IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CRMMO No.598 of 2018

Date of Decision : 19.12.2023

Gagnesh Thakur ....Petitioner

Versus

Vishal Awasthi ....Respondent

Coram:
The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.
Whether approved for reporting? Yes.

For the Petitioner : Mr. Devender K. Sharma, Advocate.

For the respondent : Mr. Pradeep K. Sharma, Mr. Akash Thakur, Advocates.

Vivek Singh Thakur, Judge

Petitioner herein is complainant in a case Criminal Complaint No.253 of 2013, titled as **Gagnesh Thakur v. Vishal Awasthi,** preferred by him under Section 138 of the Negotiable Instrument Act ('NI Act' for short), which is pending adjudication before the trial Magistrate.

2. Respondent-accused had preferred an application, under Section 311 of the Code of Criminal Procedure ('Cr.P.C.' for short), being Cr.MP No.2 of 2018 before the trial Magistrate, when the case was pending for arguments. The said application was allowed by the Magistrate vide order dated 1.2.2018.

3. Criminal Revision Petition No.8 of 2018, titled as **Gagnesh Thakur v. Vishal Awasthi**, preferred by the

High Court of H.P.

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complainant against the said order, stands dismissed by Additional Sessions Judge(II), Mandi, District Mandi, Himachal Pradesh, vide order dated 10.10.2018.

4. Present petition has been filed, invoking provisions of Section 482 Cr.P.C., assailing aforesaid orders for setting aside the same, by rejecting the prayer of the respondent-accused to lead further/additional evidence/ cross-examine the complainant.

5. I have heard learned counsel for the parties and have also gone through record placed before me.

6. Admittedly, respondent-accused Vishal Awasthi is son of Devinder Prakash Awasthi. Complainant Gagnesh Thakur has preferred two complaints. One against respondent-accused Vishal Awasthi and the other against Devinder Prakash Awasthi, claiming that he had given ₹5,00,000/- to Vishal Awasthi during the months of August 2011 to October 2011, on different dates, as Vishal Awasthi was in dire need of money for his business requirement and the cheques issued by Vishal Awasthi for repayment of the said amount had been dishonoured. Second complaint was preferred by Gagnesh Awasthi against Devinder Prakash Awasthi alleging that in the money of July 2011, Devinder Prakash Awasthi borrowed ₹2,00,000/- as he was in dire need of money for his domestic requirement and the cheque issued by Devinder Prakash

High Court of H.P.

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Awasthi for repayment of the said amount had been dishonoured.

7. Admittedly, trial in case of Devinder Prakash Awasthi ended on conviction of Devinder Prakash Awasthi. However, Devinder Prakash Awasthi has assailed his conviction. Whereas, trial in present case of Vishal Awasthi is pending before the Magistrate.

8. In Vishal Awasthi's case, statement of complainant Gagnesh Thakur, recorded in Devinder Prakash Awasthi's case, has been produced in evidence as Ex. DW-3/A, but at time of cross-examination of Gagnesh Thakur, which took place prior to production of statement Ex. DW-3/A, contents of the said documents were not put to Gagnesh Thakur.

9. In aforesaid circumstances, an application, under Section 311 Cr.P.C., was preferred on behalf of respondent-accused Gagnesh Thakur for leading additional evidence, i.e. to re-examine complainant Gagnesh Thakur, as well as to lead additional evidence of the concerned Banks.

10. The aforesaid application was opposed by Gagnesh Thakur by filing reply to the application. However, after taking into consideration the material placed on record, the Magistrate allowed the application.

11. Section 311 Cr.P.C. reads as under:

> **"311. Power to summon material witness, or examine person present**.—Any Court may, at any stage of any

High Court of H.P.

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> 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."

12. Section 311 Cr.P.C. empowers the Court to summon any person as a witness or recall and re-examine any person already examined or to examine any person, though not summoned as a witness, in case such evidence appears to the Court to be 'essential to the just decision of the case'. Such power can be exercised by the Court at any stage of inquiry.

