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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****CRM-M-57233-2023 (O&M)**

Date of decision: 20.11.2023

Amritpal Singh

...Petitioner

Versus

Kuldip Singh

..Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Aakash Singla, Advocate for the petitioner.

HARPREET SINGH BRAR, J. (ORAL)

1. The present petition has been filed under Section 482 of Cr.P.C for quashing the impugned order dated 06.06.2023 (Annexure P-4) passed by ld. CJM and impugned order dated 27.10.2023 (Annexure P-6) passed by ld. Sessions Judge, Fazilka, whereby the application filed by the petitioner under Section 311 of Cr.P.C for recalling of the respondent-complainant CW-1 for further cross-examination was dismissed.

2. The brief facts of the case are that the respondent filed a complaint on 30.03.2019 (Annexure P-1) under Section 138 of Negotiable Instruments Act, 1881 (hereinafter NI Act) against the petitioner on account of dishonor of cheque No. 108358 dated 14.01.2019 amounting to Rs.6,50,000/-. The case set up by the respondent in the complaint would show that the petitioner had borrowed the amount from him on 17.05.2016 in the presence of Sudhir Kumar and Ramji Lal. The petitioner had issued a cheque in

discharge of his aforesaid liability. The statutory legal notice was issued on 15.02.2019 and thereafter, the complaint under Section 138 of the NI Act was filed and the petitioner was summoned by the learned trial Court.

3. The learned counsel for the petitioner *inter alia* contends that in reply filed by the petitioner to the notice dated 15.02.2019, the petitioner has informed the respondent that he has no relationship with him as he does not know him personally and there was no occasion for him to take any loan from the complainant. It was further pleaded that the respondent has misused the cheque which was never issued to him by the petitioner. It is further contended by the learned counsel for the petitioner that while the case was pending for defence evidence, the petitioner met one person namely Mahesh Saharan, resident of Sri Ganganagar and saw that he was standing with the respondent. The petitioner overheard their conversation found out that the present cheque was misused by the respondent and the same was in fact given to him by the said Mahesh Saharan.

4. Learned counsel for the petitioner submits that in light of the said revelation and the subsequent event, the petitioner filed application under Section 311 Cr.P.C for recalling the respondent for further cross-examination. The learned trial Court has dismissed the application of the petitioner against the settled law and even the lower appellate Court had wrongly dismissed the revision petition filed by the petitioner vide order dated 05.07.2023 (Annexure P-5).

5. The learned counsel for the petitioner contends that the petitioner was denied effective opportunity to cross-examine the respondent-complainant and both the Courts below have failed to appreciate that the

recalling of the respondent for further cross-examination is very crucial and same goes to the root of the matter. The reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in *Varsha Garg Vs. State of M.P. 2022 (4) R.C.R. (Criminl) 328*. Further reliance is placed on the judgment of Supreme Court in *Rajendra Parsad Vs. Narcotic Cell Delhi AIR 1999 SC 2292* and *Rajaram Prasad Yadav Vs. State of Bihar 2013 (3) RCR (Criminal) 726* and *U.T. of Dadar and Haveli Vs. Fatehsinh Mohansinh Chauhan 2006 (4) RCR (Crl) 113*. The counsel for the petitioner insists that the re-examination of the respondent is necessary to prove the stand of the petitioner that the present complaint is motivated and filed at the behest of Mahesh Saharan.

6. Having heard the learned counsel for the parties and after perusing the record, this Court finds no ground to interfere with the impugned orders dated 06.06.2003 (Annexure P-4) passed by learned CJM, Fazilka and order dated 27.10.2023 (Annexure P-6) passed by learned Sessions Judge, Fazilka.

7. The power under Section 311 Cr.P.C. can be exercised for summoning of witnesses at any stage of any inquiry, trial or other proceeding under this Code and the Court may 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. The Court can summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just adjudication of the case. The Court is required to form an opinion whether such evidence is necessary for a just and proper decision in that case. A perusal of the record indicates that

the petitioner has taken a specific plea in his statement recorded under Section 313 of Cr.P.C that the cheque in question was already in custody of Ravi Setia due to some previous dealings but no amount whatsoever was outstanding. The petitioner further stated in his statement under Section 313 of Cr.P.C that he has moved an application to the police officials against respondent-complainant and his associates. It was further stated that the said Ravi Setia is also in possession of blank papers and cheques signed by his wife and son. The petitioner has also examined constable Sushil Kumar as DW-1 and proved attested copy of his application as Ex.DW-1/A and copy of enquiry report Ex.DW-1/B and the statement of the petitioner as Ex.DW-1/C.

8. Both the Courts below have concluded that the petitioner has filed the application under Section 311 of Cr.P.C. just to delay the trial at its fag end on imaginary grounds. The petitioner is now introducing a new defence against his own consistent stand only to delay the trial. The present complaint under Section 138 of NI Act was instituted on 03.04.2019. The petitioner intentionally avoided his presence before the trial Court and even proclamation under Section 82 of Cr.P.C was issued against him. The respondent has concluded his evidence on 01.08.2022 and the statement of the petitioner under Section 313 of Cr.P.C was recorded way back on 25.08.2022.

