IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRM-M-33053-2024(O&M)
Reserved on : 04.04.2025
Pronounced on: 21.04.2025

DR. ABHISHEK AGGARWAL AND ANOTHER

..... Petitioners

VERSUS

STATE OF HARYANA AND ANOTHER ..... Respondents

CORAM: HON'BLE MS. JUSTICE KIRTI SINGH

Present: Mr. P.S.Ahluwalia, Advocate and
Ms. Bhavi Kapur, Advocate
for the petitioner(s).

Mr. Anmol Malik, DAG, Haryana.

Mr. Dinesh Arora, Advocate and
Mr. Jatin Sehra, Advocate
for respondent No.2.

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KIRTI SINGH, J.

The prayer in the present petition filed under Section 482 of Cr.P.C. is for setting aside of order dated 17.05.2024 (Annexure P-19), passed by the learned trial Court in case FIR No.0014 dated 28.01.2017 (Annexure P-1), registered at Police Station Women Police Station, Faridabad, District Faridabad, for offences punishable under Sections 354(A)(1), 377, 406, 498-A and 34 of the Indian Penal Code, 1860, whereby the application filed by the complainant/respondent No.2 under Section 311 of the Cr.P.C. has been partly allowed.

2. Brief factual narrative pertinent for adjudication of the matter at hand is that marriage between petitioner No.1 and respondent No.2 was solemnized on 30.04.2015. It is alleged that soon after marriage, respondent No.2 was met with harassment and torture for demand of dowry, which continued till August 2016, whereafter she left the matrimonial home and started residing with her parents. A complaint was moved by respondent No.2 against her husband, i.e., petitioner No.1, and her in-laws, and the aforesaid FIR was lodged on 28.01.2017. Challan was filed and thereafter charges were framed against the petitioner No.1, the mother-in-law, who is a party to the instant petition as petitioner No.2, as also the father-in-law of the complainant. The trial commenced, during which course, the respondent No.2 moved an application under section 311 Cr.P.C. for her re-call as a witness and for production of additional evidence by way of a pendrive containing a call recording of the 'accused persons' with respondent No.2, allegedly admitting to the acts of cruelty committed against her. The said application was partly allowed, only qua the petitioner No.2 by way of the impugned order, challenging which, the present petition has been filed.

SUBMISSIONS MADE ON BEHALF OF PETITIONER

3. The foundational plank on which the learned counsel for the petitioners has built the entire structure of his arguments is that the application moved under section 311 Cr.P.C. is nothing but a tactic to delay the already prolonged proceedings, to add to the agony of the petitioners. It is his contention that since its inception, respondent No.2 has sought to hinder the conduct of a speedy trial. The entire trial, it is submitted by the learned counsel, has been marred with the *mala fide* intent of implicating the petitioners based on false, vague and utterly frivolous allegations. While

painstakingly taking the Court through the zimni orders passed in the case, he submits that prior to moving the application under section 311 Cr.P.C, respondent No.2 chose to move this Court against the order of the trial Court not charging petitioner No.1 under section 377 IPC, and when the same was upheld, an SLP was filed unsuccessfully before the Supreme Court. Respondent No.2 even raised doubts regarding the partisan conduct of the trial, constraining the Court to transfer the case to the successor Court. It is further submitted that during 5 years of the trial, a total of 44 effective opportunities were availed by respondent No.2 side just to complete evidence, and during the entire period, respondent No.2 did not put forth any declaration, much less assertion, for bringing on record the said call recording. It is also not the case where not doing the needful can be attributed as being an inadvertent mistake, since respondent No.2 had access to her counsel at all times, and at one-two odd occasions had even refused to depose in his absence. Furthermore, during her cross-examination, while answering a pointed query, respondent No.2 mentioned about having recorded the conversation that she had with petitioner No.1 and his maternal uncle. Nowhere did she disclose petitioner No.2's name for that purpose. It was only after the entire process of her evidence, including cross-examination stood concluded, that respondent No.2, with the sole purpose of filling the lacunae in the case of the prosecution, moved an application to adduce additional evidence in the form of a pendrive, which was admittedly in the possession of respondent No.2 since shortly after the presentation of the challan. In this regard, the attention of this Court is drawn to certain zimni orders wherein even the trial Court recorded its observations about the

seemingly dubious acts of respondent No.2. In the order dated 20.11.2023, it was recorded that:

