

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CR.M.P. No. 1028 of 2015

Smt. Nilima Choudhary, W/o Sanjay Choudhary, Aged About 42 Years,
R/o Janta Quarter Gudhiyari Raipur, Tahsil & District – Raipur,
Chhattisgarh

---- Petitioner

Versus

Smt. Padma Naidu, W/o Late Sangam Naidu, Aged About 35 Years,
R/o Janta Quarter No. 843, Near Shiv Mandir Gudhiyari Raipur, Tahsil
& District Raipur, Chhattisgarh

---- Respondent

For Petitioner : Smt. Ranjna Jaiswal, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

22/12/2015

1. This petition is against the order dated 23.09.2015, passed by the learned Fifth Additional Sessions Judge, Raipur, in Criminal Revision No.128/2015 whereby the order dated 24.03.2015 passed by the Judicial Magistrate First Class, Raipur, in case of *Smt. Padma v. Smt. Nilima Choudhary* was affirmed. The order pertains to rejection of application under Section 311 of Cr.P.C.
2. Learned counsel for the applicant submits that a case under Section 138 of Negotiable Instrument Act was pending before the Court of Judicial Magistrate First Class wherein the applicant had filed an application under Section 311 of Cr.P.C. to recall the complainant. It is contended that after closure of the evidence of the complainant, it was felt necessary at the time of final argument to re-examine the witness. It is contended that by further evidence it could have been shown there was no liability is existing for the alleged cheque for which the

complaint was filed.

3. Perusal of the order would show the facts that Padma, the Respondent, had filed a complaint under Section 138 of Negotiable Instrument Act on 20.11.2013, which was registered on 07.01.2014. Subsequently, on 30.01.2015 the complainant was examined and cross-examination was completed on 05.02.2015. Thereafter, the case was fixed for statement of the accused on 13.02.2015 and the statement was recorded. Subsequently, the case was listed for 11.03.2015 and after hearing the arguments, the case was fixed for orders on 19.03.2015 and at that time, one application was filed under Section 311 of Cr.P.C. to recall the complainant on the ground that certain question could not be asked, which are necessary to rebut the presumption and liability.
4. The principle of like nature, their Lordship of the Supreme Court in a recent judgment reported in **AIR 2015 SC 3501** in case of **AG v. Shiv Kumar Yadav & Anr.** at para 29 has laid down the principles, which is reproduced herein below:

“29. We may now sum up our reasons for disapproving the view of the High Court in the present case :

- (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

5. Applying the aforesaid principles in the present case, nothing is shown that what nature of evidence is further required to re-examine the complainant. The powers under Section 311 of Cr.P.C. cannot be

exercised as a matter of right unless prejudice is shown to have happened. Taking into facts of this case nothing can be substantiated before this Court as to what prejudice would be caused if the re-examination of complainant is refused. In a result, I am not inclined to invoke the extra-ordinary jurisdiction of this Court vested in it under Section 482 of Cr.P.C. to allow the application under Section 311 of Cr.P.C.

6. Accordingly, the petition fails and it is dismissed at the motion stage itself.

Sd/-
(Goutam Bhaduri)
Judge