2024:PHHC:063363

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

CRM-M-13646-2019
Date of Decision : 06-05-2024

Dr. Sanjeev Mittal

........Petitioner

Versus

Suresh Sood and another

........Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present:- Mr. Sehajbir Singh, Advocate
for the petitioner.

Mr. Mohinder Kumar, Advocate
for the respondent No.1.

PANKAJ JAIN, J. (Oral)

1. By way of the present petition filed under Section 482 of the Code, petitioner has assailed order dated 11.03.2019 (Annexure P-7) passed by Ld. Additional Sessions Judge, Moga whereby order dated 28.01.2019 (Annexure P-5) passed by the Ld. Trial Court rejecting the application filed by respondent No.1 under Section 311 of the Criminal Procedure Code and Sections 65 and 66 of The Indian Evidence Act, 1872 stands quashed and reversed.

2. At the heart of the controversy there lies a document which is stated to be abstract of the confidential report given by Dr. Sanjeev

Mittal to LIC. Complainant had moved an application for re-examining Suresh Sood and also sought directions to Dr. Sanjeev Mittal to produce original abstract of the said confidential report. The trial Court dismissed the application filed by the complainant holding as under:-

> *"7. Now, under the garb of this application, the complainant want to prove Abstract of the said report so obtained by him under RTI. First of all, this Abstract is again alleged to be forged pertains to the year 2011 and as per document placed on the record by the complainant himself, he had applied for this document on 23.1.2013 under RTI and received copy of the same in the year 2013 itself probably on 26.2.2013 meaning thereby this document was well within the knowledge as well as possession of complainant while leading preliminary evidence and also while leading we charge evidence but this document was never placed on the record at that time and this document was never taken into consideration as framing base of the charge at the relevant time. There is no explanation as to why this document was not proved in pre charge evidence despite of knowledge and possession. Now the case is at the fag end. U/S 246(6) CrPC. complainant can not sprung upon all of sudden some new document which only form the basis of charge so as to take accused to be surprise. As such, no permission U/S 311 Cr.P.C. can be granted to the complainant to prove this document. Moreover, this document is not necessary for deciding the present case. Complainant has already established prima facie that report of Doctor Sanjiv Mittal does not bear his signatures. In pre charge evidence, if there is any forgery the same can be decided on the basis of earlier report of Doctor Sanjiv Mittal Proving of this report will lead to re-trial of the case by over-riding the order of Charge also which is not permissible under law. As such, no permission US 311 Cr.P.C can be granted to prove this document. The view of the court that evidence which was available during leading of preliminary/pre charge evidence can not be allowed to be proved U/S 311 CRPC is supported by law laid down in Chittorgarh Kendriya Vs. Nirbhay Singh reported in 2018(5) RCR (Griminal) 357.*

8. Regarding permission to prove the Abstract of this document by way of secondary evidence, for that, again this court is of the view that this Abstract of medical report is a certified copy of copy as is cleat from the Abstract that even an information under RTI is appears to be copy of attested copy. In Ramagopal Naicker Versus Muthukrishna Ayyar and another All India Reporter 1957 Page-1 of Hon'ble Madras High Court, it has held that "a copy of the office copy of a document can not be taken to be a certified copy and is inadmissible in evidence", therefore, no permission for secondary evidence can be granted for such a document Accordingly, both these applications are dismissed without commenting upon the merits of the case."

3. The order stands reversed by the Revisional Court, holding as under:-

"8. This court is of the opinion that as per contention of learned counsel for revisionist, abstract of medical confidential report of complainant so alleged to be prepared by accused Dr. Sanjeev Mittal and sent to LIC is material piece of evidence which has to be proved. Since, witness Raj Kumar, LIC Office, Moga has categorically deposed that abstract of confidential report is retained by concerned Doctor and it is not in possession of LIC department. Copy of abstract of confidential report so obtained by revisionist/complainant under RTI Act can be very well proved by way of secondary evidence. Learned trial court has made observations that said document had been applied by by complainant on 23.1.2013 under RTI and received copy of the same in the year 2013 and said document was well within the knowledge as well as possession of complainant while leading preliminary evidence and also while leading pre charge evidence but same was never placed on the record at that time but this court is of the opinion that court has to impart justice and since the learned trial court has already allowed the application of the complainant to lead after charge evidence and witness Raj Kumar has deposed that said abstract of medical report is not in possession of LIC and it is in possession of accused Dr. Sanjeev Mittal, In reply to the said application, accused Dr. Sanjeev Mittal has denied his possession of said document, then there is no alternative for revisionist/ complainant

> *except to lead secondary evidence. This court is also of the opinion that no prejudice shall be caused to accused if both the applications under section 311 Cr.PC and section 65 of Indian Evidence Act are allowed."*

4. Counsel for the petitioner has argued that the complainant having miserably failed to prove the existence of the document and should not have been granted indulgence to prove the document by way of secondary evidence. He further submits that the impugned order is even discrepant with respect to ingredients of Section 311 of the Code.

5. Per contra, counsel for the respondent No.1/complainant submits that the trial is with respect of forgery of this document and thus to say that the same would not satisfy the ingredients of Section 311 of the Code cannot sustain.

