

CRM-M-46677-2018

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**Sr. No.278 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-46677-2018
Date of decision:25.10.2018

Kesar Singh

.....Petitioner

versus

Jagdish Chander

.....Respondent

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Mayur Karkra, Advocate
for the petitioner.

Mr. A.D.S.Jattana, Advocate
for the respondent.

Rajbir Sehrawat, J(Oral)

This petition has been filed for quashing of the Order dated 04.08.2018(Annexure P-4); passed by the Judicial Magistrate Ist Class/SAS Nagar(Mohali); in Comp.No.NIA-368-17 dated 03.05.2017 under Section 138 of Negotiable Instruments Act; whereby the application moved by the petitioner under Section 311 Cr.P.C. for recalling of the Complainant(CW-1) and additional witness Bhupinder Singh(CW-2) for their further scross-examination has been rejected.

Present case emanates from the complaint filed under Section 138 of the Negotiable Instruments Act, by the respondent against the petitioner. The trial of the case was at the stage of evidences. At the initial stage of the trial, the Trial Court had recorded the statement of the Complainant as CW-1 at the pre-summoning stage. Thereafter, on the basis of the material brought on record, the petitioner was summoned. After appearing before the Trial Court, the petitioner had cross-examined the Complainant to rebut his claim. Thereafter the complainant/respondent

moved an application under Section 311 Cr.P.C praying for examination of Bhupinder Singh Chakal as CW-2. The Complainant had thought fit to examine this Bhupinder Singh(CW-2) despite that his name was not mentioned in the list of witnesses mentioned with the Complaint. That application was allowed by the Trial Court. Resultantly, Bhupinder Singh (CW-2) was examined by Complainant as additional witness and cross-examined by the petitioner on 20.04.2018. On an application moved by the petitioner, copy of the examination and cross-examination of Bhupinder Singh(CW-2) was supplied to the petitioner. The case was adjourned for remaining evidence of the complainant for 09.05.2018. On 09.05.2018, the respondent had not produced any witness. Therefore, the evidence of the respondent/complainant was closed on his statement. The case was adjourned for recording of the statement of the petitioner under Section 313 Cr.P.C.

On 14.05.2018 the statement of the petitioner under Section 313 Cr.P.C. was recorded. One witness DW-1 Mangat Singh was also examined by the petitioner. The case was adjourned to 01.06.2018. At this stage the petitioner also examined Mandeep Singh(DW-2). However, then the complainant/respondent again moved an application under Section 311 Cr.P.C for examining one more witness from the bank, in view of the statement made by DW-2 Mandeep Singh. That application of complainant/respondent was allowed and CW-3(PW-3)Satwinder Singh was examined as still additional witness. The next Order of the Trial Court also shows that on 06.06.2008 no other PW was present, therefore, the case was adjourned for 10.07.2018 for recording of additional statement of the accused under Section 313 Cr.P.C. At this stage, the application is moved

by the petitioner for recalling of Complainant(CW-1) and the above said Bhupinder Singh(CW-2) for further cross-examination. This application of the petitioner was dismissed by the Trial Court vide impugned order dated 04.08.2018. It is this Order which is being impugned in the present petition.

Learned counsel for the petitioner has argued that since Bhupinder Singh(CW-2) was summoned as additional witness by allowing the application filed by the complainant under Section 311 Cr.P.C; though he was not named as a witness at the time of filing of the complaint; and Bhupinder Singh has disclosed certain facts, therefore, the petitioner would require to further cross-examine the complainant also; with reference to the facts which have surfaced and have become relevant after examination of Bhupinder Singh(CW-2). It is contended that after examination of Bhupinder Singh(CW-2), the petitioner has not been granted any opportunity to further cross examine the complainant. It is further contended that even at the initial stage, as it transpires; later on, some relevant questions were not put up by his earlier counsel. Therefore, further cross-examination of the complainant(CW-1) and Bhupinder Singh(CW-2) has become extremely essential for just decision of the case. Hence, it is contended that the Trial Court should have allowed the application so as to grant a fair opportunity to the petitioner to defend himself against a false charge levelled against him.

