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

CRM-M-36817-2024

DATE OF DECISION: 01.08.2024

JAGDISH SINGH

...PETITIONER

Versus

GURWINDER SINGH

... RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Sukhmeet Singh, Advocate
for the petitioner.

SANDEEP MOUDGIL, J (ORAL)

1. The petitioner has filed the present petition under Section 482 Cr.P.C. with a prayer to quash the impugned order dated 11.07.2024 (Annexure P-5) passed by the Additional Chief Judicial Magistrate, Moga in a complaint case bearing No. NACT 141 of 2022 dated 10.03.2022 (Annexure P-1) titled as “Gurwinder Singh Vs. Jagdish Singh”, whereby, the application filed by the petitioner under Section 311 Cr.P.C. has been ordered to be dismissed.

2. Learned counsel for the petitioner contends that a complaint under Section 138 of the Negotiable Instruments Act 1881 (hereinafter to be referred as 'the Act') was filed by the respondent against the present petitioner wherein the Trial Court vide order dated 07.04.2022 (Annexure P-2), the trial Court summoned the petitioner to face the trial in the present case. During the pendency of the complaint, when the case was listed for defence evidence, the petitioner had moved an application under Section 311 Cr.P.C. (Annexure P-3), which was dismissed by the Trial Court vide

order dated 11.07.2024 (Annexure P-5). Learned counsel contends that in



fact by moving an application under Section 311 Cr.P.C., the petitioner wanted to summon a witness namely Harmesh Singh son of Gurmail Singh who was summoned as a witness on 04.04.2024. However, due to some urgent work, he could not appear before the Court and was given up as a witness. Thereafter, the said witness was found to be essential for the just and effective disposal of the matter and as a result, the application under Section 311 Cr.P.C. was filed before the trial Court.

3. I have gone through the relevant record in the present case and have heard the learned counsel for the petitioner at length.

4. In the present case, the case was already listed for defence evidence, wherein on 04.04.2024, the accused wanted to summon and examine Harmesh Singh son of Gurmail Singh in the present complaint, however, due to some urgent work, Harmesh Singh could not be examined and later on, there was no right to appear as a witness under Section 311 Cr.P.C. Even, the trial Court dismissed the application under Section 311 Cr.P.C. on the ground that earlier the said summoned witness Harmesh Singh was given up by the accused himself being unnecessary and at this stage, he thereafter was sought to be summoned, without mentioning the reason for summoning him.

5. Before proceeding any further, it would be relevant to reproduce the provisions of Section 311 Cr.P.C., which is 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”.

6. The Hon’ble Supreme Court has dealt with similar issues in number of judgments. In a recent judgment of **‘Varsha Garg VS. The State of Madhya Pradesh and others’**, Criminal Appeal No. 1021 of 2022, decided on 08.08.2022, it was held as follows:-

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 reexamine 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.

30. A two judge Bench of this Court in Mohanlal Shamji Soni (supra) while dealing with pari materia provisions of Section 540 of the Criminal Code of Procedure 1898 observed:

“16. The second part of Section 540 as pointed out albeit imposes upon the court an obligation of summoning or recalling and re-examining any witness and the only condition prescribed is that the evidence sought to be obtained must be essential to the just decision of the case. When any party to the proceedings points out the desirability of some evidence being taken, then the court has to exercise its power under this provision — either discretionary or mandatory — depending on the facts and circumstances of each case, having in view that the most paramount principle underlying this provision is to discover or to obtain proper proof of relevant facts in order to meet the requirements of justice.” Justice S Ratnavel Pandian, speaking for the two judge Bench, noted that the power is couched in the widest possible terms and calls for no



limitation, either with regard to the stage at which it can be exercised or the manner of its exercise. It is only circumscribed by the principle that the “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.” In that context the Court observed:

“18 ...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 to 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.”

31. Summing up the position as it obtained from various decisions of this Court, namely Rameshwar Dayal v. State of U.P., State of W.B. v. Tulsidas Mundhra, Jamatraj Kewalji Govani v. State of Maharashtra, Masalti v. State of U.P., Rajeswar Prosad Misra v. State of W.B. and R.B. Mithani v. State of Maharashtra , 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 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 person which would depend on the facts and circumstances of each case.”



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.*

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38. *Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311."*

8. *Still further, it has been held in the matter of Rajaram Prasad Yadav Versus State of Bihar, 2013(3) R.C.R. (Criminal) 726, as follows:-*

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 reexamine 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.

..[emphasis supplied]”

7. Now coming back to the facts of the present case, the case was already listed for defence evidence and the petitioner had requested for summoning of Harmesh Singh as a witness whereas on 04.04.2024, Harmesh Singh could not appear as a witness before the trial Court. However, the said witness was essential for the just disposal of the matter and another application was moved under Section 311 Cr.P.C. for summoning him as a witness. Even otherwise, Harmesh Singh could not appear on 04.04.2024 due to some urgent work and was given up as unnecessary by the trial Court. Moreso, since his testimony was essential for the effective determination of the issues involved in the present case, the present application under Section 311 Cr.P.C. was moved.

8. The Court opines that the trial Court had wrongly dismissed for the reason that Harmesh Singh was earlier given up by the accused and now at the end of the trial, he could not be granted an opportunity to allow him to submit a defence witness. Rather, if allowing the application under

Section 311 Cr.P.C. amounts to the filling up the lacunae, that fact would remain subsidiary to the larger issue of essentiality of the evidence and fairness in the trial to all the sides. Thus, even at the stage of defence evidence, if Harmesh Singh is ordered to be examined as a witness, no loss would be caused to them. Even otherwise, the respondent shall also get an opportunity to cross-examine the witness with respect to the deposition made by him on oath before the trial Court.

9. In view of the above, the petition is allowed and the impugned order dated 11.07.2024 (Annexure P-5) passed by the Additional Chief Judicial Magistrate, Moga is hereby set aside and the application under Section 311 Cr.P.C. (Annexure P-3) is allowed in terms of the prayer made therein.

10. Since the matter is pending since long, the trial Court is directed to decide the case expeditiously by affording one effective opportunity to examine the witness.

(SANDEEP MOUDGIL)
JUDGE

01.08.2024
anuradha

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>