

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Dinesh

CRM-M-60270-2022 (O/M)
Date of decision : 22.05.2023
..... Petitioner

Versus

Rajesh and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present:- Mr. Prashant Singh Chauhan, Advocate
for the petitioner.

Mr. Amrik Narwal, DAG Haryana
for respondent No. 2-State.

HARSH BUNGER, J.

Petitioner (Dinesh) has filed this petition under Section 482 Cr.P.C. seeking quashing of the order dated 01.11.2022 (Annexure P-3) passed by the learned Additional Sessions Judge, Rewari, whereby the application under Section 386 Cr.P.C., filed by the petitioner, for remanding the case back to the trial Court, has been dismissed.

2. Briefly, the petitioner was an accused in complaint filed under Sections 138/142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the N.I. Act'). After the trial, the petitioner was convicted for the offence punishable under Section 138 of the N.I. Act, vide judgment of conviction dated 20.02.2017 passed by Judicial Magistrate Ist Class, Rewari and vide separate order of sentence dated 22.02.2017, the petitioner was sentenced to undergo simple imprisonment for a period of six months for commission of offence punishable under

Section 138 of the N.I. Act and by imposing a fine of Rs. 5,000/-.

3. Being aggrieved against the aforesaid judgment of conviction and order of sentence, the petitioner herein filed an appeal before the Court of learned Additional Sessions Judge, Rewari. During the pendency of the said appeal, the petitioner herein filed an application under Section 386 Cr.P.C. seeking remand of the case back to the trial Court by contending that during the course of the trial, on 17.01.2017 when the matter was listed before the trial Court at the stage of examination of defendant witnesses, on the said day, the complainant moved an application under Section 311 Cr.P.C. for examining additional witnesses and the said application was allowed on 18.01.2017 and two witnesses namely Sanjay, Clerk in the Sales and Taxation Office, Rewari was examined as PW6 who produced documents VAT D-3 and another witness PW7 Devdutt, Clerk of Sales Tax Office, Rewari was also examined who tendered the documents Ex.PW7/A to Ex.PW7/E.

It was the contention of the petitioner that after the examination of additional witnesses, the statement of the accused (petitioner herein) under Section 313 Cr.P.C. was not recorded and complete incriminating circumstances were not put to him and he was convicted.

4. The aforesaid application under Section 386 Cr.P.C. was contested by respondent No. 1 herein (Rajesh) wherein it was submitted that since PW6 and PW7 were official witnesses and documents were official, therefore, there was no mixing in their testimonies and there was no occasion for tampering with the documents. It was stated that there is no requirement that evidence of each witness must be put to accused. It was further stated that mere omission to put a question to accused would not ipso facto amount to rejection of the evidence,

unless the accused shows that he was prejudiced and the onus to show such prejudice lays on the accused. It was also submitted that the basic ingredients of the offences were put to accused in his statement under Section 313 Cr.P.C. Accordingly, it was prayed that the application be dismissed.

5. The Court of learned Additional Sessions Judge, Rewari, vide impugned order dated 01.11.2022 (Annexure P-3), dismissed the application under Section 386 Cr.P.C., filed by the petitioner herein. Accordingly, the instant petition has been filed.

6. I have heard learned counsel for the parties and have perused the paper book as well as the impugned order.

7. Before considering the contentions of the petitioner, it would be apposite to refer to a few judgments rendered by the Hon'ble Apex Court.

8. In ***Wasim Khan v. The State of Uttar Pradesh***, AIR 1956 Supreme Court 400; a three-Judge Bench of Hon'ble Supreme Court held that every error or omission in compliance of the provisions of Section 342 of the old Criminal Procedure Code does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

In ***Paramjeet Singh @ Pamma v. State of Uttarakhand***, 2010 (4) RCR (Criminal) 548, Hon'ble Supreme after considering large number of cases on the issue, held as under :-

“31. Thus, it is evident from the above that the provisions of Section 313 Cr.P.C. make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstances, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the

court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the Court.”

9. As regards the power of court to order retrial, in ***Mohd. Hussain @ Julfikar Ali v. State***, 2013 (1) RCR (Criminal) 927, Hon'ble Supreme Court held that the appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code, however such power should not be exercised in a routine manner. It was further held that a de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice.

10. Coming to the case in hand, the statement of petitioner recorded under Section 313 Cr.P.C. (Annexure P-4) reads as under :-

“313	RAJESH VERSUS DINESH
Question No.	<i>It has come in evidence against you that you issued two cheques bearing no. 007704 of Rs. 6,00,000/- and No. 007705 of Rs. 6,62,999/- in favour of complainant in discharge of your liability towards the complainant, which are Ex.P1 and P2 on record. What you have to say about it ?</i>
Answer	<i>It is incorrect.</i>
Question No.	<i>That when Cheques Ex.P1 and P2 were presented for encashment, same were dishonored with remarks “insufficient funds and drawer's signature differ” ? What you have to</i>

say about it ?

Answer

It is incorrect.

Question No.

That thereafter, complainant sent a legal notice dated 02.06.2012 through his counsel, however despite receipt of notice, no reply was given. What you have to say about it ?

Answer

It is incorrect.

Question No.

That, thus you have committed offence punishable under Section 138 of NI Act ? What you have to say about it ?

