

2024:PHHC:062323

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

126

CRM-M-8978-2017(O&M)

Reserved on: 15.04.2024

Date of Pronouncement:25.04.2024

GULSHAN KUMAR

.....Petitioner

VERSUS

STATE OF HARYANA AND ANOTHER

.....Respondents

CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI

Present : Mr. Ashit Malik, Advocate
for the petitioner.

Mr. Bhupender Singh, DAG, Haryana.

Mr. D.K.Tuteja, Advocate,
for respondent no.2-complainant.

KULDEEP TIWARI. J.

1. The petitioner, who is facing trial as an accused in FIR No.493, dated 30.10.2008, under Sections 420, 466, 467, 468 and 471 of the IPC , registered at Police Station Civil Lines, Rohtak, District Rohtak, as well as in a private complaint dated 11.06.2006, under Sections 420, 466, 467, 468 and 471 of the IPC, throws challenge to the order 01.03.2017 (Annexure P-8) passed by the Judicial Magistrate Ist Class, Solanki, Rohtak, (hereafter referred to as 'the learned trial court concerned'), whereby the third application preferred under Section 311 Cr.P.C. by the prosecution, has been allowed. This caused grievance to the present petitioner/accused, and propelled him to invoke the inherent

powers of this Court as envisaged under Section 482 of the Cr.P.C. for quashing of impugned order (*supra*).

BRIEF FACTS

2. Before proceeding to evince any opinion upon the legality of the impugned order, it deems imperative to deal with the facts in detail as the case has its chequered history.

3. In the instant case a complaint was filed by respondent no.2- Ramesh Chander, who alleged therein that he was owner of 2/5th share in shops No.361 to 367, Quilla Road, Rohtak, i.e.18 sq.yards, out of 45 sq.yards and the co-accused-Krishan Lal, who was owner of 1/5th share i.e. 9 sq.yards, out of 45 sq.yards, vide sale deed no.5156, dated 06.01.1982, however, he forged the said sale deed and projected himself to be owner of entire 45 sq.yards, and obtained a loan of Rs.10 lacs.from Canara Bank. It was also alleged by him that from the certified copy of the said sale deed he found that relevant page of the original record was torn. Hence, respondent no.2-complainant filed a complaint for taking action against Krishan Lal, and other concerned officials, of the revenue department.

4. On the basis of the above complaint, an FIR was registered as mentioned above, besides that respondent no.2-complainant filed a separate private complaint against the present petitioner and other co-accused with similar allegations before the JMIC, Rohtak.

5. The petitioner and co-accused earned acquittal in both; the complaint case; and the FIR, vide verdicts of acquittal dated 18.04.2014

(Annexure P-2), and 31.03.2015 (Annexure P-3) respectively, passed by the learned trial Court concerned.

6. This caused grievance to respondent no.2-complainant, therefore he preferred an appeal against the verdicts of acquittal (*supra*) before the appellate court concerned. He remained successful in that as the appeal was partly allowed, and the matter was remanded back to the learned trial Court concerned, with a direction to club both, the complaint case as well as FIR case, and to decide afresh after examining Ramesh, Shakuntala Devi, and cross-examining of ASI Parkash Chand.

7. Thereupon, respondent no.2-complainant preferred an application under Section 311 Cr.P.C. for examination of Ramesh Chander and Shakuntala Devi, that application was allowed by the learned trial Court. Again third application under Section 311 Cr.P.C. was moved by the prosecution for tendering several documents as additional documents and vide impugned order (*supra*), the said application was allowed, which is under challenge before this Court.

SUBMISSIONS OF LEARNED COUNSEL FOR THE PETITIONER

8. Learned counsel for the petitioner submits that the appellate court had partially allowed the appeal filed by respondent no.2-complainant, remanded the case to the learned trial Court concerned, and only permitted to examine Ramesh Chander, and his wife Shakuntala Devi, and allowed cross-examination of ASI Parkash Chand.

9. He further submits that the trial court concerned, has no power to entertain fresh application under Section 311 Cr.P.C. as the

remand was only for a limited purpose.