9. A two judge Bench of the Hon'ble Supreme Court in ***VN Patil Vs. K. Niranjan in Criminal Appeal No. 267 of 2021*** decided on 04.03.2021 examined the scope of the power under Section 311 of Cr.P.C and following was observed:-

“Object underlying Section 311 Cr.P.C is that there may not be failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is ‘at any stage of enquiry or trial or other proceeding under this Code’. It is however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said wider the power, greater is the necessity of caution while exercise of judicious discretion.”

10. The Hon’ble Supreme Court in ***Mohanlal Shamji Soni vs. Union of India and another, AIR 1991 SC 1346*** has held that where the object of the accused in recalling witnesses already examined in the case is to prolong the trial of the case, the Court would not allow such application. Moreover, the power under Section 311 of Cr.P.C is dictated by exigency of the situation based on the principle of fair play and goodwill and existence of the evidence being essential for the just adjudication of the case is the only guiding factor and that only the ends of justice requires the examination of any person which would depend to the facts and circumstances of each case. It was further held that it is obligatory on the part of the court to summon the witness in case his evidence appears to be essential for just decision of the case. Such power may be exercised at any stage. However, the power is circumscribed by the principle underlying the section, that is, the evidence to be obtained must be essential for just decision of the case.

11. The Division Bench of this Court in ***Sukhdev Singh vs. State of Punjab, 1982 Cr. LJ 2201*** has held that:-

“The discretion is required to be exercised by the Court keeping in view the just decision of the case unmindful of the fact whether any party before it gains or losses from the exercise of such discretion under this section. There is no doubt that object of the section is not to enable any one or the other party to fill up the gaps of its case. The section is not to be used to enable it to repair the lacuna. The sole criterion in such a case should be whether the exercise of power under section is necessary in the interest of justice. While exercising this discretion the court has to keep in its mind the well-known principle of law that the order should not operate as a rebuttal of the case set up by the defence after the prosecution case is closed. The use of this section cannot be limited only to something arising eximporviso which no human agency could see. The mere fact that evidence is permitted to be taken after the entire prosecution case is over is in itself in excess of the powers of the Court. No hard and fast rules can be prescribed as to when and at what stage this discretion should be exercised. The anxiety for justice is paramount an should be kept in view. The Court should be unmindful of the fact of the use of the discretion in favour or against any party. The principle that such evidence should not demolish the case set up by the accused in his defence, if he has done so should be present in the mind of the judge at the time when he takes a decision. The powers of the Court under Section 311 which are very wide cannot be limited. The discretion can be exercised by the Court at any stage of the case, but on justifiable grounds”. (emphasis added).”

12. The proceedings under Negotiable Instruments Act, 1881 are quasi-criminal in nature. The provision of Section 138 raises two presumptions-one contained in Section 118 (a) and the other in Section 139.

Under section 118 (a) the following presumption is provided:-

Section 118: Presumptions as to negotiable instruments. —*Until the contrary is proved, the following presumptions shall be made:-*

(a) of consideration that every negotiable instrument was made or drawn for consideration and that every such instrument would be accepted endorsed negotiated or transferred, was accepted, endorsed and negotiated or transferred for consideration.

13. Similarly, under Section 139 of the NI Act, a presumption in favour of the holder of the cheque is raised that it shall be presumed, unless the contrary is proved, that the holder of the cheque received the cheque for discharge in whole or in part of debt or other liability. However, in *N.S.*

Narayana Menon Vs. State of Kerala 2006 (6) SCC 39 while dealing with the scope of presumption in a case under Section 138 of the NI Act, the Hon'ble Supreme Court has held that the presumption under Section 118 (a) and 139 of the NI Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt in terms of Section 4 of the Indian Evidence Act. For rebutting such presumption what is needed is to raise a probable defence indicating preponderance of probability. Moreover, the judgments relied upon by the learned counsel for the petitioner are not applicable in the facts and circumstances of the present case

14. The petitioner has failed to demonstrate how Mahesh Saharan is connected with the cheque in question. Further, the case in hand is that of an offence under Section 138 of NI Act, where the petitioner has already led evidence in his defence. The standard of proof is not beyond reasonable doubt hence the petitioner cannot plead that he is being deprived of his right to defend his case. The respondent has already been cross-examined at a considerable length and the petitioner has not been able to show how the further cross-examination of the respondent is essential for just adjudication of the case.

15. Keeping in view the above discussion, this Court finds both the learned Courts below have correctly adverted to the factual matrix in the light of the provision of Section 311 of Cr.P.C. and came to the right conclusion that the application filed by the petitioner under Section 311 of Cr.P.C. at the fag end of the trial is for the sole reason of delaying the trial.

The necessary ingredients for invoking the power under Section 311 of

Cr.P.C. are completely missing. Hence, this Court finds no merit in the present petition and, as such, the same is dismissed.

20.11.2023

Yogesh

(HARPREET SINGH BRAR)
JUDGE

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