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

**CRR-787-2023 (O&M)
Reserved on : 21.08.2023
Pronounced on : 29.09.2023**

Darshna

..... Petitioner

versus

State of Punjab and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Ms. Monita Mehta, Advocate
for the petitioner.

Mr. Kunal Vinayak, AAG, Punjab.

Mr. Jasmeet Singh Ghuman, Advocate
for respondents No.2 & 3.

PANKAJ JAIN, J. (Oral)

1. Present revision petition filed by the complainant is directed against order dated 28.02.2023 passed by CJM, Jalandhar, whereby the application filed by the complainant under Section 311 Cr.P.C. for recalling prosecution witness Rajinder Gaba, who appeared as PW-5 stands declined.

2. The matter relates to an unfortunate dispute between son and mother. On the complaint made by mother, the present FIR No.356 dated 20.12.2013, Police Station Sadar, District Jalandhar was registered for offences punishable under Sections 307 and 452 against respondents No.2 and 3. One of the cited witnesses namely Rajinder Gaba, who happens to be brother of the complainant appeared as PW-5 on 06.01.2023 and was declared hostile on the request made by

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Additional Public Prosecutor. He was cross-examined by APP. However, thereafter on 14.02.2023, application was moved under Section 311 Cr.P.C. seeking recall of PW-5 Rajinder Gaba for further examination. The said application stands rejected by the trial Court on the ground that the explanation given by the complainant cannot be a ground to recall the witness.

3. Counsel for the complainant while assailing the order passed by the trial Court submits that the application has been dismissed on flimsy ground without even recording satisfaction that recalling of the witness was not required for the proper adjudication of the controversy involved. It has been submitted that PW-5 is related to both the parties and is thus material witness.

4. Per contra, counsel for the respondent submits that after having been declared as hostile witness, PW-5 was cross examined at length by APP and the trial Court thus rightly rejected the application moved by the petitioner for recalling PW-5 whose re-examination is being sought on the ground that he told the petitioner that he never turned hostile and is still supporting the case of prosecution.

5. I have heard counsel for the parties and have gone through the records of the case.

6. The broad principles regarding exercise of power as contemplated under Section 311 Cr.P.C. for recalling witness have been well spelled out by Apex Court in the case of **Rajaram Prasad Yadav vs. State of Bihar and another**, reported as **2013(14) SCC 461** holding as under:-

“XX XX XX

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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.

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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

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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.”

7. In the considered opinion of this Court, the trial Court ought to have tested the prayer made by the complainant on the touchstone of the aforesaid principles and should not have merely gone by legality of the ground pleaded by the complainant.

8. In view of above, impugned order is set aside. Trial Court is directed to decide the application filed by the petitioner-complainant afresh in view of the principles laid down by Apex Court in **Rajaram’s case (*ibid*)** and formulate its opinion accordingly.

9. Resultantly, the present revision petition is allowed.

Impugned order dated 28.02.2023 is hereby quashed and trial Court is

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directed to decide the application filed by the petitioner-complainant under Section 311 Cr.P.C. seeking recall of PW-5 Rajinder Gaba afresh within a period of 15 days from the date of receipt of certified copy of this order.

(PANKAJ JAIN)
JUDGE

29.09.2023
Dinesh

Whether speaking/reasoned :	Yes
Whether Reportable :	No