

HIGH COURT OF PUNJAB AND HARYANA
CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR
Date of Decision: 21.03.2024
CRM-M No.49345 of 2022 (O&M)

Ram Narayan ...Petitioner

VERSUS

State of Haryana and another ...Respondents

Legislation:

Section 138 of the Negotiable Instruments Act, 1881
Section 311, 482 Cr.P.C.
Section 126 of the Evidence Act, 1872

Subject:

Petition filed under Section 482 Cr.P.C. for setting aside orders dismissing petitioner's application for recalling defense witness and summoning another witness in a case under Section 138 of the NI Act.

Headnotes:

Criminal Procedure – Revision of Order – Section 311 Cr.P.C. – Court examined the petitioner's application under Section 311 of the Criminal Procedure Code for the recall and examination of defense witnesses in a case involving Section 138 of the Negotiable Instruments Act. The petitioner sought to set aside the orders of lower courts, which dismissed his application for the recall of a defense witness and summoning of his advocate. [Para 1-3]

Application for Recall and Examination of Defense Witnesses – Dismissed – The Court found no merit in the petitioner's argument for recalling the defense witness and summoning his advocate. It was observed that the petitioner failed to establish how the examination of these witnesses was essential for a just decision of the case. Furthermore, the conversation between an advocate and a client is protected, and using it to the disadvantage of the complainant was deemed inappropriate. [Para 5]

Scope and Exercise of Power under Section 311 Cr.P.C. – Analyzed – The High Court analyzed the scope of Section 311 of the Cr.P.C., emphasizing that the court's power to summon or recall witnesses must be used judiciously and only when such evidence is deemed essential for a just adjudication of the case. The Court referred to precedents set by the Supreme Court in its deliberation. [Para 6-11]

Decision – Application for Recall and Examination of Witnesses Rejected – The High Court upheld the orders of the lower courts, concluding that the petitioner's application under Section 311 Cr.P.C. was an attempt to fill lacunae in his case and delay the trial. It was held that the necessary

conditions for invoking Section 311 Cr.P.C. were not met in this instance. [Para 13-14]

Judgement – Petition Dismissed – The petition was dismissed by the High Court, affirming the decisions of the lower courts and highlighting the importance of the prudent exercise of judicial discretion in matters involving the recall and examination of witnesses. [Para 14]

Referred Cases:

- Kokkanda B. Poondacha v. K.D. Ganapathi (2011) 12 SCC 600
- Rajaram Prasad v. State of Bihar, (2013) 14 SCC 461
- VN Patil Vs. K. Niranjan, Criminal Appeal No. 267 of 2021
- Mohanlal Shamji Soni vs. Union of India and another, AIR 1991 SC 1346
- Sukhdev Singh vs. State of Punjab, 1982 Cr. LJ 2201

Representing Advocates:

Mr. Amanpreet Singh, Legal Aid Counsel for the petitioner.

Mr. Vikas Bhardwaj, AAG, Haryana.

Mr. Surinder Dhull, Advocate for respondent No.2.

HARPREET SINGH BRAR, J.

1. The present petition has been filed under Section 482 Cr.P.C. for setting aside the order dated 26.09.2022 passed by the learned Additional Sessions Judge, Kaithal whereby order dated 17.03.2022 passed by the learned Judicial Magistrate 1st Class, Kaithal dismissing the application filed by the petitioner for recalling the defence witness, has been upheld.
2. In brief, the facts are that respondent No.2-complainant has filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act) against the petitioner for dishonour of cheque bearing No.517220 dated 25.09.2017 for an amount of Rs.3,50,000/- drawn on the State Bank of India Anaj Mandi Pundri, District Kaithal, which was allegedly given by him for discharge of his legal liability. During the pendency of the said complaint, petitioner moved an application for recalling of DW1 Mukesh and summoning of Mr. K.L. Sharma, Advocate, who was appearing for the respondent No.2- complainant as a witness in his defence. The said application was dismissed by the learned Judicial Magistrate 1st

Class, Kaithal vide order dated 17.03.2022 and the revision petition preferred against the said order also stands dismissed vide order dated 26.09.2022 passed by the learned Additional Sessions Judge, Kaithal. Hence, the present petition.

3. Learned counsel appearing for the petitioner submits that both the Courts below have gravely erred in dismissing the application moved by the petitioner for recalling of DW-1 Mukesh and summoning of Mr. K.L. Sharma, Advocate as a defence witness, as their examination was essential for just decision of the case and to meet the ends of justice. It is further contended that discretionary power under Section 311 Cr.P.C. can be exercised at any stage of trial. Both the witnesses sought to be recalled/summoned are material witnesses and therefore, the prayer sought in the present petition deserves acceptance.
4. Per contra, learned counsel appearing for respondent No.2-complainant submits that the Courts below have rightly dismissed the application filed by the petitioner under Section 311 Cr.P.C., as the same is sheer abuse of process of the court. The petitioner miserably failed to establish that as to how and in what manner, examination of both the witnesses is essential for just decision of the case. Furthermore, Mr. K.L. Sharma, Advocate was appearing as a counsel for the complainant and therefore, a conversation between a client and an advocate under fiduciary capacity cannot be used by the accused to his advantage and to the disadvantage of the complainant.
5. Having heard learned counsel for the parties and after perusing the record of the case, this Court does not find any merit in the arguments raised by the counsel for the petitioner.

