Before Rameshwar Singh Malik, J

RANJIT SINGH — *Petitioner*

versus

BOOTA SINGH — *Respondent*

CRM-M No.2860 of 2015

August 04, 2015

Code of Criminal Procedure, 1973 — Ss. 482 and 311 — High Court has inherent jurisdiction u/s 482 Cr.P.C. to interfere with patent illegal order vide which application u/s 311 Cr.P.C. for recalling the witness has been dismissed by the Trial Court on the ground of delay—High Court allowed the Application u/s 311 Cr.P.C. for re-calling the Branch Manager as a witness to clarify the debit entry by the Bank, and further to facilitate the Trial Court to arrive at the judicious conclusion.

Held that having heard the learned counsel for the Petitioner at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the contentions raised, this court is of the considered opinion that in view of the peculiar fact situation of the case, referred to hereinable, instant one has been found to be a fit case warranting interference at the hand of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C.

(Para 5)

Further held that above said material discrepancy in the case could have been removed only by the concerned witness of the above said Bank, clarifying as to how the said bonafide mistake was committed, while making a wrong debit entry. Since the petitioner had already closed his evidence on 14.09.2012 and the abovesaid communication came to be issued much later i.e. on 12.09.2013 (Annexure P-3), no delay can be attributed to the petitioner in this regard. The learned Courts below have proceeded on a factually incorrect approach while alleging delay to the petitioner. In the given fact situation of the case, referred to hereinabove, neither the petitioner, as a matter of fact, has caused any delay in this regard not he was going to gain anything in delaying the mater, he being the complainant of a complaint under Section 138/142 of the Negotiable Instruments Act. In such a situation, it can be safely concluded that since the true import of the communication dated 12.09.2013 (Annexure P-2) could not be

appreciated by the learned Courts below in the correct perspective, the impugned orders have resulted in serious miscarriage of justice and the same cannot be sustained, for this reason as well.

(Para 7)

A.K. Khunger, Advocate *for the petitioner.*

None for the respondent.

RAMESHWAR SINGH MALIK, J.

(1) Petitioner, by way of instant petition under Section 482 of the Code of Criminal Procedure ('Cr.P.C.' for short), seeks quashing of the order dated 02.01.2015 passed by learned Additional Sessions Judge, Fazilka (Annexure P-4), whereby revision filed by the petitioner was dismissed, upholding the impugned order dated 16.10.2013 (Annexure P-3) passed by learned Sub Divisional Judicial Magistrate, Jalalabad (West), thereby dismissing the application of the petitioner moved under Section 311 Cr.P.C., for recalling the witness i.e. Branch Manager, Punjab & Sind Bank, Branch Chak Kherewala.

(2) Notice of motion was issued.

(3) Despite the service having been effected on the respondent, none appeared on his behalf on the last date of hearing i.e. 26.05.2015 and in the interest of justice, case was adjourned for today, granting another opportunity to the respondent.

(4) Learned counsel for the petitioner refers to the communication dated 12.09.2013 (Annexure P-2) issued by the Manager, Punjab & Sind Bank, Branch Chak Kherewala, to contend that since cheque No.671958 dated 17.10.2006 for Rs.5 lacs came to be wrongly debited to ZCC Account No.6 of Smt. Basant Kaur instead of CC Account No.206 of M/s Ranjit Singh & Sons, the serious discrepancy took place but only because of a bonafide mistake on the part of Bank officials. Since this material fact was not in the knowledge of the petitioner, when he appeared as his own witness before the Court in the year 2012, petitioner was left with no other option except to move an application under Section 311 Cr.P.C., for recalling the concerned witness i.e Branch Manager of abovesaid Bank, so as to clarify this crucial aspect of the matter. He further submits that the material clarification which is being sought to be brought to the notice of the Court at the hands of the petitioner, would certainly facilitate the learned trial Court to come to a judicious conclusion. Learned counsel for the petitioner concluded by submitting that such a clarification

would cause no prejudice to either of the parties. However, since the learned Courts below proceeded on a wholly misconceived approach, while passing the respective impugned orders, the same are patently illegal and liable to be set aside.

(5) Having heard the learned counsel for the petitioner at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the contentions raised, this Court is of the considered opinion that in view of the peculiar fact situation of the case, referred to hereinabove, instant one has been found to be a fit case warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C., for the following more than one reasons.

(6) A bare perusal of the communication dated 12.09.2013 (Annexure P-2) issued by the Manager of the abovesaid Bank would show that petitioner was fully entitled and competent to move the application under Section 311 Cr.P.C. It is so said because the petitioner was left with no other option except to move such an application so as to seek clarification on the abovesaid material discrepancy in the case. Learned counsel for the petitioner has been found justified in contending that such a clarification would certainly facilitate the learned trial Court to arrive at a judicious conclusion. Having said that, this Court feels no hesitation to conclude that the learned Courts below failed to appreciate the true factual as well as legal aspect of the matter, while passing their respective impugned orders and the same cannot be sustained.

