

In the High Court of Punjab and Haryana, at Chandigarh

Criminal Misc. No. M-9279 of 2015

Date of Decision: 24.3.2015

Rahul Labroo

... Petitioner(s)

Versus

Dr. Priya

... Respondent(s)

CORAM: Hon'ble Mr. Justice Darshan Singh.

Present: Mr. Aayush Gupta, Advocate
for the petitioner(s).

Darshan Singh, J.

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") for seeking quashing of the order dated 13.3.2015 (Annexure P3) passed by the learned Judicial Magistrate Ist Class, Jind, whereby the application, filed by the respondent-husband, under Section 311 Cr.P.C., has been allowed.

2. The respondent-wife has filed a petition under Section 125 Cr.P.C. for grant of maintenance against the petitioner-husband. During the pendency of the said petition, she moved an application under Section 311 Cr.P.C. for recalling her in accordance with the provisions Section 126(2) read with Section 274 Cr.P.C. for recording her statement. The respondent in her evidence, recorded by the learned trial Court, has filed her affidavit Ex.CW.1/A. Thereafter, she faced the cross-examination. During the course of the arguments, while relying upon the law laid by this Court in ***Gurtej Singh v. Balwinder Kaur 2013(5)***

R.C.R. (Criminal) 814, it was contended that the evidence of the respondent-wife could not have been recorded by way of affidavit as she was not a formal witness and thus, the application under Section 311 Cr.P.C. has been filed on the ground that her re-examination was necessary for just and effective decision of the case.

3. This application was contested by the petitioner-husband on the ground that the objection was raised at the time of cross-examination of the respondent-wife and it was specifically pointed out that her evidence cannot be recorded by way of affidavit in the proceedings under Section 125 Cr.P.C. It was pleaded that the application under section 311 Cr.P.C. was not maintainable. The respondent-wife had herself not deposed in the court and instead of it, she chose to tender her affidavit. Now, it does not lie in her mouth to say that she was competent and able to depose on oath in support of the contents of her petition. She cannot be allowed to fill up the lacuna in the case at the stage when the arguments have already been heard and the case is fixed for final order.

4. The learned Judicial Magistrate, vide impugned order dated 13.3.2015, allowed the application for recalling respondent-wife Dr. Priya for examination subject to payment of ₹ 1,000/- as costs. She was afforded one opportunity to get herself examined on the very next date of hearing.

5. Aggrieved against the aforesaid order, the present petition has been preferred.

6. I have heard learned counsel for the petitioner and perused

the case file.

7. Learned counsel for the petitioner-husband contended that the respondent is a well-educated lady. She is a doctor by profession. It was specifically pointed out in her cross-examination that she cannot depose by way of affidavit but even then the mistake was not corrected. Thereafter, the petitioner-husband appeared in the witness box. His evidence was closed and the case was posted for hearing the final arguments. The final arguments were also heard. During the course of final arguments, it was contended by learned counsel for the petitioner-husband that the respondent-wife cannot lead her evidence by way of affidavit as she is not a formal witness. Thereafter, the case was posted for final judgment. During that period, the application, under Section 311 Cr.P.C., has been filed by the respondent-wife.

8. He further contended that the application under Section 311 Cr.P.C. has only been filed to fill up the lacuna in the case by the respondent-wife, which cannot be permitted by the Court. He further contended that the application has been moved at the belated stage when the case was posted for final judgment. It has not been shown that the respondent has exercised her due diligence at the time of evidence. Rather she did not even care for the objection raised by learned counsel for the petitioner-husband. Thus, he pleaded that the impugned order is unsustainable in the eyes of law.

9. I have duly considered the aforesaid contentions of learned counsel for the petitioner.

10. Respondent-wife Dr. Priya has filed a petition under Section

125 Cr.P.C. against the petitioner-husband for grant of maintenance. She, being the petitioner therein, was not a formal witness. As per Section 296 Cr.P.C., the evidence of only those witnesses, who are of the formal character, can be recorded by way of affidavit and that too subject to all just exceptions by the opposite party. So, certainly, respondent-wife being the petitioner in the petition under Section 125 Cr.P.C. was not a formal witness and could not have been examined by way of affidavit.

