Before Rameshwar Singh Malik, J.

SAHAB SINGH @ SABHI —*Petitioner*

versus

DHARAMVIR—*Respondents*

CWP No. 4649 of 2014

March 24, 2015

Code of Criminal Procedure, 1973—S. 311—Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, 1989—Power of summon material witness or examine any person present—Power u/s 311 to be exercised only for just decision of the case—Discretionary power to be exercised sparingly to meet ends of justice—S. 311 not to be used by parties to fill up serious lacuna in case—Held, that petition is wholly misconceived, bereft of merit and without any substance, this must fail—No case of interference made out—Petition dismissed.

Held that this Court is of the considered view that present petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out.

(Para 15)

Further held that resultantly, with the abovesaid observations made, present petition is dismissed, however, with no order as to costs.

(Para 16)

B.S. Dhillon, Advocate,
for the petitioner.

Arun Luthra, Advocate
for the respondent.

RAMESHWAR SINGH MALIK, J.

(1) Present petition is directed against the order dated 16.01.2014 (Annexure-1) passed by the learned Special Judge, Kurukshetra, whereby application moved on behalf of the complainant under Section 311 of Code of Criminal Procedure ('Cr.P.C.' for short) was dismissed.

(2) Notice of motion was issued.

(3) Learned counsel for the petitioner submits that the learned Special Judge, Kurukshetra, under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SCST Act' for short), has proceeded on a misconceived approach, while passing the impugned order. He further submits that it was complaint case under the SCST Act and when the prosecution evidence was going on, application (Annexures P-2) was moved under Section 311 Cr.P.C., for permission to summon and examine three more witnesses. All three witnesses sought to be summoned and examined by the applicant-petitioner, were very much necessary for the proper adjudication of the case. However, the learned trial Court misdirected itself while dismissing the application of the petitioner by passing the impugned order. In support of his contentions, learned counsel for the petitioner places reliance on a judgment passed by this Court in ***Jagseer Singh*** *versus* ***State of Punjab***[1].

(4) He prays for allowing the present petition, by setting aside the impugned order.

(5) Per contra, learned counsel for the respondent-accused submits that the petitioner-complainant had been proceeding on a very casual approach right from day one. Neither any of the witnesses sought to be summoned and examined by way of application under Section 311 Cr.P.C. were in the list of witnesses, nor it was pointed out as to what was the purpose of their summoning and examining. The application moved by the petitioner was cryptic and ambiguous which was amounting to misuse of process of law. Petitioner was not entitled in law to fill up the lacuna in the concocted story put up in the complaint. The impugned order passed by the learned trial Court was factually correct and legally justified which deserves to be upheld. He prays for dismissal of the present petition.

(6) Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the contentions raised, this Court is of the considered opinion that in the peculiar facts and circumstances noticed hereinabove, present one has not been found a fit case warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C. To say so, reasons are more than one, which are being recorded hereinafter.

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[1] 2012 (2) RCR (Crl.) 56

(7) No doubt, the Court has ample powers under Section 311 Cr.P.C. for summoning and examining any person at any stage of the trial. However, it is equally true that the power under Section 311 Cr.P.C. is to be exercised by the Court only when it is found that examination of any such person is essential for the just decision of the case. It is so said because higher the power, the more careful should be its exercise. The discretionary power is to be exercised sparingly and only when the ends of justice so demand. A careful perusal of the impugned order would show that the learned trial Judge did not commit any error of law, while passing the impugned order and the same deserves to be upheld.

(8) Another equally important issue is that whether the power under Section 311 Cr.P.C. should be exercised for filling up lacuna left in the case of either of the parties i.e. prosecution or defence. This Court is afraid that it is not the object and scope of Section 311 Cr.P.C. If the power under Section 311 Cr.P.C. is exercised with a view to fill up serious lacuna in case of either of the parties at the cost and prejudice of other side, it would certainly amount to misuse of process of law. Such an exercise of power under Section 311 Cr.P.C. will run counter to the legislative intent behind it. Since the application Annexure P-2 moved by the petitioner was itself cryptic and vague, it was rightly dismissed by the learned trial Court and the impugned order deserves to be upheld, for this reason also.

(9) Coming to the judgment relied upon by learned counsel for the petitioner, there is no dispute about the law laid down therein. However, on close perusal thereof, the cited judgment has not been found of any help to the petitioner, being distinguishable on facts. Further, it is the settled proposition of law that peculiar facts of each case are to be examined, considered and appreciated first before applying any codified or judgemade law thereto. Sometimes, difference of one additional fact or circumstance can make a world of difference, as held by the Hon'ble Supreme Court in ***Padmausundra Rao and another*** *versus* ***State of Tamil Nadu and others***[2].

