

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

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CRM-M-11863-2023

Date of decision: 21.09.2023

M/s Whirlpac Aids Pvt. Ltd. and another

..Petitioners

Versus

M/s Kamal Kishore Goyal & Brothers

..Respondent

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr. Arun Kumar Kaundal, Advocate for the petitioners

None for the respondent

AMAN CHAUDHARY, J.

1. The present petition has been filed under Section 482 Cr.P.C. for quashing of impugned order dated 06.12.2022 passed by the Judicial Magistrate 1st Class, Ludhiana, whereby the application filed by the petitioner under Section 311 CrPC was dismissed.

2. Learned counsel contends that the application was filed under Section 311 Cr.P.C. to recall the Special Power of Attorney of complainant CW3-Balbir Singh for a limited purpose to put the question to him as regards the total amount of discount received by the complainant from Reliance Industries and the discount passed on to the petitioner and in case there is any document in support thereof. The aforesaid would amount to reopening of the case inasmuch as the question in cross examination to the said witness has already been put regards the discount to which only a clarification was being sought and there is nothing new to be put to him. The trial Court has not even given any finding that the same was not essential for just decision of the case, as required by the provision, even though it has rightly observed that no party

should suffer because of lapse of his counsel. A reference is made to **P. Sanjeeva Rao vs. State of A.P.**, (2012) 7 SCC 56, **Hanuman Ram vs. State of Rajasthan**, (2008) 15 SCC 652 and **Rajaram Prasad Yadav vs. State of Bihar**, (2013) 14 SCC 461.

3. As per office report, *dasti* notice issued to respondent has been received back served through its counsel Mr. Shiv Kumar Arora, Advocate before the trial Court. However, there is no representation on its behalf, despite the case having been called out twice.

4. Heard.

5. It is apposite to refer to the provision of Section 311 CrPC that reads thus:

“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.”

6. Evidently, there are two aspects in the afore referred provision namely; that the power can be exercised by any Court at any stage of the proceedings and equally if not more important is the usage of word ‘shall’ in the second part, that makes it incumbent upon the Court to summon and examine all persons whose evidence appears to be essential to the just decision of the case. The purpose behind exercise of powers under Section 311 of CrPC by the Court is not to fill in lacunae in the evidence led by the prosecution or to support the defence but to discover the relevant facts or to obtain proper proof of such facts for arriving at a just decision of the case. It is ultimately with the trial Court to place reliance on the testimony of witness which would be based on the quality of

their evidence, the truthfulness in it and confidence which it inspires. The only consideration which should weigh with the Court is to see that justice is done.

7. A gainful reference can be made to the judgment in **Rajaram Prasad Yadav** (supra) wherein Hon'ble The Supreme Court while elucidating the scope and ambit of Section 311 CrPC observed and held thus:-

“17. 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:

17.1 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?

17.2 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.

17.3 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.

17.4 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.

17.5 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.

17.6 The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7 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.

17.8 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.

17.9 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.

17.10 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.

17.11 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.

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

17.13 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.

17.4 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.”

8. In the case in hand, as has been canvassed by the learned counsel for the petitioner that the purpose of recall is only clarificatory in nature and it would cause grave prejudice in case an opportunity is not granted for the said purpose, the same being essential for the just decision of the case and the petitioner should not be penalised for fault on the part of his counsel, as was observed by Hon’ble

The Supreme Court in **P. Sanjeeva Rao** (supra), while allowing the application under Section 311 CrPC, set aside the orders passed by the trial Court as well as the High Court, that merely because a mistake was committed, it should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer, and held that, “We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price. leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

9. Hon’ble The Supreme Court in **Hanuman Ram** (supra), had highlighted the object of Section 311 CrPC being that there may not be failure of justice on account of 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. As is apparent in the present case, it was on account of an error that a pertinent question was not put in the cross-examination to the Special Power of Attorney of the complainant, CW-3, Balbir Singh and that it

was not by way of taking up a new defence thus, recalling him would infact serve the ends of justice, as the discretionary power under Section 311 CrPC exists to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, while also ensuring no prejudice is caused to anyone, observed and held by Hon'ble The Supreme Court in **Manju Devi vs. State of Rajasthan**, (2019) 6 SCC 203.

10. In the case of **Swapan Kumar Chatterjee vs. CBI**, (2019) 14 SCC 328, it was observed by Hon'ble The Supreme Court, that it well settled that the power conferred under Section 311 CrPC should be invoked by the Court only to meet the ends of justice, for strong and valid reasons after taking into consideration the facts and circumstances of each case, which are found to be existing in the present case having regard to the importance of the statement of the Power-Attorney holder of the complainant-respondent about the amount of discounts received and the amount passed on to the petitioner, especially where the bone of contention is the bouncing of a cheque, even the Magistrate, on his own motion or on the motion of the complainant, could have exercised powers under Section 311 CrPC which provides for wholesome power to the Court to secure the ends of justice and called the complainant for recording his statement so as to arrive at a just decision of the case.

11. Hon'ble The Supreme Court in **Varsha Garg vs. State of M.P.**, 2022 SCC OnLine SC 986, while considering and allowing the application under Section 311 CrPC observed that, "...The statutory provision goes to emphasize 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."

12. Having evaluated the peculiar facts and circumstances, whilst also surveying the above law enunciated, this Court finds that it would be in the interest of justice to grant an opportunity to the petitioner to recall the Special Power of Attorney of complainant, CW3-Balbir Singh, subject to payment of costs of Rs.15,000/- to the complainant forthwith. Accordingly, the present petition is allowed.

13. Nothing herein shall be treated as an expression on the merits of the case and the trial Court shall proceed and decide the matter, independent of any observation made in the present judgment, which was only for the purpose of adjudicating the instant petition.

(AMAN CHAUDHARY)
JUDGE

21.09.2023
ashok

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No