

f) a court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action.

19. Coming to the present writ petition in hand, three factors may be highlighted by this Court. Firstly, the impugned order merely copies the reply provided by the petitioner which leads to a conclusion that there was non application of mind by the respondent authority. Secondly, in the reply to the show cause notice, certain documents and reports were sought for by the assessee, which had been relied upon by the authorities. However, without providing the same to the assessee, the authorities proceeded to impose the tax liability and penalty. Thirdly, the explanation provided by the petitioner with regard to the use of the raw materials in the process of the manufacture by the petitioner supported with opinions of the experts were simply brushed aside by the respondent authority, who did not even examine whether the said raw materials had been used in manufacture of the final products which were fabrics. Without having done so and without granting an opportunity of fair hearing to the petitioner, the liability that has been imposed upon the petitioner appears to be patently illegal and without any authority in law.

20. As discussed above, non production of certain documents to the petitioner that were relied upon by the authorities, coupled with the manner in which no proper opportunity of hearing was granted to the petitioner leads us to the

conclusion that severe prejudice has been caused to the petitioner. Ergo, the impugned order cannot be sustained and is liable to be quashed and set aside.

21. Accordingly, the impugned order dated September 12, 2024 is quashed and set aside with a direction upon the respondent authorities to examine the fabrics, provide a copy of the report to the petitioner, grant an opportunity of hearing to the petitioner and thereafter pass a reasoned order in the same. We make it clear that with regard to E-way bills on which liability has also been fastened, an opportunity of hearing shall be granted to the petitioner.

22. With the above directions, the writ petition is allowed.

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**(2024) 11 ILRA 118**  
**ORIGINAL JURISDICTION**  
**CRIMINAL SIDE**  
**DATED: ALLAHABAD 07.11.2024**

**BEFORE**

**THE HON'BLE MANISH MATHUR, J.**

Application U/S 482 No. 4826 of 2024

**Sanket Singh** **...Applicant**  
**Versus**  
**State of U.P. & Anr.** **...Opposite Parties**

**Counsel for the Applicant:**  
 Abhilasha Singh, Ashutosh Yadav, Shyam Lal

**Counsel for the Opposite Parties:**  
 G.A., Imran Ullah, Pankaj Kumar Mishra

**Criminal Law-The Code of Criminal Procedure,1973 - Section 233-** The scope and object of Section 233 is to advance the cause of substantial justice by providing the accused an opportunity for compelling the

production or attendance of any document or witness which is normally required to be allowed and can be rejected for reasons to be recorded only on the three grounds which are vexation or delay or defeating the ends of justice indicated under sub-section (3) of Section 233 Cr.P.C--- Impugned order is quashed--- Trial court shall ensure that process is issued for attendance of witnesses five and six indicated in the application no.91Kha as also production required in terms of application no. 92Kha/1.

**Petition partly allowed.** (E-15)

**List of Cases cited:**

1. Vivek Narayan Sharma & ors.(Demonetisation Case-5 J.) Vs U.O.I. & ors. (2023) 3 SCC 1
2. J. Jayalalithaa & ors.Vs St. of Karn. & ors.reported in 2014 (2) SCC 401
3. Kalyani Baskar Vs M.S. Sampooram, (2007)2 SCC 258
4. Munna Pandey Vs St. of Bihar passed in Criminal Appeal Nos.1271-1272 of 2018
5. Dr. Rajesh Talwar & anr.Vs C.B.I. & anr.2014 (1)SCC 628.
6. Enforcement Directorate Vs Kapil Wadhawan, (2024) 7 SCC 147
7. Anupam Singh Vs St. of U.P. Through Principal Secretary Home & anr. reported in 2024 SCC Online All 156
8. Angadh S/o. Rohidas Kadam, Rohidas S/o Vs The St. of Maharashtra & Madhukar reported in 2007(109)BOM. L.R.34,
9. Manoj Kumar Swami Vs St. of U.P. reported in 2006 CRI.L.J. 1781.
10. Anees Vs St. of Uttarakhand reported in 2018 STPL 6476 Uttarakhand
11. Natasha Singh Vs CBI (St.) reported in (2013) 5 SCC 741
12. Amarjeet @ Kaluwa Vs St. of U.P. & anr.passed in Application U/S 482 No.8463 of 2020,
13. Dharmendra Kumar @ Dhamma Vs St. of M.P. reported in (2024) 8 SCC 60
14. Krishan Kumar Pandey @ Kukkoo Pandey Vs The St. of U.P. passed in Criminal Misc. Case No.2109 of 2008

