

IN THE COURT OF THE JUDICIAL MAGISTRATE
FAST TRACK COURT (M.L) AT, THENI

Present : Tmt. G. Rubana, B.Sc., M.L.,
Judicial Magistrate,
Fast Track Court (M.L), Theni.

Wednesday the 13th day of November 2019

Cr.M.P. No.2531 of 2019
in
S.T.C. No.1 of 2017

K.A.Kannan (40/ 2019)

..... Petitioner / Accused.

// Vs //

P.Muthukumaran (43/2019)

..... Respondent / Complainant.

This petition is filed under Sections 311 of Cr.P.C., to recall PW1 for further cross examination.

2. The gist of the petition filed by the petitioner / accused is as follows: -

The petitioner submits that he is facing trial under Section 138 of NI Act and that on 23.09.2019 PW1 was chief examined and on that day of chief examination the defence counsel partly cross examined the respondent and sought further time for further cross examination since the counsel could not get instructions from the petitioner, however the respondent side evidence was closed and that it is just and necessary to recall PW1 for further cross examination and prays for order in his favour.

3.The gist of the counter filed by the respondent / complainant is as follows: -

The respondent submits that this petition is false, frivolous, vague and liable to be dismissed and that the petition has no valid reason for recalling PW1 and this petition is filed with a view to fill up the lacuna and drag on the proceedings and that the petitioner has cross examined PW1 in length and the reason stated in the petition is not at all plausible and that the inability of the counsel to get instruction from his party cannot be a ground to recall witness and that the petitioner ought to have cross examined PW1 on the prescribed date and if this petition is allowed serious prejudice will be caused to the respondent and prays for dismissal of this petition.

4. Now the point for consideration is Whether this petition could be allowed or not?

(i). Heard, and perused the records.

(ii). Brief facts of the case are that the respondent / complainant has filed a complaint under Section 138 of NI Act against the petitioner alleging that the petitioner has borrowed a sum of Rs. 3,00,000/- in the month of July 2016 and to discharge the same the accused issued cheque bearing nos: 000042 dated 10.08.2016 drawn HDFC Bank, Chennai Branch and that the complainant presented the cheque for encashment on 12.08.2016 through his banker namely Bank of Baroda,

Theni Branch and the same were returned on 12.08.2016 with an endorsement as "payment stopped by drawer" hence the complainant issued a legal notice dated 23.08.2016 and the same was returned with endorsement as refused and since the accused did not pay the amount within the stipulated period, it constrained the complainant to file the aforesaid complaint.

(iii). The learned counsel for the petitioner contended he was not able to cross examine PW1 fully on that day since he could not get instruction from his client. On the other hand the learned petitioner counsel argued that for the past one year this case is pending for cross examination of PW1 and further could not get instruction from the client is not a valid ground for recall PW1 and further this petition is filed with a view to drag on the proceedings.

Section 311 Cr.P.C., which reads as under:

"311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

(v). Careful perusal of Section 311 clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness provided same is essentially required for just decision of the case. Moreover, such application can be filed at any time before conclusion of trial. However, the above said power cannot be exercised to permit the petitioner to fill up lacuna.

(vi). It is a settled principle of law that, allowing of the sec.311 Cr.P.C., could not be done in a routine manner just because it was filed by a party, time and again the Hon'ble Apex court and Our high court had reminded the trial courts not to allow the sec.311 Cr.P.C. petitions mechanically. It is a settled principle of law that to recall a witness the petitioner ought to have shown a strong reason, satisfying the court to do so and the same could not be allowed merely because the parties filed a petition.

(iv). On perusal of the docket sheet it reveals that on 19.07.2018 the complainant was examined as PW1 and Ex.P:1 to Ex.P:5 were marked and the case was posted for cross examination of PW1 on 27.08.2018, 18.09.2018, 06.10.2018, 26.10.2018, 23.11.2018, 04.01.2019, **14.02.2019**, 21.02.2019, 21.03.2019, 22.04.2019, 28.05.2019, 25.06.2019, 04.07.2019, 10.07.2019, 15.07.2019, 29.07.2019, 09.08.2019, 16.08.2019, 29.08.2019, 09.09.2019, 19.09.2019 and on 23.09.2019. On 23.09.2019 the petitioner has cross examined PW1. On 14.02.2019 the respondent has filed petition under Section (143A) and the same was dismissed 16.08.2019. Hence on the date of chief examination of PW1 i.e. on 23.09.2019 itself the defence counsel cross examined is unsustainable and after giving sufficient opportunity the petitioner has failed to cross examine fully on 23.09.2019. Further on perusal of entire records it reveals that the petitioner has refused to receive the legal notice sent by the respondent and hence he has not sent reply notice also. Further

initial questioning under Section 251 of Cr.P.C., the petitioner simply denied the substance of accusation and further the petitioner has not stated his defence in this petition also.

(v). Even though the reason stated by the petitioner is not a valid one, in the interest of justice to give an opportunity to give the petitioner to substantiate his case, this court is of the considered view that the present petition could be allowed on condition that the petitioner shall pay a cost of Rs.5,000/- to the respondent on or before 19.11.2019 and shall examine the respondent on the date of his appearance failing any one of the condition this petition stand dismissed automatically.

Typed by me in the laptop and pronounced by me in the open court on this the 13th day of November 2019.

Judicial Magistrate,
Fast Track Court (M.L.),
Theni.

Petitioner side witness: - Nil
Petitioner side list of Documents: - Nil
Respondent side witness: - Nil.
Respondent side documents: - Nil.

Judicial Magistrate,
Fast Track Court (M.L.),
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