Learned counsel for the petitioner has further contended that the delay in trial is not attributable to the petitioner to any significant extent. He has taken only three dates; spanning over a period of about one month only. Hence it can not be said that the petitioner is responsible for delay in conclusion of the trial. Learned counsel for the petitioner has relied upon

the judgment of the Hon'ble Supreme Court rendered in **2000(10)SCC 430; Hoffman Andreas versus Inspector of Customs, Amritsar** to contend that even engagement of a new counsel can be a ground for allowing the application under Section 311 Cr.P.C if it is necessary for just decision of case. It is contended by the counsel that; in that case; the Hon'ble Supreme Court permitted the further cross-examination by the new counsel. While permitting so, the Hon'ble Supreme Court had also held that the opportunity to further cross-examine the witness, by allowing the application under Section 311 Cr.P.C., should have been allowed because courts have to afford opportunity to the accused to defend himself in a most fair possible manner.

On the other hand, learned counsel for the respondent has submitted that earlier counsel for the petitioner had already cross-examined the complainant as well as Bhupinder Singh(CW-2), therefore, merely the change of counsel is no ground to permit an opportunity to the petitioner; to call the complainant and the said Bhupinder Singh(CW-2) for re-cross-examination. Learned counsel further submits that the same counsel is still representing the petitioner in some other proceedings before this Court; as well as before the Trial Court in other FIR case.

Learned counsel for the respondent/complainant further submits that the opportunity to cross-examine was never denied by the Trial Court and it was not even sought by the petitioner.

Learned counsel for the respondent/complainant has relied upon the judgment of the Hon'ble Supreme Court rendered in **2016(2)SCC 402; State(NCT of Delhi) vs. Shiv Kumar Yadav** to contend that change of counsel is not a ground for allowing the application under Section 311

Cr.P.C. Learned counsel further submits that the judgment relied upon by the counsel for the petitioner in case of *Hoffman Andreas(supra)* has already been referred to; by the subsequent bench; in the case of *State(NCT of Delhi)(supra)*. In the end, it is contended by learned counsel for the respondent that the application moved by the petitioner is not bonafide and nothing has been disclosed as to the requirement of moving application under Section 311 Cr.P.C. It is also contended that even if the application of the petitioner is to be allowed then he should be permitted to re-cross-examine only the complainant and even the scope of his cross-examination should be restricted to the new facts which have come in the deposition of the additional witnesses examined by the respondent/complainant.

Having heard the learned counsel for the parties, this Court finds that the Trial Court ought to have allowed the application moved by the petitioner. It is not disputed that; at the initial stage; after the respondent/complainant was examined; the petitioner had cross-examined the Complainant. However, it is the doing; of the respondent/complainant only; to introduce through application under Section 311 Cr.P.C. the new witness, namely, Bhupinder Singh(CW2), who was not even mentioned in the mandatory list of witnesses attached with the Complaint. Of course Bhupinder Singh(CW2) had been even cross-examined by the petitioner, however, it appears that thereafter, the case was again adjourned by the Trial Court for further PW's, if any. It was only when no PW's were presented on the next date and the evidence of the Complainant was closed that the petitioner had initiated the process of examining DW's and one defense witness, namely, DW-1;Mangat Singh was examined and cross-examined by the Complainant. Again at this stage, it was the Complainant

himself who again moved an application under Section 311 Cr.P.C for introducing one more witness to rebut the DW-1 and support his own case. Resultantly, the Trial Court again had been liberal, and allowed the complainant to examine one more additional witness against the petitioner, despite the fact that such witness was, again, not named in the list of witnesses nor his relevance was disclosed in the Complaint; and earlier complainant himself had closed his evidence. Resultantly, Satender Singh (CW-3) was examined before the Court by the Complainant.