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Ashutosh Yadav, learned counsel for accused-applicant, Mr. Satyendra Tiwari, learned Additional Government Advocate appearing for opposite party no.1 State and Mr. Imran Ullah, learned counsel for opposite party no.2.

2. Application under Section 482 Cr.P.C. has been filed for modification of order dated 17.01.2024 passed in Sessions Trial No.401 of 2017, State versus Sanket & Ors., arising out of Case Crime No.1263 of 2016, under Sections 147, 148, 149, 307, 302, 506, 120B IPC and Section 7 Criminal Law Amendment Act, Police Station Quarsi, District Aligarh by directing summoning of witnesses no.1, 2 and 8 at the expense of State Government and not at the expense of accused-applicant. Further prayer for quashing part of the order dated 17.01.2024 passed in the aforesaid case so far as it rejects summoning of witnesses 3, 4, 5, 6 & 7 has been sought. Prayer has also been made for quashing of the said order dated 17.01.2024 whereby application no.92 Kha for summoning of record of affidavit verification photo from the record keeper of Photo Identification Centre of this Court has been made.

3. Learned counsel for accused-applicant submits that earlier the accused-

applicant had filed an application dated 03.07.2017 seeking verification of the Photo Identification Centre of this Court as well as records of the Shri Ram Hotel Allahabad. The said application was rejected by means of order dated 15.07.2017 which was challenged before this Court in application under Section 482 Cr.P.C. bearing No.26575 of 2017 in which initially interim order dated 05.09.2017 was passed but the application thereafter was dismissed vide order dated 07.05.2019 leaving it open to the applicant to lead such evidence at the appropriate stage with the observation that such a plea is not required to be considered since at that time the stage was only for framing of charge.

4. It is submitted that subsequently the applicant preferred another application dated 29.05.2019 before the trial court seeking a direction to the Photo Identification Centre of this Court, specifically the record in charge to keep the said record in safe custody till disposal of the case. The said application was allowed by means of order dated 19.10.2019. It is submitted that however despite allowing the said application, no information was sent by the office of trial court to the Photo Identification Centre of this Court leading to filing of another application by the applicant through jailor. The said application was rejected by means of order dated 11.08.2021 which was challenged by the applicant in an application under Section 482 Cr.P.C. bearing No.23012 of 2021, which is said to be still pending consideration.

5. It has also been submitted that the Photo Verification Centre of the High Court functions under the Bar Association which is a Private Society registered under the Societies Registration Act and therefore

the documents issued by such a Centre would not come within purview of public document as envisaged under Section 74 of the Evidence Act due to which its corroboration is required.

6. It is submitted that during pendency of the earlier application under Section 482 Cr.P.C., the applicant filed the present applications dated 20.12.2023 with Application No.92Kha/1 pertaining to summoning of the In charge of the Photo Identification Centre alongwith records of 19.12.2016 and the Second Application Bearing No.91Kha/1 indicating a list of eight different witnesses sought to be summoned under Section 233 Cr.P.C.

7. It is these two applications which have been rejected by means of impugned order dated 17.01.2024.

8. Learned counsel submits that the incident as per first information report is said to have taken place on 19.12.2016 in which first information report was lodged and charge-sheet was also submitted on 19.03.2017 whereupon cognizance was taken on 30.03.2017 with charges being framed on 25.09.2019. It is submitted that due to interim protection granted earlier, the proceedings were hived off into Sessions Trial No.401 of 2017 and 401A of 2017 with Trial No.401A of 2017 pertaining to the applicant. It is further submitted that the prosecution witnesses have already been examined with evidence under Section 313 Cr.P.C. being recorded on 25.09.2023.

