

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 28 OF 2016**

MR. FREDINAND L. PINTO. ... Petitioner
Versus
MR. SHOMID KENY AND ANR. ... Respondents

Shri Ganesh R. Naik, Advocate for the
Petitioner.

Shri S. Dhargalkar, Advocate for Respondent
No.1.

Ms. M. Pinto, Additional Public Prosecutor for
Respondent No.2.

Coram:- C. V. BHADANG, J.

Date:- 30th June, 2016

ORAL ORDER:

Heard learned Counsel for the parties.

2. By this petition, the petitioner who is the complainant in a complaint under Section 138 of the Negotiable Instruments Act, is challenging the order, by which the learned Magistrate has refused to recall respondent/accused (DW1) for further cross-examination. Indisputably, the respondent/accused had examined himself as DW1 and a Branch Manager as DW2. The Magistrate has also recorded statement of the respondent/

accused under Section 313 of the Code of Criminal Procedure.

3. The petitioner filed an application under Section 311 of Criminal Procedure Code, for recall of DW1 for further cross-examination, on the ground that the previous advocate, has failed to ask some of the 'leading questions', to the accused and put some material facts to him. The learned Trial Court in the impugned order found that mere change of the Counsel, is not sufficient to recall a witness and "by recalling a witness it would amount to giving a second inning to the complainant which is not permissible".

4. The learned Counsel for the petitioner submits that certain aspect about the previous dishonour of the cheque on two occasions, was not properly put to DW1. He relies upon the judgment in the case of **Mannan Sk. & Ors. V/s. State of West Bengal & anr.** reported in **2014 ALL**

MR Cri) 4463 (S.C.) and the decision of the Delhi High Court in the case of **Inderjeet Kaur Kalsi V/s,. NCT of Delhi & Anr.** in **CRL. M.C. No.4504/2013.** He also points out to the guidelines laid down by the Hon'ble Supreme Court in the case of **Rajaram Prasad Yadav V/s. State of Bihar AIR 2013 SC 3081** in order to submit that this was a fit case, where DW1 could have been recalled.

5. The learned Counsel for the respondents submits that the application filed by the petitioner for recall is vague and does not make out a case for recall. It is submitted that the case, now sought to be given, for recall, is not made out in the application. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **State (NCT of Delhi) V/s. Shiv Kumar Yadav & Anr. (2016) 2 SCC 402.**

6. I have carefully considered the circumstances

and the submissions made. The judgment in the case of **Rajaram Prasad Yadav** (supra) as also **Mannan Sk. & Ors.** (supra) has been considered by the Hon'ble Supreme Court in the case of **Shiv Kumar Yadav & anr.** (supra). It has been inter alia held that mere change of a Counsel is not sufficient to recall a witness, under Section 311 of the Criminal Procedure Code. The sine qua non for such recall is that the Court comes to a conclusion that the evidence of such witness or his recall, is necessary for the just decision of the case. It is this finding which can be basis for recall of any witness. It has been further held that although the powers under Section 311 may be wide, they have to be exercised with circumspection, having regard to the facts and circumstances of each case.

7. Coming back to the present case, the petitioner has not mentioned any ground, as such in the application seeking recall, except that the previous advocate failed to put some

'leading questions' to DW1. The ground about the previous dishonour of the cheque is not made out in the application. That apart, the complaint is based on the last dishonour. I have also gone through the cross-examination of DW1 which has already been effected and I do not find that the recall of the witness would be necessary, for the just decision of the case. No exception can be taken to the rejection of the application by the learned Magistrate.

8. The Writ Petition is without any merit and is accordingly dismissed.

C. V. BHADANG, J.

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