Answer

It is incorrect.

Question No.

Why the witnesses have deposed against you ?

Answer

Witnesses are falsely.

Question No.

What else you have to say in your defence ?

Answer

I have not issued any cheque. No signature my on the disputed cheques.

Question No.

Do you produce any evidence in defence evidence ?

Answer

Yes.

*(Meenakshi Yadav)
CJ (JD)-cum-JMIC
Rewari 12.10.2016*

RO & AC

Sd/-

Dinesh”

11. Keeping in view the aforestated legal position, when the statement of the petitioner recorded under Section 313 Cr.P.C. is read as a whole, it clearly shows that the petitioner knew what the accusation against him was and he offered an explanation for the same. Petitioner was very well aware of the case

against him and also the offence for which he was being tried.

12. Learned counsel for the petitioner was specifically asked as to what prejudice has been caused to him and as to what material circumstance has not been put to him which shall vitiate the trial, however no answer is forthcoming. There is no justification for supposing that there had been any prejudice caused to the petitioner on account of improper or insufficient recorded of his statement under Section 313 Cr.P.C.

13. A perusal of the impugned order passed by the learned Additional Sessions Judge, Rewari would reveal that application under Section 386 Cr.P.C. filed by the petitioner herein, has been dismissed by holding as under :-

“3. After giving thoughtful consideration to the rival contentions of both sides and perusing record of case, this Court is of the considered opinion that present application is liable to be dismissed for the reasons given hereinafter. By way of moving the present application, the appellant has alleged that after allowing application under Section 311 Cr.P.C. and after examining PW6 Sanjay and PW7 Devdutt and tendering of relevant documents, the case was fixed for defence evidence but the statement of the appellant has not been recorded under Section 313 Cr.P.C. again.

4. Perusal of the trial court record reveal that the statements of both the said witnesses have been recorded in the presence of accused/his counsel and both the said witnesses have been duly cross-examined by them. The omission on the part of the learned trial court of putting specific questions in statement under Section 313 Cr.P.C. as regards both the said witnesses is no ground to conclude that the appellant was not properly examined under Section 313 Cr.P.C. No prejudice has been caused to appellant and above-said error or omission does not vitiate the trial. The appellant is being fully aware regarding the offence for which, he was being prosecuted. My views find support from case titled as

Sukhdev Singh @ Sukha Vs. State of Punjab, 2016 (2) RCR (Criminal) 1 (P&H), wherein, it has been held by Hon'ble Punjab & Haryana High Court as under :-

*“The accused-appellant was fully aware of the charges being faced by him. The entire evidence of the prosecution has been recorded in his presence. He was also aware of the nature of the evidence brought on record by the prosecution against him. Though, in his statement under Section 313 Cr.P.C., the question regarding the conscious possession has not been specifically put to him, but this omission of putting specific question to the accused-appellant in his statement under Section 313 Cr.P.C. with respect to the conscious possession is no ground to conclude that he was not properly examined under Section 313 Cr.P.C. and that has resulted into any prejudice to the appellant. To support this view reference can be made to case **Jarnail Singh son of Jwara Ram Vs. State of Haryana 2013 (2) RCR (Criminal) 580 (DB)**. The Hon'ble Apex Court also in case **Gian Chand and others V. State of Haryana 2013 (3) RCR (Criminal) 916** has laid down that every error or omission in the statement of the accused does not necessarily vitiate the trial unless the accused is able to show that the same has resulted in prejudice to him. In the instant case as already mentioned that the accused-appellant was fully aware from the very beginning that he is being prosecuted for having found in conscious possession of the contraband. Learned counsel for the appellant has not been able to show me as to what prejudice has been caused to the appellant due to the omission of the question with respect to the conscious possession in the statement of the accused under Section 313 Cr.P.C. In view of the these latest judgments of the Division Bench of this Court and that of the Hon'ble Apex Court cases relied upon by learned counsel for the appellant on this aspect of the case are of no help to her.”*

5. Furthermore, the retrial order may be passed in cases in exceptional cases and where the omission or irregularity has occasioned in failure of justice. Further, the retrial order can be passed in the cases, where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidence or the court refused to hear certain witnesses, who were supposed to be heard. In this regard, my views find support from case law titled as **Ajay Kumar Ghosal etc. Vs. State of Bihar and Anr., 2017 (1) RCR (Criminal) 1061 (SC)**,

wherein it has been held as under :-

“Though the word “retrial” is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellant court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidence or the Court refused to hear certain witnesses, who were supposed to be heard.”

6. *Keeping in view the above discussed facts and circumstances coupled with above-cited legal proposition, this Court is of the considered view that the present application is liable to be dismissed.”*

14. I have gone through the order passed by the learned Additional Sessions Judge, Rewari on an application under Section 386 Cr.P.C. and I find that the same is in accordance with law and no interference is called for in the said order, moreso when no prejudice has been shown to be caused to petitioner herein.

15. In view of the above, finding no merit in the instant petition, same deserves to be dismissed. Hence, the instant petition is dismissed.

16. All pending applications stand disposed of.

(HARSH BUNGER)
JUDGE

22.05.2023.
sjks

Whether speaking order : Yes / No
Whether referred to the Reporter : Yes / No