(10) Coming to the fact situation of the present case, petitioner also sought to summon the earlier Presiding Officer of the Court as witness to be examined. In this regard, the Hon'ble Supreme Court in the case of ***Rameshwar Dayal*** *versus* ***State of U.P.***[3] expressed its

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[2] 2002 (3) SCC 533

[3] 1978 (2) SCC 518

disapproval to such an approach. The relevant observations made by the Hon'ble Supreme Court in ***Rameshwar Dayal's case (supra)***, which can be gainfully followed in the present case, read as under: -

> "In the case of **Regina v. Gazard (1838) 173 ER 633** it was held by Patteson, J. that it will be a dangerous precedent to allow a President of the Court of Record to be examined as a witness. In this connection, Patteson, J. made the following observations :
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> > "It is a new point, but I should advise the grand jury to examine him. He is the president of a Court of Record, and it would be dangerous to allow such an examination, as the Judges of England might be called upon to state what occurred before them in Court."
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> Although in the instant case the Sessions Judge was not a Court of Record but the principles laid down by Patteson, J. would equally apply to him. We do not mean to suggest for a moment that the High Court has no power to examine a Sessions Judge in any case whatsoever for there may be proper and suitable cases where the examination of the Sessions Judge or the trial Court may be very necessary but this must be indeed a very rare occasion where all other remedies are exhausted. In the instant case, we feel that there was no good and cogent ground for the High Court to have examined the Sessions Judge because his evidence was not essential for a just and proper decision of the case particularly when the appellants never challenged the statements made in the judgment regarding the live cartridges either before the Sessions Judge or even in the High Court when the memo of appeal was filed before the Court.
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> As far as the evidence of Muniraj Singh the Investigating Officer is concerned that also was not necessary because that really amounted to allowing the prosecution to fill up gaps. Even if we hold that the High Court was justified in exercising its discretion under Section 540 Criminal Procedure Code the High Court committed a serious error of law in not allowing the appellants an opportunity to rebut the statement of the witnesses examined by the High Court which caused a serious prejudice to the accused.

It was argued by counsel for the State that there is no provision in the Criminal Procedure Code which requires the Court to allow the appellant an opportunity to rebut the evidence of witnesses summoned under Section 540 Criminal Procedure Code This argument, in our opinion, is based on a serious misconception of the correct approach to the cardinal principles of criminal justice. Section 540 itself incorporates a rule of natural justice. The accused is presumed to be innocent until he is proved guilty. It is, therefore, manifest that where any fresh evidence is admitted against the accused the presumption of innocence is weakened and the accused in all fairness should be given an opportunity to rebut that evidence. The right to adduce evidence in rebuttal is one of the inevitable steps in the defence of a case by the accused and a refusal of the same amounts not only to an infraction of the provisions of the Criminal Procedure Code but also of the principles of natural justice and offends the famous maxim Audi Alteram Partem. Section 540 of the Criminal Procedure Code runs thus :-

> "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 re-examine 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 essential to the just decision of the case."

A careful perusal of this provision manifestly reveals that the statute has armed the Court with all the powers to do full justice between the parties and as full justice cannot be done until both the parties are properly heard the condition of giving an opportunity to the accused to rebut any fresh evidence sought to be adduced against him either at the trial or the appellate stage appears to us to be implicit under Section 540 of the Criminal Procedure Code The words "just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fairplay.

(11) The next question that falls for consideration is whether the Court should allow any of the parties to fill up the lacuna left in its case, at the cost and causing serious prejudice to the other side, while exercising its powers under Section 311 Cr.P.C. The answer to this question is and has to be an emphatic 'No', because it is not the object of Section 311 Cr.P.C. This view taken by the Court also finds support from a judgment of the Hon'ble Supreme Court in ***Mohanlal Shamji Soni*** *versus* ***Union of India and another***[4]**.** The principles of law laid down by the Hon'ble Supreme Court in Paras 10, 18 & 27 of the judgment in ***Mohanlal Shamji's case (supra)*** which aptly apply to the facts of the present case, read as under: -

> "It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and 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 sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory"functions whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry,

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[4] 1991(Suppl.-1) SCC 271

trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

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The next important question is whether Section 540 gives the Court carte-blanche drawing no underlying principle in the exercise of the extraordinary power and whether the said Section is unguided, uncontrolled and uncanalised. Though Section 540 (Section 311 of the new Code), is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the Court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

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The principle of law that 'emerges from the views expressed by this court in the above decisions is that the Criminal

> Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

(12) Learned counsel for the respondent-accused was found fully justified in contending that the petitioner-complainant was not only proceeding on a very casual approach right from day one but was also trying to misuse the process of law, thereby intending to cause serious prejudice to the respondent-accused. During the course of arguments, when a pointed question was put to learned counsel for the petitioner as to why the earlier Presiding Officer was sought to be summoned and examined, he had no answer and rightly so because it was a matter of record. Thus, it can be safely concluded that petitioner himself was not sure as to what was the purpose of moving his application under Section 311 Cr.P.C. Thus, it is held that the application moved by the petitioner under Section 311 Cr.P.C. does not seem to have filed for bonafide reasons. The impugned order passed by the learned trial Court deserves to be upheld, for this reason as well.

(13) Learned counsel for the petitioner could not point out any patent illegality or jurisdictional error in the impugned order passed by the learned trial Judge so as to enable this Court to take a different view than the one taken by the learned trial Court. Therefore, keeping view the peculiar facts and circumstances, this has not been found to be an appropriate case by this Court, for exercising its inherent powers under Section 482 Cr.P.C.

(14) No other argument was raised.

(15) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that present petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out.

(16) Resultantly, with the abovesaid observations made, present petition is dismissed, however, with no order as to costs.

Amit Aggarwal