

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION (APL) NO.1615 OF 2022

Narmada Shri Biotech,
Through its Prop. Urmila Suresh
Jonwal (Mina),
8, Sojar Nagar, Nemawar Road,
Indore (MP)

2. Sau. Urmila Suresh Jonwal (Mina),
Aged : 48 Yrs., Occ.: Business,
R/o. 8, Sajin Nagar, Nemawar Road,
Indore, (MP)

3. Yogesh Bhagwansingh Shire,
Aged : 40 Yrs., Occ. : Business,
R/o. Rajput Pura, Akola,
Tq. & Dist. Akola

.... **APPLICANTS**

// **VERSUS** //

Shree Varu Traders,
Cotton Merchant and Commission
Agent, 230/232, Mahavir Plaza,
Rallies Plot, Amravati.

Prop. Sau. Sarika Suyog Laddha,
Aged :35 Yrs., Occ. Business,
R/o. University Camp, Amravati,
District Amravati,
Through Power of Attorney,
Shrinarayan Kisanlalji Laddha,
Aged :63 Yrs., Occ. Business,
R/o. University Campus, Opposite to
SBI Camp Branch, Amravati

.... **NON-APPLICANTS**

CORAM : G. A. SANAP, J.
DATED : 16th JANUARY, 2023

ORAL JUDGMENT :

1) Heard.

2) **ADMIT.** Heard finally by consent of learned Advocate for the parties.

3) In this application, made under Section 482 of the Code of Criminal Procedure, 1973 (For short 'Cr.P.C.'), the applicants, who are the accused Nos. 1, 2 and 3 in the Summary Criminal Case No.2612 of 2013, filed under Section 138 of the Negotiable Instruments Act, 1881 (For Short 'N. I. Act'), have questioned the correctness of the order dated 22/11/2022 passed by the learned Additional Sessions Judge, Amravati, whereby the revision, challenging the order passed by the Judicial Magistrate First Class dated 19/09/2022, came to be dismissed. The learned Magistrate vide order dated 19/09/2022 had rejected the application at Exh. 175 made by the applicants/accused under Section 311 of the Cr.P.C. for recalling the witness No.1 for further cross examination. In this order, the parties would be referred by their nomenclature in the complaint.

4) The complainants filed the complaint against the accused persons under Section 138 of the N. I. Act. The cheque issued under the signature of accused No.3 for Rs.44,23,600/- was dishonored on account of insufficient funds in the account of the drawer. The notice before filing the complaint was issued. The amount of cheque was not paid within 15 days from the date of the receipt of the notice. The complainants, therefore, filed the complaint. The witness No.1, the power of attorney holder of the complainants filed his affidavit of examination-in-chief in June 2017. The documents were exhibited on 22/07/2019. His cross was completed on 21/09/2021. The affidavit of examination-in-chief of witness No.2 was filed on 11/06/2018. He was cross examined on 13/01/2022. The statement of the accused under Section 313 of the Cr.P.C. was recorded on 07/07/2022. Thereafter, the matter was posted for recording the defence evidence.

5) The accused persons appointed the new Advocate in place of their earlier Advocate on 18/08/2022. The application under Section 311 of the Cr.P.C. came to be filed on 16/09/2022. The main ground stated in the application for recalling the witness No.1 for cross examination is that the previous Advocate representing the accused persons hurriedly completed the cross examination. The previous

Advocate did not cross examine the witness No.1 on the point of service of demand notice, signature of the accused No.2 on the cheque in question, the authority to accused No. 3 being an authorized signatory of the cheque on behalf of the accused No.1 Firm and the details and particulars of the purchase bills. It was also stated that the documents Exh. Nos. 3, 19, 70, 104 and 128 were not supplied to the accused. The previous Advocate conducted the cross examination without going through the documents. It was stated in the application that for just decision of the case the further cross examination is necessary. The cross examination is not intended to fill up the lacunae. It was submitted that, therefore, the witness No.1 would be required to be recalled for further cross examination.

6) Learned Magistrate heard the arguments on behalf of the accused as well as the complainants. Learned Magistrate found that there was no substance in the application. The application was made at belated stage. The necessary facts sought to be confronted with the witness No.1 in the further cross examination have already been dealt with in the cross examination by the previous Advocate. The cross examination on recalling is proposed on certain undisputed facts. Learned Magistrate also found that all documents were provided well in

advance to the accused persons and therefore, the grievance that their Advocate had not received the documents and cross examined the witness No.1 without documents is not acceptable. Learned Magistrate, therefore, rejected the application. The accused persons preferred a revision application against this order passed by the learned Magistrate. Learned Additional Sessions Judge, Amravati by his order dated 22/11/2022 dismissed the revision application by holding that no illegality is committed by the learned Magistrate while rejecting the application. The above two orders are questioned in this application.

