

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

305-A

CRM-M-13577-2021
Date of decision: 16.01.2023

M/s HIRA SONS BRICKS FACTORY AND ANOTHER

....Petitioner(s)

Versus

HARJEET SINGH

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Piyush Aggarwal, Advocate
for the petitioner.

Mr. Vipul Babuta, Advocate
for the respondent.

AMAN CHAUDHARY. J.

The present petition has been filed under Section 482 Cr.P.C. for quashing the order dated 24.02.2021 (Annexure P-8) passed by the JMIC, Ludhiana whereby the application under Section 311 Cr.P.C. has been dismissed.

Learned counsel for the petitioner submits that an application filed under Section 311 Cr.P.C. for examining the accountant of complainant's firm has been wrongly dismissed by learned trial Court vide order dated 24.02.2021, Annexure P-8 . He further submits that it is on account of illness of the petitioner No. 2 that he could not present himself on 23.07.2019 for which, though the application for exemption from personal appearance was allowed by the learned Court but prosecution evidence was closed by order, despite the fact that he had yet to get his examination and cross-examination, which the Court could have

granted an opportunity. An irreparable loss to the petitioners will be caused, he therefore, prays for grant of only one opportunity to lead his entire evidence, which may even be subject to costs.

Learned counsel for the respondent submits that number of opportunities had been granted to the prosecution to examine the witnesses, however, the same was not done. Last opportunity was already given to the petitioner to produce his witnesses but he failed to present himself and produce the witnesses as he only wants to delay the matter. Application was rightly disallowed by the learned trial Court and thus, prays for the dismissal of the present petition.

Heard.

At first it is considered relevant to refer to the orders passed by the trial Court, which read thus:-

“Due to reasons mentioned in the application, the personal appearance of complainant is exempted for today only. No more exemption application will be entertained. Complainant is directed to appear before the Court personally.

No CW is present. An adjournment is requested by learned Counsel for complainant, which is granted in the interest. Now case stands adjourned to 23.07.2019 for evidence of complainant. subject to last opportunity, failing which the evidence of complainant will be closed by order. Subject to costs of Rs.200/- to be deposited in DLSA.”

That on 23.07.2019 the petitioner filed an application seeking exemption from personal appearance, being confined to bed, on the ground of ill health, the order passed on the said date reads thus:

“Again no CW is present today. Previous costs, unpaid. Perusal of the file shows that complainant is granted last opportunity to step into witness box. Perusal of the file shows that notice of accusation was served upon the accused on 18.01.2018 and thereafter, present case was repeatedly

adjourned for cross-examination of complainant, but till dated, complainant has failed to conclude his evidence. I seen no justification to adjourn the present case for further evidence of complainant. As such evidence of complainant closed by Court order. Now case stands adjourned to 05.08.2019 for recording statement of accused under Section 313 of Cr.P.C. It is also made clear that no exemption application will be entertained by this Court. Accused is directed to come present before the Court personally.

At this stage, learned Counsel for complainant moved an application for exemption of personal appearance of complainant. In view of contents mentioned in the said application, the personal appearance of complainant is exempted for today only. Complainant is directed to come present before the Court personally. No exemption application will be entertained by this Court. Now case stands adjourned to 05.08.2019 for above said purpose.”

The complainant-petitioner filed application under Section 311 CrPC on 05.08.2019, for his examination and cross-examination, which came to be dismissed by the learned trial Court vide order dated 17.01.2020, the operative part whereof reads thus:-

