

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-25911-2022

Reserved on: 13.02.2024

Pronounced on: 16.02.2024

2024:PHHC: 022040

TEJ RAM

.... PETITIONER

Vs.

SHAMSHER SINGH

.... RESPONDENT

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. Sherry K. Singla, Advocate, for the Petitioner.

Mr. Amarpreet Singh, Advocate, for the respondent.

DEEPAK GUPTA, J.

By way of this petition filed under Section 482 CrPC, petitioner prays for quashing of the impugned order dated 24.05.2022 (Annexure P4) passed by Id. JMIC, Talwandi Sabo, whereby trial Court has allowed application dated 04.04.2022 under Section 311 CrPC (Annexure P2) filed by the respondent-accused for recalling defence witness Jasvir Singh, Mandi Supervisor, Market Committee, Maur District Bathinda along with auction register in a complaint No.288 of 2017 titled '*Tej Ram Vs. Shamsher Singh*', under Section 138 of the Negotiable Instrument Act.

2.1 Complaint (Annexure P1) was filed by the petitioner to prosecute the respondent under Section 138 of the NI Act claiming that in order to discharge his liability i.e. to repay the loan amount borrowed by him, accused had issued a cheque dated 26.05.2017 for ₹2,50,000/-, which on presentation was dishonoured due to 'insufficient funds' in the account of the respondent-accused. Statutory notice was sent to the

accused, but in vain.

2.2 After recording preliminary evidence, summoning order was passed. Petitioner concluded his evidence by examining himself as CW1 besides one Jagtar Singh as CW2. Statement of the accused under Section 313 CrPC was recorded and in his defence, he examined Nishant Garg, Branch Manager, Punjab and Sindh Bank, Maur Mandi as DW1; and Jasvir Singh, Mandi Supervisor, Market Committee Maur as DW2 besides Mohit Joshi, Manager, PNB Bank, Maur as DW3. He also tendered certain documents.

2.3 Respondent then moved an application under Section 311 CrPC to recall the complainant for his further cross-examination, but later on withdrew the application and the same was dismissed as withdrawn on 06.10.2021.

2.4 Respondent then moved another application under Section 311 CrPC to recall DW2 Jasvir Singh, Mandi Supervisor, Market Committee Maur, which has been allowed by way of the impugned order.

3.1 Assailing the aforesaid order, it is contended by Id. counsel that trial Court failed to consider that application under Section 311 CrPC was filed by the respondent-accused to recall his own witness. Examination-in-chief and cross-examination of the witness had already been conducted on all the material aspects. Simply because a suggestion had been given to the witness to the effect that the petitioner was doing the work of commission agency, could not be the ground to recall the witness at the instance of the respondent-accused. Id. counsel contends further that Section 311 CrPC cannot be invoked to fill in the lacuna and that in case impugned order is allowed to sustain, it will result in re-trial.

3.2 Ld. counsel has relied upon a decision of this Court rendered in *Shabbir Ahmad Laway @ Shabbir Kala Vs. Central Bureau of Investigation, Chandigarh* [CRM-M-3659-2018 decided on 16.05.2018], wherein application was moved by the petitioner before trial Court for recalling prosecutrix for re-examination. It was found that aspects asserting in the application were not the new facts, having come to light later for requiring the recall of prosecutrix and so the petition was dismissed. Further reliance is placed upon a decision of this Court rendered in *Baljinder Singh @ Kaka Vs. State of Punjab and another* [CRR-495-2021 decided on 27.04.2021], wherein it was held by this Court that discretionary power under Section 311 CrPC is to be exercised judiciously and that failure of the defence to put certain questions cannot be the ground for recalling of the witness. Ld. counsel also refers to *Jasbir Singh Vs. State of Punjab* [CRM-M-32376-2016 decided on 08.05.2018], wherein it was found that application under Section 311 CrPC was not bona fide and the same had been moved with intention to delay the proceedings after examining as many as 8 defence witnesses.

4. Refuting the aforesaid contentions, ld. counsel for the respondent submits that petitioner-complainant had refused to be doing the work of commission agency; that DW2 Jasvir Singh was examined to prove the commission agency license of the petitioner, who produced relevant documents to prove said fact. However, suggestion was given to the witness that petitioner-Tej Ram was not doing the work of commission agent on the basis of license. Ld. counsel contends that it was in these circumstances that application under Section 311 CrPC was moved to recall DW2 along with an auction register for the year 2021-

2022 regarding the accounts of Tej Ram and Sons, Commission Agent, Maur Mandi, in order to show that petitioner was in fact continuously doing the work of commission agent. Ld. counsel contends that Id. trial Court has rightly allowed the application. Prayer is made for dismissing the petition.

5. I have considered submissions of both the sides and appraised the record.

6. Section 311 CrPC reads as 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.”

7. It has been held by Hon’ble Supreme Court in ***P. Sanjeeva Rao Vs. State of A.P., 2012(3) RCR (Criminal) 653*** that object underlying Section 311 CrPC is to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence. It was held further that prosecution may suffer prejudice on account of a belated recall, but it would be preferable to err in favour of accused rather than protecting the prosecution against a possible prejudice at his cost. It was held further that fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue.

