

(2008) 03 P&H CK 0212

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. 15516-M of 2005

A.K. Malhotra

APPELLANT

Vs

H.K. Dass

RESPONDENT

Date of Decision: March 4, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 482
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2008) 4 RCR(Criminal) 65

Hon'ble Judges: Vinod K.Sharma, J

Bench: Single Bench

Advocate: A.K. Chopra, with Ms. Shilpa Malhotra, for the Appellant; Baldev Singh with Mr. Anhul Singh, for the Respondent

Judgement

Vinod K. Sharma, J.

This petition u/s 482 of the Code of Criminal Procedure is directed against the order dated February 18, 2005 passed by the learned Judicial Magistrate 1st Class, Chandigarh dismissing the application moved by the petitioner u/s 311 of the Code of Criminal Procedure for recalling the respondent-complainant for his further cross-examination.

The impugned order (Annexure P-6) reads as under:

"This order of mine will dispose of an application filed by the accused u/s 311 Cr.P.C. for recalling the complainant CW.2 H.K. Dass for further cross-examination. It is submitted that at the time of cross-examination of the complainant, certain documents could not be put to him which thereby affect the rights of the applicant/accused and, therefore, he be recalled for further cross-examination.

2. Notice of this application was given to the complainant who through counsel filed reply taking preliminary objection regarding maintainability that the same has been

filed with mala fide intention for delaying the present proceedings. Upon merits, it was submitted that the complainant has been cross-examined and no further opportunity can be given to the accused to recall him for further cross-examination and prayed for dismissal of the application.

3. Rejoinder was filed wherein averments of the reply were denied. It was submitted that the complainant is to be confronted with income tax record and to falsify his version regarding Zen Euro-II car.

4. I have heard the Ld. Counsel for both the parties and have gone through the case file carefully.

5. The arguments of the Ld. Counsel for the parties were in consonance with their pleadings.

6. Upon hearing the Ld. Counsel for both the parties, I find no force in the arguments of the Ld. Counsel for the applicant/accused. Perusal of the file shows that the complainant's examination-in-chief was recorded on 19.1.2003 as CW.2 and finally, he was cross-examined at length on 25.8.2004. Now the averment of the applicant-accused is that he could not cross-examine the complainant on certain facts and hence, he be recalled for further cross examination. Although Section 311 Cr.P.C. has a wide scope but it cannot be resorted at the will of the parties seeking to recall a witness. If such would be the case then there would be no end to the examination of witnesses-as applications would be filed as and when desired. Reference has been made by the Ld. Counsel for the accused to the observations of Hon'ble Supreme Court in case titled as Rajendra Prasad v. The Narcotic Cell through its Officer-in-charge, Delhi as reported in 1999 (3) RCR (Crl.) 440 (SC) but the same are distinguished as the facts of the case in hand are totally different. When once the witness has been cross-examined exhaustively, the applicant cannot be allowed in the garb of Section 311 Cr.P.C. to recall him at the instance of the applicant. Therefore, I see no merit in the present applicant which is hereby dismissed.

7. However, nothing said hereinabove will prejudice the rights of the parties till the final disposal of the case on merits."

2. Mr. A.K. Chopra, learned Sr. counsel appearing on behalf of the petitioner has challenged the order primarily on the ground that further cross- examination of the complainant was essential for the just decision of the case. Though, no ground for recalling was made in the application u/s 311 Cr.P.C. The learned Senior Counsel appearing on behalf of the petitioner referred to the rejoinder filed by the petitioner wherein it was asserted as under: -

"That para No. 2 of the reply to the application is incorrect therefore denied and the contents of para No. 2 of the application are reiterated. It is worth mentioning here that the important questions pertaining to income tax returns could not be put to

the CW-2 Sh. H.K. Dass because on the said date i.e. when he was cross-examined on 25.8.2004, he disclosed his PAN number to be APBPD6929G. However, he did not produce the income tax returns. After inquiries, the accused came to know some vital information which is very relevant and the CW-2 is required to be cross-examined on the said points. Besides that the accused has falsely stated regarding the version given pertaining to Zen E-II. The information regarding the same came to the accused only on 189.2004 through Pasco Automobiles. Therefore, the CW-2 is required to be cross-examined on the said point also in order to establish the truth".

