



CRM-M-43438-2019

1

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(118)

CRM-M-43438-2019
Date of Decision : 26.11.2024

Suresh Kumar ...Petitioner

Versus

State of Haryana and others ...Respondents

CORAM: HON'BLE MR. JUSTICE KULDEEP TIWARI

Present: Mr. Naveen S. Bhardwaj, Advocate for the petitioner.

Mr. Rajesh Gaur, Addl. AG, Haryana.

Mr. Munish Kumar Garg, Advocate and
Mr. Tanuj Goyal Tohana, Advocate
for the respondents No.2 to 4 and 6 to 9.

KULDEEP TIWARI, J.(ORAL)

1. Through the instant petition, as cast under Section 482 of Cr.P.C., challenge is thrown to the interlocutory order dated 31.08.2017 (Annexure P-1), passed by the learned trial Court concerned, in case FIR No.581, dated 28.09.2011, under Sections 420, 467, 468, 471 and 120-B of the IPC, 1860, registered at Police Station City Jind, District Jind, Haryana, whereby, the application preferred by the prosecution, under Section 311 of Cr.P.C., for leading additional evidence was declined, as well as the revision preferred against the order (supra), has also been dismissed, vide order dated 11.05.2018 (Annexure P-2), passed by the learned Additional Sessions Judge, Jind, primarily, on the ground of maintainability.

SUBMISSIONS BY LEARNED COUNSEL FOR THE PETITIONER

2. Learned counsel for the petitioner, at the very outset, admits the

factum that there is no illegality in the order dated 11.05.2018 (Annexure P-2),

**CRM-M-43438-2019****2**

passed by the learned Additional Sessions Judge, Jind, as the revision so preferred by the petitioner, against the interlocutory order dated 31.08.2017 (Annexure P-1), is not maintainable, and is in fact, is a misconceived motion, as he ought to have challenge the order passed by the learned trial Court concerned, by filing a petition under Section 482 of Cr.P.C.

3. In order to throw challenge to the impugned order dated 31.08.2017 (Annexure P-1), passed by the learned trial Court concerned, learned counsel for the petitioner submits that the documents, which the complainant wants to place on record, are the official documents, and the reasons for placing the same on record surfaced on account of the accused, having placed some additional documents, during the course of the trial, therefore, the prayer made in the application cannot at all be considered as a filling-up lacuna. He further submits that the prosecution evidence was closed by Court's order dated 28.04.2017, whereas, the instant application was filed on 10.05.2017, i.e. on the very next date fixed before the learned trial Court concerned, therefore, there is no intent on the part of the complainant to cause any delay, or the application can be considered as an efforts or an endeavour to fill-up the lacuna, which the defence has pointed out in their evidence.

4. While continuing with his arguments, he further submits that in the instant case, the date of death of one, Har Sarup, is a pivotal issue, and the entire allegations revolves around that. Therefore, to bring on record certain documents, to establish that the maker of the Will i.e. Har Sarup, has in fact, expired, on dated 03.02.1985, i.e. prior to the registration of the Will No.77, dated 18.02.1985. The other document, which the petitioner wants to place on record through additional evidence, is deed No.1162, dated 22.09.1958, to establish the right of the complainant upon the property in dispute, as the



allegations in the FIR, is that the accused Devi Dayal (since deceased), has in fact, sold the property belonging to the complainant, to which he has no right.

5. Finally, learned counsel submits that the learned trial Court concerned, has not considered the basic issues, while declining the application under Section 311 of Cr.P.C., whereas, the said application was dismissed only on account of delay and laches, on the part of the complaint, to bring on record these documents. In addition, he further submits that in case, these documents are allowed to be taken on the record, then no prejudice would be caused, as the respondent-accused would get ample opportunity to cross-examine the witnesses.

***SUBMISSIONS BY LEARNED COUNSEL FOR THE RESPONDENTS
AS WELL AS LEARNED STATE COUNSEL***

6. Mr. Munish Garg, Advocate, has caused appearance on behalf of the private respondents No.2 to 4 and 6 to 9.

7. At the very outset, learned counsel for the complainant informs this Court that during the pendency of the instant petition, unfortunately, the demise of Devi Dayal, respondent No.5, has occurred, and the trial qua him, has already been *abated*.

8. Learned counsel for the respondent/complainant, vociferously opposed the prayer, as made by the learned counsel for the petitioner. At the first instance, he draw attention of this Court, towards some of the documents, which were exhibited before the learned trial Court concerned, to submit that in fact, Har Sarup, withdrew some amount on dated 13.02.1985, whereas, the complainant wants to establish that Har Sarup, has died on dated 03.02.1985. He further submits that apart from the complainant, the prosecution has also moved an application under Section 311 Cr.P.C., to summon the witness



CRM-M-43438-2019

4

Sheela, wife of Tek Chand, ASI Yogender Singh, Record Clerk of the office Sub-Registrar (Birth and Deaths) and Inspector/SHO Surinder, as an additional witness. The said application was also dismissed, by drawing an order dated 10.03.2023. He also submits that as many as total 25 effective opportunities including 08 last opportunities were given to the prosecution to lead evidence, and only thereafter, the learned trial Court concerned closed the prosecution evidence on dated 28.04.2017. Therefore, the intent of filing of the another application is only dilatory tactics and to fill up the lacuna in the prosecution's case, which is not permissible by invoking the provisions of Section 311 of Cr.P.C. The application dated 10.05.2017, which is now under consideration before this Court, was filed by the complainant in his personal capacity and has not been routed through the Public Prosecutor concerned.