> *"A careful perusal of the file shows that examination of PW-8 Priyanka Mangla was started on 04.09.2023. However, the same could not be concluded so far. Complainant Priyanka Mangla had seeking adjournment on one pretext or another. Complainant Priyanka Mangla is hereby directed to make herself present in this court on 30.11.2023 at sharp 10.00 AM for her remaining examination. Remaining private witnesses namely Sushma Mangla and Subhash Mangla are also directed to appear before the court on 30.11.2023 for their oral evidence. All remaining official witnesses be also summoned for the date fixed."*

In the order dated 15.02.2024 also it was observed that:

> "*3. Heard. Material perused. Perusal of the case file shows that the complainant has been duly represented through counsel on each and every date since the inception of the proceedings of the present case. A further perusal of the record also reveals that on 04.09.2023, the complainant/PW Priyanka chose to appear for the first time in the witness-box as PW-8 and her examination-in-chief was partly recorded and due to the expiry of Court time, her further examination-in-chief was deferred. Thereafter, on 18.09.2023 and 11.09.2023 only part examination-in-chief of PW-8 recorded. On 18.09.2023, examination-in-chief of PW-8 Priyanka was completed and case was adjourned for cross-examination of PW-8. Thereafter, part cross-examination of PW-8 was conducted on 25.09.2023, 28.09.2023 and 20.10.2023. On 20.10.2023, the case was adjourned for 03.11.2023 for further cross-examination of PW-8 but thereafter, the complainant/PW-8 Priyanka Aggarwal did not turn up for completing her cross-examination and chose to move applications for adjournment or application for exemption from personal appearance on each and every date. Further perusal of the case file shows that PWs Sushma Mangla and Subhash Mangla have also not come present despite service of summons and applications for exemption from personal*

appearance of PWs Sushma Mangla and Subhash Mangla has also been moved by their counsel on each and every date. Further, a perusal of the record also reveals that the earned defence counsel has also placed on record a photocopy and its perusal shows that the CRM-M-52112-2023 filed by complainant before the Hon'ble High Court has been dismissed by the Hon'ble High Court on 13.02.2024 and the said fact has also been duly admitted by the ld. Proxy counsel appearing for the complainant.

At this stage, the ld. Proxy Counsel appearing for the complainant has contended that the complainant as well as her father i.e. both prosecution witnesses, have gone to Hon'ble Supreme Court for filing the appeal against the order dated 13.02.2024 passed by the Hon'ble High Court in CRRM No. 52112 of 2023 and for this reason they have not appeared before the court. Further the proxy counsel has also contended that another prosecution witness i.e. the mother of the complainant also cannot appear before the court as she is suffering from fever and cold.

4. After perusing the record, this court is of the view that it appears from the record that the complainant and her parents are deliberately delaying the proceedings of the present case and are not appearing before the court for their examination as prosecution witnesses for the reasons best known to them. A further perusal of the record reveals that all other prosecution witnesses have already been examined and only the complainant and her parents are left. A further perusal of the record also reveals that for the last 2-3 hearings even the main Counsel for the complainant is not appearing before the Court and only one Proxy counsel appears before the court just to seek further adjournment. A perusal of the record reveals that neither the present application is supported by any Affidavit nor any document has been annexed on behalf of the applicants in order to show that the complainant and her father have gone to appear before the Hon'ble Supreme Court and that the mother of the complainant is suffering from fever and cold.

