

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

**CRM-M No. 2305 of 2018
Reserved on: 05.10.2023
Pronounced on : 20.10.2023**

ASHA RAM

... Petitioner

Versus

STATE OF HARYANA AND OTHERS

.. Respondent

CORAM:- HON'BLE MR. JUSTICE SANJIV BERRY.

Present:- Mr. Chanderhas Yadav, Advocate
for the petitioner.

Mr. Surinder Singh, AAG, Haryana

Mr. Gaurav Deep Goyal, Advocate
for respondents No.2 to 9, 11 and 12.

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SANJIV BERRY, J.

The instant petition under Section 482 Cr.P.C. has been preferred by the petitioner for setting aside of the impugned order dated 09.01.2018 (Annexure P-7) passed by learned Additional Sessions Judge, Jhajjar in case FIR No. 292 dated 13.12.2014 (Annexure P-1) registered under Section 148, 149, 447, 307, 323 IPC and 27/30 of the Arms Act, Police Station Beri District, Jhajjar whereby applications of the petitioner under Section 311 Cr.P.C to produce additional prosecution witnesses has been dismissed.

2. It is, *inter alia*, contended by learned counsel for the petitioner that the petitioner has lodged FIR against respondent No.2 to 12, who had thrashed the whole family of the petitioner in a land dispute and fired shots with intention to kill the petitioner and his family members. Challan was filed, and list of witnesses was given, in which Ompati wife of Bhagat Singh, Bijender son of Daya Kishan were mentioned as injured eye witness, but the earlier counsel for the petitioner had given a hand written application to give up the prosecution witnesses. This fact came to the notice when the petitioner changed the counsel and he informed that injured eye witness and scribe of the complaint are very relevant witnesses, therefore, the petitioner moved an application under Section 311 Cr.P.C for producing the additional witnesses, but the same was dismissed. There is land dispute between the parties for which CWP No. 14921 of 2017 is pending before this Court. Petitioner had given an application for examining the Sadar Kanungo of Deputy Commissioner's Office, on 18.03.2016 which was also dismissed. He further contends that all the accused are on bail and no pre-judice would be caused to any of the party and prays for setting aside the orders 09.01.2018 (Annexure P-7) passed by learned Additional Sessions Judge, Jhajjar, and hence the present petition.

3. Learned counsel for the State contends that since the examination of the witnesses who happens to be the injured eye witnesses is essential for just decision of the case and as such the learned additional Sessions Judge committed error in dismissing the application. He has referred to the judgment cited as ***Rajaram Prasad Yadav v. State of Bihar and another, 2013(3) R.C.R. (Criminal) 726.***

4. Learned counsel appearing on behalf of the private respondents has submitted that since the complainant while moving application had given up the aforesaid witnesses as unnecessary, therefore he cannot be allowed to fill in lacuna by moving application to examine those witnesses who had already been given up being unnecessary and prayed for dismissal of the present petition.

5. I have considered the submissions made by learned counsel for the parties and have also gone through the record with their assistance.

6. After considering the rival contentions and considering the facts and circumstances of the present case, it is observed that the present FIR was registered on the complaint of the petitioner for offences under Section 307, 148, 149, 447, 323 IPC read with Section 27/30 of the Arms Act at Police Station Beri, District Jhajjar, after conclusion of investigation Challan (Annexure P-1) was presented in Court along with the list of witnesses (Annexure P-2). A perusal of list of witnesses reveals that Ompati wife of Bhagat Singh and Bijender son of Daya Kishan has been cited as witnesses by the prosecution. Subsequently vide application (Annexure P-3) colly dated 14.02.2017 and 07.03.2017 respectively on the application moved by the counsel for the complainant the PW's Ompati and Bijender were given up being unnecessary.

7. During the course of trial, the complainant-petitioner moved an application under Section 311 Cr.P.C for producing the witnesses namely Ompati and Bijender vide (Annexure P-4) dated 09.01.2018 when the case was already fixed for prosecution evidence. It is pertinent to mention here that prior to this the petitioner had moved a previous application under

Section 311 Cr.P.C. on 18.03.2016 (Annexure P-5) whereby he had sought examining of official witnesses along with record from the office of Commissioner Rohtak and also the Sadar Kanungo Jhajjar and this application as is evident from the order (Annexure P-6) dated 02.08.2016 passed by learned trial Court was kept pending, to be decided after examination of the investigating officer. The record reveals that vide impugned order Annexure P-7 dated 15.01.2018 the learned Trial Court dismissed both the applications and aggrieved by the same the present petition has been preferred.

