceased. They did not even invite her in their functions which they organized post marriage of the deceased. The complainant was not even aware of mobile phone number of the deceased. She was not aware about date of

marriage as well as whereabouts of children of the deceased. The deceased had died in Hospital and not at residence, thus, there was no concealment of fact and on the complaint of respondent proceedings under Section 174 Cr.P.C. were conducted. Concededly, family of the deceased never came to meet the deceased, thus, their evidence is irrelevant and complainant wants to create evidence just to implicate the petitioner.

6. I have heard the arguments of both sides and with the able assistance of learned counsels for the parties perused the record.

7. The petitioner is assailing impugned order on following counts:

- i) To summon a person under Section 311 of the Code, it is not necessary to record his statement under Section 161 of the Code;
- ii) An application under Section 311 Cr.P.C. cannot be dismissed on the ground that it would amount to filling of lacuna in the case of prosecution;
- iii) An application cannot be dismissed on the ground that it has been filed at a belated stage and
- iv) In the present case, the proposed witnesses are necessary for the adjudication of the trial.

8. A Co-ordinate Bench of this Court in ***Saroj Versus State Of Haryana (Supra)***, Andhra Pradesh High Court in ***M/s Chemo steel Ltd. (supra)*** and Rajasthan High Court in ***Om Prakash (supra)*** have held that recording of statement under Section 161 of the Code is not necessary to summon a witness under Section 311 of the Code.

In view of above cited judgment, contention of the petitioner that it was not necessary to record statement under Section 161 to summon anyone as witness deserves to be countenanced.

9. A two judge bench of Hon'ble Supreme Court speaking through Justice D.Y. Chandrachud in ***Varsha Garg versus State of Madhya Pradesh and Others 2022 SCC Online SC 986***, has answered the questions of stage of filing application and filling of lacuna. With respect to stage of filing application, Hon'ble Court has held:

32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

33. 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 reexamine 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.

34. *A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with parimateria provisions of Section 540 of the Criminal Code of Procedure 1898 observed:*

“16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision—either discretionary or mandatory—depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.”

35. *Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the*

“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.” In that context the Court observed:

“18 ...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.”

36. *Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra the Court held:*

“27. The principle of law that emerges from the views expressed by this Court in the above decisions is 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 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 the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.”

37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

(Emphasis Supplied)

9.1 With respect to objection of accused-respondent that it amounts to filling lacuna in the case of prosecution, Hon’ble Supreme Court has held:

43. 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.

44. In the decision in *Zahira Habibullah Sheikh (5) v. State of Gujarat* 26, which was more recently reiterated in *Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.* 27, the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:

“28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

(Emphasis Supplied)

9.2 In view of enunciation of law by Hon’ble Supreme Court, it is evident that an application under Section 311 cannot be rejected on the

ground of stage of the trial or it amounts to filling of lacuna in the case of prosecution. Thus, contention of the petitioner that application of the petitioner could not be dismissed on the ground of stage of trial or it amounts to filling of lacuna carry substance.

10. The Hon'ble Supreme Court in *Varsha Garg (supra)* has emphasized on the fact that 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 power conferred under Section 311 Cr.P.C is very wide and it should be governed by requirement of justice. The power must be exercised wherever the Court finds that any evidence is essential for the just decision of the case. Court is not a hapless bystander in the derailment of justice.

In the case in hand, the proposed witnesses are the brother, cousin and neighbour of the deceased. Indubitably, the marriage of the deceased with her husband was a love affair. The family members of the deceased did not participate in the marriage. They did not visit her matrimonial home even at the time of her death. The complainant was not carrying mobile and she is not aware of mobile number of the deceased. The complainant and her family members did not invite deceased on any occasion. The complainant was not even aware of date of marriage. She had disclosed that marriage took place one year back whereas she had disclosed that deceased was blessed with two children.

These facts collectively indicate that there was no relation between deceased and her parents because deceased had performed a love marriage and she was blessed with two children who are in the custody of their father.

There is another aspect of the matter. The FIR was registered on 11.06.2014 and police after completing investigation filed its report under Section 173 Cr.P.C. One of the proposed witnesses is the real brother of the deceased. It is apt to notice that there is nothing on record indicating that brother of deceased was present at the time of registration of FIR or thereafter, during the course of investigation. Had there been any conversation between deceased and her brother, it is highly improbable that he would not go to police station at the time of registration of FIR and during the course of investigation to assist the investigating officer to conclude the investigation. Admittedly, he had never visited matrimonial home of the deceased during her lifetime.

The application under Section 311 Cr.P.C., before the Trial Court, was preferred through Public Prosecutor. The petitioner has arrayed State as one of the respondents. The State has filed its reply wherein State has categorically stated that impugned order passed by the Trial Court is a reasoned order and there is no infirmity. The State has vehemently supported the impugned order.

11. In view of above facts and circumstances, this Court does not find any factual or legal infirmity in the impugned order warranting

interference. There seems no reason to set-aside impugned order which is a well-reasoned and speaking. The Trial Court has judiciously exercised its powers conferred by Section 311 Cr.P.C. The present petition being bereft of merits deserves to be dismissed and accordingly dismissed.

(JAGMOHAN BANSAL)
JUDGE

28.04.2023
Mohit Kumar

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