

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-29676 of 2018

Date of Decision: May 08, 2023**Dilbag Rai****...Petitioner****Versus****State of Haryana and another****...Respondents****CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA****Present: -** Mr. J.S. Mehndiratta, Advocate for the petitioner.

Mr. Parveen Kumar Aggarwal, DAG, Haryana.

Mr. Deepak Singh Saini, Advocate for respondent No.2.

DEEPAK GUPTA, J.

Prayer in this petition filed under Section 482 Cr.P.C is to quash summoning order dated 11.08.2017 passed by learned Additional Chief Judicial Magistrate, Kurukshetra (Annexure P.4), summoning the petitioner to face trial under Section 420, 467, 468, 471, 506 and 120-B IPC in complaint bearing COMI No.448/2014; and all the subsequent proceedings arising therefrom, including the order dated 01.06.2018 (Annexure P.7), whereby petitioner was declared proclaimed person.

2. It is contended by learned counsel that as per the allegations contained in the complaint, Satish Kumar, the brother of respondent No.2 – complainant had business of property dealing with Rajesh Goyal. Both of them purchased properties and were engaged in developing colonies. It was alleged by the complainant (now respondent No.2) that a land was purchased by Satish Kumar and 11 others in Village Ratgal, District Kurukshetra. The said land was to be further sold. As per allegations, Rajesh Goyal called the complainant on the pretext of executing a sale deed and got sale deed executed in the name of his wife Smt. Anita Rani.

However, said sale deed was not got registered. It was alleged that subsequently Rajesh Kumar got sale deed of the said shop registered in the name of Dr. Baldev Raj by calling respondent No.2 to Tehsil Office. It was also submitted that later on, documents were used by Rajesh Goyal for filing a civil suit against him. Learned counsel contends that only allegation against the petitioner is that at the instance of accused No.1 and 2 i.e., Sandeep Kumar and Rajesh Kumar Goyal, petitioner had become witness to the agreement dated 28.02.2014.

3. Learned counsel submits that petitioner appeared as a witness during the preliminary evidence recorded in the complaint instituted by respondent No.2. He was not informed by the complainant that he (petitioner) had been arrayed as an accused in the complaint. He had categorically stated in the preliminary evidence that his signatures were obtained on the agreement to sell by deceiving him and by informing that it was a mere formality. Learned counsel also submits that petitioner also submitted an affidavit in civil suit pending between the parties and in that affidavit dated 27.11.2015, he stated that no transaction had taken place in his presence. Learned counsel contends that learned Additional Chief Judicial Magistrate vide order dated 11.08.2017 summoned the petitioner and others, by ignoring the fact that petitioner had earlier appeared as a witness during preliminary evidence. It is pointed out that name of the petitioner is wrongly mentioned in the complaint as Dilbag Ram instead of Dilbag Rai. It was done deliberately with a view to deceive him and fraudulently obtain his testimony as a witness. It is further submitted that no summons/ warrants were ever executed upon him. He was declared proclaimed person on 01.06.2018.

After coming to know that he had been arrayed as an accused in the same complaint, in which he had appeared as a witness, he applied for

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anticipatory bail, which was dismissed on the ground that he had been declared a proclaimed person. Petitioner is filing separate petition to seek anticipatory bail before this Court.

4. Learned counsel contends that as per mandate of Section 132 of the Indian Evidence Act as also that of Article 20 of the Constitution of India, petitioner cannot be summoned to face trial along with the other accused, once he had been asked to appear as a witness. Besides, entire matter is of civil nature. Learned counsel has referred to ***R. Dinesh Kumar alias Deena Vs. State represented by Inspector of Police and others, (2015) 7 Supreme Court Cases 497.***

5. In reply filed on behalf of respondent No.1, it is submitted that in the private complaint filed by respondent No.2, the name of the petitioner has been wrongly mentioned as Dilbag Ram in place of Dilbag Rai but despite summons, he had not appeared in the Court of learned Illaqa Magistrate, due to which proclamation was issued and he was declared as proclaimed person.

