

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

252

CRM-M-44474-2017

Date of decision : 21.2.2023

Aarti

.....Petitioner(s)

Versus

Narinder Kumar

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr.Ayush Gupta, Advocate for the petitioner(s)

Mr.Ankit Joshi, Advocate/ Legal Aid Counsel
for the respondent

AMAN CHAUDHARY, J.

The present petition under Section 482 Cr.PC has been filed for quashing of order dated 29.07.2017, Annexure P-4, passed by learned Judicial Magistrate, 1st Class, Ludhiana vide which the application filed by the petitioner under Section 311 Cr.PC, Annexure P-2, for calling two essential witnesses, was dismissed.

Brief facts of the case as emerge from the complaint are that the complainant-petitioner advanced a friendly loan of Rs.8 lakh in December, 2014 to the accused-respondent. To discharge his liability, the respondent issued a cheque bearing No.270103 dated 06.05.2015 in favour of the petitioner, which on presentation got dishonoured vide memo dated 11.05.2015 with the remarks “insufficient funds”. Hence, the complaint in

question was filed alongwith the list of witnesses i.e. complainant himself, respective clerks from the bank of the complainant.

Learned counsel for the petitioner submits that the learned trial Court has committed a grave error while declining the application of the petitioner without appreciating the facts of the case. In the legal notice as well as in her affidavit, the petitioner had specifically pleaded that she had given money to the respondent in the presence of her husband, Murli Dhar Tiwari and also after taking an amount of Rs.4 lakh from Dalip, she advanced the loan to the respondent. These two witnesses inadvertently could not be mentioned in the list of witnesses and both are essential for the just decision of the case and in case, if the same would not be examined, it will cause an irreparable loss to her. In support of his assertions, reliance is placed on the judgment of Hon'ble The Supreme Court of India in the case of **Varsha Garg vs. State of Madhya Pradesh and others**, 2022 SCC OnLine SC 986.

On the other hand, learned legal aid counsel for the respondent submits that the application was filed for filling up the lacuna, which the learned trial Court after taking into consideration that the pleadings of the complainant did not support calling of the witnesses and its only to fill up the gaps after the cross-examination that the application came to be filed and has thus been rightly dismissed. He prays for the dismissal of the present petition.

Heard.

In view of the submission made by the learned counsel for the petitioner, it is relevant to refer to the para in the complaint as regards the fact of advancing the friendly loan is concerned:

“That accused requested for a friendly loan of Rs.8,00,000/- in the month of December, 2014. Complaint advanced an amount of Rs.8,00,000/- to accused as friendly loan. Accused further assured the complainant to return the same within four months.”

It is next pertinent to refer to the application wherein the ground has been raised to summon the witnesses, which read thus:

“2. That inadvertently the names of two witnesses Sh.Murlidhar Tiwari husband of the complainant and Sh.Dalip Kumar could not be mentioned in the list of witnesses submitted with the complaint. The non mentioning of these two names was neither intentional nor willful but by sheer inadvertance.

3. That bringing on record, the deposition of the above said witnesses one being Mr.Murlidhar Tiwari, the husband of teh complainant in whose presence the loan amount of Rs.8,00,000/- was given to the accused and second Mr.Dalip Kumar s/o Sh. Ashwani Kumar r/o Haibowal Ludhiana from whom the complainant had taken loan of Rs.4,00,000/- is very essential and important/ material piece of evidence which goes to the root of the case. The complainant wants to bring on record the testimony of these two witnesses to substantiate her claim. The deposition of these two witnesses sought to be summoned will assist this Hon’ble Court to decide the matter in controversy between the parties more effectively and judiciously.

The reply filed by the accused-respondent is equally pertinent to be referred to:

That this application is the result of afterthought and has been filed to fill up the serious lacunas in the complainant case when the complainant has already been cross-examined by the counsel for the accused at length four times and her entire case has been shattered during her cross-examination. The complainant has herself admitted in her cross-examination that she is well

educated and she can read and write English. It is highly improbable and untrustworthy that the names of these witnesses could not be mentioned inadvertently. Even otherwise, these witnesses have not been examined by the complainant in preliminary evidence. Had it been the case that these two witnesses would have been material witnesses, undoubtedly the complainant would have examined these witnesses in the preliminary evidence, which is missing in the present complaint. Thus, apparently the present application has only been filed to fill up the serious lacunas in the complainant case by misusing the provisions of section 311 Cr.P.C. Even the names of these two witnesses do not find mention either in the notice u/s 138 of N.I. Act or in the complaint. Even during the cross-examination of the complainant, there is no mention of alleged Dalip Kumar that she had taken loan of Rs.4,00,000/- from Dalip Kumar for payment to the accused, whereas specific question was put to the complainant with regard to source of alleged loan amount of Rs.8,00,000/-. It is also pertinent to mention here that from the bare perusal of Ex.CW-1/2A, it is mentioned in the said document that a sum of Rs.2,50,000/- has been given to the complainant as help for starting some business. This fact amply shows the fact that the financial condition of the complainant herself was very weak/ poor, then how it can be believed that a person who herself is such financially poor that is taking help of Rs.2,50,000/- from the Gurudwara, but will give loan of Rs.8,00,000/- to the accused. Even otherwise, the complainant is herself changing her stand every now and then. On one hand, the complainant in her cross-examination dated 19/8/2016 alleged that she took loan of Rs.15,000/- from Jan Laxmi, but will give loan of Rs.8,00,000/- to the accused, on other hand in the present application she alleged that she took a loan of Rs.4,00,000/- from Dalip Kumar, but will give loan of Rs.8,00,000/- to the accused.”

The operative part of order declining the application under Section 311 CrPC dated 29.07.2017 passed by the trial Court, reads thus:

“By way of filing the present application, the complainant/ applicant wants to examine two witnesses namely Murlidhar Tiwari and Dalip Kumar as additional evidence on the ground that she advanced the loan amount to accused in presence of her husband Murlidhar Tiwari and that she took loan of Rs.4,00,000/- from Dalip Kumar, which was advanced by her to accused. Ld.

Counsel for the complainant / applicant argued that examination of both the witnesses is very much essential for the just decision of the case. However, it is pertinent to mention here that the complainant nowhere in her legal notice, complaint as well as her affidavit Ex.CA pleaded that she gave money to the accused in presence of her husband Murlidhar Tiwari and that she took an amount of Rs.4,00,000/- from Dalip Kumar to advance the same to accused. In fact, it was never the case of the complainant. Rather, the fact regarding taking of Rs.4,00,000/- by the complainant from Dalip Kumar has never been raised or asserted by the complainant at any stage, before filing of the present application. In light of all these circumstances, this court is of confirm and considered view that the present application has just been filed by the complainant to fill up the gaps left in her case after the completion of her cross-examination, which under law is not permissible. Moreover, all the evidence sought to be adduced by the complainant/ application is additional evidence by way of filing the present application is beyond the own pleadings of the complainant and this is an established fact that any evidence beyond the pleadings is of no value. In this context, regard can be had to the decision of Hon'ble Supreme Court in case titled as Bondar Singh & Ors. Versus Nihal Singh 2003(2) R.C.R.(Civil) 222” in which the Hon'ble Apex Court has held that 'No amount of evidence beyond the pleadings can be looked into'. Moreover, the present application has been moved at the stage when the complainant has been fully cross-examined by the accused and the defence of the accused has already been disclosed. Allowing the present application at this stage will seriously prejudice the accused in her defence.”

It is well settled that no party in a trial can be foreclosed from correcting errors and 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. However, as is apparent even the names of the said witnesses were not mentioned in the legal notice, complaint as well as her affidavit as has been observed by the learned trial Court. An application under Section

311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties, as held by Hon'ble The Supreme Court of India in the case of **Natasha Singh vs. CBI (State)** 2013 Cr.L.R.(SC) 582.

The power conferred under Section 311 CrPC should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed, as was observed by in the case of **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation**, (2019) 14 SCC 328, by Hon'ble The Supreme Court, as in the present case also there being no reference of the witnesses in the pleadings and the application having been filed only after the cross-examination of the complainant, the same was rightly dismissed by the learned trial Court.

Considering the facts and circumstances of the case in light of the aforesaid principles, this Court finds no illegality or perversity in the impugned order passed by the trial Court and does not call for any interference by invoking the jurisdiction under Section 482 Cr.P.C. Accordingly, the present petition being bereft of merit is dismissed.

21.02.2023
gsv

(AMAN CHAUDHARY)
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No