10. He further submits that earlier also an application filed by the complainant under Section 311 Cr.P.C. for examination of complainant-Ramesh Chander and Shakuntala Devi, was rejected as well as the statutory revisional court also upheld the order passed by the learned trial Court concerned, however, these two orders were never brought to the knowledge of the learned first appellate Court, which led to passing of the remand order with directions of examination of complainant-Ramesh Chander, Shakuntala Devi and cross-examine Parkash Chand.

11. He further submits that there is no provision under Section 311 Cr.P.C. which could empower any court in allowing the tendering several documents rather the court can only allow any person to be examined, cross-examine, or re-examine as a witness.

12. Finally, he submits that the documents which were very much in the knowledge of respondent no.2-complainant, should have been supplied during investigation to the investigating officer, however, at the belated stage, when the earlier accused (petitioner herein), earned acquittal in first round of litigation, these documents cannot be allowed to be taken on record as this would amount to filling up of *lacuna*, which is not the object of Section 311 Cr.P.C.

SUBMISSIONS OF THE LEARNED STATE COUNSEL ASSISTED BY LD.COUNSEL FOR THE COMPLAINANT/RESPONDENT NO.2.

13. While opposing the submissions made by learned counsel for the petitioner, learned State counsel assisted by learned counsel for

respondent no.2 submits that the first appellate court, while remanding the trial vide order dated 27.04.2016 (Annexure P-5), nowhere prohibits the filing of application under Section 311 Cr.P.C.

14. They further submit that the learned trial Court concerned, in fact not only exercised its powers under Section 311 Cr.P.C. but also referring the provisions of section 165 of the Indian Evidence Act (hereinafter referred to as 'Act'), has allowed the application in question vide impugned order.

15. They further submit that in fact the learned trial Court concerned, in principle and basically exercised powers under Section 165 of the Act, allowing respondent no.2-complainant to bring on record certain documents, which is an independent power of the court and cannot be questioned through the instant petition.

16. They next submit that the petitioner has nowhere challenged the power of the learned trial Court concerned, exercised under Section 165 of the Indian Evidence Act, therefore, the instant petition is bereft of any merits and requests for its dismissal.

ANALYSIS

17. This Court has examined the impugned order (*supra*) alongwith the entire record, as well as the detailed submissions made learned counsel for both the parties.

18. So far as the first submission as made by learned counsel for the petitioner that the learned first appellate court concerned, vide its judgment dated 27.04.2016, remanded the matter back to the learned trial

Court for deciding the matter afresh after recording only the statements of Ramesh Chander, Shakuntala Devi and cross-examination of ASI Parkash Chand, therefore, the learned trial Court should not have exceeded to the mandate of remand and further allow the application under Section 311 Cr.P.C. at belated stage.

19. This Court does not find merits in the above submissions made by learned counsel for the petitioner, for the reason that once the learned first appellate court, has remanded back the *lis* to decide it afresh, however, with the directions upon the learned trial Court, that the matter be decided only after recording the statements of Ramesh Chander, Shakuntala Devi and cross-examination of ASI Parkash Chand, that does not restrain the learned trial Court to entertain application under Section 311 Cr.P.C. and to adjudicate the same independently.

20. A perusal of the verdict of remand passed by the learned first appellate Court, dated 27.04.2016, makes it crystal clear that the power of the learned trial Court, has not been restricted, and therefore, at the time of deciding the matter afresh it can exercise its powers under Section 311 Cr.P.C. to reach a just decision. The relevant extract of the verdict reads as under:-

“.....Thus, considering the case law as referred above, above referred witnesses being material for the just decision of this case A required to be examined. Considering this situation, the matter in question stands remanded back to learned trial Court for deciding the matter afresh after recording the statements of above referred witnesses. Since complaint case titled as Ramesh v. Krishan Lal is connected to FIR No.493 dated 30.10.2008, under Sections 420, 466, 467, 468, 471 of IPC, Police Station Civil Lines, Rohtak, as same facts emerged from the complaint as that of state case, therefore, the same requires to be decided together with the state case bearing FIR No.493 dated 30.10.2008. Thus, the findings

returned by learned trial Court in complaint case titled as Ramesh v. Krishan Lal also stand set aside with the direction to learned trial Court to club both the cases together and thereafter to record evidence as earlier directed and to decide the matter afresh. With these A observations, present appeals stand allowed.....”

