IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Revision No. 79 of 2020

Date of decision: 16.5.2023

Sumitra Devi. …**Petitioner.**

Versus

Kapoor Chand. …**Respondent.**

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?[1] Yes

For the Petitioner. ***Mr.Tejasvi Verma, Advocate.***

For the Respondent: ***Mr.Hoshiyar Singh Rangra, Advocate.***

Vivek Singh Thakur, Judge (Oral)

Petitioner, complainant in case No. 118-3 of 2013, titled as Sumitra Devi Vs. Kapoor Chand, filed under Section 138 of the Negotiable Instruments Act (for short 'NI Act'), has approached this Court against rejection of application filed by her for her re-examination, vide order dated 28.1.2020 passed by Judicial Magistrate First Class, Anni, District Kullu, H.P. (Trial Court).

2. I have heard learned counsel for the parties and have also gone through the material placed before me.

3. Petitioner has preferred a complaint under NI Act for dishonor of cheque issued by respondent Kapoor Chand for payment towards her salary, claiming that the said cheque was issued by respondent as Director of BHK construction Company. An affidavit in evidence, in examination-in-chief, has been filed by the petitioner and thereafter, she was subjected to cross-examination on behalf of respondent, wherein at one place she had admitted it to be correct that respondent was also an employee of the Company like her. At the

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Whether the reporters of the local papers may be allowed to see the Judgment? Yes

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High Court of H.P.

time of her cross-examination, no liberty was prayed by her counsel to re-examine her regarding this part of statement made by her in cross-examination as in examination-in-chief she had stated that respondent was Director of the Company. However, later on an application was filed on behalf of petitioner for her re-examination by proposing filing of an affidavit in re-examination, stating therein that respondent was Chairman of the Company and he had issued the cheque in her favour on behalf of Company under reference.

4. The aforesaid application was opposed by respondent on the ground that admission made by the petitioner with respect to status of respondent during cross-examination that respondent was an employee like her, is unambiguous and clear and, therefore, there is no question of allowing re-examination of the petitioner as proposed, as it would amount to fill up the lacuna and also prolonging of proceedings.

5. The trial Court after, considering pronouncements of the Supreme Court in ***Rajaram Prasad Yadav Vs. State of Bihar and another, (2013) 14 SCC 461; Jamatraj Kewalji Govani Vs. State of Maharashtra, AIR 1968 (SC) 178; U.T. of Dadra and Nagar Haveli and another Vs. Fatehsinh Mohansing Chauhan, (2006) 7 SCC 529; Iddar and others Vs. Aabida and another, AIR (SC) 2007 3029*** and also judgment of the High Court of Delhi in ***Acura Glass Tiles Enterprises V. S.S. Ray LawSuit (Del) 496*** and appreciating the facts on record, arrived at the conclusion that affidavit proposed to be filed in cross-examination would amount to withdrawal of self harming admission came on record during cross-examination of the petitioner and it would amount to fill up lacuna by afterthought causing prejudice

High Court of H.P.

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to the respondent/accused and would amount to give unfair advantage to the petitioner, and accordingly, after referring para 18 of judgment of the Supreme Court passed in ***Mohanlal Shamji Soni Vs. Union of India, 1991 Suppl (1) SCC 271,*** Trial Court dismissed the application preferred by the petitioner.

6. Learned counsel for the petitioner, referring ***Rajendra Prasad Vs. Narcotic Cell, (1999) 6 SCC 110; P. Chhaganlal Daga Vs. M. Sanjay Shaw, (2003) 11 SCC 486;*** and ***Manju Devi Vs. State of Rajasthan and another, (2019) 6 SCC 203,*** contended that in cross-examination a fact has come on record which appears to be in conflict with the contents of examination-in-chief and in view of provisions of Section 138 of the Indian Evidence Act, 1872 and Section 145 of the NI Act, petitioner has a right to be re-examined on that point as clarification and truth about the said point shall be necessary for complete, final and just adjudication of the matter and, therefore, he contended that proposed re-examination of the petitioner shall not amount to filling up of lacuna by the petitioner.

7. Learned counsel for the respondent, by referring case law relied upon by the Trial Court and reasoning given for rejection of application, has justified and supported the impugned order of rejection of application filed by petitioner for re-examination of the petitioner.

8. Relevant paras of case law referred on behalf of petitioner in *Rajendra Prasad's case* are as under:-

> *"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not fill the lacuna in the prosecution case'. A lacuna in prosecution is not to be equated with*

High Court of H.P.

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the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage `to err is human' is the recognition-of the possibility of making mistakes to which humans are proved. A corollary of any such latches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can before-closed from correcting errors. 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. The very same decision Mohanlal Shamiji Soni v. Union of India, which cautioned against filling up lacuna has also laid down the ratio thus: (AIR Headnote)

> *"It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examined 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. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches only when the defence highlighted them during final arguments, The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision, The steps which the trial court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at."