9. It is submitted that under Section 233 Cr.P.C., the applicants have a fundamental right to seek production of relevant documents and witnesses to prove their case of alibi that as on the date of

incident on 19.12.2016, the applicants had attended Court proceedings before this Court which was sought to be proved by means of relevant documents such as Photo Identification issued by the Photo Identification Centre of this Court. It is submitted that once the earlier application for keeping such records in safe custody was allowed, with only information not being remitted to the Centre, it was incumbent upon the trial court to have adhered to the initial directions and not to have rejected the subsequent applications for production of the Incharge and the said records.

10. It is submitted that similarly the eight defence witnesses sought to be produced by the applicant under Section 233 Cr.P.C. were for the purposes of proving and substantiating not only their alibi but the fallacies in the prosecution story. It is submitted that such a right is available to the accused under Section 233 Cr.P.C. read with Article 21 of the Constitution of India and therefore would be a fundamental right available to an accused-applicant particularly keeping in view the provisions of Section 233 Cr.P.C. which are couched in mandatory terms.

11. It is also submitted that the application under Section 233 Cr.P.C. could have been rejected only on account of three grounds indicated in the section viz vexation or delay or for defeating the ends of justice but a perusal of the impugned order would indicate that none of the three grounds have been taken by the trial court for rejecting the said application.

12. It is further submitted that even while allowing the summoning of witnesses no.1, 2 & 8 sought under Section 233 Cr.P.C., expenses thereof have been

fastened upon the accused-applicant whereas for purposes of ensuring a fair trial, expenses were required to be fastened upon the State. □

13. Learned counsel has placed reliance on judgments:

(i) *Angadh S/o. Rohidas Kadam, Rohidas S/o versus The State of Maharashtra & Madhukar reported in 2007(109)BOM. L.R.34,*

(ii) *Smt. Sreeja versus Public Prosecutor passed in CRL. MC No.4909 of 2024, Crime No.248 /2022 of Angamali Police Station, Ernakulam,*

(iii) *Anees versus State of Uttarakhand reported in 2018 STPL 6476 Uttarakhand,*

(iv) *Natasha Singh versus CBI (State) reported in (2013) 5 SCC 741,*

(v) *Amarjeet @ Kaluwa versus State of U.P. & Anr. passed in Application U/S 482 No.8463 of 2020,*

(vi) *Krishna Kumar Pandey @ Kukoo Pandey versus The State of Uttar Pradesh passed in Criminal Misc. Case No.2109 of 2008,*

(vii) *Mahe Aalam versus State of U.P. reported in 2005 STPL 12541 Allahabad,*

(viii) *Manoj Kumar Swami versus State of Uttar Pradesh reported in 2006 CRI.L.J. 1781.*

14. Learned Additional Government Advocate appearing on behalf of State as well as learned counsel for opposite party no.2 have refuted submissions advanced by learned counsel for applicant with the submission that the provisions of Section 233 Cr.P.C. cannot be construed as a specific mandate binding the court concerned to the effect that any application filed by an accused under the said provision

is mandatorily required to be allowed. It is submitted that the stand of prosecution and the defence does not stand on equal footing and therefore exception under Section 233 Cr.P.C. has been carved circumscribing the powers of trial court under the said provision. It is submitted that in view of the provisions of Section 233 Cr.P.C., it would be incumbent upon an accused to indicate valid reasons for production of any additional document or witness under Section 233 Cr.P.C.