13. Power under Section 311 Cr.P.C. has been conferred upon the Court in order to enable it to find out truth and render just decision. The object and aim of the provision, as a whole, is to do substantial justice not only from the view point of the party but also to establish orderly society. Where the Court finds it essential to examined, re-examine, recall or call any witness, at any stage of inquiry/trial or other proceedings for rendering just decision in the case, this power can be exercised at any stage.

14. In ***Rajaram Prasad Yadav v. State of Bihar and another,*** **(2013) 14 SCC 461,** the Supreme Court has observed as under:

High Court of H.P.

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14.1 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?

14.2 The exercise of the widest discretionary power under Section 311 Code of Criminal Procedure 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.

14.3 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.

14.4 The exercise of power under Section 311 Code of Criminal Procedure 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.

14.5 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.

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

14.7 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.

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

14.9 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.

High Court of H.P.

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14.10 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.

14.11 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.

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

14.13 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.

14.14 The power under Section 311 Code of Criminal Procedure 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.”

15. In present case, Trial Court, after going through statement Ex. DW-3/A and after taking into consideration evidence before it, including Ex.DW-3/A, and considering the

High Court of H.P.

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rival contentions of the parties, concluded that it appeared to be just and important to allow the application for adjudication of the complaint and, therefore, after recording that though application was filed at a belated stage, in the interest of justice, allowed the application with further order to compensate the complainant with costs of ₹1,000/-.

16. Present petition has been preferred by invoking provisions of Section 482 Cr.P.C. in a matter where Trial Magistrate has allowed the application after recording its satisfaction with respect to necessity of allowing the application for just decision of the case. The application preferred by the respondent has been filed by laying proper foundation and the said order has been affirmed by the Additional Sessions Judge, exercising revisional jurisdiction under Section 397 Cr.P.C. Power conferred upon the Court under Section 311 Cr.P.C. is a discretionary power to be exercised to arrive at a just decision in order to do substantial justice to establish rule of law.

17. In the Revision Petition as well as in present petition, main ground for opposing the application, filed under Section 311 Cr.P.C., is that the said application was filed at a belated stage only to linger on the trial.

18. Though it has been contended that proposed defence was not mentioned in the application filed by the

High Court of H.P.

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accused under Section 145(2) of the NI Act for cross-examination of the witness, and no such plea with respect to the defence, proposed to be brought on record now, was pleaded or recorded, and that at this belated stage application of the respondent-accused was liable to be dismissed, however, no plausible ground against satisfaction of the Trial Magistrate, recorded in the order, with respect to necessity of additional evidence and recalling of complainant for re-cross-examination has been raised.

19. From the facts and circumstances related to two cases, one against father and the other against son, alleging borrowing of money by the accused persons, at the same relevant time, it appears that there may be some link between the two cases and, therefore, Ex. DW-3/A would be necessary to be put to complainant, which should have been put by the Advocate at the time of cross-examination, but it could not be done because statement of Gagnesh in present case was recorded on 4.2.2014, whereas in Devinder Prakash Awasthi's case, Ex. DW-3/A was recorded on 26.6.2015 and, therefore, Ex. DW-3/A was not available at the time of cross-examination of Gagnesh.

20. Taking into consideration the material on record, provisions of Section 311 Cr.P.C., and the ratio of law laid down by the Supreme Court in aforesaid pronouncements, I

High Court of H.P.

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am of the considered opinion that the Trial Magistrate has not committed any irregularity, illegality or perversity in the impugned order, and, therefore, it is not a fit case to exercise jurisdiction under Section 482 Cr.P.C.

21. The complainant-petitioner has failed to make out a case to rebut the satisfaction recorded by the Trial Magistrate with respect to necessity of allowing the application for just decision of the case.

Accordingly, the present petition is dismissed and disposed of, so also pending applications, if any.

(Vivek Singh Thakur)
Judge.

December 19, 2023(sd)

High Court of H.P.

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