High Court of H.P.

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9. Relevant paras of case law referred on behalf of petitioner in *P. Chhaganlal Daga's case* are as under:-

> *"4. In the impugned judgment a learned single judge of the High Court held that production of the postal receipt at the said belated stage was only "to fill up the lacuna" and hence the same is impermissible in law. He, therefore, interfered with the order passed by the trial court and permission to produce the postal receipt was countermanded. The learned single judge has stated the following regarding that aspect:*
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> > *"After the trial is over, if the petitioner is permitted to produce the postal receipt, that would only prejudice the right of the accused. Further, the postal receipt is sought to be produced only to fill up the lacuna or letting in corroboration of the evidence, if any available regarding this aspect. I consider that the respondent cannot be allowed to adopt such a course."*
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> *5. In Rajendra Prasad v. Narcotic Cell , this court has explained what is meant by lacuna in the prosecution case. The following passage of the said decision will be apposite in this contest (SCC p. 113, para 7):*
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> > *"It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872, by saying that the court could not 'fill the lacuna in the prosecution case'. A lacuna in the prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up."*
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> *6. In deciding so, this court has taken into account some of the earlier decisions of this court including Mohanlal Shamji Soni v. Union of India 1991 Suppl. 1 SCC 271. In the said decision this court had observed that the power to receive evidence in exercise of Section 311 of the Code could be exercised "even if evidence on both sides is closed" and such jurisdiction of the court is dictated by the exigency of the situation and fair play. The only factor which should govern the court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word*

High Court of H.P.

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"any" at different places. This would also indicate the widest range of power conferred on the court in that matter. It is so stated by this court in Ram Chander v. State of Haryana."

10. Relevant paras of case law referred on behalf of petitioner in *Manju Devi's case* are as under:-

> *"8. Having given thoughtful consideration to the rival submissions and having examined record with reference to the law applicable, we find it difficult to approve the orders impugned; and it appears just and proper that the application moved in this matter under Section 311 CrPC be allowed with direction to the Trial Court to ensure that the testimony of the doctor conducting first post-mortem comes on record.*
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> *9. Section 311 CrPC reads as under:-*
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> > *"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 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 to be essential to the just decision of the case"*
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> *10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions. In Natasha Singh v. CBI, (2013) 5 SCC 741, though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under: (SCC pp. 746 & 748-49, paras 8 & 15)*
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> > *"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised*

High Court of H.P.

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> *judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.''*
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> *   *   *
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> *"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." (emphasis in original)"*

11. The indisputable fact situation of the case remains that the daughter of the appellant died an unnatural death on 14.01.2010 in Nigeria, where she was living with her husband (the respondent No. 2), who is standing the trial for offences under Sections 302, 304-B and 498-A IPC. The first post-mortem of the dead-body of the daughter of appellant was carried out on 16.01.2010 in Aminu Kanu Teaching Hospital, Nigeria by the said Dr. I. Yusuf. A copy of the post-mortem report prepared by the said doctor in Nigeria has, of course, been placed on record wherein, the cause of death is stated as "asphyxia secondary to strangulation". Though the dead-body of the daughter of appellant was brought to India on 29.01.2010 and Medical Board was constituted for conducting the post-mortem but

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then, the Board found that no definite opinion could be given regarding the time and cause of death. The investigating agency, for the reasons best known to it, did not cite the said doctor, who conducted the first post-mortem in Nigeria as a witness. It is also not the case on behalf of the accused that the copy of the post-mortem report dated 16.01.2010 prepared in Nigeria was not disputed and/or he would not be seeking to cross-examine the said doctor, if he is examined as a witness in this matter. In the given set of facts and circumstances, evident it is that the testimony of the said doctor who conducted the first post-mortem in Nigeria is germane to the questions involved in this matter; and for a just decision of the case with adequate opportunity to both the parties to put forward their case, the application under Section 311 CrPC ought to have been allowed."

11. Section 145 of the NI Act reads as under:-

*"145. **Evidence on affidavit**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.*
(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

12. Sections 137 and 138 of the Indian Evidence Act read as under:-

*"137. **Examination-in-chief**.—The examination of a witness by the party who calls him shall be called his examination-in-chief.*
***Cross-examination**.—The examination of a witness by the adverse party shall be called his cross-examination.*
***Re-examination.**—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.*
*138. **Order of examinations**.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*

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High Court of H.P.