3. The contention of the learned Senior counsel for the petitioner was that the learned trial Court was in error in rejecting the application moved by the petitioner though the case of the petitioner for recalling the witness fall in second part of Section 311 of the Code of Criminal Procedure under which it was mandatory to the Court to have recalled the witness. In support of this contention the learned Senior counsel for the petitioner placed reliance on the judgment of this Court in the case of Kala Ram v. State of Haryana, 2006 (3) RCR (Cri) 562 (P&H), wherein this Court was pleased to lay down as under:

"After hearing arguments of the learned counsel for both the parties and going through the impugned order, I do not find any merit in the instant petition. The powers of the Court u/s 311 Cr.P.C. are very wide. It contains two parts. First part enables the Court at any stage of any inquiry, trial or other proceeding under the Code (i) to summon any person as a witness; (ii) to summon any person, who is in attendance, though not summoned as a witness, or to re-call and re-examine any person already examined. The second part enables the Court to summon, examine and recall or re-examine any person, if his evidence appears to be essential for just decision of the case. The first part of the Section gives a discretion to the Court and in the second part, it is obligatory on the Court to summon and examine or recall and re-examine any witness where the evidence of such witness is essential for the just decision of the case. The provisions of Section 311 of the Code cannot be interpreted so as to limit the powers of the Court to examine witnesses only before the conclusion of the arguments. The Court can permit any witness to be examined or re-examined at any stage. When the Court is satisfied that the evidence of a particular witness is necessary for the just decision of the case, it is bound to summon the said witness and record his evidence under the second part of Section 311 of the Code. Merely because the arguments have been heard in a case and the case had been posted for judgment, is no ground for limiting the scope of the passing of order u/s 311 of the Code. I do not find any force in the contention of the learned counsel for the petitioner that trial in a case stands terminated when the case is posted for pronouncement of a judgment. It is well settled that trial stands terminated with the pronouncement of the judgment and not before that. After considering the case law in detail, a Division Bench of the Allahabad High Court in Ram Jeet and others v. The State, AIR 1958 Allahabad 439 has held that a trial is terminated by the pronouncement of the judgment and so long as a judgment has

not been pronounced, the trial is not terminated, even though the judgment itself may not be part of the trial. It was further held that the powers conferred by this Section (Section 540 of Cr. P.C. 1898) can be exercised at any stage of the enquiry or trial. An enquiry or trial comes to an end when the judgment or order is pronounced and until then the Court has power to act under this Section. Thus, a fresh witness can be summoned and examined even where the evidence on both sides is closed and the case is posted for judgment. Similar view was taken by a Division Bench of this Court in [Sukhdev Singh Vs. State of Punjab](#), wherein it was held it cannot be laid down as a general rule that in no case additional witnesses be called by the Judge at the suggestion of the prosecution, before the close of the trial of the case, where the defence has been closed or the arguments have been heard. Trial comes to an end with the pronouncement of the judgment, though judgment itself may not be part of the trial. The discretion u/s 311 can be exercised by the Court at any stage of the case, but on justifiable grounds. The mere fact that additional evidence is permitted to be taken when the entire prosecution case is over is not 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".

4. The learned Senior counsel appearing on behalf of the petitioner also placed reliance on the judgments of Hon"ble Madhya Pradesh High Court in the case of Deen Dayal Soni v. Smt. Pancho Bai, 2002 (3) RCR (Cri) 357, Delhi High Court in the case of Shri Sat Devo Jain v. M/s Investment Point 2002 (1) RCR (Cri) 402, judgment of the Madras High Court in the case M/s Bindu Industries and another v. Soundarya Leasing and Hire Purchase (P) Ltd., 2003 (4) RCR (Cri) 826, which also laid down law, referred to above.

5. Mr. Baldev Singh, Senior counsel appearing on behalf of the respondent has supported the impugned order by contending that the conduct of the petitioner does not entitle him to relief u/s 482 Cr.P.C. It is the case of the respondent that the petitioner did not appear in pursuance to the summons issued and appeared in Court through non-available warrants. The petitioner thereafter again absconded and furthermore the complainant has already been examined twice. It is also the contention of the learned Senior counsel for the respondent that a case u/s 138 of the Negotiable Instruments Act has been filed against the petitioner and evidence now sought to be produced by way of re-examination of the complainant cannot said to be essential for the just decision of the case as projected.

6. The learned senior counsel appearing on behalf of the respondent relied upon the judgment of this Court in the case of Maharaja Singh v. State of Haryana, 2003 (4) RCR (Cri) 870. In the said judgment this Court was pleased to lay down that unless something extraordinary is disclosed for recalling the witness, the Court can refuse the request.

