

CRM-M-20775 of 2019

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-20775 of 2019
Date of decision: 20.02.2023

Gaurav Jain and another
.....Petitioners
Versus
Harmehtab Singh Rarewala
.....Respondent

CRM-M-20776 of 2019

Gaurav Jain and another
.....Petitioners
Versus
Harmehtab Singh Rarewala
.....Respondent

CRM-M-20786 of 2019

Gaurav Jain and another
.....Petitioners
Versus
Harmehtab Singh Rarewala
.....Respondent

CRM-M-20796 of 2019

Gaurav Jain and another
.....Petitioners
Versus
Harmehtab Singh Rarewala
.....Respondent

CRM-M-20800 of 2019

Gaurav Jain and another
.....Petitioners
Versus
Harmehtab Singh Rarewala
.....Respondent

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CRM-M-20808 of 2019

Gaurav Jain and another

.....Petitioners

Versus

Harmehtab Singh Rarewala

.....Respondent

CRM-M-20809 of 2019

Gaurav Jain and another

.....Petitioners

Versus

Harmehtab Singh Rarewala

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present: - Mr. Saurabh Jain, Advocate,
for the petitioners.

Mr. Aalok Jagga, Advocate,
for the respondent.

NAMIT KUMAR, J.

This judgment shall dispose of aforesaid seven petitions as common question of law and facts are involved in all the petitions.

For the sake of brevity, facts are being taken from CRM-M-20775 of 2019.

This petition has been filed under Section 482 Cr.P.C. for quashing order dated 11.04.2019 passed by the Court of learned Judicial Magistrate Ist Class, Payal, in complaint No.110/4 dated 01.07.2006 (Annexure P-1) titled 'Harmehtab Singh Rarewala v. Gaurav Jain and another' under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act'), whereby

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application filed by the petitioners under Section 311 Cr.P.C. for recalling the complainant-respondent for cross-examination has been dismissed.

The brief facts of the case are that the respondent had filed a complaint under Section 138 of the NI Act, against the petitioners, in the year 2006. It was alleged in the complaint that petitioner No.1 was running business under the name and style of M/s Gaurav Jain and Company at Ahmedgarh. The complainant is an agriculturist and he owns land at Rara Sahib. The accused had business dealing with the complainant. The accused took a loan amounting to Rs.63,00,000/- on 03.02.2006 from the complainant and promised to return the same up to 01.05.2006. It was further alleged that in order to discharge his legal liability to repay the said loan amount of Rs.63,00,000/-, petitioner No.1 had issued seven cheques bearing No. 483273, 483274, 483275, 483276, 483277, 483278 and 483279 of Rs.9,00,000/-, all drawn on Oriental Bank of Commerce, Branch Ahmedgarh, from account No.632 of the firm M/s Gaurav Jain and Company, Ahmedgarh. Aforesaid cheques upon presentation were returned unpaid with the remarks "Exceeds Arrangement". After the cheque issued by petitioner No.1 was dishonoured, then the respondent served a legal notice dated 10.06.2006 upon petitioners; as required under the mandatory provisions of law. However, despite that, the payment was not made; leading to filing of the complaint against the petitioners. During his evidence, the respondent-complainant examined as many as three witnesses and had himself appeared in the witness box as CW-3.

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Subsequently, respondent-complainant moved an application under Section 311 Cr.P.C. seeking permission to examine two other witnesses to prove the agreement dated 03.02.2006, which was dismissed by the trial Court vide order dated 19.10.2012. Aggrieved against the aforesaid order, respondent filed as many as seven petitions before this Court, all of which were allowed by this Court vide a common judgment dated 07.08.2018. In compliance of aforesaid judgment of this Court, CW-4 and CW-5 were examined on 02.04.2009 and the agreement dated 03.02.2006 was also tendered in evidence. Thereafter, petitioners filed an application under Section 311 Cr.P.C. for recalling the respondent-complainant-Harmehtab Singh CW-3 for cross-examination on the ground that at the time of his testimony in Court, alleged agreement to sell dated 03.02.2006 had neither been propounded nor the same was in existence as the legal notice, complaint and affidavit of the respondent were completely silent about the existence of any such agreement. The said application has been dismissed by the Court of learned Judicial Magistrate Ist Class, Payal, vide impugned order dated 11.04.2019. Hence, this petition.