“I have heard the Id. Counsel for the parties and gone through the case file with minute details. The present application has been filed by the applicant/complainant for examination of the complainant on the ground that on 23.07.2019, the applicant/complainant Rajesh Kumar Gupta was not available for his cross-examination due to some unavoidable circumstances and when on the same day after lunch the complainant came on the calling of counsel the order of closing the evidence was passed by the Hon'ble Court. Perusal of file shows that notice of accusation was served upon the accused on 18.01.2018. After that the case was fixed for cross-examination of

complainant on 10.01.2019, 18.02.2019, 04.04.2019, 14.05.2019, 16.07.2019 and 23.07.2019 and ultimately, last opportunity was granted to the complainant to step into the witness box for cross-examination but he failed to do so as such the evidence of the complainant was closed by court order on 23.07.2019. Also, once the evidence of the complainant was closed by court order then the evidence of the complainant cannot be opened again through the back-door through the application u/s 311 Cr.P.C. The case law referred by the Ld. Counsel for the applicant / complainant does not apply to the facts of the present case as in the said case law it has been held that the Magistrate was duty bound for securing the presence of the remaining unexamined prosecution witnesses. As such the said case law apply to such cases where the duty was caste upon the Magistrate to secure the presence of the prosecution witness but in the present complaint the complainant is a private complaint and witness sought to be examined is the complainant himself. As such, it is the duty of the complainant himself to step into witness box for his cross-examination after notice of accusation upon the accused. Moreover, once an order has been passed and evidence of the complainant closed by court order again the evidence of the complainant cannot be opened through back door through the present application. As such, the present application stands dismissed.”

It is apt to refer to Section 311 of Criminal Procedure Code which reads thus:

"Any court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as 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."

As one glances through the provision, essentiality of the evidence coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court.

The judgment in the case of **Zahira Habibullah Sheikh (5) v. State of Gujarat**, 2004 SCC (Cr1) 999, which was more recently reiterated in **Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd**, (2008) 11 S.C.C. 108, Hon'ble The Supreme Court of India observed that the Court's determination of the application should only be based on the test of the essentiality of the evidence. The statutory provision goes to emphasise that the court is not a hapless bystander, 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 were the categoric observations in **Varsha Garg Vs State of Madhya Pradesh and others**, 2022 SCC OnLine SC 986. The determinative factor is whether it is essential to the just decision of the case. Thus moving on the facts of the present case, the complainant-petitioner had sought and granted an exemption from personal appearance on the relevant date, however on the same very date the evidence was closed. Once the Court had accepted the ground of absence of the petitioner as justified, then in all fairness one opportunity, perhaps subject to costs could have been granted, for recording of evidence of the complainant and that of his witnesses, which in the present case was the accountant of his firm is considered essential for the just decision of the case and denial of such an opportunity would result in failure of justice. The dishonor of cheque was being complainant of, delay in finalization of such proceedings would infact be to the

detriment of the complainant himself.

It is settled that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution.

In the case of **Swapan Kumar Chatterjee Vs CBI,(2019) 14 SCC 328**, it was observed by Hon'ble The Supreme Court of India, that it well settled that the power conferred under Section 311 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 statement of the accountant of petitioner firm in a cheque bounce case.

This Court not losing the sight of the fact that the learned trial Court had been magnanimous in granting opportunities to the complainant, however bearing the aforesaid facts, reason of non-appearance, the same having been accepted on a justified ground, the right of examination of the complainant and producing his witnesses, being essential for just decision, and deprived of the same, surely would be prejudicial, finds that it will be in the interest of justice to grant one opportunity to the complainant-petitioner, bearing in mind the object underlying Section 311 of the Code.

Taking into consideration the facts and circumstances and to secure ends of justice, the present petition is allowed and the order dated 23.07.2019 passed by the learned JMIC, Ludhiana is hereby set aside subject to the petitioner deposit of Rs.10,000/- with the Chandi Kusht Asharm, Chandigarh Airport Area, Sector 47, Aerodrome Chandigarh, Chandigarh-160003 (3brd Gate). One effective opportunity is ordered to be granted to the petitioner to examine the

accountant for exhibiting the bills and other records of the petitioner No. 1. The respondent would ofcourse have the right of cross-examination.

(AMAN CHAUDHARY)
JUDGE

January 16, 2023
Mehak

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