
(2017) 03 SHI CK 0117
In the High Court Of Himachal Pradesh
Case No : 77 of 2016

Achhar Singh

APPELLANT

Vs

Kapoor Singh and others

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 311](#) - Power to summon material witness, or examine person present
[Indian Penal Code, 1860](#), [Section 34](#), [Section 147](#), [Section 148](#), [Section 506](#), [Section 149](#), [Section 427](#), [Section 504](#), [Section 455](#) - Acts done by several persons in furtherance of common intention - Punishment for rioting - Rioting, armed with deadly weapon - Punishment for criminal intimidation - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Mischief causing damage to the amount of fifty rupees - Intentional insult with intent to provoke breach of the peace - Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint

Citation : (2017) 03 SHI CK 0117

Hon'ble Judges : Ajay Mohan Goel

Bench : Single Bench

Advocate : Leena Guleria, G.R. Palsra, Narender Reddy

Judgement

1. By way of this petition, the petitioner has challenged the order passed by the Court of learned Judicial Magistrate 1st Class, Chachiot at Gohar in Private Complaint No. 221-1-2013, dated 20.02.2016, vide which learned Court below has dismissed an application filed under Section 311 of the Code of Criminal Procedure by the present petitioner/complainant.

2. A perusal of the impugned order demonstrates that learned Court below has rejected the application so filed by the present petitioner on the ground that the applicant has not been able to make out as to what was the relevance of the documents as well as the evidence of the witnesses which the complainant intended to examine. Learned trial Court also held that provisions of Section 311

of the Code of Criminal Procedure could not be invoked to fill up the lacunae. Learned trial Court further held that it was for the complainant to plead in the application as to what was the need of examination of these witnesses and there was nothing specific mentioned in the application qua the requirement of examining these witnesses. On these bases, learned trial Court dismissed the application so filed by the present complainant by holding that the application so filed on the basis of averments made therein was not tenable.

3. During the course of arguments, Ms. Leena Guleria, learned counsel appearing for the petitioner submitted that the complainant be permitted to examine witnesses, as were prayed by way of application which has been dismissed, in the interest of justice and no prejudice in fact shall be caused to the respondents in case the witnesses are permitted to be examined and rather, it will be in the interest of justice, as the same would enable the learned trial Court also to arrive at a fair and just decision in the matter.

4. Mr. Narender Reddy, learned counsel appearing for the private respondents submitted that a perusal of the application so filed under Section 311 of the Code of Criminal Procedure by the complainant which stands rejected by the learned trial Court itself demonstrates that the ingredients of Section 311 of the Code of Criminal Procedure were not met on the basis of averments which were so made in the said application and he further submitted that if this Court was inclined to allow the complainant to examine witnesses as were mentioned in the said application, then some exemplary costs be imposed upon the complainant.

5. I have heard the learned counsel for the parties and have also gone through the records of the case.

6. Admittedly, the trial pending before the learned Court below pertains to a complaint which has been filed by the present petitioner under Sections 147, 148, 149, 455, 427, 504, 506 read with Section 34 of the Indian Penal Code.

7. Learned trial Court has dismissed the application so filed by the present petitioner under Section 311 of the Code of Criminal Procedure primarily on the ground that it was not pleaded in the said application that as to what was the need for examination of these witnesses and further the provisions of Section 311 of the Code of Criminal Procedure could not be invoked to fill up the lacunae. A perusal of the application so filed by the petitioner before the learned trial Court under Section 311 of the Code of Criminal Procedure demonstrates that the witnesses whom the complainant intends to examine are:

(i) Record Keeper, Tehsil Thunag, District Mandi, H.P. alongwith record of demarcation file No. 52 dated 28/11/2013, decided on 13/01/2014.

(ii) Patwari, Patwar Circle Tehsil Thunag, District Mandi, H.P.

(iii) Field Kanungo, Tehsil Thunag, District Mandi, H.P.

(iv) Dumani Ram, son of Shri Karam Dass, R/o Village Junghand, P.O. Jarol,

Tehsil Thunag, District Mandi, H.P.

8. Records of the trial Court also demonstrate that the case is at the stage of examining complainant's witnesses. Therefore, in these circumstances, in my considered view, the findings returned by the learned trial Court that the complainant under the garb of the said application was in fact trying to fill up lacunae, which was not permissible, are ill founded, because the other party would always have a right to cross-examine the witnesses.

9. Hon'ble Supreme Court in *Raja Ram Prasad Yadav Versus State of Bihar and another*, (2013) 14 SCC 461 has held:

"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 Cr.P.C. 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. 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 Cr.P.C. 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 Cr.P.C. 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 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. 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 Cr.P.C. 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."

10. Relying upon the said judgment of Hon"ble Supreme Court, a coordinate Bench of this Court in Anil Chauhan Vs. Education Society, Mandi, Latest HLJ 2014 (HP) 1080, in a case wherein almost similar facts were involved has held as under:

"15. The only ground taken by the petitioner is that the complainant under the garb of the order would now fill up the lacuna in his case and create and manipulate the documents. To my would always have a right to cross-examine the witnesses. Moreover, in terms of the principles as laid down by the 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.

16. Since the petitioner has a right of cross-examination, therefore, I find that no prejudice much less serious prejudice shall be caused to the petitioner which may result in miscarriage of justice in case the order passed by the learned Magistrate is upheld. This Court is required to 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 is required to be magnanimous in permitting such mistakes to be rectified (17.10 of Raja Ram"s case (supra))."

11. Therefore, keeping in view the principles which have been laid down by the Hon"ble Supreme Court in Raja Ram"s case (supra) as well as the judgment passed by a coordinate Bench of this Court, I am of the considered view that no prejudice shall be caused to the respondents, which may result in miscarriage of justice in case petitioner is permitted to examine the witnesses, which find mention in the application so filed by him under Section 311 of the Code of Criminal Procedure before the learned Court below. In fact if the application is allowed, the complainant will have the satisfaction that he was given full opportunity by the Court to put forth his case and respondents would obviously have the right to cross-examine complainant witnesses. This Court can also not loose sight of the fact that justice should not only be done, it should also seem to have been done.

12. At this stage, Mr. Narender Reddy, learned counsel for the respondents again reiterated that if this Court intends to set aside order passed by learned trial Court, dated 20.02.2016 and permits the petitioner to examine witnesses which find mention in the application so filed under Section 311 of the Code of Criminal Procedure, then some exemplary cost may be imposed upon the petitioner.

13. Accordingly, in view of my findings returned above as well as law cited above, order dated 20.02.2016, passed by the Court of learned Judicial Magistrate 1st Class, Chachiot at Gohar in Private Complaint No. 221-1-2013 is set aside and the application filed under Section 311 of the Code of Criminal Procedure is allowed, subject to cost of Rs.10,000/- payable to the respondents. It is clarified that only one opportunity shall be granted by the learned trial Court for the purpose of examining the witnesses which so find mention in the application which has been filed by the present petitioner under Section 311 of the Code of Criminal Procedure and if the cost which has been determined by this Court is not deposited by the petitioner before the learned trial Court to be released in favour of the respondents on or before the next date of hearing, which is being fixed by the Court today itself, the order so passed by this Court granting permission to the petitioner to examine the witnesses in his favour shall cease to operate and impugned order shall become operative as if it was never set aside by this Court. Parties are directed through their learned counsel to appear before the learned trial Court on 24.04.2017. Registry is directed to forthwith return back the records of the case to the learned trial Court. Petition stands disposed of in above terms, so also miscellaneous application(s), if any.