A further perusal of the record reveals that no stay has been granted by any Ld. Appellate Court in the proceeding of the present case. This Court also has to

> *keep in mind the Constitutional provisions of Speedy and Fair Trial. Accordingly, the application moved on behalf of the complainant is hereby dismissed. Further, in the interest of justice, this court has directed the proxy counsel who has appeared before the court on behalf of the complainant to secure the presence of the remaining prosecution witnesses i.e. the complainant and both her parents (complainant/PW Priyanka Mangla, PW Sushma Mangla and PW Subhash Mangla) on the next date of hearing positively for the purpose of completing their examination before the court at 10:00 AM sharp. It is also clarified that this shall be the last opportunity for the complainant and her parents to appear before the court for the purpose of completing their examination otherwise the evidence of the prosecution will be closed by Court Order. It is also hereby clarified that separate summons are not being issued for the complainant and her parents being witnesses as they are being represented on each and every date by their counsel and application are being regularly moved on their behalf.*
>
> *Now, the case is adjourned for 20.02.2024 for prosecution evidence. In the interest of justice, Complainant/PW Priyanka Mangla, PW Sushma Mangla and PW Subhash Mangla through their counsel are directed to appear before the Court on the date fixed."*

In summation, the case of the petitioners is that the dilatory tactic of the respondent No.2 in moving this application at such a belated stage reeks of a *mala fide* intent, with the sole motive being to fill in the dents made by the defence during the course of trial. Equally emphasized upon is the second contention of the learned counsel that petitioners were not supplied with a duplicate pendrive during the entire course of trial, depriving them of their right of having access to all the material sought to be proved against them. It is submitted that an integral part of the right to a fair trial is to be provided with all the relevant material which would be relied upon by the prosecution in its case against an accused person, which if

defeated, would taint the entire proceedings as being prejudiced. In the instant case, objection regarding the pendrive in question not having been provided to the petitioners was also raised, and even in the enquiry conducted qua the same, no concrete evidence has surfaced to cement the factum of conforming to this basic tenet of criminal jurisprudence. Reliance in this regard is placed on the statement of the counsel for the complainant annexed as P-23 to submit that mere conjectures or assumptions that the pendrive would have been supplied, does not suffice in the eyes of law, and rightly so, which demands proving of facts beyond reasonable doubt. The next moot point raised is of the genuineness and authenticity of the conversations, which are being sought to be placed on record, of which neither the time, date or circumstances under which the same were recorded is clearly spelt out; and it is also pointed out that there is non-compliance of section 65-B of the evidence act, insofar as the certificate required to be produced alongside the pendrive, was not filed. Fourthly, learned counsel for the petitioners submits that the said recording, contents of which are not admitted, is, arguendo, allowed to be placed on record as evidence, it must been seen that alleged conversations were recorded ostensibly, apparently when talks of an amicable settlement were going on between the parties, and as such, the question of admissibility of such a covertly recorded conversation as evidence is no longer res integra, having been decided by this Court in **Neha and anr. vs. Vibhor Garg, 2022 (1) RCR (Civil) 508**, wherein it was held that any conversation of an unsuspecting partner, recorded surreptitiously, would amount to a clear breach of the fundamental right to privacy, and is therefore, not admissible in evidence. To buttress his submissions, learned counsel has placed reliance on the judgments passed in

Swapan Kumar Chaterjee Vs. CBI (2019) 14 SCC 328; Rajaram Prasad Yadav Vs. State of Bihar 2013 (14) SCC 461; Vinod Kumar Vs. State of Punjab 2021 SCC Online P&H 5415 and Surjit Singh Vs. State of Punjab in CRM-M-39633-2019 and has reiterated the settled law that any application under section 311 Cr.P.C. must be dealt with extreme caution by the Courts, so as to make sure that the same is not used as a means to delay proceedings, making the process a punishment in itself.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.2