Learned counsel for the petitioners contends that the reasoning given in the impugned order while rejecting the application filed by the petitioners under Section 311 Cr.P.C. is unsustainable as the Court has failed to consider the scope of Section 311 Cr.P.C. and has wrongly rejected the application filed by the petitioners for recalling of CW-3-respondent-complainant Harmehtab Singh. It is further submitted that the reasoning given in the impugned order that

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the petitioners did not seek permission from the Court to cross-examine Harmehtab Singh CW-3 (complainant) with regard to agreement dated 03.02.2006, is erroneous. It is further submitted that it is settled principle of law that no estoppel operates against the statute and the mere fact that no such opportunity was granted by the Court would not prevent the petitioners from exercising their legal right as per law. It is further submitted that the agreement dated 03.02.2006 was in fact propounded by the respondent-complainant who did not make any reference of the same in his complaint or in evidence and, therefore, he was not cross-examined on the said aspect.

Per contra, learned counsel for the respondent-complainant has justified the impugned order and prayed for dismissal of the present petition.

I have heard learned counsel for the parties and perused the record.

Admittedly, application dated 05.01.2011 filed by respondent-complainant under Section 311 Cr.P.C. for leading additional evidence by examining witnesses, namely, Kulwinder Singh and Mohd. Irshad and for production of record was rejected vide order dated 19.10.2012 by learned Judicial Magistrate Ist Class, Ludhiana. Said order was challenged by the respondent-complainant by filing seven petitions and leading case was CRM-M-35947 of 2013 – Harmehtab Singh Rarewala v. Gaurav Jain and another, which were allowed vide order dated 07.08.2018 by recording following findings: -

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“Having heard learned counsel for the parties and perused the case file, this Court is of the considered opinion that the arguments raised by the learned counsel for the petitioner, deserve to be accepted. The present application has been moved by the petitioner under Section 311 Cr.P.C. For ready reference Section 311 Cr.P.C. is reproduced here under:-

“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.”

A bare perusal of this Section shows that the powers conferred upon the Court under Section 311 Cr.P.C. are wide enough but discretionary. However, like any other judicial discretion, the discretion under Section 311 Cr.P.C. also has to be exercised by the Court on sound judicial principles. The Supreme Court has amply clarified in the judgments relied upon by the counsel for the petitioner, that if the documents sought to be produced on record and the witnesses sought to be examined are relevant for just decision of the case, then mere fact, that the documents were not tendered earlier or the witness was not examined earlier, is no ground to deny the permission to examine a witness or to tender a document. Otherwise also, the trial Court is required to see, while exercising discretion under Section 311 Cr.P.C., only one

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factor, namely, whether the evidence sought to be produced is necessary for just decision of the case or not. Whether the requirement of justness of decision would lead to filling up the alleged lacuna left in a case, is totally immaterial, while considering the matter under Section 311 of Cr.P.C. Although the Court is to weigh the material on the alter of it being essential for just decision of case on one hand and the prejudice to the defense of the accused on the other hand, since no prejudice to the defense of the accused is also part of the justness of the decision, but mere fact that some lacuna be filled by such evidence, is not the criterion for Section 311 of Cr.P.C. Similarly, the other reasoning given by the trial Court, wherein, it has said that the witnesses could not be permitted to be examined because the names of these witnesses was not be mentioned earlier is also fallacious. A bare perusal of Section 311 of Cr.P.C. shows that the power under Section 311 Cr.P.C. is not restricted for examination or re-examination of the witnesses who were originally cited by the complainant or who were examined before the Court earlier. While exercising its power, the Court can order examination of any person or witness, deemed appropriate by it provided it is essential for just decision of the case.

