

In The High Court for the States of Punjab and Haryana at Chandigarh

CRM-M-2057-2024 (O&M)
Date of Decision:- 16.01.2024

Rajesh Kumar @ Rajesh ChauhanPetitioner

Versus

Gurmeet Singh and anotherRespondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Vikas Lochab, Advocate, for the petitioner.

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GURVINDER SINGH GILL, J.

1. The petitioner-Rajesh Kumar(accused) assails order dated 28.11.2023 (Annexure P-6) passed by learned Additional Sessions Judge, Gurugram vide which a revision petition filed by the petitioner has been dismissed. The said revision was against order dated 26.7.2023 (Annexure P-4) passed by JMIC, Gurugram, dismissing petitioner’s application filed under Section 311 Cr.P.C. for recalling of the complainant i.e. respondent No.1-Gurmeet Singh, in a complaint filed under Section 138 of Negotiable Instruments Act.
2. The complainant alleges that he had paid an amount of Rs.57,50,000/- to the accused regarding purchase of land but the accused refused to execute the sale deed. After much persuasion accused agreed to return back an amount of Rs.50 lakhs to the complainant and towards partial discharge of said liability issued cheque bearing No.245035, 245036 and 245037 dated

20.09.2017, 20.10.2017, 20.11.2017 respectively, all drawn on State Bank of India, Mehrauli Road, Gurgaon for Rs.1 lakh each. However, upon presentation of the said cheques, the same were dishonoured and consequently the complainant instituted a complaint under Section 138 of Negotiable Instruments Act, against the petitioner wherein he was summoned by the learned Judicial Magistrate 1st Class vide order dated 09.03.2018.

3. Pursuant to appearance of the petitioner before the trial Court and consequent upon substance of accusation having been made known to the petitioner and the petitioner having pleaded not guilty, the statement of the complainant and of his witnesses were recorded, who were duly cross-examined by learned counsel for the accused.
4. However, after the accused had examined one witness in his defence evidence, an application dated 19.4.2023(Annexure P-3) was filed by the petitioner under Section 311 Cr.P.C., for recalling the complainant for further cross-examination. Learned Judicial Magistrate 1st Class dismissed the aforesaid application vide order dated 26.7.2023 (Annexure P-4). Aggrieved by the said order, the petitioner filed a revision petition before the learned Additional Sessions Judge, which also came to be dismissed vide order dated 28.11.2023 (Annexure P-6) which has been impugned before this Court.
5. Learned counsel for the petitioner, while assailing the impugned order submitted that it was pursuant to recording of statement of DW i.e. a Manager of ICICI Bank that certain new facts came to be known to the accused and that the complainant was required to be confronted with the said facts. It has been submitted that in case, the petitioner is not permitted to

further cross-examine the complainant, the same will leave petitioner seriously prejudiced in his defence and would lead to miscarriage of justice.

6. Learned counsel further submitted that the scope of Section 311 Cr.P.C. is very wide and that approach of the Courts is required to be very liberal so as to ensure that the accused is not left handicapped in any manner in building up his defence. It has been submitted that an application under Section 311 Cr.P.C. can be allowed at any stage before pronouncement of judgment. Learned counsel in order to *hammer forth* his aforesaid submissions places reliance upon Mannan Sk. And others v. State of West Bengal and Another, 2014 (13) SCC 59; P. Sanjeeva Rao Vs. State of A.P. 2012(3) RCR (Criminal) 653, SC and Kesar Singh Vs. Jagdish Chander 2018(4) RCR (Criminal) 981, P&H.
7. This Court has considered the submissions raised above and have gone through the judgments pressed into service.
8. Before proceeding further it would be necessary to examine the relevant provisions of law:-

Section 311 Cr.P.C. reads as under:-

"Any court may, at any stage of any inquiry, trial or other proceedings 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 be essential to the just decision of the case."

9. The provisions of Section 311 Cr.P.C. have been interpreted in a number of decisions of the Hon'ble Supreme Court. The object of Section 311 Cr.P.C. (earlier 540 Cr.P.C) as well as limitation for its use came to be defined by

Hon'ble Apex Court in Mohan Lal Shamji Soni v. Union of India, 1991(3) RCR (Criminal) 182. Para 10 wherein its importance has been highlighted reads as under:

“10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties with-holds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the New Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate,, inconclusive and speculative presentation of facts, the ends of justice would be defeated.”