4. Per contra, learned counsel for respondent No.2 has vehemently opposed the submissions made by the learned counsel for the petitioners. The first of the many-fold contentions raised is to counter the suggestion that the application filed under section 311 Cr.P.C. is merely a tactic to prolong the trial. To establish the bona fide of the respondent, learned counsel has taken upon himself to put forth before this Court explanation for every adjournment taken on her behalf before the learned trial court; so as to indicate that there was no intention of causing delay in the conduct of the trial proceedings. Further, the reasoning advanced for the filing of the application under section 311 Cr.P.C. after the completion of the examination-in-chief of the respondent, is that the same was brought to the notice of the investigating agency, whereby it was suggested to the respondent No.2 to present the same before the trial Court. Reference is also made to the cross-examination of the respondent No.2 conducted on 20.10.2023 to show that the existence of the recording was in fact in the notice of the trial Court. Therefore, without causing any delay, and to not hinder the ongoing examination of the respondent No.2, as soon as the same was conducted, the said application was moved. Insofar as the reliance of the

learned counsel for the petitioners on the judgment passed by this court in ***Neha (supra)*** is concerned, it is submitted the same was challenged before the Hon'ble Supreme Court and is pending adjudication. Further, even otherwise, taped or recorded conversations are admissible in the Court of law. In matrimonial matters, where otherwise also there is limited scope of being armoured with evidence, if such restrictions are imposed and a blanket ban on admissibility of such recorded evidence is applied, then respondent No.2 would be left with no substantial way to plead her case. Therefore, instead of dismissing such evidence as being inadmissible, due regard should be given to the circumstances under which such a conversation is recorded and with what intent. With regard to the admissibility of the conversation between the parties is concerned, learned counsel for respondent No.2 contends that recording in question was not done clandestinely, and that petitioner No.1 was well aware of the same. Further, on 24.05.2024, an application was moved under Section 65-B for tendering the affidavit, on which petitioner No.1 endorsed his no objection subject to right of cross-examination. However, as an afterthought and in contradiction to his initial action of consenting to the submission of the pendrive as evidence, petitioner No.1 went to the extent of stating that he had not received a duplicate of the contested pendrive, by relying on the flimsy ground that factum of it being supplied to petitioner No.1 had not been erroneously noted in the order of the trial Court and demanded an inquiry into the same, which was duly conducted and it was observed that:

> *"Before parting with the enquiry, the gist of the matter is that an anomaly/confusion, if any has been raised as placing of the said pendrive and transcript on the judicial file does not form part of the zimni order dated 20.03.2024 or/and 03.04.2024 or any other zimni order for that matter. It may be due to mere*

> *inadvertence. There are following indications to draw that inference:*
>
> *(i) The statement of criminal Ahlmad that Id. P.O had asked for an envelope on 20.03.2024.*
>
> *(ii) Reply of the former defence counsel Sh. Nitish Sharma that pendrive/transcript was given to him in court on 03.04.2024 by complainant counsel which he promptly supplied to Dr. Abhishek Aggarwal. The usual practice is to supply the copy of document to opposite counsel and in the court simultaneously (however it is not a gospel truth).*
>
> *(iii) There was no argument by defence that they do not know the contents of pendrive at time of arguments u/s 311 Crpc. This may be due to the aforesaid circumstance mentioned under point no. (ii).*
>
> *This concludes the enquiry. Copy of this enquiry order as well as statement of Reader and Ahlmad as well as other related documents be placed before learned District & Sessions for information and further proceedings, if any."*

It is the further submission that the objective behind the inclusion of section 311 in the criminal procedure code is to ensure that the opportunity of presenting all evidence necessary for arriving at a fair conclusion in a trial is available to every party. Viewing the present case from that prism, it is imperative that the recorded conversation, which is a vital piece of evidence for respondent No.2 to prove the agony suffered by her at the hands of the petitioners throughout her marriage, be allowed to be presented not only qua petitioner No.2, but also qua petitioner No.1.

ANALYSIS AND CONCLUSION

5. Heard either side and perused the case record with their able assistance. The sole issue which stands before this Court in the present petition is whether the application filed under Section 311 Cr.P.C. to produce additional evidence by way of recorded conversation of the respondent No.2 with petitioners should be allowed.

