

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(1) CRM-M-1235 of 2015.
Decided on:-15.09.2016.

M/s Mobile 'N' More Support Pvt. Ltd. & another

.....Petitioners.

Versus

Mrs. Shital Sharma.

.....Respondent.

(2) CRM-M-3348 of 2015.

M/s Mobile 'N' More Support Pvt. Ltd. & another

.....Petitioners.

Versus

Mrs. Shital Sharma.

.....Respondent.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

Present:- Mr. Vaibhav Sehgal, Advocate
for the petitioners.

Mr. Gitish Bhardwaj, Advocate
for the respondent.

HARI PAL VERMA, J.

This order shall dispose of the aforementioned two petitions as the parties are common therein, facts of the cases are same and nature of relief is also similar to each other.

However, for brevity, the facts have been taken from ***CRM-M-1235 of 2015*** titled as ***M/s Mobile 'N' More Support Pvt. Ltd. & another***

Versus Mrs. Shital Sharma.

The petitioners have filed the present petition under Section 482 Cr.PC for quashing order dated 14.11.2014 passed by learned Judicial Magistrate 1st Class, Ludhiana whereby application filed by the petitioners for recalling the attorney of the respondent-complainant for cross-examination, was dismissed.

Briefly stated, the respondent-complainant has filed a complaint against the petitioners-accused under Section 138 of the Negotiable Instruments Act, 1881 (for short, the Act). As per the complaint, an agreement dated 5.10.2011 was entered between the parties whereby the respondent-complainant was appointed as Super Franchisee of their products and in that course, the petitioners-accused received Rs.30 lacs as security from the complainant. Later on, the complainant had resigned from Super Stockist of Punjab in the name of M/s B.S. Trader, G.T. Road, Sahnewal vide letter dated 15.2.2012 and the petitioners-accused agreed to return the security amount. In discharge of their legal liability, the accused had issued a cheque bearing No.066358 dated 25.10.2012 for an amount of Rs.6 lacs under his signatures being authorised signatory. However, when the complainant presented the aforesaid cheque with her banker i.e. Oriental Bank of Commerce, Sahnewal, a memo was received by the complainant on 1.11.2012 from the bank showing therein that the cheque has been dishonoured with the remarks "account closed". Accordingly, the respondent-complainant filed the aforesaid complaint.

While the complaint was pending before the trial Court, the petitioners-accused moved an application under Section 311 Cr.PC for recalling the respondent-complainant for cross-examination at the stage when the complaint was fixed for defence evidence/arguments. The primary ground taken in the application is that Mr. Amit Moldi, Advocate had filed his power of attorney on behalf of the petitioners-accused and sought adjournment to inspect the file and for studying the same. After going through the file of the complaint, the new counsel had come to the conclusion that some material and relevant documents were not put to the complainant during his cross-examination by the earlier counsel. The petitioners as well as their new counsel are not satisfied with the cross-examination conducted by the earlier counsel. Therefore, cross-examination of the complainant is necessary for the just decision of the case.

Reply to the said application was filed by the respondent-complainant taking a preliminary objection that change of counsel is no ground to further recall the complainant and the new counsel is already working with Mr. Parshant Pathak, the original counsel and the application has been moved just to delay the proceedings.

Learned counsel for the petitioners-accused has contended that intention of the accused is not to delay the proceedings and it is only on the basis of inspection made by the new counsel, it was realised that the earlier counsel has not conducted the cross-examination on the required line and the new counsel is not satisfied with the cross-examination. Even if the case is at

the stage of defence evidence/arguments, it cannot be alleged that the petitioners intend to fill up the gap by further cross-examining the complainant or want to delay the proceedings in any manner. The application filed by the petitioners-accused under Section 311 Cr.PC has wrongly been dismissed whereby prayer for recall of attorney of the complainant for cross-examination was made. No plausible reason has been given by learned Magistrate while dismissing the application. Earlier counsel had not asked pertinent questions with regard to the agreement entered between the parties on 5.10.2011. The relevant terms which entitle the petitioners-accused to forfeit the security deposit have not been put to the witness of the complainant during cross-examination.

