

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

[Sr. No.263]

CRM-M-10252-2019(O&M)
Date of decision :28.02.2023

Sanjay Kumar

.....Petitioner(s)

Versus

M/s Perfect Bio Nutrients

..... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present: Mr. Abhimanyu Batra, Advocate for the petitioner

Mr. Munish Kumar Garg, Advocate for the respondent

AMAN CHAUDHARY, J.

The present petition has been filed under Section 482 Cr.P.C. for setting aside the impugned order dated 11.01.2019 (Annexure P-1) passed by Judicial Magistrate Ist Class, Jind in Criminal Complaint No.144 dated 12.04.2018, whereby the opportunity of the petitioner to cross-examine the respondent/complainant has been closed and the cross-examination of the respondent treated as 'NIL'.

Learned counsel for the petitioner contends that the right to cross-examine the complainant-respondent has been given an opportunity treated as 'NIL', as reflected in the order of learned trial Court dated 11.01.2019 (Annexure P-1). Though the complainant-respondent has been granted three opportunities to get his examination-in-chief recorded, however, he appeared only on two occasions out of those three dates and, thereafter, accused-petitioner having been granted two opportunities to cross-examine the complainant-respondent. Learned counsel for the petitioner further contends that at the time when the case was taken up on the aforesaid dates, both learned counsel for the complainant-respondent and the accused-petitioner were

occupied in another matter before the Ld. Addl. Chief Judicial Magistrate, Jind in complaint case titled as 'M/s. Venus Layers Vs. Rakesh' which is an admitted position, as stated in the reply to the application for granting permission for further cross-examination of the complainant-respondent. Learned counsel for the petitioner prays for one more opportunity to cross-examine the respondent-complainant which may even be subject to cost.

Learned counsel for the respondent contends that on both occasions i.e. on 03.01.2019 as well as on 11.01.2019, learned counsel for the accused appeared in the Court at 3:45 p.m. while the witness sat in the Court throughout the entire day. Therefore the order passed by the learned court is rightly passed.

Heard.

The fact of the matter in the present case based on which, the learned trial Court has treated the cross-examination of complainant as 'Nil' was that, the learned counsel for the accused-petitioner appeared in the Court at 3.45 PM on a previous date and he was not available on 11.1.2019 till 3.40 PM. The impugned order reads thus:

“One CW Rajesh Jain is again present. He has been sitting in the court since morning. Repeatedly the court has summoned the counsel of the accused many times to cross examine the present CW but his clerk and his junior counsel have time and again come to the court stating that the main counsel is just coming. Accused was duly informed and opportunity was granted to him to cross examine the CW to which he went out of the court to call his counsel again but he did not come. The case pertains to Action Plan category and needs urgent attention of the court. On previous date also cross examination of the present witness was not concluded as Ld counsel for the accused appeared in the court at 3.45 PM. The witness sat throughout the entire day and counsel came at 3.45 pm on previous date. Even today counsel for the accused was not available till 3.40 pm still this court graciously accepted his request and allowed him to cross examine the CW. This shows casual attitude of Id

defence counsel towards the proceedings of this court. After repeatedly summoning him, he has not come before this court. This court apprised the accused of his right to cross examine the CW but he refused to do the same. Therefore as opportunity was given to the accused, the cross examination of the present CW Rajesh be treated as NIL. Thereafter Ld counsel for complainant has closed the after charge evidence vide his separate statement. Now the case is fixed for recording the statement of accused under Section 313 Cr.PC on 02.02.2019.”

The application was thus filed on 24.1.2019 by the learned counsel for the accused-petitioner giving the reason of his non-appearance in para 2 thereof, which reads thus:

“That on the previous date i.e. on 11.01.2019 the applicant alongwith junior counsel Ms. Pooja was present and the main counsel alongwith counsel of complainant Sh. S.K. Garg, Advocate, was busy in the court of Sh. Khatri Saurabh, Ld. Addl. Chief Judicial Magistrate, Jind in complaint case titled as "M/s. Venus Layer Vs. Rakesh". This case was called and cross-examination started at about 01:45 p.m. and it remained continue up till 03:45 p.m. and both counsels i.e. Sh. S.K. Garg, Advocate and Sh. P.K. Batra, Advocate were busy in that complaint case and due to this reason the cross-examination on complainant could not be conducted in the present complaint. The applicant as well as junior counsel had made request to this effect but their request has not been considered by the Hon'ble Court and the order dated 11.01.2019 marking the presence of the counsel of the accused and cross-examination was showing nil and ordered that the opportunity has been granted has been passed. It is pertinent to bring into the notice of this Hon'ble Court that vide order dated 29.09.2018 the detailed order on framing of charge only under Section 138 was passed by this Hon'ble Court and the complaint was adjourned for 17.11.2018 for after charge evidence of the complainant and on 17.11.2018 no after charge evidence of the complainant was present and adjournment was sought by the counsel for the complainant and the complaint was adjourned for 06.12.2018 for after charge evidence of the complainant own responsibility. Thereafter, on 06.12.2018 application for exemption of complainant for his appearance was filed and the same was allowed by the Hon'ble Court subject to the cost of Rs.200/- to be paid in DLSA, Jind and the complaint was adjourned for 18.12.2018 for after charge evidence of the complainant at own responsibility. Thereafter, on 18.12.2018 previous cost of Rs.200/- was not paid by the complainant and Sh.