6. In separate reply filed by respondent No.2 – complainant, it is submitted that after declaring the petitioner as proclaimed person, he was granted the benefit of anticipatory bail vide order dated 29.04.2019 in CRM-M-29586 of 2018 and so the petition has become infructuous. It is not disputed by him that during preliminary evidence, petitioner had appeared as a witness as CW6. However, it is submitted that after making statement on 03.11.2015, petitioner got prepared an affidavit dated 16.11.2015 in favour of Sandeep Kumar, who fraudulently executed agreement to sell dated 28.02.2014 and that affidavit was contrary to the statement made by the petitioner on 03.11.2015 before the Magistrate and so present petition is not sustainable and liable to be dismissed.

8. It is not in dispute that in the criminal complaint filed by respondent No.2, petitioner was called as witness during the preliminary evidence and he appeared as CW6. It is also conceded that petitioner has been arrayed as one of the accused in the same complaint, though by mentioning his name as Dilbag Ram instead of Dilbag Rai. So, the question is as to whether the petitioner could be summoned to face trial as an accused, in the case in which he had earlier appeared as a witness, on the basis of testimony made by him.

9. Section 132 of the Indian Evidence Act reads as under: -

“S. 132. Witness not excused from answering on ground that answer will criminate. - A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may lend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind;

Proviso. - Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.”

10. In ***R. Dinesh Kumar alias Deena’s case (supra)***, Hon’ble Supreme Court discussed the scope of Section 132 of the Evidence Act and that of Article 20(3) of the Constitution of India. Hon’ble Supreme Court referred to ***Laxmipat Choraria Vs. State of Maharashtra, AIR 1968 SC 938***, and held as under: -

*“39. The scope of Section 132 of the Evidence Act fell for consideration of this Court in **Laxmipat Choraria & Others v. State of Maharashtra, (1968) 2 SCR 624**. Three appellants (brothers) were convicted for the offence under Section 120-B of the Indian Penal Code and Section 167(81) of the Sea Customs*

Act, 1878. Briefly stated the facts are that the three appellants before this Court were part of an international gold smuggling organization. The kingpin of the organization was a Chinese citizen living in Hong Kong. One Ethyl Wong, an Air Hostess of Air India was also a member of the abovementioned organization and carried gold on "several occasions". She was examined as a prosecution witness in the case. "She gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transaction. Her testimony was clearly that of an accomplice."

40. Before this Court, the main argument was that "Ethyl Wong could not be examined as a witness because (a) no oath could be administered to her as she was an accused person since Section 5 of the Indian Oaths Act bars such a course and (b) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly with the appellants. The breach of the last obligation vitiated the trial and the action was discriminatory. In the alternative, even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here or in the High Court".

41. Dealing with the question whether Ethyl Wong should have been prosecuted along with other accused, this Court opined:

"The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness...."

42. Dealing with the immunity conferred under Section 132, this Court held thus:

"Now there can be no doubt that Ethyl Wong was a competent witness. Under Section 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under Section 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal

*proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Article 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. **A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself.** In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross- examination and may be asked questions incriminating him."* [emphasis supplied]

43. In substance, this Court held that once the prosecution chose to examine Ethyl Wong as a witness, she was bound to answer every question put to her. In the process, if the answers given by Ethyl Wong are self- incriminatory apart from being evidence of the guilt of the others, she could not be prosecuted on the basis of