Learned counsel for the petitioners-accused has further argued that the agreement dated 5.10.2011 is a document signed between the parties wherein terms of the agreement have been reduced into writing. He referred to clause 3.4 of the terms of agreement which provides that if the Super Franchisee wants to cancel the agreement or the company cancels the agreement, the deposit amount if applicable will be refunded only after 3 months from the commencement of the agreement without any interest on the deposit. He has also placed reliance upon judgment of this Court passed in ***CRM-M-4571 of 2016*** titled as ***Rajesh Kumar Versus State of Punjab and another*** decided on 25.2.2016 as well as judgment of Hon'ble Supreme Court in ***Iddar and others Versus Aabida 2007(3) RCR (Criminal) 909*** and has argued that the Court can summon the complainant for further cross-

examination. In case attorney is called for cross-examination, no prejudice would be caused to the complainant.

On the other hand, learned counsel for the respondent-complainant has argued that the original counsel Mr. Parshant Pathak and the new counsel Mr. Amit Moldi are working together and even if, the petitioners-accused have engaged a new counsel, it does not give a ground to the petitioners to file an application under Section 311 Cr.PC for recalling the witness for cross-examination. The case is at the fag end of its conclusion as the same is fixed for defence evidence/arguments. The case was fixed for cross-examination of the complainant on three different times including 18.3.2014, 13.5.2014 and 28.5.2014 and in the application, no plausible reason has been given for recalling the complainant for further cross-examination. The petitioners were given sufficient opportunities to cross-examine the complainant and filing of the present application is nothing, but an attempt to delay the trial. The documents sought to be referred in the application under Section 311 Cr.PC were already in the knowledge of the petitioners-accused and in case the application is allowed, it would cause a great prejudice to the interest of respondent-complainant.

I have heard learned counsel for the parties.

The provision of Section 311 Cr.PC 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 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.”

A bare perusal of the aforesaid provision makes it abundantly clear that the Court, may at any stage of enquiry, trial or other proceeding, summon any witness if such evidence appears to be essential for the just decision of the case. However, in the present case, the application under Section 311 Cr.PC has been filed at a belated stage despite the fact that the case was fixed for cross-examination of the complainant on different dates.

Further perusal of the application under Section 311 Cr.PC reveals that the petitioners-accused have nowhere mentioned the reason/ground for which they want to summon the complainant for further cross-examination. The earlier counsel cross-examined the complainant on two different occasions at length to his complete satisfaction and the complainant has admitted that he does not maintain any stock register and he cannot tell how much stock has been supplied to the accused. Therefore, once it has come on record that the complainant is unable to tell the stock supply to the accused, the question of recalling the complainant for further cross-examination does not arise. Merely because a new counsel has been engaged by the petitioners-accused is no ground to recall the complainant for further cross-examination.

So far as judgment of this Court in ***Rajesh Kumar's case*** (*supra*) cited by learned counsel for the petitioners-accused is concerned, the

same is quite distinguishable as in that case, the application under Section 311 Cr.PC was filed when the evidence of the complainant was in process, whereas in the present case, the application under Section 311 Cr.PC has been filed for further cross-examination of the complainant at a different stage as the case is on the verge of its conclusion. Therefore, the cited judgment has no relevance. Similarly, another judgment cited by learned counsel for the petitioners-accused in ***Iddar and others' case (supra)*** is also not applicable in the present case as enough opportunities have already been granted to the petitioners-accused for cross-examination of the complainant and change of lawyer is no ground to seek further cross-examination of the complainant.

The complaint under Section 138 of the Act was filed way back in January, 2013 and the petitioners-accused had enough opportunities to cross-examine the complainant. Hon'ble Supreme Court in ***Rajaram Prasad Yadav Versus State of Bihar and another 2013(3) RCR (Criminal) 726*** has issued broader guidelines and has observed that the exercise of the power under Section 311 Cr.PC cannot be dubbed as filling in a lacuna in a case. The Apex Court has also observed that the Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

In the present case, the respondent-complainant is already suffering an inordinate delay and filing of the application under Section 311 Cr.PC is nothing but an attempt to delay the proceedings. Therefore, this

Court does not find any illegality in the impugned order dated 14.11.2014 passed by learned Judicial Magistrate 1st Class, Ludhiana whereby application filed by the petitioners-accused for recalling the attorney of the respondent-complainant for further cross-examination, was dismissed.

Accordingly, affirming the impugned orders, both these petitions, being devoid of any merit, are dismissed.

It is made clear that these petitions have been decided on the limited question of Section 311 Cr.PC and any observations made hereinabove shall not be construed as a reflection of any opinion on the merits of the main case and the trial Court shall decide the case on the basis of available evidence.

Photocopy of this order be placed on the file of other connected case.

September 15, 2016
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes / No

Whether Reportable: Yes / No