

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-28423-2016 (O&M)
Date of decision: 09.03.2023

Atul Sood

....Petitioner(s)

Versus

Kotak Mohindra Prime Ltd.

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. BD Sharma, Advocate for the petitioner(s).

Mr. ADS Sukhija, Advocate for the respondent.

AMAN CHAUDHARY. J.

The present petition under Section 482 CrPC has been filed for setting aside order dated 04.07.2016, Annexure P-11, and order dated 20.07.2016, Annexure P-12, passed by learned Judicial Magistrate, 1st Class, Jalandhar, whereby the applications filed by the petitioner under Sections 311 CrPC in Criminal Complaint No.34275 of 2013 under Section 138 of the Negotiable Instruments Act, 1881 were dismissed.

Briefly put, the petitioner is alleged to have approached the respondent-company for the financial assistance and in order to discharge part of his legal debt/ liability, the cheque bearing No.461687 dated 28.06.2013 issued in favour of the complainant for an amount of Rs.63,000/, was dishonoured vide memo dated 29.06.2013 with remarks “insufficient funds”, that led to filing of the complaint in question.

Learned counsel for the accused-petitioner would contend that CW-1 Gulshan Dhamija, could not be properly cross-examined by the previous counsel of the petitioner on certain points as Ex.D2, the loan

agreement, was entered into between M/s SS Pharmaceutical and the complainant-company, however, the cheque in question was issued by MAS Pharmaceutical Ltd. There is nothing on record to show that the applicant is having any connection with M/s MAS Pharmaceutical and to prove it, the petitioner had filed second application for summoning the witness from the office of Registrar of Companies. The said fact could not be noticed by the earlier counsel. Thus, he prays for grant of one opportunity to lead the aforesaid evidence.

Per contra, learned counsel for respondent would state that the statement of the petitioner was recorded under Section 313 CrPC on 16.1.2015 and thereafter, having availed of more than 32 opportunities, the defence evidence was closed by order on 20.5.2016 and when the case was listed for arguments, the applications have been filed at such belated stage only with a view to delay the proceedings and fill up lacuna. The trial Court has thus, rightly dismissed the same.

Heard.

At the outset, it is apposite to refer to para 2 of the application dated 24.5.2016, seeking to recall CW-1 for further cross-examination, wherein the reason for the same has been stated. The same reads thus:

“That in the above said case the complainant got examine CW-1 Gulshan Dhamija and he was cross examined by previous counsel of the applicant and the said counsel has not cross examined on the points which has been explained to him. In fact, as per loan agreement Ex-D2, the alleged deal was between the complainant M/s.S.S. Pharmaceutical through its partner and the complainant company. But the cheque in question was alleged to be issued by the company M/s.M.A.S. Pharmaceutical Ltd. The previous counsel of the applicant has not cross examined the witness on this point and thorough cross examination of the witness is required on this point and

for which the summoning the CW-1 is necessary. The applicant has changed his counsel and after going through the said cross examination it is necessary to summon the CW-1 for further cross examination as number of documents are to be put to the said witness during cross examination.“

Similarly, the ground taken in the 2nd application dated 19.07.2016, seeking permission to summon witness from office of Registrar companies is considered relevant to be referred to, reads thus:

“2.That the present case has been filed against the applicant but in the head note of the complaint, nothing has been mentioned about the status of applicant and about the constitution of the company M/s.M.A.S. Pharmaceutical Pvt.Ltd. There is nothing on the record that the applicant is having any connection with the company M/s.M.A.S. Pharmaceutical and even otherwise the applicant is nothing to do with the said company and therefore the applicant is not liable to be prosecuted in the present case.

3.That the above said fact has been explained to the previous counsel but the said counsel has failed to prove this fact that the applicant is having no connection with the present company. Now, when the new counsel engaged by the applicant inspected the file and found that nothing has been brought on record with respect to the constitution of the company.”