Again, the case was adjourned for recording of the statement under Section 313 Cr.P.C. This statement of the petitioner under Section 313 Cr.P.C. was also recorded. However, at this stage, the petitioner realised that certain facts which has come up in the testimony of original witness and the additional witnesses, namely, Complainant(CW-1) and Bhupinder Singh(CW-2), both and the same deserve to be cross checked by further cross-examining the Complainant himself. Since the record does not show that the petitioner was ever granted any opportunity to further cross-examine the Complainant, after examination of the additional witness Bhupinder Singh(CW-2), therefore, it would be unjust to deny an opportunity to the petitioner to cross-examine the complainant, after the examination of the above said additional witness of complaint, Bhupinder Singh(CW-2). The argument of learned counsel for the respondent/complainant that the petitioner had already cross-examined the complainant, therefore, he can not be granted any opportunity to re-cross-examine him, is totally unsustainable. When the petitioner had cross-examined the Complainant, he was not even aware of the fact that Bhupinder Singh(CW-2), would at all, be a witness in this case. So, by any

means, the petitioner has got every right to further cross-examine atleast the complainant, to confront him qua the facts involved in the complaint with reference to the additional testimony made by Bhupinder Singh(CW-2). Therefore, the petitioner had moved an application for summoning of the Complainant(CW-1) and Bhupinder Singh(CW-2) to further cross-examine these witnesses.

This Court is of the considered opinion that to cross-examine the complainant, after the examination of additional witness of complainant, Bhupinder Singh(CW-2), is his legal right, which could not have been declined by the Trial Court.

Although learned counsel for the respondent/complainant has submitted that the cross-examination be limited only to Complainant(CW-1) and even scope of his cross-examination be restricted to only new facts emerging in testimony of additional witnesses of the Complainant, however, this Court does not find such restrictions to be reasonable or even practicable. Cross-examination of witness with reference to relevant facts is a complex process interwoven with all the relevant facts of a case in an intricate manner. It would not be possible and appropriate to compartmentalize it. If a cross question is otherwise relating to a relevant fact, then the same can not be disallowed by the court only for the reason that it was not put to some other witness or to the same witness at some prior stage of cross-examination. Scope of cross-examination is to be determined by the accused and not by the Court, subject to of-course, to the relevance and propriety, which is to be considered by the Trial Court. Since upon further cross-examination of Complainant(CW-1) the further cross-examination of Bhupender Singh(CW-2) can also become relevant and

necessary for just decision of the case, therefore, it is not desirable to leave the unnecessary scope for another application to be moved by the petitioner for his cross-examination again. So it would be justified and necessary also; that the matter of right of the accused to cross-examine the Complainant and his witnesses is decided in one go. Therefore, the petitioner deserves to be granted opportunity to further cross-examine both, the Complainant(CW-1) and Bhupinder Singh(CW-2). It deserves to be noted here that, otherwise also, the case is at the stage of defense evidence only. The accused has a right to adduce any evidence in his defence. There is no prohibition in statutory law to the effect that such defense evidence would not include further cross-examination of the complainant, who might have been earlier cross-examined at the stage of Prosecution evidence.

This Court also finds substance in the argument of the learned counsel for the petitioner that, since the earlier counsel had not put certain cross questions in right earnest, thereafter, the new counsel had thought it appropriate to cross-examine the Complainant(CW-1) on those aspects, and hence, the petitioner should have been granted an opportunity. The reliance of the learned counsel for the petitioner on the judgment of the Hon'ble Supreme Court rendered in *Hoffman Andreas(supra)* is well placed. In that case also the earlier counsel had already cross-examined the relevant witness. However, the Hon'ble Supreme Court had permitted to cross-examine the Complainant once again, in view of the peculiar facts, the pleadings and the change of counsel. Besides, the Hon'ble Supreme Court has also observed that the Trial Court should have adopted a liberal approach, so as to give a fair opportunity to the accused to defend himself against the charge levelled against him. Although, the counsel for the