Rajesh Jain complainant was present and was partly examined. Cross-examination was deferred for 03.01.2019 and on 03.01.2019 again previous cost of Rs.200/- was not paid and the accused/applicant was not present and exemption application of the accused/applicant was moved which was allowed by the Hon'ble Court. Sh. Rajesh Jain, complainant was present in the court and he was cross-examined but his cross-examination could not be completed on that day and the case was adjourned for 11.01.2019 for remaining after charge evidence of the complainant at own responsibility and for payment of previous cost which was to be deposited by the complainant with DLSA, Jind.”

In response to the said application, the complainant with regard to the averments made in para 2 of the application, responded thus:

“That para No.2 of the application, as alleged, is incorrect, hence denied. It is correct that on 11.01.2019, Sh. P.K. Batra, Advocate, alongwith counsel of the complainant Sh. S.K. Garg, Advocate, remained busy in the court of Ld. Addl. Chief Judicial Magistrate, Jind in complaint case titled as “M/s. Venus Layer Vs. Rakesh” during the period of 01:45 p.m. up till 03.35 p.m., but it is denied that Sh. P.K.Batra, Advocate, remained busy thereafter. It is incorrect that due to this reason the cross-examination of CW-1 Rajesh could not be conducted in the present complaint. It is incorrect that the applicant as well as junior counsel of Sh. P.K. Batra, Advocate has made request to this effect but the said request has not been considered by this Hon'ble Court. Rest of the paragraph is matter of record. However, on 11.01.2019 Sh. Rajesh Jain CW remained present throughout the day in this Hon'ble Court for the purpose of his further cross-examination alongwith his counsel before lunch break and alongwith Sh. Abhay A. Singhal, Advocate, an Asstt. Advocate of Sh. S.K. Garg, Advocate, after lunch break. The evidence was closed by Sh. S.K. Garg, Advocate, counsel for the complainant at about 04:00 p.m. in this case.”

The Court however, dismissed the application being not maintainable by observing that:

“Heard both Ld counsel. Perusal of case file shows that on 11.01.2019 court granted opportunity to the accused to cross examine the complainant and then treated the cross examination as NIL because his counsel did not come in the court till 3.45 pm. Order dated 11.01.2019 is self

explanatory and there is no need to reproduce its content here. The present application is filed to grant the permission to further cross examine the complainant. Ld counsel for complainant has rightly pointed out that there is no provision in Cr.P.C under which the present application has been filed. The present application is not maintainable in the eyes of law as when the court itself has treated the cross-examination of complainant as NIL with speaking order; this court has no power to review its own order under Cr.P.C. The criminal court do not have inherent powers as the Civil court has under Section 151 Cr.P.C.”

This Court in the case of **Dr.Shashi Adlakha vs. SD Jain (died) through LRs 2020(3) RCR (Crl.)865** wherein the petitioner had failed to cross-examine the complainant despite several opportunities and the cross-examination was treated as ‘Nil’, held that petitioner could suffer imprisonment, therefore, he should not have any impression that he has been denied the due opportunity to defend himself, thus, granted one effective opportunity to the petitioner to cross-examine the complainant/witness.

In the case of **Nikhil Sahota vs. Sanjeet Singh @ Gaurav** 2019(1) Law Herald 223 while dealing with a petition whereby application filed under Section 311 declining the opportunity to the accused to cross-examine the witness of the complainant on the ground that the accused was only trying to delay conclusion of trial and had taken numerous opportunities, 6 out of which, happened to the last and final opportunity, observed that it would be travesty of justice, if the accused, who remained under a mistaken impression that he can drag the proceedings as per his choice, is suddenly denied the opportunity to cross-examine the complainant and granted one last opportunity to him to cross-examine the complainant/ witnesses.

In the present case, for the reasons given by the accused-petitioner in his application, it being that his learned counsel and the learned

counsel for the complainant were both occupied in the other court, wherein the cross-examination that started at 1.45 pm and continued upto 3.45 pm, due to which reason the cross-examination of the complainant could not be conducted in the present case. The request made by his associate to this effect was not considered by the Court and cross-examination was shown as 'Nil'.

Hon'ble The Supreme Court of India in case of '**Rafiq and another vs. Munshilal and another**' AIR 1981 SC 140 observed that, "What is the fault of the party who having done everything in his power expected of him, would because of his advocate... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent... We cannot be a party to an innocent party suffering injustice merely because of his chosen advocate defaulted."

This Court in case of **Veena Rao** (supra), while dealing with somewhat similar set of facts, has observed that, "The counsel contended that the statements of PW1- ASI Kulwant Singh, who was the SHO of Police Station, Sadar Abohar and was witness of the alleged recovery and that of LC Usha Rani were recorded on 24.7.2002 but on that day, the defence counsel was not present and as such, they could not be cross-examined. Later on, a request was made to recall them for cross-examination but the prayer was declined. Since, the defence counsel was not present, so, the petitioner should not suffer for the fault of the counsel. In fact, cross-examination of ASI Kulwant Singh and LC Usha Rani is necessary for the just decision of the case. In such circumstances, this petition is allowed and order dated 20.12.2002 passed by Additional Special Judge, Ferozepur is set aside. The trial Court is directed to recall ASI Kulwant Singh and LC Usha Rani for their cross-examination by the petitioner."

The cross-examination of the complainant being necessary for the just decision of the case, the denial of the same, on account of the fault of the counsel would gravely prejudice the accused -petitioner.

Considering, the aforesaid facts and circumstances in light of the judgements referred to hereinabove, it would be in the interest of justice to allow the present petition

Consequently, the trial Court is directed to grant one opportunity to the accused-petitioner to cross-examine the complainant, subject to costs of Rs.10,000/- to be paid to the complainant.

The present petition is allowed in the above terms.

28.02.2023
Anjal/S.Sharma(syr)

[AMAN CHAUDHARY]
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No