15. On merits as well, learned counsel for opposite parties have submitted that the production of witnesses 3 & 4 who are Police Officers has been sought by the opposite parties only to corroborate the information supplied to accused under the Right to Information Act, 2005. It is submitted that such documents having been supplied under statutory enactment come within the realm of public documents under Section 74 of the Evidence Act with presumption of genuineness subject to rebuttal under Section 79 of the Evidence Act and therefore there is no occasion for the accused to seek summoning of such witnesses.

16. It is also submitted that the applicant had earlier as well filed applications on 30.10.2023, 03.11.2023 and 01.12.2023 under Section 233 Cr.P.C. whereunder also applicants could have very well sought production of such documents and witnesses as has been done by means of the present applications. It is submitted that since such an opportunity has not been availed of by the accused thrice, it clearly indicates that the present applications have been filed for a vexatious purpose and only to delay the trial and therefore the order rejecting production of such

documents and summoning of witnesses has been correctly passed.

17. Learned counsel for opposite party no.2 on the basis of instructions has made specific statement that the genuineness of the Photo Identity passes issued to the accused-applicant which was brought on record of the trial court are not being disputed and are in fact admitted. However the said admission does not extend to the contents of the said document.

18. With regard to the aspect of expenses fastened upon the applicants, learned counsel for opposite parties submit that such a power is to be exercised under Section 233 Cr.P.C. read with Section 312 Cr.P.C. and since it is the accused-applicant who is seeking such witnesses, the trial court has rightly fastened the aspect of expenses upon the accused-applicant.

19. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident that the aspect of validity of impugned orders are required to be adjudged in terms of provisions of Section 233 Cr.P.C. which are as follows:

**".233. Entering upon defence-**

(1) *Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.*

(2) *If the accused puts in any written statement, the Judge shall file it with the record.*

(3) *If the accused applies for the issue of any process for compelling the attendance of any witness or the production*

*of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."*

20. The wordings of Section 233 (3) Cr.P.C. clearly indicates a positive obligation upon the Court for compelling attendance of any witness or production of any document or thing in case the accused, applies for issue of process for compelling such attendance or production. However such a positive direction is circumscribed by three grounds viz vexation or delay or defeating the ends of justice on which the trial court would be entitled to reject such a plea, for reasons to be recorded.

21. With regard to statutory interpretation, Hon'ble the Supreme Court in the case of ***Vivek Narayan Sharma and Ors. (Demonetisation Case-5 J.) v. Union of India and Ors., (2023) 3 SCC 1*** has specifically held that in case of statutory interpretation, a purposive interpretation is required to be given keeping in view the wordings of a particular enactment to further the purpose of such a provision having been incorporated in the Act. The relevant paragraph is as follows:

*"148. It is thus clear that it is a settled principle that the modern approach of interpretation is a pragmatic one, and not pedantic. An interpretation which advances the purpose of the Act and which ensures its smooth and harmonious working must be chosen and the other which leads to absurdity, or confusion, or friction, or contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of*

*the enactment must be eschewed. The primary and foremost task of the Court in interpreting a statute is to gather the intention of the legislature, actual or imputed. Having ascertained the intention, it is the duty of the Court to strive to so interpret the statute as to promote or advance the object and purpose of the enactment. For this purpose, where necessary, the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment. Ascertainment of legislative intent is the basic rule of statutory construction."*

22. Upon applicability of aforesaid judgment in the facts and circumstances of the case, it is evident from the wordings of Section 233 (3) Cr.P.C. that the provision is clearly meant for beneficial purpose for the attendance of any witnesses or production of any document sought by the accused-applicant. Such a positive enactment is keeping in view the purpose of a fair trial as required under Article 21 of the Constitution of India.

23. The concept of fair trial has already been explained and enunciated upon by Supreme Court in the case of ***J. Jayalithaa and Ors. versus State of Karnataka and Ors.*** reported in ***2014 (2) SCC 401*** in the following manner:

*"28. Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests*

of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.

29. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution. "No trial can be allowed to prolong indefinitely due to the lethargy of the prosecuting agency or the State machinery and that is the *raison d'être* in prescribing the time frame" for conclusion of the trial.