respondent has submitted that the judgment of the Hon'ble Supreme Court, relied upon by the counsel for the petitioner i.e. in case of *Hoffman Andreas(supra)* has been referred to by the subsequent bench in the subsequent judgment of *State(NCT of Delhi) (supra)*, however, a perusal of the subsequent judgment of the Hon'ble Supreme Court rendered in *State of NCT(supra)* also shows that the subsequent bench has neither over-ruled the earlier judgment, nor has laid down any inflexible rule that on the ground of change of counsel, the application under Section 311 Cr.P.C. can not be allowed by the Trial Court. Even in this subsequent judgment the Hon'ble Supreme Court has emphasised on the fact that advance of justice remains the prime object of law. Although in this judgment the Hon'ble Supreme Court has also observed that the procedure can not be left to the convenience of the party and therefore, a mere change of counsel by a party may not be permitted as a ground for allowing the application under Section 311 Cr.P.C.. However, it has also emphasised on the fact that it is the interest of justice; which would be the determining factor; and which should not be made to suffer. Court has also observed in that case that the right to fair trial is a fundamental right of an accused. However, in that particular case, the offence involved was under Section 376 of the IPC. The Court has specifically observed that the approach in such heinous crime has to be different. In that case, the prosecutrix had already been cross-examined and the accused was found to be well aware of the procedure of trial because he was facing other cases of rape as well. As a result, in the facts and circumstances of that particular case, as involved in the case of *State (NCT of Delhi)(supra)* the Hon'ble Supreme Court has held the application under Section 311 Cr.P.C. to be not sustainable. The present case is clearly

distinguishable from that case on its own facts. However, from harmonious reading of the above said judgments of the Hon'ble Supreme Court, cited by the counsel for the petitioner as well as cited by the counsel for the respondent, it is quite clear that it can not be an inflexible rule that if an application is moved on the ground of change of counsel; the same has to be necessarily dismissed in all cases. Rather it is the interest of justice and fairness of the procedure which has to be emphasised and which has to be given leverage to by the Court; while considering such an application.

In view of the above facts and the legal proposition, this Court finds that the Complainant/respondent herein had repeatedly introduced new witnesses. The petitioner was not even aware of these witnesses or their depositions; in advance; at the stage of prosecution evidence. Therefore, in the end of the process; and at the stage of defense evidence, if the petitioner has gathered that something relevant for the defence is yet to be put to the complainant, then it can not be said that such a prayer by the petitioner made to the Court under Section 311 Cr.P.C. is unjustified. Resultantly, it has to be held that; in the facts and circumstances of the present case, it was not legally sustainable or justified on the part of the Trial Court to dismiss the application moved by the petitioner, and thereby to deny him the opportunity to further cross-examine the complainant(CW-1) and witness Bhupinder Singh(CW-2).

Although, learned counsel for the respondent/complainant has also argued that the petitioner was never denied the opportunity to cross-examine these witnesses by the Trial Court, however, this Court finds that it is not entirely within the discretion and authority of the petitioner to cross-examine a particular witness. Controller of the process of evidence is

the Trial Court. Opportunity is to be granted by the Court to the accused to cross-examine a witness through specific order. The records, produced before the Court, does not show that after examination of these additional witnesses the petitioner was ever granted any opportunity to cross-examine the complainant. Therefore, the testimony of Complainant; with reference, subsequently examined witness of the Complainant himself, has remained totally un-cross-examined and unopposed to the Complainant.

In view of the above, the impugned order dated 04.08.2018 (Annexure P-4) is set aside. The petitioner is granted one effective opportunity to cross-examine the Complainant(CW-1) and Bhupinder Singh (CW-2). However, it is made clear that the petitioner would not be granted more than one effective opportunity to complete his cross-examination qua both the witnesses. The Court is further informed that the date fixed before the Trial Court is 31.10.2018. Counsel for the petitioner submits that he would complete his cross-examination on 31.10.2018 itself if these witnesses are produced before the Court. Accordingly, it is ordered that petitioner be granted an opportunity to cross-examine the Complainant(CW-1) and Bhupinder Singh(CW-2) on 31.10.2018.

Since the trial is pending for more than about 1½ year now, although the same was required to be decided within six months. Therefore, it is further ordered that after completion of the above said cross-examination of the above said two witnesses, the Trial Court would finally decide the trial itself within a period of next one month.

25th October, 2018

Shivani Kaushik

[RAJBIR SEHRAWAT]

JUDGE

Whether speaking/reasoned *Yes/No*
Whether Reportable *Yes/No*