7. The learned senior Counsel appearing on behalf of the respondent also placed reliance on the judgment of Madhya Pradesh High Court in the case of Rajkumar v.

Smt. Gunmala and others 2007 (2) RCR (Cri) 722, wherein the Hon"ble Madhya Pradesh High Court was pleased to lay down as under:

"7. I have considered the arguments advanced by learned counsel for the petitioner. It is apparent from the order passed by the Revisional Court as well as from the averments made in this petition itself that the criminal case has travelled beyond the stages of recording prosecution evidence, examination of accused person in the defence. During all these stages petitioner was having full opportunity to cross-examine the complainant and to put his defence. It appears that he failed to avail the opportunities which were provided to him. Even now it is not clear as to what type of questions are necessary to be put to the complainant. It has not been clarified in the petition itself. In such circumstances at the fag end of the trial when the case is at the stage of pronouncement of judgment then it is not advisable to re-open the trial of the criminal case and to recall the complainant for cross-examination. The powers which are available to this Court u/s 482 of Criminal Procedure code can only be exercised in rarest of rare cases and particularly when there is any occasion of failure of justice or it is necessary in the interest of justices to exercise such powers. In the facts of present case, there appears no such occasion.

8. Therefore, in the facts and circumstances of the case the order passed by the trial Court and confirmed by Revisional Court does not suffer any infirmity and injustice and does not call for any interference. The petition fails and is dismissed in limine without giving any notice to the opposite party".

8. The learned senior counsel appearing on behalf of the respondent also placed reliance on the judgment of this Court in the case of Harinder Gun House v. Mohinder Kaur, 2006 (2) RCR(Cri) 416 (P&H), wherein this Court was pleased to lay down as under:

"7. No doubt the Court has wide powers u/s 311 of the Code of Criminal Procedure to summon any person as a witness or examine any person or recall or re-examine any person in attendance already examined if the Court is of the opinion that the evidence of that witness is essential for the just decision of the case. There is no limitation on the powers of the Court irrespective of the stage to which the trial may have reached, for examination of a witness in the interest of justice. However, the Courts are required to exercise their discretion in a judicious way. In the instant case, it is apparent from the zimni orders reproduced in the petition that witnesses of the complainant have been examined and cross-examined on 15.3.2005 by the counsel for the petitioner and the complainant had closed her evidence. As per petitioner"s own pleadings, his counsel did not put the relevant questions and documents to the complainant at the time of her cross-examination in spite of his repeated requests. If that was so, the petitioner could himself put the documents to the complainant or he could have requested the trial Court to adjourn the matter for any other date as he wanted to replace his counsel since he had lost confidence in

him. After the complainant's evidence was closed, the case was rather adjourned for effecting compromise between the parties. The object of provision of Section 311 of the Code of Criminal Procedure is to further and not to hamper the cause of justice. The intention of the petitioner in invoking the provisions of Section 311 of the Code does not appear to be in consonance with the aforesaid object. Even the petitioner has the opportunity of producing and proving any document in his defence, if he is so advised".

9. Thus, the law is well settled that the Court has discretion u/s 311 Cr.P.C. to recall any witness if the statement is essential to reach at just conclusion. The discretion exercised by the learned trial Court is not to be easily interfered with.

10. In the present case, it may be noticed that the petitioner had an opportunity to cross-examine the complainant and the questions sought to be put now by way of re-examination, cannot be said to be such questions which were not in the knowledge of the petitioner when the complainant was examined. It may further be noticed here that the only ground taken in the application u/s 311 Cr.P.C. for re-examining the witness was as under:

"That Shri H.K. Dass-CW2 was cross examined on 25.8.2004 but at that relevant time, certain documents were not with the applicant-accused and certain material and important questions pertaining to the transaction as alleged by the complainant could not be put to the complainant thereby adversely affecting the rights of the applicant-accused".

11. Thereafter the petitioner tried to make improvement in the replication to make out a case u/s 311 Cr.P.C. It may further be noticed that it is always open to the petitioner to bring evidence in defence (sic) examined. In any case, the exercise of discretion by the learned trial Court cannot be said to be perverse or contrary to material brought on record which may call for interference by this Court especially when the conduct of the petitioner throughout has been to delay the proceedings.

No merit.

Dismissed.