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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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***Reserved on: 12.12.2022
Pronounced on: 05.01.2023***

+ **W.P.(CRL) 2304/2022 & CRL.M.A. 20039/2022**

SH. GURVINDER PAL SINGH Petitioner

Through: Petitioner in person

versus

SMT. RAVINDER KAUR Respondent

Through: Mr. Vikramaditya Bhaskar,
Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present Writ Petition under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed on behalf of the petitioner challenging order dated 21.04.2022 passed by learned Judge, Family Court, West, Tis Hazari Court, Delhi ("Trial Court") *vide* which his application under Section 311 Cr.P.C. for being granted opportunity to cross-examine the respondent, who is petitioner before the learned Trial Court has been dismissed.

2. The petitioner states that a decree for mutual consent divorce was obtained by him and respondent on 11.12.2001 in case HMA No.

910/2001 from the concerned Court at Delhi. It is stated that the divorce had been obtained after all matrimonial disputes pending between the parties had been amicably settled. It is now stated that the respondent due to her greed had filed a maintenance petition under Section 125 Cr.P.C. in the year 2003. It is stated that the petitioner has been cross-examined on four occasions by the respondent herein in the year 2013, 2014, 2016 and 2022. It is also stated that *vide* order dated 26.11.2019 passed by learned Principal Judge, Family Court, the evidence of the petitioner had been closed. However, upon an application being filed under Section 311 Cr.P.C. by the wife i.e. respondent herein, her application for cross-examination was allowed *vide* following order dated 01.02.2020:

“Keeping in view the submissions made and in order to give an FAIR OPPORTUNITY TO BOTH THE PARTIES, application is allowed. One last opportunity is given to both the parties to appear and conclude evidence. Now to come up for cross examination of RW1 on 04.02.2020.”

3. It is, however, stated that as per order dated 01.02.2020, an application filed under Section 311 Cr.P.C. for recalling the respondent for her re-examination and cross-examination filed by the petitioner had been dismissed. It is stated that the present order is in clear contravention of order dated 01.02.2020 as both the parties were given opportunity to cross-examine each other, however, the wife was given more than four opportunities to cross-examine the petitioner/husband. The petitioner states that after submission of fresh income affidavit on 11.04.2017 by his wife/respondent, the petitioner herein has not been allowed to cross-examine her. It is stated that he was granted

opportunity to cross-examine the respondent only on 20.04.2011, prior to filing of an affidavit in 2017. It is stated that it is essential to cross-examine the respondent/wife since there are numerous transactions and entries in her bank account statements which reveal that she has spent, withdrawn and deposited huge amount of money in her bank account which reflects that she is capable to maintain herself.

4. The relevant portion of the order dated 21.04.2022 impugned before this Court is reproduced as under:-

“Moreover, the applicant/respondent in his application has nowhere mentioned as to what new material facts have surfaced in the income affidavit filed by petitioner in the year 2017. He has further failed to disclose as to what are the material facts which need to be examined for just decision of the case. The application filed by respondent is quite vague and does not disclose the material particulars which warrant recall of petitioner for her re-examination and cross-examination. The income affidavit has been filed by petitioner in terms of directions of the court dated 28.08.2015 and 27.03.2017. Respondent was also directed to file the income affidavit in terms of judgment in “Kusum Sharma vs. Mahinder Sharma”, which he has not filed till date despite more than sufficient time and opportunity given to him. Respondent cannot be permitted to recall the petitioner for her further cross-examination after closure of her evidence only on account of the fact that she has filed the income affidavit in the year 2017.

For the aforesaid reasons, no ground for recall of petitioner for further examination and cross-examination is made out. Accordingly, the application filed by respondent u/s 311 Cr.PC is hereby dismissed.

In view of recent judgment passed by Hon'ble Apex Court in the case of “Rajesh vs. Neha”, both the parties are directed to file fresh income affidavit along with supporting

documents, if any on or before the next date of hearing after exchanging copies with each other.”

5. Arguments have been heard and case file has been perused.
6. Before proceeding with the case in hand, it would be appropriate to first reproduce section 311 of Cr.P.C. which 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 reexamine 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...”

7. The scope of Section 311 Cr.P.C. has been examined and principles have been laid down in catena of judgments of the Hon’ble Supreme Court and various High Courts. In the case of ***State (NCT of Delhi) v. Shiv Kumar Yadav (2016) 2 SCC 402***, the Hon’ble Supreme Court observed as under:

“...11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The legislature

in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer only some of the decisions for the principles laid down which are relevant for this case...

8. Further, the Hon'ble Supreme Court in ***Rajaram Prasad Yadav v. State of Bihar & Anr. (2013) 14 SCC 461*** laid down guidelines regarding exercise of powers under Section 311 Cr.P.C. The relevant portion reads as under:

"...15.1 In the decision in jamatraj Kewalji Gowani v. State of Maharashtra, this Court held in para 14: (AIR pp. 182-83)

14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court at or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction..."

(emphasis supplied)

14.3 In the decision in Raj Deo Sharma (2) v. State of Bihar, the proposition has been reiterated as under in para 9: (SCC p. 613)

“9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

(emphasis supplied)

15.6. In P. Sanjeeva Rao v. State of A.P. the scope of Section 311 CrPC has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paras 20 and 23, which are as under: (SCC pp. 63-64)

“20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs. The following passage is in this regard apposite: (SCC p. 432, para 6)

“6....In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory

apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

(emphasis supplied)

9. Though, it is not disputed that the present matter pertains to the year 2003 and is about 19 years old, at the same time, it cannot be overlooked that a fresh income affidavit has been filed in the year 2017 by the respondent/wife, and to decide grant of maintenance, it will be essential for the petitioner/husband to cross-examine her only qua the said deposits and cash withdrawal entries as he refers to in the present petition. Therefore, for just decision of the case, the order dated 11.04.2022 is set aside, only to the extent whereby the application for cross-examination of the present petitioner under Section 311 CrPC was dismissed, on the following conditions:-

- a) That the respondent will be cross-examined in one single opportunity and on same day preferably.
- b) No adjournment shall be sought by the counsel for the petitioner for cross-examination of respondent.

c) Cost of Rs. 5,000/- is imposed on the petitioner/husband which will be deposited with Delhi High Court Advocates' Welfare Fund within a period of two weeks from the date of receipt of this judgment.

10. The petitioner herein will be allowed to cross-examine the witness only regarding the cash deposits and withdrawal entries since that is his limited plea before this Court.

11. The trial court has noted that the present petitioner has not filed his fresh income affidavit in view of the Hon'ble Apex Court's judgment and directions in case of *Rajnesh v. Neha & Anr. (2021) 2SCC 324*.

12. Therefore, the cross-examination will be allowed subject to the petitioner herein filing the said affidavit and providing the supporting documents, if any, with advance copy to the other side, within 15 days from passing of this order. In case he fails to file the same, the opportunity granted *vide* this order will not be available to him.

13. The rest of the order regarding application filed under Section 125(4) and (5) CrPC filed by the petitioner herein does not need any interference and no order qua the same is being passed.

14. In view of the above, the present petition alongwith pending application stands disposed of.

15. A copy of this judgment be forwarded to learned Trial Court by the Registry for information and compliance.

SWARANA KANTA SHARMA, J

JANUARY 05, 2023/ns