(7) The abovesaid material discrepancy in the case could have been removed only by the concerned witness of the abovesaid Bank, clarifying as to how the said bonafide mistake was committed, while making a wrong debit entry. Since the petitioner had already closed his evidence on 14.09.2012 and the abovesaid communication came to be issued much later i.e. on 12.09.2013 (Annexure P-3), no delay can be attributed to the petitioner in this regard. The learned Courts below have proceeded on a factually incorrect approach while alleging delay to the petitioner. In the given fact situation of the case, referred to hereinabove, neither the petitioner, as a matter of fact, has caused any delay in this regard nor he was going to gain anything in delaying the matter, he being the complainant of a complaint under Section 138/142 of the Negotiable Instruments Act. In such a situation, it can be safely concluded that since the true import of the communication dated 12.09.2013 (Annexure P-2) could not be appreciated by the learned

Courts below in the correct perspective, the impugned orders have resulted in serious miscarriage of justice and the same cannot be sustained, for this reason as well.

(8) The abovesaid view taken by this Court also finds support from the following judgments of the Hon'ble Supreme Court: -

1. ***Rajaram Prasad Yadav*** *versus* ***State of Bihar and anr***[1]
2. ***Jamatraj Kewalji Govani*** *versus* ***State of Maharashtra***[2]
3. ***Mohanlal Shamji Soni*** *versus* ***Union of India and anr***[3]
4. ***U.T. of Dadra and Nagar Haveli and anr.*** *versus* ***Fatehsinh Mohansinh Chauhan***[4]
5. ***Iddar and ors.*** *versus* ***Aabida and anr.***[5]
6. ***P. Sanjeeva Rao*** *versus* ***State of Andhra Pradesh***[6]
7. ***Sheikh Jumman*** *versus* ***State of Maharashtra***[7]
8. ***Natasha Singh*** *versus* ***CBI (State)***[8]

(9) The relevant principles of law laid down by laid by the Hon'ble Supreme Court in para 13,14&23 of its judgement in Rajaram Parsad Yadav's case (supra),which can be gainfully followed in the present case, read as under :-

> "Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 Criminal Procedure Code, as well as Section 138 of the Evidence Act. The same are extracted hereunder:
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> Section 311, Code of Criminal Procedure

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[1] 2013 (14) SCC 461
[2] AIR 1968 SC 178
[3] 1991 SCC (Crl.) 595
[4] 2006 (7) SCC 529
[5] 2008 (1) SCC (Crl.) 22
[6] 2012 (7) SCC 56
[7] 2012 (12) SCC 486
[8] 2013 (5) SCC 741

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.

Section 138, Evidence Act

138. **Order of examinations** - witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

A conspicuous reading of Section 311 Criminal Procedure Code would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Criminal Procedure

Code and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Criminal Procedure Code. It is, therefore, imperative that the invocation of Section 311 Criminal Procedure Code and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Criminal Procedure Code read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Criminal Procedure Code should ensure that the judgment should not be rendered on inchoate, inconclusive

speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Criminal Procedure Code should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Criminal Procedure Code simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Criminal Procedure Code must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

(10) Reverting back to the facts of the case in hand and keeping the above principles in mind, respectfully following the law laid down by the Hon'ble Supreme Court, it is unhesitatingly held that the learned Courts below, while passing their respective impugned orders, have completely ignored the principal objectives with which the provision under Section 311 Cr.P.C. was brought on the statute book. Thus, the impugned orders cannot be sustained.

(11) No other argument was raised.

(12) Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since both the impugned orders passed by the learned Courts below have been found suffering from patent illegality, present petition deserves to be allowed.

(13) Consequently, impugned order dated 16.10.2013 passed by learned Sub Divisional Judicial Magistrate, Jalalabad (West) as well as the revisional order dated 02.01.2015 passed by learned Additional Sessions Judge, Fazilka, are set aside. The application moved by the petitioner under Section 311 Cr.P.C. stands allowed. The learned trial Court is directed to allow the petitioner to re-examine the concerned witness i.e. Branch Manager, Punjab & Sind Bank, Branch Chak Kherewala, on the abovesaid material aspect of the matter. However, it goes without saying that the respondent shall be at liberty to cross-examine the witness who is being sought to be recalled by the petitioner.

(14) Resultantly, with the abovesaid observations made and directions issued, present petition stands allowed, however, with no order as to costs.

Arihant Jain

Before Daya Chaudhary, J.

ONKAR SINGH — *Petitioner*

versus

STATE OF HARYANA AND OTHERS — *Respondents*

CWP No.7084 of 2003

August 05, 2015

Constitution of India, 1950 — Art. 226 — Allegations against petitioner, who was an ASI in the Police, regarding demand of bribe — Departmental inquiry absolved him of charge — Punishing Authority after collecting evidence independently, imposed penalty of stoppage of two increments with cumulative effect — Based on above adverse remarks in his ACR, petitioner compulsorily retired — High Court held that though punishing Authority for valid reason could disagree with the inquiry report, it could not collect independent evidence to justify compulsory retirement an employee — Smacks of vindictiveness — Order of Punishing Authority and order of compulsory retirement set aside — Writ petition allowed.

Held, that the punishing authority can differ with the finding recorded by the Inquiry Officer but he has no business to collect the evidence independently so as to make it a handle for disagreeing with the findings of the Inquiry Officer, especially when those have been affirmed by the Punishing Authority. In such like situation, the