Hence, either of the grounds mentioned by the trial Court while rejecting the application is not sustainable. Otherwise also, a bare perusal of the alleged agreement, which is sought to be placed on record and proved by the petitioner in the case, shows that this document is duly signed by the respondent. Therefore, prima facie, contention of the respondents that the document is forged, cannot be accepted. Once permitted to be led in evidence, the respondents shall be at full liberty to test the veracity

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and authenticity of the document and to put the complainant to strict cross-examination on this aspect. In view of the above, all the aforesaid petitions are allowed. The impugned orders dated 19.10.2012 are set aside. The applications moved by the petitioner under Section 311 Cr.P.C. for leading additional evidence are ordered to be allowed.

Thereafter, on 02.04.2019, respondent-complainant examined Kulwinder Singh and Mohd. Irshad as CW-4 and CW-5. Although, respondent-complainant was examined on 17.10.2011 as CW-3, since the alleged agreement dated 03.02.2006 was not in controversy at that point of time and was not relied upon by the respondent-complainant, therefore, respondent-complainant-Harmehtab Singh can be recalled for cross-examination. Further, this Court vide judgment dated 07.08.2018 while disposing of the earlier seven petitions filed by the respondent-complainant has given liberty to test the veracity and authenticity of the documents and to put the complainant to strict cross-examination on this aspect. Further, the power conferred under Section 311 Cr.P.C. is wide enough and any witness can be recalled and re-examined who has already been examined for the just decision of the case.

The nature and extent of the power vested in the Courts under Section 311 Criminal Procedure Code to recall witnesses was examined by the Hon'ble Apex Court in ***Hanuman Ram v. The State of Rajasthan & Ors., 2008(4) RCR (Criminal) 823***, wherein it was held that the object underlying Section 311 was to prevent failure of justice

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on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses.

The Hon'ble Apex Court had observed as under:

"This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or 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. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to

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any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

In recent judgment rendered by the Hon'ble Apex Court in ***Criminal Appeal No.1021 of 2022 titled as "Varsha Garg Vs. State of Madhya Pradesh and others"***(decided on dated 08.08.2022),wherein the following observation has been made in paragraphs No.31 and 32 thereof:-

*"31. Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P. (1978) 2 SCC 518, State of W.B. v. Tulsidas Mundhra (1963) Supp 1 SCR 1, Jamatraj Kewalji Govani v. State of Maharashtra (1967) 3 SCR 415, Masalti v. State of U.P. (1964) 8 SCR 133, Rajeswar Prosad Misra v. State of W.B. (1966) 1 SCR 178 and R.B. Mithani v. State of Maharashtra (1971) 1 SCC 523,** 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

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requirements of justice command the examination of any person which would depend on the fact and circumstances of each case.”

32. 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.”

From the above discussion, it is manifest that the power under Section 311 Cr.P.C. can be exercised at any stage of the proceedings for the just decision of the case.

In ***Rajendra Prasad v. Narcotic Cell, Delhi, 1999(3)***

R.C.R. (Criminal) 440, the Hon'ble Apex Court held as under:

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to error in human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case

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cannot be understood as the lacuna which a court cannot fill up.”

Since the object is to do complete justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.

In view of the above, present petition(s) are allowed. Impugned order(s) dated 11.04.2019 passed by the Court of learned Judicial Magistrate Ist Class, Payal, are set aside. The application(s) moved by the petitioners-accused under Section 311 Cr.P.C. for recalling the complainant-respondent for cross-examination are ordered to be allowed. Interim order dated 08.05.2019 passed by this Court whereby further proceedings before the trial Court were stayed, is also vacated.

In the present case, trial is pending since the year 2006. Trial Court is directed to make an endeavour to conclude the trial expeditiously.

With the abovesaid observations, petitions are accordingly, disposed of.

20.02.2023
R.S.

(NAMIT KUMAR)
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No