

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

CRM-M-44151 of 2017.

Decided on:-September 14, 2018.

Naresh Kumar.

.....Petitioner.

Versus

Suman Oberoi.

.....Respondent.

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

Present:- Mr. Anoop Singh Sheoran, Advocate
for the petitioner.

HARI PAL VERMA, J.

The petitioner has filed this petition under Section 482 Cr.PC for quashing the order dated 10.08.2017 passed by learned Judicial Magistrate 1st Class, Ludhiana, whereby the application filed by the petitioner-accused under Section 311 Cr.PC for recalling CW Suman Oberoi for her cross-examination, was dismissed.

Briefly stated, respondent-complainant Suman Oberoi had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, the Act) read with Section 420 IPC, against the petitioner-accused. As per the complaint, the petitioner issued a cheque bearing No.000007 dated 30.11.2015 for an amount of Rs.2.5 lakh in order to discharge his liability towards the respondent-complainant. However, on presentation of the cheque for encashment, it was returned back unpaid with the remarks "Account

Closed” vide memo dated 02.12.2015. The complainant issued a legal notice under Section 138(b) of the Act, but despite receiving the said notice, the petitioner-accused failed to make payment within the stipulated period of 15 days. Resultantly, the complaint was filed.

While the aforesaid proceedings were pending, the petitioner-accused filed an application dated 02.06.2017 under Section 311 Cr.PC for recalling CW Suman Oberoi for her cross-examination on the ground that on 22.02.2017, his counsel did not appear before the trial Court for cross-examination of complainant Suman Oberoi and her cross-examination was marked as ‘Nil’, though the accused was present in the Court. Thereafter, the petitioner-accused requested the Chief Judicial Magistrate-cum-Secretary District Legal Services Authority, Ludhiana to provide the facility of free legal aid counsel so as to defend his case and the services of Mr. Gaurav Anand, Advocate were extended to the petitioner, who appeared on behalf of the petitioner-accused. Complainant Suman Oberoi is a material and necessary witness.

Reply to the application was submitted, wherein the respondent-complainant prayed for dismissal of the application as the petitioner-accused appeared in the case after publication and he was intentionally avoiding service despite issuance of summons, bail warrant and warrant of arrest. The pendency of the case was within the knowledge of the accused and he intentionally avoided his appearance. Once the opportunity has been shown as ‘Nil’, the Magistrate has no power to recall his order. The case was fixed for cross-examination of the complainant for 03.10.2016 and on the request of the

petitioner-accused, the case was adjourned to 23.11.2016 for cross-examination of the complainant. Again on the request of the petitioner-accused, the case was adjourned to 19.01.2017. Even on that day, the accused did not cross-examine the complainant. Thereafter, the case was adjourned to 22.02.2017 and the accused was directed to pay Rs.1,000/- as cost, but the petitioner did not pay the cost.

The trial Court dismissed the application on the ground that the accused availed several opportunities to cross-examine the complainant, but the counsel for the accused failed to cross-examine the complainant and ultimately, the cross-examination of the complainant was treated as 'Nil'. Thereafter, the case was fixed for recording statement of the accused under Section 313 Cr.PC. The object of filing the application under Section 311 Cr.PC is but obvious as the accused is intentionally causing delay in the proceedings of the case.

Learned counsel for the petitioner-accused has argued that the trial court has erred in law while dismissing the application with pre-judicial mind as if the petitioner was trying to delay the proceedings in the complaint. On 22.02.2017, his counsel did not come present though the petitioner was present in the Court. Therefore, the petitioner should not be made to suffer for non-appearance on the part of his counsel. The provision of Section 311 Cr.PC does provide that the Court may at any stage of the proceedings summon or examine or re-examine any person, who has already been examined.

He has further argued that in case the application under Section 311 Cr.PC filed by the petitioner is not allowed, he would suffer an irreparable loss and the very principle that no person should be judged without a fair hearing would be violated.

I have heard learned counsel for the petitioner-accused.

Vide order dated 16.02.2018 passed by this Court, learned counsel for the petitioner was directed to place on record the zimni orders so as to show that as to how many opportunities were granted by the trial Court to the petitioner to cross-examine complainant Suman Oberoi. Thereafter, the petitioner having been granted three more opportunities i.e. on 22.02.2018, 03.04.2018 and 23.07.2018, no such zimni orders have been placed on record.

Having perused the impugned order dated 10.08.2017 passed by learned trial Court, it transpires that the case was fixed for cross-examination of the complainant for 03.10.2016, but on the request of the petitioner-accused, it was adjourned to 23.11.2016 for recording her cross-examination, but no cross-examination was conducted. Again on the request of the petitioner-accused, the case was adjourned to 19.01.2017, but even on that date, the accused had not cross-examined the complainant. Finally, the case was adjourned to 22.02.2017 for recording cross-examination of the complainant and the petitioner-accused was directed to pay Rs.1,000/- as cost, but neither the cost was paid nor the counsel came present to further cross-examine the complainant. In this manner, there was no option with the trial Court except to treat the opportunity as 'Nil' and thereafter to fix the case for recording the statement of petitioner-accused under Section 313 Cr.P.C.

Therefore, this Court finds that there is no illegality in the impugned order dated 10.08.2017 passed by learned Magistrate as the petitioner-accused has failed to cross-examine the complainant despite having been granted ample opportunities including the opportunity with cost.

Accordingly, the present petition, being devoid of any merit, is dismissed.

September 14, 2018
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: No