8. After hearing the respective arguments and perusing the record it transpires that so far as the witnesses Ompati and Bijender Singh are concerned they were already cited as prosecution witnesses in the list of witnesses annexed with the Challan (Annexure P-2). It is also the fact that by moving applications Annexure P-3 colly (supra) the counsel for the complainant had given up these witnesses being unnecessary and it is on the basis of the application moved under Section 311 Cr.P.C. (Annexure P-4) dated 09.01.2018 petitioner had sought their examination as witnesses.

9. Another application under Section 311 Cr.P.C had been moved by the petitioner on 18.03.2016 for summoning of the official witnesses along with record namely the superintendent of the office of Commissioner Rohtak and also the Sadar Kanungo, office of Deputy Commissioner, Jhajjar along with revenue record. Although the documents sought to be produced from these official witnesses had already been exhibited but admittedly the authenticity thereof had already been objected to by learned defence counsel and the objections were kept open to be decided at the time of final

arguments. It is, due to this reason the petitioner had sought the examination of the aforesaid witnesses along with record.

10. Admittedly the trial of the case is under progress and infact fixed for prosecution evidence when the aforesaid application had been moved. The prosecution had already relied upon the testimony of Bijender and Ompati injured eye witnesses and had also cited them as prosecution witnesses in the list of witnesses attached with challan, meaning thereby the accused were well aware of their testimony. Simply because at one stage the counsel for the complainant had given up these witnesses as being unnecessary, cannot be in any manner be said to wash away the right of complainant to summon them as witnesses for just decision of the case. Moreover, when the case is at the stage of prosecution evidence, itself, in doing so this Court is of the opinion that no prejudice whatsoever would be caused to the accused as they will have ample opportunity to cross examine of these witnesses who are not strangers in any manner but had already been cited in the list of witnesses by the prosecution at the time of presentation of challan.

11. So far as the official witnesses along with revenue record are are concerned, no doubt the documents have been tendered in evidence as Exhibit P-1 to P-13, but the fact remains that their authenticity has been objected to by learned defence counsel which has been kept open by the learned trial Court to be decided later on. Since the case is at the stage of leading prosecution evidence, no prejudice would be caused to the accused by examining the official witnesses and producing the record from its lawful custody in Court.

12. In this regard, it is worth mentioning here that Hon'ble Apex Court in ***Rajaram Prasad Yadav v. State of Bihar and another, 2013(3) R.C.R. (Criminal) 726***, case while deciding the provision under Section 311 Cr.P.C, observed the following principles to be borne in mind by the Courts which are reproduced 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.”

13. Applying the aforesaid principle laid down by Hon’ble Apex Court to the facts and circumstances of the present case, it is observed that the application moved by the complainant under Section 311 Cr.P.C squarely falls within the purview of the principle laid down in the aforesaid judgment. Admittedly, at the cost of repetition, both the witnesses Bijender and Ompati (both injured eye witnesses) had been cited in the list of

witnesses and accused were aware of it. Similarly the official witness sought to be summoned along with revenue record are to produce the record from their official custody which although is tendered in evidence as Exhibit P-1 to P-13 but with objections from the defence counsel and objections have been kept open by the learned trial Court, therefore, by examining the official witness no prejudice would be caused in any manner to the accused. On the other hand, non examination thereof will hamper trial Court in arriving it to just decision of the case.

14. Learned trial Court has ignored the principle laid down in *Rajaram's case (supra)* in dealing with application under Section 311 Cr.P.C and passed the impugned order dated 09.01.2018 (Annexure P-7) dismissing both the applications under Section 311 Cr.P.C moved by the petitioner-complainant and as such the impugned order in the light of the above decision is not sustainable in the eyes of law and as such is liable to be set aside and is hereby set aside.

15. Consequently, to the above the present petition is allowed thereby directing the learned trial Court to allow the examination of the witnesses mentioned in the aforesaid applications filed under Section 311 Cr.P.C in the aforesaid case.

16. Any observation made above shall not be construed as opinion of this Court on the merits of the case.

(SANJIV BERRY)
JUDGE

20.10.2023

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i)	Whether speaking/reasoned?	Yes/No
ii)	Whether reportable?	Yes/No