7) I have heard the learned Advocate for the accused and learned Advocate for the complainants. Perused the record and proceedings.

8) Learned Advocate for the accused submitted that in the application made under Section 311 of the Cr.P.C. sufficient reasons have been stated in support of the prayer to allow the cross examination of witness No.1 by recalling him. Learned Advocate submitted that the Courts below have not taken the material on record into consideration and rejected the prayer made by the accused persons. Learned Advocate further submitted that further cross examination of the witness No.1 is

necessary for complete adjudication of the matter. Learned Advocate submitted that there was carelessness on the part of the previous Advocate in conducting the overall matter and particularly in conducting the cross examination. Learned Advocate submitted that newly engaged Advocate by the accused persons, on going through the record, found that the witness No.1 was not cross examined consistent with the defence of the accused persons. Learned Advocate submitted that the important documents were not provided to the Advocate appearing for the accused persons. Learned Advocate submitted that the grievance made by the Advocate was not properly appreciated by the Courts below. It is, therefore, submitted that by setting aside the orders passed by the Courts below the application is required to be allowed.

9) Learned Advocate for the complainants submitted that the grounds put forth in the application were not at all justifiable. Learned Advocate submitted that the previous Advocate was unnecessarily blamed by the accused persons. Learned Advocate for the complainants took me through the evidence and particularly the cross examination of the witness No.1 and pointed out that on all the relevant aspects the witness No.1 was cross examined. Learned Advocate took me through the contents of the application made under Section 311 of the Cr.P.C. and

pointed out that some of the facts sought to be asked to the witness No.1 in further cross examination are undisputed and some of the facts have already been dealt with. Learned Advocate submitted that the chronology of the events from the date of filing of the complaint till rejection of the application indicates that there was deliberate intention on the part of the accused persons to delay the completion of the trial. In order to substantiate this submission, the learned Advocate drew my attention to the relevant dates. Learned Advocate submitted that change of the Advocate by the party is never ending exercise. Learned Advocate submitted that every Advocate engaged by the party is presumed to be competent. Learned Advocate submitted that on change of the Advocate it is easy for the party to blame the previous Advocate. In short, learned Advocate submitted that no case is made out for grant of an application. He, therefore, supported the orders passed by the Courts below.

10) Learned Advocates for both the parties in support of their submissions placed heavy reliance on the decision in the case of ***Varsha Garg .v/s. The state of Madhya Pradesh and Ors.***¹. In this case the Hon'ble Apex Court has held that the application under Section 311 of C.r.P.C. cannot be dismissed merely on the ground that it will lead to

1 *AIR 2022 SC 3707*

filling in the lacunae in the case. It is held that essentiality of the evidence of a person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the Court finds that any evidence is essential for the just decision of the case. It is further held that the statutory provision goes to emphasise that the Court is not a hapless bystander in the derailment of justice.

11) In order to consider the applicability of the proposition of law laid down in this case to the case on hand, it is necessary at the outset to make a mention of some of the dates. The affidavit of examination-in-chief of the witness No.1 was filed on 02/06/2017. The copy of this affidavit was received by the Advocate for the accused on 22/01/2019. The documents were exhibited on 22/07/2019. The Advocate for the accused cross examined witness No.1 on 21/09/2021. It is to be noted that earlier on 06/04/2018 the accused and the Advocate remained absent and therefore, the cross examination was treated as closed. However, the learned Magistrate on the application made by the Advocate for the accused persons was pleased to set aside the said order.

It is further seen on perusal of roznama that on number of dates after exhibiting the documents and before conducting the cross examination the Advocate remained absent. The affidavit of examination-in-chief of witness No.2 for the complainants was submitted on 17/07/2018. The Advocate for the accused received the copy of the same on 22/01/2019. The witness No.2 was cross examined on 13/01/2022. A grievance is made that all the documents were not provided to the Advocate for the accused. Learned Advocate for the accused submitted that on the list of documents there is no endorsement with regard to the receipt of the documents by the Advocate for the accused. It is submitted that the previous Advocate conducted the cross examination without collecting the documents. The record does not support this submission. Advocate appearing for the accused was present when the documents were exhibited. Therefore, the grievance of the accused that the Advocate conducted the cross examination without collecting the documents is without substance. It is to be noted that if the documents had not been actually furnished, the Advocate could have made grievance before the Magistrate. The Advocate could have made a request to defer the cross examination for want of documents placed on record by the complainants. The rozanma does not support his contention. Therefore,

on this ground the Courts below were right in accepting the case of the complainants.