21. Now coming to the legality of the impugned order. It is apt to refer to the grounds on which the application has been filed, which is attached as Annexure P-6, with the instant petition. Application under Section 311 Cr.P.C., has been filed by the complainant, through the public prosecutor. In the application there is only mention about the list of certified copies of certain documents which they want to place on record as additional evidence, but there is not even whisper that for what purpose they want to place on record the certified copies of those documents. There is not even any reason mentioned which prevented the complainant (respondent no.2) or the investigating agency, not to bring on record the same on earlier occasion, i.e. at the time of investigation or during the earlier trial. Simplicitor, it is the application for placing on record certain documents.

22. Before, further evincing any opinion regarding validity of the impugned order it is apt here to catch a glimpse of Section 311 Cr.P.C., which 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.

[311-A. Power of Magistrate to order person to give specimen signatures or handwriting. - If a Magistrate of the first class is

satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this Section unless the person has at some time been arrested in connection with such investigation or proceeding.]

23. A studied survey of the hereinabove extracted Section explicates that it carries two parts, inasmuch as, in the first part occurs the word ‘may’, while in the second part occurs the word ‘shall’. Since the first part carries the word ‘may’, therefore, it endows discretionary power to a criminal court, besides empowers it to, at any stage of enquiry, trial or other proceedings under the Code, summon any person as a witness, or, to examine any person in court, or, to recall and re-examine any person, whose evidence has already been recorded. However, the existence of the word ‘shall’ in the second part, imposes an obligation upon Court to take any of the above measures, if evidence of such a person is necessary for just decision of the case.

24. The Courts must examine an “essential” witness, under Section 311 of the Cr.P.C., only to arrive at a just decision and not to aid either the prosecution or the accused. Section 311 of the Cr.P.C. cannot be used as a tool by the litigants to fill up the lacunae in their evidence, otherwise, there would be no end to a trial.

25. The Hon’ble Supreme Court, in its judgment rendered in **“Hanuman Ram V/s The State of Rajasthan and Ors.”, Criminal Appeal No.1597 of 2008 (Arising out of S.L.P. (Crl.) No.7382 of**

2007), Decided on: 13.10.2008, has dealt with the object of Section 311 of the Cr.P.C. The relevant paragraphs of the judgment (supra) are extracted hereinafter:-

“7. 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 for 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 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.

9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant.....”

26. On the touchstone of the above law laid down by the Apex Court, I have examined the impugned order also. In the impugned order there is not even a whisper regarding the relevancy of these documents which the respondent no.2-complainant wanted to prove on record. There is no finding by the learned trial Court, that these documents are essential for the just decision. Even the complainant has not laid any foundation whereby the learned trial Court, can conclude that the documents are

essential. Therefore, without laying down any concrete foundation through the application under Section 311 Cr.P.C., the applicant cannot compel the learned trial Court to exercise its powers. To lend vigor to above observation, this Court relies upon the earlier judgment passed by this Bench in **Abhijeet Sharma vs. Mahipal Singh**, 2024(1) RCR (CrI.) 692, the observation therein, reads as under:

“7. Moreover, the averments too, as made in the application (supra) appear to be vague and evasive. It is a trite law that the power, as envisaged under Section 311 of the Cr.P.C., has to be cautiously exercised by the learned trial Court concerned, only if it has reason to believe that the same is essential for just decision of the case. However, for the learned trial Court concerned to form such a conclusion for exercise of power (supra), there has to be a concrete foundation laid by the applicant/accused, who approaches the court for exercise thereof.”