8. Hon’ble Supreme Court also referred to ***Hanuman Ram Vs. The State of Rajasthan, 2008(4) RCR (Criminal) 823***, wherein it was held 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 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." (emphasis supplied)

9. Apart from above, recently, Hon'ble Supreme Court in ***Varsha Garg Vs. The State of Madhya Pradesh and others – Criminal Appeal No.1021 of 2022 decided on 08.08.2022***, has discussed the scope of Section 311 and Section 91 Cr.P.C., besides Section 65 of the Evidence Act. It has been held as under: -

“This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad

terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

29. *The first part of the statutory provision which uses the expression “may” postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “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”. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.*

10. After referring to the observations made in *Mohanlal Shamji Soni vs. Union of India (1991) Supp (1) SCC 271*, Hon’ble Supreme Court further held in Varsha Garg (supra):

*31 Summing up the position as it obtained from various decisions of this Court, namely **Rameshwar Dayal v. State of U.P. (1979) 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 reexamine 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.**”*

11. Hon’ble Supreme Court further held in *Varsha Garg (supra)*:

“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.

33. *Section 91 CrPC empowers inter alia any Court to issue summons to a person in whose possession or power a document or thing is believed to be, where it considers the production of the said document or thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the CrPC.*

34. *Section 91 forms part of Chapter VII of CrPC which is titled “Processes to Compel the Production of Things”. Chapter XVI of the CrPC titled “Commencement of Proceedings before Magistrates” includes Section 207 which provides for the supply to the accused of a copy of the police report and other documents in any case where the proceeding has been instituted on a police report. Both operate in distinct spheres.”*

12. Hon'ble Supreme Court in **Varsha Garg (supra)** further dealt with the objections of the opposite party to the effect that application under Section 311 Cr.P.C should not be allowed, as it would lead to filling up the lacunae of the prosecution case. It was held that even the said reason cannot be absolute bar in allowing the application under Section 311 Cr.P.C. Hon'ble Supreme Court held under: -

39. *In the decision in **Zahira Habibullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374**, which was more recently reiterated in **Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd. (2008) 11 SCC 108**, the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:*

“28. 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 side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted

allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be “filling of loopholes”. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.” (emphasis supplied)

13. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in ***Mina Lalita Baruwa v. State of Orissa (2013) 16 SCC 173***, while reiterating ***Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110***, the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In ***Rajendra Prasad (supra)***, the Court had held that:

“8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.” (emphasis supplied)

14. Further, in ***Varsha Garg (supra)***, dealing with the objection regarding the stage, at which the application under Section 311 Cr.P.C can be moved, Hon'ble Supreme Court held that Court is vested with a broad and wholesome power in terms of Section 311 Cr.P.C., to summon and resummon or recall and re-examine any material witness at any stage and that closing of the prosecution evidence is not an absolute bar. In this regard, Hon'ble Supreme Court noted as under: -

“42..... Further, in *Zahira Habibullah Sheikh (5) (supra)*, the Court reiterated the extent of powers under Section 311 and held that:

“27. 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, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. **In Section 311 the significant expression that occurs is “at any stage of any 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.”
(emphasis supplied)

15. The Court while reiterating the principle enunciated in ***Mohanlal Shamji Soni (supra)*** stressed upon the wide ambit of Section 311 which allows the power to be exercised at any stage and held that:

“44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, “any court”, “at any stage”, or “any enquiry or trial or other proceedings”, “any person” and “any such person” clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution

that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, “essential” to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

(emphasis supplied)

16. Keeping in mind the legal position as above, when the facts of the present case are analysed, it is noticed that in the cross-examination of DW2 Jasvir Singh, Mandi Supervisor, Market Committee, Maur District Bathinda, as reproduced in the petition itself, specific stand was taken by the petitioner-complainant to the effect that he was not doing the work of commission agent on the basis of the license as proved by DW2, by making a suggestion to him to that effect. Said suggestion was denied by DW2.

17. The application under Section 311 CrPC was moved by the accused-respondent so as to falsify the aforesaid stand of the petitioner as DW2 has been sought to be recalled to produce the auction register regarding the accounts of Tej Ram and Sons, Commission Agents, Maur Mandi, in order to show that complainant was continuously working as commission agent.

18. In the aforesaid facts and circumstances, the moving of the application cannot be held to be an attempt to fill up the lacuna or an

attempt to delay the trial. Rather, the application is moved to refute the stand taken by the petitioner. Respondent-accused has the right to be provided fair opportunity to put forth his defence so as to rebut the case of the petitioner.

19. As such, this Court finds no merit in the present petition. As far as the authorities, cited by ld. counsel for the petitioner, are concerned, those are distinguishable on facts and are not applicable to the facts of this case.

Dismissed.

16.02.2024
Vivek

(DEEPAK GUPTA)
JUDGE

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | No |