

\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 31st March, 2016

+

CRL.M.C. No.416/2016

M/S. JBA ENTERPRISES PVT LTD & ORS. Petitioners

Represented by: Ms. D. N. Chaturvedi and
Mr. Deepak Kr.Tripathi,
Advocates.

Versus

STATE & ANR. Respondents

Represented by: Mr.Panna Lal Sharma,
Additional Public Prosecutor
for the State.

**CORAM:
HON'BLE MR. JUSTICE SURESH KAIT**

SURESH KAIT, J. (Oral)

CRL.M.C. No.416/2016

1. Vide the present petition, the petitioners assailed the order dated 16.12.2015, whereby the application of the petitioners under Section 311 Cr.P.C. was dismissed by the learned Metropolitan Magistrate.
2. In the said application, the petitioners have averred as under:-

“6. That however the accused has now been advised by his counsel that a cross examination of the complainant was not only his right but also a must in order to establish the fact that the complainant with full possession of all facts had agreed to the transaction with

only one stipulation that is two blank security cheques were handed over to the complainant in order to ensure that the amount to be paid to the bank to release the mortgage was paid as intended. This fact is clearly illustrated by the fact that the cheques were only signed by the accused and no details were filled in by him and secondly by the fact that the accused could not have given a cheque for the interest amount calculated to the date.

7. That the accused states that unless the complainant is cross examined grave injustice and ir-repairable loss will be done to the accused who has already been cheated by the complainant and is now been put harm because the complainant mislead him into believing that he would be willing to settle the matter only to avoid cross examination.”

3. Learned counsel appearing on behalf of the petitioners submits that the aforesaid application was not filed by her, however, filed by some other Advocate and the petitioners wish to again cross-examine the complainant CW1. She submits that if an opportunity will not be given, ir-repairable loss will cause to the petitioners and states that CW1 will be cross-examined on day-to-day basis if one opportunity is given.

4. It is not in dispute that under Section 311 Cr.P.C., a witness can be examined, re-examined or further examined by the Court at any stage of the proceedings, however, in the present case, CW1 was examined and cross-examined on 04.09.2012 and discharged. Counsel for the petitioners had cross-examined the witness as per his wisdom.

Thereafter, CW-2 was examined on 17.11.2012 and CE was closed. Statements of petitioners were recorded on 05.02.2013 and 20.03.2013 and the matter was listed for defence evidence. Thereafter, DW1 was examined on 13.11.2013 and DW2 was examined on 01.08.2014. Subsequently, final arguments on behalf of the complainant were also heard on 07.10.2014 and one more opportunity was given to the petitioners to advance arguments. Thereafter, though an application under Section 311 Cr.P.C. for examining two more witnesses was filed by the petitioners, however, as noted by the learned Trial Court, the petitioners restricted their prayer only to examine two more witnesses and never sought recalling of CW1 therein. The said application was dismissed by the learned Trial Court vide order dated 20.01.2015 but the same was allowed by the Sessions Court. Therefore, out of two witnesses, one witness, namely, Mr. Ajit Kumar Jain, Ex-AGM of the State Bank of India, was examined as DW3 on 26.05.2015 and the other witness was not examined by the petitioners. Accordingly, defence evidence was again closed and the matter was fixed for final arguments on 04.09.2015 when another application under Section 311 Cr.P.C. was filed by the petitioners, which was dismissed by the impugned order.

5. It is noted by the learned Trial Court that record makes it clear that the contentions of the petitioners are not in conformity with the stand taken in the application in question. CW1 was cross-examined and discharged long back on 04.09.2012 itself. Even if some settlement talks were going on that time which could not have been materialized, that did not give any reason to the petitioners to participate in the

future trial and wait for the stage of final arguments to come and move the application in question. For that matter, even the previous application under Section 311 Cr.P.C. was also moved at the stage of final arguments, but the petitioners never sought to cross-examine the CW1 again in that application also. The petitioners cannot now say that even at that time they were under the apprehension that the matter would be amicably settled. Had it been so, there was no need for the petitioners to have moved even the earlier application. Therefore, the learned Trial Court has rightly rejected the explanation that settlement talks were going on, being not justified.

6. It is also noted by the learned Trial Court that no explanation was given by the petitioners as to why the so called “so many important questions” were not asked from CW1 when he was under cross-examination about three years ago. It was also not explained as to why the petitioners have chosen to wait for the final arguments stage to come and then moved the application in question. Moreover, it was not the case of the petitioners that some new development took place which was not within the knowledge of the petitioners which could necessitate recalling of CW1. Now at a stage when even the final arguments have been concluded on behalf of the complainant, the petitioners cannot be given a liberty to keep moving such applications repeatedly as due opportunity had already been given to the petitioners to cross-examine CW1. But now when the entire trial is over, the court cannot allow the witness to be recalled just because a particular stand was never taken by the petitioners at the relevant time.

7. Even the averments made in the application in question are not in conformity with the defence taken by the petitioners at the trial. Neither at the stage of framing of notice under Section 251 Cr.P.C. nor at the time of cross-examination of CW1, nor at the time of recording of statements of petitioners under Section 313 Cr.P.C. they had ever taken a stand that the cheques were blank security cheques, as being claimed in the application in question. Such stand had been taken only during the defence evidence. Even going by this position, while leading defence evidence, the petitioners were well aware of their stand and there was no scope of amicable settlement. But despite that, no such application was moved to recall CW-1.

8. Therefore, the learned Trial Court has correctly held that there was no force in the stand of petitioners that it was the complainant who had tried to cheat them and made them believe that he wished to settle the matter to avoid cross examination. The witness had tendered himself for cross-examination at the relevant time. He cannot be asked to step into the witness box again and again with every change of the counsel for the petitioners.

9. So far as contention of the petitioners that as to why the complainant had opted for mediation if he claims to be having a strong case is concerned, I am in complete agreement with the observations made by the learned Trial Court that firstly, there is no need to go into such a question and that it cannot be said that a party having a strong case, as being contended, will never opt for amicable settlement during the trial. Thus, no adverse inference can be drawn against the complainant for his agreeing to go for mediation to explore

possibilities of amicable settlement, so as to end the matter without going through the rigors of a full-fledged trial.

10. Moreover, it is not the question of the petitioners agreeing for a day-to-day trial if one opportunity is given as witnesses cannot be recalled just on the pretext that the applicant had agreed for a day-to-day trial or that the matter would not be delayed further. Since the matter has reached the stage of final arguments for the second time and reopening CE without any sufficient reason would certainly cause prejudice to the complainant. Article 21 of the Constitution of India, as invoked by the petitioners, is equally applicable even to the complainant, who also has a right to fair and speedy trial, which right is not confined only to the petitioners.

11. In view of the above discussion, considering the facts and circumstances of the case and the fact that while passing the impugned order dated 16.12.2015, the learned Trial Court has rightly considered each and every aspect of the matter in detail, I do not find any substance in the submissions made by the learned counsel for the petitioners to interfere in the impugned order.

12. The present petition is dismissed accordingly.

Crl.M.A. No.1757/2016 (for stay)

With the dismissal of the petition itself, the instant application has become *infructuous*. The same is dismissed accordingly.

**SURESH KAIT
(JUDGE)**

MARCH 31, 2016
sb