

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

(1) CRM-M-4571 of 2016.
Decided on:-25.02.2016.

Rajesh Kumar.

.....Petitioner.

Versus

State of Punjab and another

.....Respondents.

(2) CRM-M-4589 of 2016.

Rajesh Kumar.

.....Petitioner.

Versus

State of Punjab and another

.....Respondents.

(3) CRM-M-4591 of 2016.

Rajesh Kumar.

.....Petitioner.

Versus

State of Punjab and another

.....Respondents.

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

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Aayush Gupta, Advocate
for the petitioner.

Mr. Gurinderjit Singh, DAG, Punjab.

Mr. Vaibhav Sehgal, Advocate
for respondent No.2.

HARI PAL VERMA, J.

This order shall dispose of the aforementioned three 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-4571 of 2016** titled as ***Rajesh Kumar Versus State of Punjab and another.***

Petitioner Rajesh Kumar has challenged order dated 13.1.2016 (Annexure P-9) passed by learned Sessions Judge, Ludhiana whereby his revision petition against order dated 9.12.2015 (Annexure P-8) passed by learned Judicial Magistrate 1st Class, Ludhiana, was dismissed.

Briefly stated, the respondent No.2-complainant has filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, the Act) against the petitioner-accused and during the evidence, the complainant was cross-examined by counsel for the petitioner. However, after cross-examination of the complainant, certain new facts came to his notice and for that purpose, the petitioner filed an application under Section 311 Cr.PC for recalling the complainant for further cross-examination by way of additional evidence through a new counsel. In the application under Section 311 Cr.PC, the petitioner-accused submitted that he want to cross-examine the complainant as regards pan card, earlier litigation and income tax record, since the complainant could not be cross-examined earlier on these aspects.

The application, as filed by the petitioner-accused for recalling the complainant for further cross-examination was replied. The application was opposed on the ground that the case was fixed for cross-examination of the complainant and the petitioner-accused was given as many as 21 opportunities to cross-examine the complainant. It has been denied that the documents which are in the shape of pan card, earlier litigation and income tax record was not in the notice of the petitioner. It has been denied that after cross-examination of the complainant, certain new facts have come to the knowledge of the petitioner-accused as he has engaged a new counsel for confronting the witness with regard to those material documents. The petitioner-accused was in the knowledge of these documents.

Learned Magistrate vide order dated 9.12.2015 has dismissed application under Section 311 Cr.PC moved by the petitioner observing therein that the petitioner has already availed sufficient opportunities to cross-examine the respondent-complainant and at this juncture, the very object of filing the application is just to delay the proceedings and apparently, there is no reason which could justify the acceptance of the application filed under Section 311 Cr.PC.

The petitioner has challenged said order of learned Magistrate by way of revision petition, but learned Sessions Judge, Ludhiana vide order dated 13.1.2016 has dismissed his revision petition by observing that as many as 21 opportunities to cross-examine the complainant were afforded to

the petitioner. The respondent-complainant tendered his affidavit during post-notice stage on 5.7.2014 and thereafter, the complainant had been cross-examined on 19.3.2015, 4.4.2015 and 29.4.2015, but it was completed on 17.7.2015 and therefore, sufficient opportunities to cross-examine the complainant were availed by the petitioner-accused.

Learned counsel for the petitioner has contended that the respondent-complainant has filed complaint under Section 138 of the Act and Section 420 read with Section 120-B IPC against the petitioner-accused and while making reference to various zimni orders, as reproduced in the revision petition, stated that not as many as 21 effective opportunities have been granted to him to cross-examine the complainant. It is after the grant of concession of regular bail, he moved an application under Section 311 CrPC for recalling the respondent-complainant for further cross-examination, as certain new facts have come to knowledge of the petitioner which are in the shape of pan card, earlier litigation and income tax record. Since these facts were not in the knowledge of the petitioner earlier, the same could not be put to the complainant in his cross-examination.