10. Hon'ble Apex Court further observed as under :-

“18. The next important question is whether Section 540 gives the court carteblanche drawing no underlying principle in the exercise of the extraordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code) is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or the cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

11. The Apex Court summed up its conclusions in the following words :

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

12. A three Judges Bench of Hon'ble Supreme Court also examined the aforesaid issue in 2013(3)RCR(Criminal)726 Rajaram Prasad Yadav vs. State of Bihar and another. In the said case, the trial Court disallowed the application filed by State under Section 311 of the Code of Criminal Procedure (Cr.P.C.), to re-examine PW-9, the informant. The High Court reversed the order and allowed the said application. While discussing a plethora of judgements, the broad principles with regard to invoking section 311 Cr.PC were culled out as under:

“23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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 Criminal Procedure Code 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. The Hon’ble Apex Court, while applying the said principles, came to a conclusion that the order of the trial Court impugned before the High Court did not call for any interference restored the order of the trial Court which had dismissed the application under Section 311 Cr.P.C.

14. Hon'ble the Supreme Court in AG v. Shiv Kumar Yadav and Another, 2015 AIR (SC) 3501, where the High Court in revision petition had accepted an application under Section 311 Cr.P.C., 1973 and had ordered for recall of the witness, set aside the order of the High Court while observing that no finding could be recorded that the counsel appointed by the accused earlier was incompetent and that mere change of counsel cannot be a ground to recall a

witness especially when the counsel had been given due opportunity of cross-examination.

15. It is evident that the broad principles culled out by three Judges Bench of Hon'ble Supreme Court Rajaram Prasad Yadav's case, clearly define the scope of section 311 Cr.PC. and are consistently being followed.
16. The judgment pressed into service by learned counsel for the petitioner i.e. Mannan Sk. And others Vs. State of West Bengal and another 2014(13) SCC, 59 was a case where the trial Court had dismissed the application moved by prosecution u/s 311 Cr.P.C. but the order was reversed by the High Court. The matter pertained to offence under Section 302 IPC wherein the Investigating Officer during his cross-examination has stated that he has recorded the statement of the deceased before his death, but no such statement had infact been brought on record. The prosecution had moved an application under Section 311 Cr.P.C. at the stage when the matter was fixed for arguments. The purpose of recalling the witness of the prosecution was to place on record a statement which was virtually in the nature of dying declaration. The importance of a dying declaration in a case where there is no direct evidence can hardly be undermined. Further, in the said case accused were found to be aware of the said statement and had duly cross-examined the Investigating Officer in this regard and it was under these circumstances Hon'ble the Supreme Court while affirming order of High Court observed that it was a case of oversight that the document could not be placed on record earlier and not a case of filling up lacuna.
17. However, even in Mannan's case, the broad view taken by Apex Court is in tune with the ratio of Rajaram's case (Supra). The Supreme Court of India in Mannan's case (Supra) held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

18. The facts Mannan's case (Supra) are distinct from facts of the present case.

In the instant case the accused seeks to recall the complainant at a stage when matter is at the stage of recording of defence witness. It is not a case where any new fact has been introduced by the complainant. When petitioner had appeared in witness to depose, he had been duly cross-examined by counsel for the accused. In any case, there is no dispute as regards the broad principles laid therein which have already been referred to above.

19. In P. Sanjeeva Rao's case(supra), relied upon by the petitioner, the witness sought to be recalled had not been cross-examined at all by the counsel for the accused due to a mistake on part of the lawyer. The cross-examination

had been deferred previously in the said case so as to first cross-examine the Trap Laying Officer. The counsel had also furnished an affidavit to this effect. However, while the two witnesses i.e. the complainant and the shadow witness had not still been cross-examined, the evidence of the prosecution came to be concluded. The aforesaid facts show that it was a case where the material witnesses had not been cross-examined at all and that too on account of some mistake of the counsel which led the Hon'ble Supreme Court to uphold the order of Sub Judge accepting such applications.

