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**(2011) 02 P&H CK 0415**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Rev. No. 448 of 2011

Ravinder

APPELLANT

Vs

State of Haryana

RESPONDENT

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**Date of Decision:** Feb. 23, 2011

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 313
- Evidence Act, 1872 - Section 60, 64, 91
- Prevention of Corruption Act, 1988 - Section 13(1), 7

**Citation:** (2011) CriLJ 1705 : (2011) 2 RCR(Criminal) 393

**Hon'ble Judges:** Alok Singh, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

Alok Singh, J.

Present petition is filed challenging the order dated 12.2.2011 passed by Addl. Sessions Judge, Faridabad in Sessions trial No. 24/11.5.2009/19.1.2010 thereby rejecting the application moved by the accused/revisionist u/s 311 of the Code to recall P.W. 6 - Balraj Singh for further cross-examination.

2. The facts of the present case inter alia are that present revisionist-accused is facing trial for an offence punishable under Sections 7 and 13(1)(d) of Prevention of Corruption Act. P.W. 6 Balraj Singh had appeared in the witness box on 1.2.2010 and again on 10.3.2010. He was cross-examined at length. After the closer of prosecution evidence statement of the accused u/s 313 code of Criminal Procedure was recorded on 31.7.2010. There after, four defence witnesses were examined. Thereafter, an application was moved by the accused-revisionist to recall P.W. 6 - Balraj Singh for further cross-examination on the points relating to search and site plan. As per the accused-revisionist, P.W. 6 -Balraj Singh could not be

cross-examined by the earlier counsel on the question of search and site plan, therefore, P.W. 6 - Balraj Singh should be recalled for further cross-examination. Learned trial Court vide impugned order has rejected the application, consequently, present revision petition was filed by the accused-Petitioner.

3. Learned Counsel for the Petitioner while placing reliance on the judgment of Hon'ble Apex Court in the matter of [Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd.](#), has vehemently argued that even lacuna can be filled up by recalling the witness in the interest of justice. Learned Counsel has further argued that application u/s 311, Code of Criminal Procedure ought not to have been rejected only on the ground that it would amount to filling up loop holes.

4. Apex Court in the matter of Godrej Pacific Tech. Ltd. (supra) in paragraphs No. 7, 8 and 9 has observed as under:

7. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

8. 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 of 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 the 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 any 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. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

5. From the dictum of the Apex Court, it is thus clear that Section 311, Code of Criminal Procedure is in two parts. In first part, it is the discretion of the Court to summon any witness for examination while in second part of Section 311, Code of Criminal Procedure a mandatory duty is assigned to the Court to summon, recall any witness who is known to be in position to speak important relevant facts, if Court finds it is essential and must for the fair adjudication of the case. Discretion conferred is to be exercised judiciously, as the wider power the greater is the necessity for application of judicial mind.

6. Present is the case where defence wants to recall P.W. 6 for further cross-examination on the point of search and site plan stating that earlier counsel could not cross-examine on these points as observed herein before. P.W. 6 was cross-examined at length by the earlier counsel appearing on behalf of the accused and thereafter statement of the accused was recorded u/s 313, Code of Criminal Procedure and thereafter accused had produced four witnesses in defence and thereafter, after change of the counsel he has moved the present application. Judicial discretion can. only be invoked when Court is satisfied that examination-further cross examination is must in the peculiar facts and circumstances of the case. Recalling of the witness on the ground that earlier counsel could not cross examine the prosecution witness on certain points, that too

after examination of four defence witnesses seems to be afterthought and does not inspire confidence. Order of the trial Court seems to be justified. Dismissed.