

Before Paramjeet Singh, J.
SANJIV NAGPAL—Petitioner
versus
ATUL SHARMA—Respondent
CRMM No.M-3011 of 2013

April 12, 2013

Code of Criminal Procedure, 1973 - S.304 & 482 - Negotiable Instruments Act, 1881 - S.138 - Complainant in proceedings u/s 138 N.I. Act, not cross-examined by counsel for accused despite a number of opportunities - Cross examination closed by order - High Court set aside/quashed the order of trial court and allowed cross-examination holding that veracity of statement of complainant can only be tested through cross-examination - Petition allowed.

Held, that perusal of the zimni orders shows that on various dates, counsel for the petitioner did not appear, meaning thereby the petitioner remained unrepresented on various dates. Fair trial is a necessity specifically in criminal justice system where the right to life and liberty is involved.

(Para 9)

Further held, that I am of the view that cross-examination is the only method by which the accused may directly challenge the veracity of the accusation against him. It is one of the fundamental and important rights given to the accused in the criminal justice system.

(Para 10)

Further held, that in view of the above, this Court is of the view that no prejudice will be caused to the complainant if an opportunity is granted to the petitioner to cross-examine CW1 and other complainant witnesses as they are yet to be examined by the complainant. However, the petitioner can be burdened with cost to compensate the complainant in this regard.

(Para 11)

Rajiv Kataria, Advocate, *for the petitioner*;

Tapan Yadav, Advocate, *for the respondent*.

PARAMJEET SINGH, J.

(1) A case was initiated on a criminal complaint under Section 138 of the Negotiable Instruments Act wherein the petitioner was summoned for dishonour of cheque amounting to Rs. 4.40 lacs.

(2) After appearance of the petitioner, case was fixed for examination of the complainant witnesses. The examination-in-chief of the complainant was submitted by way of affidavit on 12.2.2012 and the case was deferred to 27.1.2012 for cross-examination. Number of opportunities were provided to the petitioner for cross-examination of complainant CW1. Ultimately vide order dated 12.12.2012, when the counsel for the petitioner was not present, cross-examination of CW was ordered to be 'nil'. Petitioner is aggrieved against this order. Hence, this petition.

(3) In pursuance of the notice of motion, the complainant/respondents appeared and submitted reply denying the averments made in the petition and the main objection of the respondents is that petitioner has been given adequate opportunities to cross-examine the complainant but his counsel did not appear to cross-examine the complainant, so his cross-examination has been correctly shown as 'nil'.

(4) Learned counsel for the petitioner vehemently argued that on CW1-complainant had tendered his affidavit in examination-in-chief and no other witnesses of the respondents were present. For that reason the cross-examination could not be done. He has made reference to the zimni orders of various dates. In zimni order dated 15.2.2012 it is mentioned that no CW is present and last opportunity was granted to the complainant. On 28.2.2012 and 22.3.2012 also no CW was present. On 12.4.2012, case was fixed for cross-examination of complainant/CW1. No other CW was present. In this manner a number of opportunities were granted to the complainant, only complainant remained present but no other witness was present. Though, the counsel for the petitioner has not controverted that there was lapse on the part of the petitioner's counsel for cross-examination of CW1 but for that reason petitioner should not suffer. Petitioner being an accused has a right to cross-examine the CWs. Necessity of testing by cross-examination the veracity of truth is fundamental principle and a vital feature of law of evidence, the accused cannot be denied his right to cross-examine the complainant witnesses. Cross-examination of CW is the only

opportunity to the accused to present the facts, inferences and impressions by questioning the veracity of the statement of the witness and also to set up the plea of defence. As such when the counsel was not present, it is the duty of the Court also to assign a legal aid counsel for the accused, who remains unrepresented during the trial as opportunity to cross-examine is a necessity. When the case was taken up on 12.12.2012, there was no counsel representing the petitioner/accused. As such it was the duty of the Court to assign a legal aid counsel for him. In these circumstances, learned counsel for the petitioner prays that an opportunity to cross-examine the complainant may be granted otherwise the right of the petitioner will be prejudiced. The complainant can be compensated with cost as the complaint under Section 138 of the Negotiable Instruments Act is a quasi-civil nature dispute.

(5) Learned counsel for the respondents vehemently opposed the contentions raised by the learned counsel for the petitioner and submitted that for almost one year CW1-complainant was not cross-examined by the counsel for the petitioner. For that reason, petitioner is not entitled to any relief.

(6) I have considered the rival contentions raised by the learned counsel for the parties and perused the file.

(7) Perusal of order dated 12.12.2012 clearly indicates that on that date only CW1 Atul Sharma-complainant was present. No other CW was present, his cross-examination was ordered to be nil and the case was adjourned for examination of CWs for the next date.

(8) It would be pertinent to mention here that cross-examination is crucial in which the reliability of the complainant evidence is to be tested. It is also taken care of in the criminal justice system that piecemeal evidence of complainant's witnesses is not generally allowed. Material witnesses are allowed to be examined on one date. The cross-examination is the only method by which the accused may directly challenge the veracity of the complainant witnesses and it is one of the fundamental and important rights of the accused. On the date when cross-examination of the complainant witness was treated as nil, petitioner remained unrepresented. In view of

provisions of Section 304 Cr.P.C., when the accused remains unrepresented the Court should consider providing him the legal aid counsel at the State expenses or assign amicus curiae. The entitlement to free legal aid counsel is not dependent on the accused making an application to that effect and the Court is obliged to inform the accused of his right to obtain free legal aid.

(9) Perusal of the zimni orders shows that on various dates, counsel for the petitioner did not appear, meaning thereby the petitioner remained unrepresented on various dates. Fair trial is a necessity specifically in criminal justice system where the right to life and liberty is involved.

(10) I am of the view that cross-examination is the only method by which the accused may directly challenge the veracity of the accusation against him. It is one of the fundamental and important rights given to the accused in the criminal justice system.

(11) In view of the above, this Court is of the view that no prejudice will be caused to the complainant if an opportunity is granted to the petitioner to cross-examine CW1 and other complainant witnesses as they are yet to be examined by the complainant. However, the petitioner can be burdened with cost to compensate the complainant in this regard.

(12) In the peculiar facts and circumstances of the case, petition is allowed. Petitioner is burdened with costs of Rs.15,000/- out of which Rs.2,000/- shall be given to the complainant and Rs.13,000/- shall be deposited by the petitioner with the State Legal Services Authority, Union Territory, Chandigarh.

(13) Parties are directed to appear before the trial Court on 1.5.2013. One opportunity shall be granted to the petitioner to cross-examine the complainant-CW1. The trial Court will summon CW1 and it will be the responsibility of the petitioner to engage counsel and cross-examine the complainant/CW1 on the date, which is to be fixed by the trial Court. In case the petitioner remains unrepresented, the Court shall assign a legal aid counsel. Thereafter, further proceedings shall continue in accordance with law.