20. Kesar Singh's case (Supra) pertains to offence under Section 138 of Negotiable Instruments Act wherein recalling of the complainant and another witness for further cross-examination had been declined by the trial Court but, this Court reversed the said order. In the cited case, after the deposition of the complainant, he introduced new witness in respect of which accused was not even aware of. In other words, when the accused had cross-examined the complainant, he was not even aware that one Bhupinder Singh was also to be examined as a witness in the said case. The accused having been taken by surprise, it was considered by this Court that the accused deserves to be given an opportunity to recall the complainant. The facts of the cited case are also altogether different from the instant case.
21. In the present case, the grounds set forth by the petitioner in his application filed under Section 311 Cr.P.C. (Annexure P-3) for recalling complainant are reproduced herein-under:

“1. That, the above titled matter is pending adjudication for today i.e. 19.04.2023.

2. That, the present application is moved under section 311 CRPC, 1973 for recalling of complainant for cross examination.
 3. That the ICICI manager was called in which the complainant was having an account as a DW. That the manager had placed the statement of account of the complainant on the basis of statements, that the counsel of accused need some further cross of complainant regarding some entries in the statement because earlier complainant said about those entries in his cross examination.
 4. That recalling of the complainant is very much required to confront with the account statement as during the cross examination he answered that he was having sufficient amount in his bank and from bank itself he has withdrawn the amount and paid it to accused.
 5. That after this only the financial capacity of the complainant will be proved.”
22. In the instant case it is not on account of any new evidence having been brought by the complainant which has necessitated the recalling of the complainant, but it is pursuant to recording the statement of one DW that the accused asserts that the complainant is required to be recalled. However, it may be mentioned here that the said DW is in the nature of an official of the bank who had produced the account statement as would have been called for. To establish the authenticity or admissibility of such statement, the complainant is not required to be confronted with same. Such bank record if produced by a responsible bank officer would be admissible in evidence and can be used by any of the parties.
23. The trial Court while dismissing the application filed under Section 311 Cr.P.C. observed that there was no need for further cross-examination of the complainant and that the purpose of filing such application is simply to delay the proceedings further. It is further observed that the account statement of

the complainant is on record and would be read in evidence and that there is no need to re-examine the complainant for the same.

24. As already noticed above, while the Hon'ble Supreme Court has consistently held that Court has vast powers to summon or recall any witness with the aid of Section 311 Cr.P.C. at any stage but such application can only be allowed if the Court comes to a conclusion that it is absolutely necessary to do so for just decision in the matter. Such application is neither to be allowed to fill up lacuna nor can be allowed to be made as a tool to delay trial. While this Court cannot dispute that the right to fair trial is a crucial and precious right of the accused, but so is the complainant's right to a fair trial which requires that they should not unnecessarily be harassed. Ensuring a fair trial can not be interpreted to mean that the accused has to be afforded opportunities of recalling witnesses for further cross-examination at the mere asking. The case of an accused has to be meritorious where such prayer is made. The Hon'ble Apex Court in case of State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402 had emphasized that fairness of a trial has to be seen, not only from the perspective of accused, but also of the victim and society. Thus, this Court also has a duty to ensure an expeditious and fair trial, preventing misuse of such applications for delaying the proceedings before the learned Trial Court.
25. Examining the instant case in light of ratio of above cited judgments more particularly keeping in view the fact that the instant application has been filed by accused rather belatedly and without any justifiable ground and that the accused had duly cross-examined the complainant, the order passed by trial Court is not found to be suffering from any infirmity. It is not the case

that the petitioner did not cross-examine the witness at all or only formal questions were put to complainant during cross-examination. It is not even the case that complainant has come out with some new evidence necessitating clarification. Thus, in the given set of facts and circumstances, no ground is made out for recalling the witnesses at this belated stage for further cross-examination. Consequently, this Court does not find any valid ground to interfere with the impugned order and the same is upheld. Finding no merit in the petition, the same is dismissed.

16.01.2024
mohan

(GURVINDER SINGH GILL)
JUDGE

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No