30. Article 12 of the Universal Declaration of Human Rights provides for the right to a fair trial what is enshrined in

Article 21 of our Constitution. Therefore, fair trial is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity and is governed by the rule of law. Denial of fair trial is crucifixion of human rights."

24. In **Kalyani Baskar v. M.S. Sampooram**, (2007)2 SCC 258, the Supreme Court while elaborating the meaning of fair trial observed as below:?

"Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

25. The said proposition has been reiterated in the case of **Munna Pandey versus State of Bihar** passed in Criminal Appeal Nos.1271-1272 of 2018 & **Dr. Rajesh Talwar & Anr. versus C.B.I. & Anr. 2014 (1)SCC 628**.

26. The Supreme Court in the case of **Enforcement Directorate v. Kapil Wadhawan**, (2024) 7 SCC 147 has clearly enunciated the law that provisions of Cr.P.C. are to be seen in the context of advancement of justice particularly in case of defence setup by the accused in order to ensure a fair trial.

27. The concept of provisions of Section 233 Cr.P.C. therefore assumes significance, as per which an application thereunder can be rejected only in case the Court concerned, for reasons to be recorded, indicates that it has been made

for the purpose of vexation or delay or for defeating the ends of justice. The specific wordings of Section 233 Cr.P.C. therefore do not envisage rejection of such an application on any other ground. The gist of the said provision particularly sub-section (3) thereof clearly imposes an obligation upon the Court to allow such an application positively except only on the grounds indicated hereinabove. It therefore appears that provision of Section 233 Cr.P.C. are clearly in favour of allowing such an application being preferred by the accused.

28. The provision of Section 233 Cr.P.C. has also been considered by the Coordinate Bench of this Court in the case of **Anupam Singh versus State of U.P. Through Principal Secretary Home and Anr.** reported in **2024 SCC Online All 156** reiterating the fact that an application under Section 233 Cr.P.C. cannot be refused on the grounds which are not covered by three excluding clauses in the following manner:

*"8. In my view, if the application is refused on the grounds which are not covered by three excluding clauses, as provided in latter part of section 233(3) Cr.P.C. such approach shall be alien as far as scope of section 233 Cr.P.C. is concerned. This fact is undisputed that the witnesses who are sought to be summoned by the defence under section 233(3) Cr.P.C. were not examined as prosecution witnesses, at any stage. In fact, though they were witnesses of inquest but never produced by the prosecution.*

29. The said aspect has again been reiterated by another Coordinate Bench of this Court in the case of **Manoj Kumar Swami** (supra).

30. The said concept has also been considered by High Court of Bombay in the case of **Angad** (supra) as follows:

*"13. Then the question comes as to what is the scope of Section 233 of Cr.P.C. A bare perusal of Sub-section 3 of Section 233 would reveal that when accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. It can thus be clearly seen that when an accused exercises his right under Sub-section 3 of Section 233 for compelling the attendance of any witness or production of any document, the learned Magistrate can refuse the said request only on three grounds: (i) vexation, (ii) delay, and (iii) defeating the ends of justice. Moreover, the Magistrate is required to record his reasons for refusing the request. A bare perusal of the said Section would reveal that except those three grounds, the request cannot be turned down on any other ground."*

31. Similarly the High Court of Kerala at Arnakulam has also adverted to the aforesaid provision and has held that when the accused submits a list of witnesses, is not open for the Court to pick and choose the witnesses and is bestowed with the power to refuse to summon such a witness only on the exclusion clauses indicated in Section 233(3) Cr.P.C. It has also been held that it is not proper for a trial court to conclude during the middle of trial that some witnesses would not advance the case of accused since such a conclusion can be

drawn only once the said witnesses have been examined.

32. The High Court of Uttarakhand in the case of *Anees* (supra) had also held that non-compliance of mandatory provision prescribed by Section 233 Cr.P.C. would be a serious lapse causing prejudice to the accused and in such circumstances, the conviction and sentence may not stand the test of law.