*her deposition in view of the proviso to Section 132 of the Evidence Act. This Court's conclusions that "in India the privilege of refusing to answer has been removed" and that "the safeguard to this compulsion" in our opinion, are clearly in tune with the dissenting opinion expressed by Ayyar, J. in Gopal Doss's case. This Court opined that the proviso to Section 132 of the Evidence Act is a necessary corollary to the principle enshrined under Article 20(3) of the Constitution of India which confers a fundamental right that **"no person accused of any offence shall be compelled to be a witness against himself."** Though such a fundamental right is available only to a person who is an accused of an offence, the proviso to Section 132 of the Evidence Act creates a statutory immunity in favour of a witness who in the process of giving evidence in any suit or in any civil or criminal proceeding makes a statement which criminales himself. Without such an immunity, a witness who is giving evidence before a Court to enable the Court to reach a just conclusion (and thus assisting the process of law) would be in a worse position than an accused in a criminal case."*

11. Hon'ble Supreme Court in ***R. Dineshkumar alias Deena's case (supra)***, further referred to the observations made in ***Nandini Satpathy Vs. P.L. Dani, (1978) 2 SCC 424*** and held as under: -

"45. The rule against self-incrimination found expression in Indian law much before advent of the Constitution of India [under Article 20(3)]. Facets of such rule are seen in

(i) Section 161 Cr.P.C., 1898. Sub-section (1) authorised a police officer investigating a case to examine any person "supposed to be acquainted with the facts and circumstances of the case". Sub-section (2) exempted such person from answering the questions "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Section 161 of the Cr.P.C., 1973 corresponds to Section 161 of the Cr.P.C., 1898. Sub-sections (2) of both the old and new Code are substantially identical.

(ii) Another facet of the rule against self-incrimination finds expression in Sections 25 and 26 of the Evidence Act

which make a confession made to a police officer or a confession made while in the custody of the police inadmissible in evidence.

(iii) The proviso to Section 132 of the Evidence Act, in our opinion, embodies another facet of the rule against self-incrimination.

46. Section 132 existed on the statute book from 1872 i.e., for 78 years prior to the advent of the guarantee under Article 20 of the Constitution of India. As pointed out by Justice Muttusami Ayyar in Gopal Doss (supra), the policy under Section 132 appears to be to secure the evidence from whatever sources it is available for doing justice in a case brought before the Court. In the process of securing such evidence, if a witness who is under obligation to state the truth because of the Oath taken by him makes any statement which will criminate or tend to expose such a witness to a "penalty or forfeiture of any kind etc.", the proviso grants immunity to such a witness by declaring that "no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding". We are in complete agreement with the view of Justice Ayyar on the interpretation of Section 132 of the Evidence Act.

47. The proviso to Section 132 of the Evidence Act is a facet of the rule against self-incrimination and the same is statutory immunity against self-incrimination which deserves the most liberal construction. Therefore, no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court.

48. In the light of our above discussion, we are of the opinion the High Court rightly refused to summon PW64 as an accused to be tried along with the appellant and others."

12. From the legal position as above, it is clear that proviso to Section 132 of the Evidence Act is a facet of the rule against self-incrimination. The same is statutory immunity against self-incrimination deserving most liberal construction and, therefore, no prosecution can be

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launched against make of a statement falling within the sweep of Section
132 of the Evidence Act on the basis of answers given by such a person
while deposing as a witness before the Court.

13. Having regard to the aforesaid legal position, it is held that
in the present case, once respondent No.2 – complainant preferred to
examine the petitioner as a witness (CW6) during the preliminary
evidence, said petitioner could not have been arrayed/ summoned as an
accused based on the same testimony with the help of other evidence.
Summoning the petitioner by way of the impugned order amounts to
breach of rule against self-incrimination granting statutory immunity as
per proviso to Section 132 of the Evidence Act to be read with Article
20(3) of the Constitution of India.

14. Consequent to the entire discussion as above, summoning
order dated 11.08.2017 passed by learned Additional Chief Judicial
Magistrate, Kurukshetra (Annexure P.4) and all the subsequent
proceedings arising therefrom, including the order dated 01.06.2018
(Annexure P.7) are hereby quashed.

May 08, 2023
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(DEEPAK GUPTA)
JUDGE

Whether reasoned/speaking:	Yes/No
Whether reportable:	Yes/No