> ***Direction of re-examination**.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*

13. From the provisions of Section 145 of NI Act, especially sub section (2) thereof, it is apparent that after filing of an affidavit by the complainant or his witness(es), on an application filed by the prosecution or the accused, any person giving evidence on affidavit, can be summoned and examined by the court, as to the facts contained therein. This provision further provides examination of a person which may include re-examination of a person, but it does not entitle complainant or any other person, who files an affidavit in examination-in-chief to re-file an affidavit of his statement in evidence. Such person, including the complainant, can be summoned and examined by the court on an application of either party, therefore, Section 145 of the NI Act does not provide or entitle the complainant or any party to file affidavit afresh during examination on summoning by the Court under sub section (2). Though Section 145(2) of the NI Act does not speak explicitly about re-examination of complainant or any other witnesses, but I am of the considered opinion that term summon and examine any person giving evidence in affidavit also includes power of the Court to summon and re-examine such witness/person.

14. Re-examination shall be governed by provisions of Sections 137 and 138 of the Indian Evidence Act. Section 137 of the Evidence Act provides that examination of a witness subsequent to cross-examination, by the party who called the witness, shall be called for re-examination of witness. As provided in Section 138 of the Indian

High Court of H.P.

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Evidence Act, witness shall be first examined-in-chief and then, if the adverse party so desires shall be cross-examined, and thereafter if the party calling him so desires, the said witness shall be re-examined, however, re-examination shall be directed to the explanation of matters referred in cross-examination and new matter can be introduced in re-examination only by permission of the Court and in such eventuality adverse party may further cross-examine the witnesses upon the new matter.

15. In present case, as appears from the impugned order, petitioner has proposed to re-file an affidavit in examination-in-chief, which is not permissible under law. Petitioner was summoned after filing affidavit in examination-in-chief and was cross-examined thereafter, and thus now, for valid grounds, petitioner can only be summoned for re-examination for the purpose of explanation of the matters referred to in cross-examination. For examining the petitioner with respect to any new matter a justifiable ground should be made out. It is apparent from the material placed before me that besides deposition related to the status of the respondent, revision of averments already made in affidavit filed in examination-in-chief has been proposed by raising and introducing a new matter, which is not permissible under law.

16. With respect to status of respondent, in the complaint as well as in examination-in-chief, petitioner claimed that respondent was Director/Incharge of the Company concerned on whose behalf he had issued cheque to the petitioner, but in cross-examination, she admitted that he was an employee of the Company like her. Therefore, counsel for the petitioner had a right to pray for re-examination of the petitioner

High Court of H.P.

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after her cross-examination for explanation of the statement made by petitioner with respect to status of the respondent. But the counsel failed to do so but later on, filed an application under Section 311 Cr.P.C. for re-examination of the complainant.

17. Crux of the pronouncements of the Supreme Court is that for the ends of justice and elucidating the truth, obtaining the proper proof of the facts which will lead to just and correct decision of the case, witness can be re-examined without changing the nature of the original case filed against the respondent and it is duty of the Court to determine the truth and render a just decision as failure of imparting justice would amount to miscarriage of justice and further that for mistake on the part of an Advocate or even of the party, the court should not desist from making an endavour by permitting the party to re-examine the witness, including the complainant, but within the parameters and framework of law as contained under Sections 137 and 138 of the Indian Evidence Act read with Section 142 of the NI Act.

18. I am of the opinion that for ascertaining the correct status of the respondent so as to arrive at just and fair conclusion, it would be necessary to find out the truth by obtaining proper possible evidence on record and for that purpose re-examination of the petitioner on this issue is permissible and petitioner, for mistake on the part of Advocate for not praying her re-examination at the time of cross-examination, should not be made to suffer and as such to this limited extent re-examination of the petitioner may be permitted.

19. Taking into consideration entire facts and circumstances and pronouncements of the Courts referred supra as well as other judgments referred therein, I am of the considered opinion that

High Court of H.P.

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petitioner may be re-examined with reference to the status of respondent in reference to the facts stated in examination-in-chief and in cross-examination with respect to that. However, complainant shall not be entitled to introduce any new issue or case in her cross-examination as it is neither prayer of the petitioner not it can be permitted in the facts and circumstances of the present case.

20. With aforesaid discussion impugned order dated 28.1.2020 passed by the Trial Court is modified by permitting re-examination of the petitioner in aforesaid matter but to the above referred context related to status of the respondent with observation that petitioner shall not be entitled to file fresh affidavit in re-examination, but shall be re-examined in the Court. Needless to say in case of introduction of a new issue in re-examination, if any with permission of the court, respondent shall have right to further cross-examine the petitioner upon that matter.

21. Parties are directed to appear before the Trial Court on 1st June, 2023 and thereafter Trial Court shall proceed further in accordance with law. It is made clear that no fresh notice shall be issued for presence of the parties and on failure to appear before the Trial Court, on that date, shall invite adverse order against the party in default in accordance with law.

The petition stands disposed of in aforesaid terms alongwith pending application(s).

Copy of order be transmitted to the concerned Magistrate for necessary compliance.

(Vivek Singh Thakur),
Judge.

16th May, 2023
(Keshav)

High Court of H.P.

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