33. The Supreme Court in the case of *Natasha Singh* (supra) although considering provisions of Section 311 Cr.P.C has also adverted to the concept of fair trial as being the main object of criminal procedure while casting a duty on the court to ensure that such fairness is not hampered or threatened in any manner since it entailed interest of accused and therefore a grant of fair and proper opportunity to the accused is required to be ensured as his constitutional and human right. It has also been held that trial court cannot prejudice evidence of the witness sought to be examined by an accused since it would cause grave and material prejudice to the accused with regard to defence and would therefore the tantamount to flagrant violation of principles of law. The relevant portions of judgment are as follows:

*"15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in*

*the case of the prosecution, or of 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 opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as 'any court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.*

20. Undoubtedly, an application filed under Section 311 CrPC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping

*with the provisions of Section 311 Cr.P.C. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the handwriting expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW 40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the handwriting expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, to have been seized, were actually recovered or not, and therefore, from the point of view of the appellants, his examination might prove to be essential and imperative for facilitating a just decision of the case."*

34. Although the said judgment pertains to Section 311 Cr.P.C. but in the considered opinion of this Court, the aforesaid judgments can be read for the purpose of determining power of trial court with regard to summoning or re-examination of witnesses under Section 233 Cr.P.C. as well, since both provisions

pertain to summoning of material witnesses.

35. Another Coordinate Bench of this Court while considering provisions of Section 311 Cr.P.C. in the case of *Amarjeet @ Kaluwa* (supra) has also held that the accused has a right to summon any evidence/witness which may be relevant for proper appreciation of prosecution evidence and to substantiate his defence.

36. Upon encapsulation of the aforesaid judgments, it is clearly discernible that the scope and object of Section 233 Cr.P.C. is to advance the cause of substantial justice by providing the accused an opportunity for compelling the production or attendance of any document or witness which is normally required to be allowed and can be rejected for reasons to be recorded only on the three grounds indicated under sub-section (3) of Section 233 Cr.P.C.

37. In the background of aforesaid enunciation of law, the application preferred under the said provision by the applicant is required to be seen.

38. The application no.91Kha/1 indicates a list of eight different witnesses sought by the accused to be summoned. Out of the said eight persons, trial court has granted summoning with regard to three of the witnesses at serial no.1, 2 and 8 while rejecting the rest.

39. It has been submitted that persons required to be summoned as indicated in the application at serial no.3 and 4 are the S.P. City and the C.O. City who require to be examined by the accused in order to corroborate the information provided to accused-applicant under the Right to

Information Act. With regard to summoning of such witnesses, it is not the case of the applicant that the said persons are eye witnesses to the incident. The information provided to the applicant under Right to Information Act may come within definition of a public document under Section 74 of the Evidence Act and may therefore attract the provision of Section 79 of the Evidence Act.

40. In such circumstances, the application pertaining to said persons are found by this Court to be vexatious having been made only for the purposes of delaying the trial. With regard to aforesaid witnesses, the finding recorded by trial court is therefore upheld.

41. So far as witnesses 5 & 6 of the application being Yogesh Mahajan & Monu Mahajan is concerned production of such witnesses has been refused by trial court on the ground that they are not relevant witnesses for the purpose of establishing proceedings recorded by the CC TV Camera.

42. In the considered opinion of this Court, rejection of summoning of said two witnesses clearly goes beyond the ground indicated in Section 233(3) Cr.P.C. since at this stage, trial Court is not required to consider whether their defence would be material or not and such a satisfaction can be garnered only once the said witnesses have deposed.

43. So far as production of witness No.7 being the Branch Manager/ CPIO of the State Bank of India/Branch Manager D.S. College is concerned, this Court also finds that production of such witness may be only to fill in lacuna of the defence instead of corroborating any particular evidence or for

substantiation of the defence case. It is settled law that by means of an application under Section 233 Cr.P.C., lacuna in the defence case cannot be sought to be fulfilled or for creation of evidence. In view thereof, the production for said witness no.7 also is found to be vexatious and would lead to delay in conclusion of trial. The rejection by trial court recorded for summoning of said witness is therefore upheld.