6. It is only once the threshold required for allowing an application under section 311 Cr.P.C. is met, that it would be apposite to delve into the nature and type of evidence sought to be presented in the trial. Thus, before considering and adjudicating upon the other submissions made by the learned counsel(s), this Court deems it fit to first deal with, in-extensio, the contention regarding delay in moving the application by the respondent No.2.

7. At this juncture, a reference can be made to the bare language of the provision contained in section 311 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 reexamine 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."*

8. The Hon'ble Supreme Court, in **V. N. Patil Vs. K. Niranjan, 2021 (2) R.C.R. (Criminal) 310**, while examining the scope of Section 311 of Cr.P.C observed that:

> *"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."*

9. This principle has also been reiterated in **Swapan Kumar Chatterjee vs. Central Bureau of Investigation**, **2019(14) SCC 328**, the relevant paras of which read thus:

> *"11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."*

10. The illustrative principles on which an application of Section 311 Cr.P.C. must be adjudged were consolidated by the Hon'ble Supreme Court in **Rajaram Prasad Yadav v. State of Bihar**, **2013 AIR (SC) (Cri) 1746** as follows:

> *"23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:*
>
> *a) 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?*
>
> *b) 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.*
>
> *c) 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.*

d) 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.

e) 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.

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

g) 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.

h) 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.

i) 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.

j) 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.

k) 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.*
>
> *l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*
>
> *m) 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.*
>
> *n) 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."*

11. As can be evinced from the foregoing judgments, Courts must be vigilant and ensure that wide powers contained under section 311 Cr.PC. are not misused to delay the proceedings or to fill up lacunae in the case. Though it has been consistently held by the Hon'ble Apex Court that there must be magnanimity in condoning procedural delays in case any evidence necessary facilitating a just decision is inadvertently left out by the parties. However, in the present case, challan was presented on 16.06.2018 while charges stood framed on 22.05.2023. Thereafter, evidence of respondent No.2 was recorded on various dates between 04.09.2023 till 28.09.2023 and it was later, on 20.02.2024, that her cross-examination was closed and the application under section 311 Cr.P.C. was moved. Since respondent No.2 was admittedly in possession of the said recordings throughout the stage of her evidence which was conducted over a course of 44 dates of hearing, it can, by no stretch of imagination be said that not bringing the said

conversation on record was due to a bona fide mistake of the party. Under such circumstances, allowing the recordings to be placed on record as evidence would amount to ignoring the caution that the Court is expected to keep in mind while permitting an application under section 311 Cr.P.C. Insofar as the test of essentiality of evidence is concerned, the conduct of the respondent No.2/complainant in not presenting the same before the trial Court despite having knowledge of the evidence is a factor to be taken into consideration. Even if this fact is overlooked by the Court, there is neither a satisfactory response to the contention raised by the learned counsel for the petitioners that the claim qua the recorded conversation with petitioner No.2 did not find mention in the testimony of the respondent No.2; nor has any convincing argument been advanced as to how the proposed evidence is relevant as also necessary for the just adjudication of the case, and as to how the failure to take the same on record adversely prejudice the case and prevent dispensation of justice. At this stage, when the respondent side has not been able to convince the Court as to why the said application should be allowed in the first place, in such a case discussing about the admissibility of the contents of the proposed evidence would be a futile undertaking.

12. Therefore, on a cumulative conspectus of the peculiar facts and circumstances of this case, in light of the foregoing discussion, the present petition is allowed. The order of the trial Court in dismissing the application qua petitioner No.1 is upheld on the grounds contained therein as also on the basis of delay, and is partly set aside whereby the application under section 311 Cr.P.C. was allowed qua petitioner No.2.

13. However, nothing stated herein shall be taken as an expression of opinion on the merits of the case. Learned trial court is encouraged to conclude the trial expeditiously in accordance with law.

Pending application(s), if any, also stands disposed of accordingly.

(KIRTI SINGH)
JUDGE

21.04.2025
Kavita Nain

Whether speaking / reasoned Yes/No
Whether Reportable Yes/No