12) In order to consider the necessity of recall of witness No.1 for cross examination to deal with certain facts remained to be dealt with in the earlier cross examination, I have gone through the evidence. It is to be noted that the notice issued by the complainants was not replied. The postal envelopes sent at the address of the accused persons came back unserved. The envelopes are placed on record at Exh. 117, 119 and 121. The necessary averments with regard to service part of the notice have been made in the complaint. It, therefore, cannot be accepted that by placing these documents on record the accused were taken by surprise. As far as signature of accused No.2 is concerned, in the complaint it is stated that the cheque in question was signed by the accused No.3. Witness No.2 examined by the complainants is from the Bank. Said witness has stated that the accused No. 3 had signed the cheque. The question of cross examination of witness No.1 of complainants on this point would not arise because it is not the case of the complainants that accused No.2 is the signatory of the cheque. As far as the authority of the accused No. 3 to sign the cheque is concerned, the same has been sufficiently dealt with in the cross examination. As far as the bills are

concerned, the suggestions have been put to the witness No.1 in the cross examination. It is, therefore, seen on perusal of the record that all the aspects stated to have gone uncontroverted in the cross examination, have been sufficiently dealt with. The reasons, in my view, put forth to recall the witness No.1 for further cross examination are therefore not supported by the material.

13) It is to be noted that after engaging the new Advocate the accused have made this application. Even if it is accepted that the previous Advocate was discharged, in my view, that itself would not be a ground to give a cause of action for making such an application. The change of Advocate by party in the litigation is a never ending process. In this context, I may usefully refer the decision of the Hon'ble Apex Court in the case of *AG .v/s. Shiv Kumar Yadav and Anr.*¹, as well as the decision in the case of *State of Haryana Vs. Ram Mehar and ors*², wherein it is held that the power under Section 311 if tested on the anvil of violation of Article 21, cannot be exercised on the ground of change of the defence Advocate and failure to put certain questions to the witnesses by the erstwhile advocate. In the case of *A.G. Vs. Shiv Kumar Yadav and Anr. (supra)*, the Hon'ble Apex Court has observed that counsel is

1 2015 AIR SCW 5302

2 AIR 2016 SC 3942

normally presumed to be competent to conduct the matter particularly when a counsel is appointed by choice of a litigant. It is further observed that if such principle is taken to logical end then the retrial may follow on every change of counsel and the same can have serious consequences on conduct of trials and criminal justice system.

14) In my view, the decisions of the Hon'ble Apex Court, in the above cases, are applicable in this case. In this case, the newly engaged advocate made general statements that certain relevant matters remained to be dealt with in the cross-examination. The aspects which are stated to have remained to be dealt with, in the opinion of the learned Magistrate have already been taken care of in the cross examination conducted by erstwhile Advocate. This observation finds support from record.

15) It is to be noted that after change of the Advocate the application was made. It is to be noted that on the date of this application the statement under Section 313 of the Cr.P.C. of the accused was recorded. The matter was posted for the evidence of the defence witness. In my view, looking at the facts from any angle the same would show that the application was not bonafide. It seems to have been made just to prolong the trial. I am conscious of the fact that while deciding

such application a hyper-technical approach cannot be adopted. However, that does not mean that the prayer for recalling the witness can be granted merely for asking and in a routine manner. The party seeking recalling of a witness must make out a case for the same. It must be demonstrated that recalling of witness for further examination is necessary for just decision of the case. Therefore, in my view, the law laid down in the decision in the case of *Varsha Garg .v/s. The State of Madhya Pradesh and Ors. (supra)* is of no help to the case of the accused persons. On the basis of the proposition laid down in this case, the learned Advocate for the complainants satisfied this Court that the case in question is not a fit case to warrant the recalling of the witness No.1.

16) In view of the above, I am of the view that there is no substance in the application. On careful perusal of the order passed by the learned Additional Sessions Judge as well as the order passed by the learned Magistrate it is seen that the Courts below have not committed any mistake or illegality. I, therefore, conclude that there is no substance in the application. The application stands **dismissed**, accordingly.