9. This Court has examined the issue in totality. Before evincing any opinion to the legality of the impugned order (supra), on embarking upon the lengthy submissions, as made by learned counsel for the petitioner, as well as learned counsel for the complainant, it is apt to deal with the legal journey of Section 311 of Cr.P.C. At this stage, it is apt to reproduce Section 311 of 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.]”

10. The perusal of the above makes it clear that it is an enabling provision, giving powers to the learned trial Court concerned, that at any stage of inquiry, trial or other proceedings, under this Code, may summon any person as a witness or examine any person in attendance, who has not been cited as a witness, or re-call and re-examine any person, who has already been examined, where it appears to the Court concerned that the evidence is essential to the just decision of the case.

ANALYSIS

11. 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.

12. A studied survey of the hereinabove extracted Section explicates



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.

13. 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.....”

14. A coordinate Bench of this Court, in its judgment rendered in **‘Sandesh vs. State of Haryana and another’, on dated 18.04.2024, passed in CRR-361-2022**, has observed as under :-

“8. The law is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case. If the 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. No doubt, the prosecution can never be allowed to fill up the lacuna and the Court’s determination of the application should be based only on the test of essentiality of evidence. Even the Court is under a legal obligation to satisfy itself that it was in every respect, it is essential to examine such a witness or to recall him for further examination in order to arrive at a



just decision of the case.”

15. On the touchstone of the above discussed legal propositions, this Court has examined the facts and circumstances of the instant case and has also tested the legality of the impugned order, on the anvil of the above legal propositions.

16. As per the allegations in the FIR, the property in question belonged to one Badri Parsad. Earlier on the plot in question, there was a house, and the owner of the said house was Badri Parsad, son of Telu Ram, and the said house was received by Badri Parsad, through a gift deed No.341, dated 15.04.1905, from Smt. Nanhi, wife of Shadi Ram. The above property was bequeathed after the death of Badri Parsad, by way of inheritance to his son Tek Chand, and after the death of Tek Chand, the present complainant(s) become the legal owners in possession of the property in question. Devi Dayal, who was alleged to be the owner of the plot, adjoining to the plot in question, has sold his plot which he inherited by virtue of a Will No.27 dated 18.02.1985, to one Satpal son of Partap Singh, through registered sale deed No.885 dated 19.05.1988. In the said sale deed, there is specific recital on behalf of Devi Dayal, that he does not own any other property, on the basis of the above Will. Despite that, with the reference of that Will, he got registered one another sale deed No.3425 dated 10.09.2012, in connivance with Sushil Kumar and Shiv Kumar, sons of Om Parkash and Mahesh Chand, son of Jai Govind. There are allegations that in fact, the Will in question, is also a fabricated document and it was executed on dated 18.02.1985, whereas, Har Sarup, has in fact, died on dated 03.02.1985.

17. As also recorded above, the pivotal issue revolves around the authenticity of Will, in question, as well as the date of death of one Har Sarup.



CRM-M-43438-2019

9

It is not in dispute that during the trial, the accused has made a reference to some LAC proceedings. The certified copies of which were already made a part of the record of the learned trial Court concerned. Learned counsel for the petitioner/complainant, now wants to place on record one of the document, which was part of LAC proceedings, i.e. the summons, and the report of the process server, to substantiate that in fact, the date of death of Har Sarup, is prior to the date of registration of the Will.

18. The petitioner/complainant wants to place on record one sale deed No.1162 dated 22.09.1958, to substantiate that the plot in question, which allegedly on forged documents sold by Devi Dayal, accused, to other co-accused, is belonged to the present petitioner.

19. This Court has considered the rival submissions, as made by the learned counsel for the parties concerned, and has gone through the record as well.

20. This Court is of the considered view that the documents, which are sought to be placed on record, by moving the instant application are essential for the just decision of the facts in dispute, specifically, in view of the fact that the private respondents, has placed on record the certain documents before the learned trial Court concerned, i.e. application for impleadment of LRs of deceased Har Sarup, affidavit, vakalatnama, order sheet etc. of LAC No.31 of 10.09.1984, therefore, it is nowhere can be observed that this tantamounts to fill-up lacuna.

21. What tantamounts to lacuna, has already been explained by the Hon'ble Supreme Court in '*Rajendra Prasad vs. Narcotic Cell*' (1999) 6 *Supreme Court Cases* 110. The relevant extract of the said judgment, is reproduced hereunder :-



“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

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.”

22. In view of the above ratio, this Court can safely conclude that by allowing the complainant to bring all these documents on record, would not be construed as filling-up of lacuna, rather, these are the essential documents, which could throw light on the facts in dispute.



23. So far as the issue regarding the delay, as raised by the learned counsel for the complainant is concerned, though enough opportunities were granted to the prosecution to lead the evidence, however, the same was closed on dated 28.04.2017, and this application was filed on the very next day, i.e. on dated 10.05.2017, fixed before the learned trial Court concerned, therefore, there was no inordinate delay to file the application dealing the evidence, under Section 311 of Cr.P.C.

24. The third issue raised by the learned counsel for the complainant, is dismissal of the second application, as preferred by the prosecution, which has no significance, as the legality of the said order has not been challenged before this Court, rather, the document and the witnesses sought to be examined, in that application were altogether different. Therefore, the dismissal of the second application would not be construed as a legal impediment for the petitioner/complainant to seek the remedy against the impugned order.

25. In view of the above discussed position, the instant petition is **allowed**. The impugned order (supra), is hereby **quashed**.

(KULDEEP TIWARI)
JUDGE

November 26, 2024
Manpreet

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