

2025:PHHC:009283

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

**1. CRM-M- 60675-2024
DECIDED ON: 22.01.2025**

RAJESH CHARAYA @ RAJESH KUMAR

.....PETITIONER

VERSUS

GAURAV SHARMA

.....RESPONDENT

AND

2. CRM-M-60676-2024

RAJESH CHARAYA @ RAJESH KUMAR

.....PETITIONER

VERSUS

GAURAV SHARMA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL.

Present: Mr. Rhythem Bajaj, Advocate
for the petitioner.

SANDEEP MOUDGIL, J

1. By way of common order, this Court intends to dispose of both the petitions together, as both are arising out of the same impugned order i.e. 04.11.2024 (Annexure P-5).

2. The jurisdiction of this court under Section 528 BNSS, 2023 has been invoked seeking quashing of the impugned order dated 04.11.2024 (Annexure P-5) passed by learned Judicial Magistrate Ist Class, Abohar, vide which an under Section 311 Cr.P.C. filed by the petitioner-accused for recalling the complainant-respondent for re-cross examination, has been dismissed.

2. Shorn of unnecessary details the fact leading to filing of present petition is that the complaint under Section 138 of Negotiable Instruments Act, 1881, was preferred by the complainant-respondent on 20.05.2022 alleging that an amount of Rs.11,00,000/-, as earnest money, has been paid to the accused and in discharge of his legal liability the petitioner-accused issued cheque in question, which got dishonoured and notice of accusation was served upon to the petitioner wherein the petitioner denied any amount due towards the complainant. The petitioner-accused moved an application under Section 311 of the code for recalling the respondent-complainant for re-examination, which was dismissed vide order dated 04.11.2024 (Annexure P-5).

3. Learned counsel for the petitioner contends that the Judicial Magistrate First Class (JMFC), Abohar, has wrongly dismissed the application filed by the petitioner-accused under Section 311 of the Code through an order dated 04.11.2024 (Annexure P-5) by observing that it is an attempt to fill up the lacunae. Further contention is that by way of present application, he intend to put few relevant questions, which were left earlier to be asked inadvertently but are very necessary for the just decision of the present complaint. However on 04.06.2024, he withdrew the application on account of some technical ground in order to file afresh with better particulars. Moreover, there are major contradictions as to the date of advancement of alleged loan by the respondent-complainant to the petitioner-accused.

4. Heard.

5. The following principles will have to be borne in mind while dealing with an application under Section 311 Criminal Criminal Procedure Procedure Code read along with Section 138 of the of the Evidence Act.”

(i) 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?

(ii) 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.

(iii) 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. (iv) 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.

(v) 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. (vi) The wide discretionary power should be exercised judiciously and not arbitrarily.

(vii) 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.

(viii) 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.

(ix) 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.

(x) 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.

(xi) 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.

(xii) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(xiii) 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.

(xiv) 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.”

6. It is a well settled law that an application under Section 311 of the Code must not be allowed only to fill lacuna in the case of prosecution, or the defense or to disadvantage of the accused or to cause serious prejudice to the defense of the accused or to give an unfair advantage to the opposite party. Additional evidence must not be received as a disguise for retrial or to change the nature of the case against the parties.

7. In case of V.N. Patil vs. K. Niranjana Kumar and Ors., (2021)

3 SCC 661, the aim of every court is to discover the truth. Section 311 of the Code is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

8. Upon review of the file, it is evident that the counsel for the accused cross-examined the complainant at length on 15.02.2023, after which the complainant closed his evidence following notice. The case was then adjourned to 01.04.2023 for recording the statement of the accused under Section 313 of the Code of Criminal Procedure (Cr.P.C.). On 01.04.2023, the accused filed an application under Section 311 Cr.P.C. After multiple adjournments, the accused withdrew the said application on 04.06.2024, and on 01.07.2024, the accused filed the current application.

9. Learned counsel for the petitioner-accused has failed to provide any satisfactory explanation as to why the complainant was not cross-examined on the aforementioned points during the initial cross-examination. Furthermore, the reasons for filing the present application after several adjournments remain unclear. It appears that the accused was aware of these facts from the outset of the trial, and these are not new facts that came to the knowledge of the accused at a later stage. The trial cannot be delayed unnecessarily, and the right of the complainant to a speedy trial must also be given due consideration.

10. Moreover, the current application seems to be an attempt by the accused to remedy deficiencies or "fill the lacuna" in the prosecution's case. As such, recalling the complainant for further cross-examination at

this stage would constitute an abuse of the legal process. The accused is not precluded from presenting his defense by leading evidence or calling witnesses from the relevant department to prove his case. Additionally, the accused is entitled to raise any contradictions during the final arguments.

11. In *State of Rajasthan v. Parmanand, (2014) 7 SCC 104*, the Supreme Court observed that the power under Section 311 Cr.P.C. should be exercised judiciously and sparingly, particularly when it appears to be used to fill up gaps or lacunae in the defense. The Court emphasized that the trial should not be delayed unnecessarily, and any attempt to recall witnesses for the purpose of bridging the gaps in a case could amount to an abuse of the judicial process.

12. In view of the discussions made hereinabove, this Court is of the view that there is no illegality, perversity or infirmity in the impugned order dated 04.11.2024 (Annexure P-5). Hence, the same is upheld and both the petitions are dismissed.

(SANDEEP MOUDGIL)
JUDGE

22.01.2025

Sham

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