44. So far as the application no.92kha/1 pertaining to summoning of the In-charge of Photo Identification Centre along with record is concerned, it is evident from material on record that such verification is being sought by the applicant ever since 03.07.2017 and subsequent to initial rejection thereof, the same was thereafter allowed by means of order dated 19.10.2019. It therefore does not stand to reason as to why the earlier order dated 19.10.2019 passed by the trial court itself should not have been followed through by the trial court. It is also relevant that the said records are kept under custody of the Bar Association concerned and therefore may not come within purview of Sections 74 and 79 of the Evidence Act due to which their corroboration may be required. It is also relevant that learned counsel for opposite party no.2 has clearly on the basis of instruction admitted the genuineness of said documents but has however expressed reservation with regard to contents of said documents. Therefore the admission with regard to the said documents is not unequivocal.

45. It is also evident that production of such documents is being sought by the accused in order to substantiate and corroborate his plea of alibi.

46. With regard to the plea of alibi, Hon'ble the Supreme Court in the case of

***Dharmendra Kumar Alias Dhamma versus State of Madhya Pradesh*** reported in (2024) 8 SCC 60 has enunciated as follows:

*"50. There is no gainsaying that whosoever pleads alibi in contrast and derogation of the eyewitness version, is under cumbrous onus to prove absence from the scene and time of crime. The appellant not only failed to raise this defence but also did not adduce any evidence in support thereof. Taking into consideration the cumulative effect of all these factors, we have no reason to doubt that the appellant was not only present at the scene of crime, but he actively participated also in the occurrence and gave one of the fatal blows to Tillu (deceased)."*

47. It is thus evident that since the applicant is pleading alibi, he should be granted ample opportunity to discharge the onerous burden cast upon him particularly in view of the fact that production of such document has been sought by him ever since 2017 and was also allowed earlier.

48. The aforesaid application has also been rejected, in view of earlier order dated 11.08.2021 on the ground that the accused cannot use provisions of Section 233 Cr.P.C. to garner evidence as also placing reliance on order dated 07.05.2019 passed by this Court an application under section 482 Cr.P.C. bearing no.26577 of 2017 which however only indicates that the applicant was granted liberty to lead such evidence at the appropriate stage. Application has also been rejected on the ground that the applicant himself should have made an effort to obtain such records.

49. The reasoning indicated by trial court while rejecting the said application

No.92Kha/1 is patently erroneous since it also does not conform to rejection on any of three grounds indicated in Section 233(3) Cr.P.C. for such rejection. It is evident from record that the original pass issued by Photo Identification Centre of this Court has already been brought on record of the trial court which therefore may be required to be corroborated by production of original records from the Centre which as indicated herein-above may not come within definition of Section 74 of the Evidence Act.

50. In view of aforesaid facts and discussion, it is evident that the trial court has erred in rejecting the application No.92Kha/1 as well as a part of application No.91kha/1.

51. So far as the aspect of expenses is concerned, burden for which has been cast upon applicant himself, coordinate benches of this Court in the case of ***Krishan Kumar Pandey alias Kukoo Pandey versus The State of Uttar Pradesh*** passed in Criminal Misc. Case No.2109 of 2008 have clearly enunciated the law after considering Section 312 Cr.P.C. is as follows:

"Thus, from a study of the aforesaid provisions relating to the summoning of defence witness it is clear that as far as the Sessions Trial is concerned the provisions of the Code stands on the same footing in respect of summoning the prosecution witness viz-a-viz defence witness and there is no difference. In other words like prosecution witnesses the defence witness in the sessions case are also to be summoned at the expenses of the State. The only rider is that such a request made by defence can be rejected if the learned Sessions Judge finds that the request has been made for the