The alleged lack of competence of the previous counsel which is sought to be raised in both the applications filed by the petitioner in the present case cannot be a ground justified to reopen the examination of complainant by way of an application filed under Section 311 Cr.P.C. In case, such a view is taken, it will be contrary to the settled principles of law as laid down by Hon’ble The Supreme Court of India in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav** (2016) 2 SCC 402, the relevant excerpt from the said judgment reads thus:

“29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

- (i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also'. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;
- (ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;
- (iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;
- (iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;
- (v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- (vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;
- (vii) Mere change of counsel cannot be ground to recall the witnesses;
- (viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;
- (ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;
- (x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."

(emphasis added)

In the aforesaid judgment it was also observed that, “..to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be

normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel can have serious consequences on conduct of trials and the criminal justice system.”

The petitioner in the present case was assisted by a counsel of his choice and was professionally assisted by him when he extensively cross-examined the witness. Be that as it may, the trial Court still instead of dismissing the application solely on the aforesaid ground rightly considered whether in every respect it was essential to examine such a witness or to recall for further examination, as the Court must satisfy itself in this regard, so as to arrive at a just decision. The trial Court found no ground to recall CW1, as regards the loan agreement, Ex.D2 is concerned, the same having been produced by CW1 during his cross examination on 06.01.2015 and was admitted. As such, it observed that said document being a part of record would be read into evidence at the time of decision of the case. Similarly, while considering the application seeking to examine witness from the office of Registrar of Companies, the trial Court found the application filed under section 311 CrPC filed at an advance stage of the case, as it was pending for arguments since 20.5.2016, and the aforesaid application was dismissed on 04.7.2016. A statement was made that arguments will be addressed on 13.7.2016 but on the same day, the application was filed, thus, it was found that it was in order to delay the proceedings.

Pertinently, to take a view that an application under Section

311 Cr.P.C. can be allowed in a routine manner on the plea of change of a

counsel after discharging the previous counsel from the case that his performance was not to the liking or satisfaction of the concerned party, will be, to say the least, most unreasonable, as every counsel representing a party can have a different point of view and new questions might crop up, which according to him may be material to the case, it however, does not imply that applications of such kind on the ground as raised in the present case, can be entertained, as in such an eventuality, the trial will never culminate. The additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties as was held by Hon'ble The Supreme Court of India in the case of **Natasha Singh v. CBI (State)**, (2013) 5 SCC 741, that where the evidence had been closed long back and reasons for recalling of the witness for re-examination are not satisfactory, the summoning of the witnesses at belated stage is likely to cause prejudice and should not be allowed. Besides the aforesaid the Court must not encourage applications that appear to be misconceived, be it for the reason of stage of filing or content or relevancy or without demonstrating that such evidence would be essential for just decision of the case, which the trial Court in the present case has rightly considered and recorded in its orders, while dismissing the applications.

Still further, the power under Section 311 Criminal Procedure Code must be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection as held by Hon'ble The Supreme Court of India in the case of **Rajaram Prasad Yadav Vs. State of Bihar and another** : 2013(3) R.C.R.(Criminal) 726. The trial Court was justified in rejecting the

applications finding them to have been filed at the stage of arguments to delay the proceedings and with no cogent reason forthcoming to either recall the complainant or examine witness from office of Registrar of Companies, which was also not considered to be essential for the just decision of case, and the power under this provision should not be exercised, if the application has been filed as an abuse of the process of law as held by Hon'ble The Supreme Court in the case of **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation**, (2019) 14 SCC 328.

For the reasons recorded hereinabove, this Court finds no illegality or perversity in the impugned orders dated 04.07.2016 and 20.07.2016 (Annexures P-11 and P-12 respectively). As such, the present petition being devoid of merits is hereby dismissed.

(AMAN CHAUDHARY)
JUDGE

March 09, 2023

GSV/S.Sharma(syr)

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