11. A perusal of the impugned order shows that the respondent-wife was examined-in-chief by way of affidavit on 27.5.2014. At the time of her examination-in-chief, by way of affidavit, there was no objection from the side of the petitioner-husband. It was only on 16.9.2014 that a suggestion was put to her in the cross-examination that her evidence could not be recorded by way of affidavit and she expressed ignorance to that.

12. Mere this fact that the respondent is an educated lady and a doctor by profession, it is not expected that she is well-conversant with the technical procedure of the Court regarding the evidence. It was the duty of her counsel to get her statement recorded in accordance with law. If the learned counsel for the respondent-wife has neglected in performing his duty, she cannot be made to suffer.

13. Section 311 Cr.P.C. reads as under:-

“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person

as a witness, or examine any person in attendance, though not summoned as a witness, or recall and 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.”

14. It is crystal clear from the aforesaid provision that the Court is empowered to summon any person as a witness at any stage of enquiry, trial or other proceedings, if his/her evidence appears to the Court to be essential to the just decision of the case. In the instant case, the respondent-wife has filed a petition under Section 125 Cr.P.C. for grant of the maintenance. So, certainly her evidence is essential for the just decision of the case. If due to mistake on the part of her counsel, she was not examined-in-chief as per the provisions of the law, her request to recall and examine herself in support of her petition cannot be declined as the recording of her statement is very essential to the just decision of the case, otherwise it will be a failure of justice.

15. As per Section 311 Cr.P.C., the discretion to recall and examine the witness can be exercised at any stage of the enquiry, trial or other proceedings. In paragraph No.2 of the petition, the petitioner-husband has reproduced the orders dated 9.2.2015 & 26.2.2015 passed by the learned trial Court, which show that the application under Section 311 Cr.P.C. was moved at the stage of arguments. Mere delay in filing the application is no ground at all to decline the request of the respondent-wife if it satisfies the conditions provided under Section 311

Cr.P.C.

16. The Hon'ble Apex court in ***Mohanlal Shamji Soni v. Union of India and Another 1991(3) R.C.R. (Criminal) 182***, has laid down that the Criminal Court has ample power to summon, recall or re-examine any person even if the evidence of both the sides is closed. In case ***Rajendra Prasad v. The Narcotic Cell through its Officer-in-Charge, Delhi 1999(3) R.C.R.(Criminal) 440***, the application under Section 311 Cr.P.C. was moved when the defence pointed out the defects at the time of final arguments. The said application was allowed by the learned trial Court. The revision against that order was dismissed by the Delhi High Court and the criminal appeal was also dismissed by the Hon'ble Apex Court and it was, thus, observed as under:-

“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.”

17. In view of the ratio of law laid down in the aforesaid case, mere this fact that the application was moved by the respondent at the

stage of arguments is no ground to decline request of the respondent-wife.

18. I also do not find any substance in the plea of the learned counsel for the petitioner that allowing of this application will amount to filling up the lacuna in the case by the respondent-wife. As already mentioned, it was just a negligence and mistake on the part of counsel for the respondent-wife in the learned trial Court that instead of getting her statement recorded on oath, she was examined-in-chief by way of affidavit. The application to correct that mistake will not amount to filling up the lacuna in her case. In **Rajendra Prasad's case** (*supra*), while dealing with the similar situation, the Hon'ble Apex Court laid down 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 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 trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-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.”*

19. In the aforesaid case, the Hon'ble Supreme Court has categorically laid down that lacuna is to be understood as the inherent weakness or a latent wedge in the matrix of the case. But an oversight in the management of the case cannot be treated as irreparable lacuna and no party in a trial can be fore-closed for correcting the errors. The Court should be magnanimous in permitting such mistakes to be rectified in the administration of justice.

20. In the instant case also, as already mentioned, the examination of the respondent-wife is essential to the just decision of the case. The function of the court is to dispense justice and not to thwart the same by taking the shelter of the technicality in the procedure.

21. Thus, there is no illegality or infirmity in the discretion

exercised by the learned trial Court and the impugned order does not call for any interference by this Court. Consequently, the present petition is without any merit and the same is hereby dismissed.

(Darshan Singh)
Judge

March 24, 2015
“DK”