Learned counsel for the petitioner-accused has further submitted that the petitioner is not intending to delay the proceedings and it is only during the complainant's evidence, the application under Section 311 Cr.PC was filed. Thus, in any case, the defence evidence has yet not started and, therefore, it cannot be alleged that the petitioner intends to fill up the gap on

the basis of defence evidence. The revision petition was dismissed on the ground of maintainability. The petitioner wants to cross-examine the complainant who appeared as CW1 regarding material questions i.e. pan card, earlier litigation and income tax record.

Learned counsel for the respondent-complainant, on the other hand, has argued that merely because the petitioner has engaged a new counsel does not give a ground to the petitioner to file application under Section 311 Cr.PC for recalling the witness for cross-examination. He states that as many as 21 opportunities were granted to the petitioner to cross-examine the complainant, but he failed to complete the cross-examination. Moreover, the documents sought to be referred in the cross-examination were already in the knowledge of the petitioner and in case, the petitioner is afforded another opportunity, it will prejudice the interest of the 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. The filing of application under Section 311 Cr.PC is not delayed in the sense that it has not been filed after commencement of the defence evidence. Moreover, the petitioner has remained in judicial custody for some time.

There is no dispute that change of counsel does not give a right to the petitioner to file application under Section 311 Cr.PC for cross-examination of the complainant, but in any case, the petitioner has filed the application under Section 311 Cr.PC when the evidence of the complainant was in process. Thus, it cannot be attributed that the application filed under Section 311 Cr.PC is just to fill up the gap or was aimed at to delay the proceedings before the trial Court. As such, this Court finds that no prejudice is going to be caused to the respondent-complainant in case the complainant is cross-examined. The provisions of Section 311 Cr.PC are very liberal in nature, but at the same time, the same cannot be used to fill up the lacuna more particularly when the Court has examined all the witnesses.

In ***Davendra Singh @ Pintoo Baba Versus State of Uttarakhand 2013(1) U.D. 414***, the Hon'ble Uttarakhand High Court had examined the scope of Section 311 Cr.PC and observed that the court can summon any person as a witness at any stage of trial. It was further observed

that the Court can call a witness not only on the motion of either of the parties, but can also do so on its own motion. Similar view has been expressed by Hon'ble Supreme Court in ***Rajaram Prasad Yadav Versus State of Bihar and another 2013(3) RCR (Criminal) 726*** wherein it was observed that 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. The Apex Court had further observed that 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 and 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 Apex Court had further held that the Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

Accordingly, this Court finds substance in the present petitions and sets aside the impugned orders dated 9.12.2015 passed by learned Judicial Magistrate 1st Class, Ludhiana in Criminal Complaint Cases No.51003 to 51005 dated 6.6.2013 all titled as “Amit Gupta Versus Rajesh Kumar” as well as orders dated 13.1.2016 passed by learned Sessions Judge, Ludhiana in Criminal Revisions No.66 to 68 dated 22.12.2015 all

titled as “Rajesh Kumar Versus Amit Gupta”. As such, while accepting the present petitions, the applications under Section 311 Cr.PC filed by the petitioner-accused before the trial Court are allowed and the trial Court is directed to afford one more effective opportunity to the petitioner by recalling the complainant for cross-examination. However, it is made clear that the cross-examination of the complainant would be restricted only with relation to the 'Pan Card' and 'Income Tax Record' and the petitioner shall not be allowed to cross-examine him about the earlier litigation.

It has been informed that the cases before the trial Court are fixed for 17.3.2016. Accordingly, the parties are directed to appear before the trial Court on 17.3.2016 for recording cross-examination of the complainant in the above terms and the trial Court shall grant one more effective opportunity to the petitioner-accused, subject to payment of costs of Rs.10,000/- to the respondent-complainant in each case.

It is made clear that this petition has 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 files of other connected cases.

February 25, 2016
Yag Dutt

(HARI PAL VERMA)
JUDGE