

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-4402-2024 (O&M)
Date of Decision: 29.01.2024

Vijay GroverPetitioner

Versus

M/s Malik Finance CompanyRespondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Namit Khurana, Advocate, for the petitioner.

GURVINDER SINGH GILL, J.

1. The petitioner assails order dated 21.11.2023 (Annexure P-4) passed by the learned Judicial Magistrate Ist Class, Yamuna Nagar at Jagadhri, vide which an application filed by the petitioner for recalling the respondent/complainant for further cross-examination has been declined.
2. The petitioner is arrayed as an accused in the complaint under Section 138 of the Negotiable Instruments Act filed by the respondent with respect to dishonor of a cheque for an amount of Rs.4 lakhs which the petitioner had allegedly issued in discharge of his liability i.e. to return the loan amount.
3. After the complainant had concluded his evidence, the statement of the petitioner/accused in terms of Section 313 Cr.P.C. was recorded on 20.12.2022. Thereafter, the petitioner availed some opportunities for leading defence evidence, but later filed an application under Section 311 Cr.P.C. seeking recalling of the complainant for further cross-examination. The said application dated 19.09.2023 was, however, dismissed by the learned

Judicial Magistrate Ist Class vide impugned order dated 21.11.2023 (Annexure P-4), which is being assailed in this Court.

4. Learned counsel for the petitioner submits that some material questions pertaining to the relevant issues could not be put to the complainant during the course of his cross-examination and that for just decision of the matter and for eliciting the truth, the same are required to be put to the complainant and as such, recalling of the complainant for his further cross-examination is necessary. Learned counsel further submits that in case the petitioner is not permitted to recall the complainant for his further cross-examination, the petitioner shall stand seriously prejudiced in establishing his defence. It has been submitted that the law with regard to recalling is fairly liberal and an application under Section 311 Cr.P.C. can be allowed at any time before pronouncement of the judgment.
5. This Court has considered the aforesaid submissions.
6. 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."

7. 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 reexamine 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.”

8. 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.”

9. 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.”

10. 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.”

11. 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.
12. Hon'ble the Supreme Court in AG vs. 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.
13. 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.
14. Coming to the facts of the present case, a perusal of the application filed under Section 311 Cr.P.C. (Annexure P-2) would show that the sole ground set forth for recalling the complainant is on account of change of counsel, as the previous counsel is stated not to have asked the relevant questions. Interestingly, the petitioner/accused has not chosen to place on record a copy of the statement of the complainant from which it could be said that the cross-examination is indeed sketchy and does not pertain to relevant issues. Rather, a perusal of the impugned order dated 21.11.2023 (Annexure P-4) passed by the learned Judicial Magistrate Ist Class reveals that the complainant tendered his affidavit in evidence on 02.03.2022 and thereafter the petitioner/accused availed of 3 opportunities to cross-examine the

complainant and after his cross-examination, statement of the accused in terms of Section 313 Cr.P.C. was also recorded, wherein the accused is not stated to have specifically denied the signatures on the cheque in question and the issuance of the cheque in question.

15. Under the aforestated circumstances, the sole ground for recalling the complainant for his further cross-examination as set out i.e. on account of change of counsel, would not furnish sufficient cause to warrant recalling of the complainant particularly when the previous counsel had duly cross-examined the complainant. As such, weighing the facts of the present case against the ratio of the judgments referred to above, this Court does not find any infirmity in the impugned order dated 21.11.2023 (Annexure P-4) and the same is upheld. Finding no merit in the petition, the same is hereby dismissed.

29.01.2024

Vimal

(GURVINDER SINGH GILL)
JUDGE

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