6. Counsel for the complainant further submits that the complainant moved an application under Section 246(6) of the Code to summon Assistant Administration Officer of LIC, which was allowed by the trial court. The witness came up and testified that as per the rules of LIC, abstract of confidential report is retained by the concerned doctor which in the present case, is the petitioner Dr. Sanjeev Mittal. He submits that thereafter complainant moved applications seeking re-examination of himself and for directing the petitioner to produce original abstract of confidential report. However, erroneously the applications filed by complainant were dismissed. Therefore, the impugned order passed by Revisional Court reversing the aforesaid decision is sustainable.

7. I have heard counsel for the parties and have gone through the records of the case. Following two questions have arisen for consideration of this Court:-

(i) Whether the document satisfies the ingredients as enumerated under Section 311 of the Code?

(ii) Whether Revisional Court erred in allowing the respondent/complainant to prove the document by way of secondary evidence?

8. In order to appreciate the rival contentions raised by counsel for the parties, it will be apposite to peruse Section 311 of the Code and Section 246 (6) of the Code which read as under:-

> *"**Section 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."*
>
> *"**Section 246(6):** The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any), they shall also be discharged."*

9. The expanse of provision contained in Section 311 of the Code is no more *res integra* and has been fully explained in the case of ***Rajaram Prasad Yadav Vs. State of Bihar 2013 (14), SCC 461*** 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 of the 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 said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of a 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 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 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."

10. It is evident that the only consideration before the Court while entertaining and adjudicating application under Section 311 of the Code is the relevancy of the documents and its considerations are secondary.

11. Learned counsel for the petitioner is not in a position to dispute that at the heart of the controversy lies the present document.

12. In view thereof the document sought to be proved is relevant and meets the requirement of Section 311 of the Code. Coming to the question whether complainant ought to have been allowed to prove the

document by way of secondary evidence or not, Hon'ble the Supreme Court in case of ***M. Chandra Vs. M. Thangamuthu, 2010(4) R.C.R (Civil) 696 : (2010) 9 SCC 712*** has held as under:-

> "*47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to reply upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."*

13. While discussing ambit of Section 65 of The Evidence Act, 1872., the ingredients that the applicant needs to satisfy prior to leading secondary evidence are :-

> *"(a) When the original is shown or appears to be in the possession or power—of the person against whom the document is sought to be proved, of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
>
> *(c) when the original has been destroyed or lost, or when the party offering evidence of its content arising from his own default or neglect, produce it in reasonable time;*
>
> *(d) when the original is of such a nature as not to be easily movable;*

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this act, or by any given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot convenient fact to be proved is a general result of the whole collection;"

14. In the case of ***Rakesh Mohindra Vs. Anita Beri and Ors.***, **2016 (16) SCC 483**, Apex Court has discussed the admissibility of secondary evidence holding as under:-

"21. In the case of ***Rai Bajinath (dead) by Kedarnath Goenka v. Maharaja Sir Pavaneshwar Prasad Singh, AIR 1922 Privy Council page 54,*** *a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the judgment observed:*

"It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed."

22. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in seconday evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

......XXX."

15. Counsel for the petitioner is right in contending that prior to invoking Section 65 of the Evidence Act, the applicant has to lay foundation i.e. has to prove the very existence of the document. In the present case, in view thereof, testimony of Assistant Administration Officer of the LIC has been placed on record which reads as under:-

> "*Suresh Sood Vs. Charanjit Singh. COMI-761/13*
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> *Present: Complainant with counsel Shri SS Singla Adv.*
> *Accused Charanjit Singh on bail with proxy counsel.*
> *Proxy counsel for accused Sanjiv Mittal.*
> *(Personal appearance permanently exempted).*
> *Accused Manjit Singh already discharge.*
>
> *Cost not paid. No CW is present. CW Raj Kumar, Assistant Administrative Officer, has come present and suffered his separate statement that he will trace out the concerned record and produce on 16.01.2019. The complainant is directed to take dasti summons of the witnesses sought to the examined, so desired for 16.01.2019 at own responsibility. TA/DA be not deposited in Court and be tender directly to be witnesses on the date of examination by the complainant. In case of failure on the part of complainant his evidence will be closed by order.*
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> *Date of Order.10.01.2019 (Arun Shori), PCS,*
> *Punit Vij, Stenographer-III Judicial Magistrate, 1st Class*
> *Next date. 16.01.2029 Moga (UID No.PB0462)"*

16. This Court is satisfied that so far as existence of document is concerned, prima facie evidence has come on record which shows that confidential report existed.

17. Thereafter, an application was moved seeking directions to the petitioner/accused to produce the same. In pursuance thereto, he has claimed that the same is not in his record. He also did not denied existence thereof.

18. In view thereof, this Court has no hesitation in holding that requirements as contemplated in Section 65 of the Evidence Act stands satisfied.

19. So far as the apprehension raised by the counsel for the petitioner with respect to mode of the proof of the document is concerned, the same will be seen at the appropriate stage. In view thereof, this Court finds that there is no scope of entertaining the present petition as no fault can be found with the impugned order.

20. In view of the above, present petition is dismissed.

21. Ordered accordingly.

(PANKAJ JAIN)
JUDGE

06-05-2024
spn

Whether speaking/reasoned : Yes
Whether reportable : No