27. Further, the submission made by learned counsel for respondent no.2-complainant that the trial court concerned, in fact exercised its powers under Section 165 Indian Evidence Act, instead of Section 311 Cr.P.C. is not plausible. Though the learned trial court, while passing the impugned order has made passing reference about the powers of the trial court envisaged under Section 165 of the Indian Evidence Act, however, he has not recorded any satisfaction for invoking such powers.

28. There is no dispute that with the aid of Section 165 of the Indian Evidence Act, 1881, a judge has power to put any question to a witness or pass an appropriate order for production of any document which are essential for just decision of a case. However, this power cannot be exercised as a substitute to Section 311 Cr.P.C.

29. For the ready reference Section 165 of the Indian Evidence Act, reads as under:-

“165. Judge's power to put questions or order production.-

The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any question:

Provided that the judgment must be based upon facts declared by this Act to be relevant and duly proved :

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.”

30. In the impugned order the learned trial court concerned has nowhere recorded in its judgment that the documents which respondent no.2-complainant wanted to place on record are relevant in accordance with Act, and duly proved. Therefore, on this aspect the impugned judgment/verdict requires interference by this Court.

31. Lastly, it transpires from the record that this is a third application under Section 311 Cr.P.C. preferred by respondent no.2-complainant. It is nowhere mentioned in the application so preferred under Section 311 Cr.P.C., that these documents were not prior in his knowledge. Even neither at the time of investigation nor at the time earlier trial these documents were brought on record. Further, respondent no.2-complainant at the time of investigation or during earlier trial, had full and had final opportunity to produce whatever material he wanted to reply upon, but he opted not to do so. During the second round of trial that too on the third application, respondent no.2-complainant sought to

bring on record those documents, without even making whisper of their relevancy. Therefore, in all eventuality this would tantamount to fill up the *lacuna*, which cannot be permissible/allowed by way of invoking the powers under Section 311 Cr.P.C.

32. The above observation lend vigor from the judgment passed in **Mohd. Iqbal Ahmed vs State of Andhra Pradesh**, (1979) 4 SCC 172, wherein the Apex Court as under:-

“4.....We are, however, unable to accede to this prayer which has been made at a very late stage. The prosecution had been afforded a full and complete opportunity at the trial stage to produce whatever material it liked and it had chosen to examine two witnesses, but for reasons best known to it, it did not produce the note which formed the subject-matter of the Resolution of the Sanctioning Authority Ex. P16. It is well settled that, in a criminal case this Court or for that matter any court should not ordinarily direct fresh evidence to fill up a lacuna deliberately left by the prosecution. The liberty of the subject was put in jeopardy and it cannot be allowed to put in jeopardy again at the instance of the prosecution which failed to avail of the opportunity afforded to it.”

33. Similar observation has been made the High Court of Rajasthan, in **M/s Arihand Gems Jewellers Thr.its Proprietor vs. State of Rajasthan**, 2020 (1) NIJ 723, wherein observed as under:-

6. This criminal misc. petition filed by the petitioner-complainant deserves to be dismissed for the reasons; firstly, admittedly, the documents which the petitioner-complainant wants to place on record relate to the year 2010 i.e. prior to filing of complaint; secondly, evidence of the petitioner-complainant was closed in the year 2014 and he was also cross-examined on 19.01.2018 and after completion of evidence of both the parties the matter was fixed for final hearing and at the fag end of trial the petitioner-complainant filed this application; thirdly, the documents in question were very much in the knowledge of the petitioner-complainant and the petitioner-complainant himself was negligent in not submitting these documents before the court below in time.

FINAL ORDER

34. This Court has no hesitation to record that the impugned

judgment does not pass the test of legality, and therefore, requires interference by this Court.

35. Consequently, the instant petition is **allowed**, and the impugned judgment (*supra*), is hereby set aside.

All pending application(s), if any, also stands disposed of.

April 25, 2024
dharamvir

(KULDEEP TIWARI)
JUDGE

Whether speaking/reasoned.	:	Yes
Whether Reportable.	:	Yes