6. The power under Section 311 Cr.P.C. can be exercised for summoning of witnesses at any stage of any inquiry, trial or other proceeding under this Code and the Court may 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. The Court can summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just adjudication of the case. The Court is required to form an opinion whether such evidence is necessary for a just and proper decision in that case.
7. A perusal of the application filed by the petitioner for summoning of defence witnesses reveals that the same is bereft of any ground as to how and in what manner, summoning/examination of both the witnesses sought to be summoned are essential for just decision of the case. The relevant content of the application, annexed with the present petition as Annexure P-3, is reproduced as under:-

“1. That the above noted complaint is pending before this Hon’ble Court and the same is fixed for today for defence evidence.

2. That the applicant/accused wants to summon/examine the following witnesses in his defence evidence.

i. Sh. Krishan Lal Sharma, Advocate, Chamber No.37, District Courts, Kaithal. ii. Mukesh s/o Multan Singh, r/o Village Munna-Rehri, Distt. Kaithal.

It is, therefore, respectfully prayed that the above mentioned witnesses may kindly be summoned alongwith record and applicant be allowed to deposit the expenses of said witnesses, in the interest of justice.”

8. Mr. Krishan Lal Sharma, Advocate is the counsel representing the respondent No.2-complainant and therefore, a legal practitioner, who is acting on behalf of one of the parties and conducting litigation for him is debarred under Section 126 of the Evidence Act, 1872 to disclose the communications made to him without the express consent of his client. The Hon'ble Supreme Court in **Kokkanda B. Poondacha v. K.D. Ganapathi (2011) 12 SCC 600** has held that

“18. We may add that if the parties to the litigation are allowed to file the list of witnesses without indicating the purpose for summoning the particular person(s) as witness(es), the unscrupulous litigants may create a situation where the cases may be prolonged for years together. Such litigants may include the name of the advocate representing the other side as a witness and if the court casually accepts the list of witnesses, the other side will be deprived of the services of the advocate. Therefore, it would be a prudent exercise of discretion by the court to insist that the party filing the list of witnesses should briefly indicate the purpose of summoning the particular person as a witness.”

9. DW1-Mukesh has already been examined by the petitioner and the application filed by him under Section 311 Cr.P.C. is bereft of any reason or ground on which he is sought to be recalled for examination.

10. A two Judge Bench of the Hon'ble Supreme Court in **Rajaram Prasad v. State of Bihar, (2013) 14 SCC 461** speaking through Justice F.M. Ibrahim Kalifullahas culled out following principles which are to be borne in mind by the Courts while dealing with the application filed under Section 311 Cr.P.C.:-
“17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. 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?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. 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.

17.4. The exercise of power under Section 311 CrPC 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.

17.5. 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. 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.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. 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.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, 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.

17.11. 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.

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

17.13. 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.

17.14. The power under Section 311 CrPC 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.”

11. A two judge Bench of the Hon'ble Supreme Court in **VN Patil Vs. K. Niranjan** in Criminal Appeal No. 267 of 2021 decided on 04.03.2021 examined the scope of the power under Section 311 of Cr.P.C and following was observed:-
“Object underlying Section 311 Cr.P.C is that there may not be failure of justice on account of mistake of either party in bringing 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 significant expression that occurs is ‘at any stage of enquiry or trial or other proceeding under this Code’. It is however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said wider the power, greater is the necessity of caution while exercise of judicious discretion.”

The Hon'ble Supreme Court in **Mohanlal Shamji Soni vs. Union of India and another, AIR 1991 SC 1346** has held that where the object of the accused in recalling witnesses already examined in the case is to prolong the trial of the case, the Court would not allow such application. Moreover, the

power under Section 311 of Cr.P.C is dictated by exigency of the situation based on the principle of fair play and goodwill and existence of the evidence being essential for the just adjudication of the case is the only guiding factor and that only the ends of justice requires the examination of any person which would depend to the facts and circumstances of each case. It was further held that it is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case. Such power may be exercised at any stage. However, the power is circumscribed by the principle underlying the section, that is, the evidence to be obtained must be essential for just decision of the case.

12. A Division Bench of this Court in **Sukhdev Singh vs. State of Punjab, 1982 Cr. LJ 2201** has held as under:-

“The discretion is required to be exercised by the Court keeping in view the just decision of the case unmindful of the fact whether any party before it gains or losses from the exercise of such discretion under this section. There is no doubt that object of the section is not to enable any one or the other party to fill up the gaps of its case. The section is not to be used to enable it to repair the lacuna. The sole criterion in such a case should be whether the exercise of power under section is necessary in the interest of justice. While exercising this discretion the court has to keep in its mind the well-known principle of law that the order should not operate as a rebuttal of the case set up by the defence after the prosecution case is closed. The use of this section cannot be limited only to something arising eximporviso which no human agency could see. The mere fact that evidence is permitted to be taken after the entire prosecution case is over is in itself in excess of the powers of the Court. No hard and fast rules can be prescribed as to when and at what stage this discretion should be exercised. The anxiety for justice is paramount and should be kept in view. The Court should be unmindful of the fact of the use of the discretion in favour or against any party. The principle that such evidence should not demolish the case set up by the accused in his defence, if he has done so should be present in the mind of the judge at the time when he takes a decision. The powers of the Court under Section 311 which are very wide cannot be limited. The discretion can be exercised by the Court at any stage of the case, but on justifiable grounds”. (emphasis added).

13. Keeping in view the above discussion, this Court finds that both the learned Courts below have correctly adverted to the factual matrix in the light of the provision of Section 311 of Cr.P.C. and came to the right conclusion that the application filed by the petitioner under Section 311 of Cr.P.C. is for the sole purpose of filling up the lacunaes and delaying the trial. The necessary ingredients for invoking the power under Section 311 Cr.P.C. are completely missing. This Court finds no infirmity in the impugned orders passed by both the Courts below and the same are upheld.
14. Consequently, the instant petition stands dismissed.

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