

Witness Appearing For Complainant And Cross-Examined By Accused Cannot Be Called To Appear As Defence Witness: J&K&L High Court

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HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

MD. AKRAM CHOWDHARY, J.
CRMC No. 319/2018; 10.11.2022

Azra & Ors. versus Mohammad Afzal Baghat

Appellant/Petitioner(s) through: Mr. Anis ul Islam Advocate.

Respondent(s) through: Mr. Kaiser Ali, Advocate.

J U D G M E N T

1. In a complaint under Section 138 of Negotiable Instruments Act 1881, filed before the court of learned Judicial Magistrate (Sub Judge) Chadoora, the complainants-petitioners herein are stated to have examined Nazir Ahmad Joo, Manager J&K Bank Branch Chadoora, Mohammad Yousuf Wani and Ghulam Nabi Wani as complainants' witnesses, which were stated to have been duly cross examined by learned counsel for the accused.

2. On 10.04.2014 the respondent-accused filed the application mentioning therein the list of defence witnesses seeking issuance of process for presence of witnesses namely Nazir Ahmad Joo, Advocate A.R.Hanjura, Manager J&K Bank Branch Chadoora and Patwari Halqa Wathora at S.No. 1 to 4 respectively, in the list of witnesses and it was prayed that these witnesses be called through the process of court. The application moved by the accused was allowed on the same day vide order dated 10.04.2014, perusal whereof reveals that it was allowed in a routine manner.

3. Aggrieved of the order dated 10.04.2014, whereby application moved by the accused was allowed in a routine manner, it was challenged by way of filing of petition under Section 561-A Cr. PC and this Court vide order dated 21.04.2017 allowed this petition No. 68/2015 and the impugned order dated 10.04.2014 was quashed, directing the petitioners to file objections within a period of 15 days from the date of the order with advance copy thereof to learned counsel for the accused and the learned trial Magistrate was directed to make an endeavour to hear and decide the application within next 15 days.

4. Pursuant to the directions of this Court, the complainants/petitioners filed objections to the application filed by the accused/respondent asserting therein that Nazir Ahmad Joo and Manager J&K Bank Branch Chadoora have been examined by the complainants as their witnesses and the accused had cross examined them before being discharged, whereas Advocate A.R.Hanjura, who was the counsel of the complainants, was not required to be examined by the opposite side in view of the fiduciary relationship of counsel and the client and also that the Patwari Halqa Wathora was not required to be examined as the accused was not supposed to prove the details of his property within the village Wathora, as the same was not required for disposal of a petition under Section 138 NIA. The complainants finally prayed that the application moved by the accused-respondent seeking issuance of process for examination of Nazir Ahmad Joo, Manager J&K Bank Branch Chadoora and earlier counsel of the complainants Mr.A.R.Hanjura as defence witnesses, be dismissed.

5. After hearing both the parties and consideration of the rival submissions, learned Magistrate vide order dated 26.05.2018 did not find favour with the objections raised by

the complainants to the extent of examining Nazir Ahmad Joo one of the complainants and Manager J&K Bank Branch Chadoora and ordered to recall them to be examined as witnesses of the accused, invoking Section 540 Cr PC. The application was also allowed to the extent of issuance of process for presence of Patwari Halqa Wathora with a direction to come with complete details of the property of accused Mohammad Afzal Baghat.

6. Contention of complainants to the extent of not allowing Mr. A.R.Hanjura as defence counsel was, however, agreed by the learned Magistrate in view of the provisions of Section 126 of Evidence Act Svt. 1977 due to the professional communication of the counsel by the client.

7. Having been aggrieved of the order dated 26.05.2018 passed by learned Magistrate, whereby the contention of complainants to not allow the plea of the accused to allow Nazir Ahmad Joo one of the complainants and Manager J&K Bank Branch Chadoora and Patwari Halqa Wathora as witnesses of the respondent-accused, the same has been challenged through this petition filed under Section 561-A Cr PC seeking quashment of process initiated by the impugned order on the grounds *inter-alia* that it is the settled position of law as well as prescribed in statute that a witness produced by prosecution/complainant, properly examined, and cross examined by the counsel for the accused, cannot be called as a witness on behalf of the defence unless he is recalled by the court on an application moved by either of the parties and has to depose only then on behalf of the party which had produced him or as a court witness. But in the instant case the counsel for the accused has with an intention of delaying the proceedings included the name of those witnesses who have been mentioned in the list of witnesses produced on behalf of the complainants as their witnesses, which action is not only illegal but is barred under the procedure governing the trial of cases under N.I Act 1881. It is stated that the learned Magistrate while passing the order dated 26.05.2018 has erred gravely, since the power conferred upon the court under Section 540Cr. PC is to be exercised only to advance the cause of justice and not to cause the failure of justice. However, in the instant case, learned Magistrate rather than advancing the cause of justice of the petitioners has paved way for failure of justice by allowing the accused to vitiate the whole proceedings. Furthermore, it is stated that the trial court vide impugned order has issued process in a most mechanical and perfunctory manner against the complainants' witnesses clearly and manifestly in grave abuse of process of law, hence prays for quashment of the impugned order.

8. Pursuant to the notice, respondent has filed objections to the petition, wherein respondent has vehemently denied that the trial court has abused the process of law or any illegal order has been passed. It is further submitted that on the date of dismissal of complaint, order passed by this Court was not in force and this Court only stayed the proceedings initiated vide impugned order dated 26.05.2018 not the proceedings in toto but the petitioners have construed it as the proceedings in whole, which is not the fact, hence the petitioners have remained absent in court proceedings not once but in a number of hearings and the court below has rightly taken recourse of dismissing the complaint.

9. Heard and considered.

10. Learned counsel for the petitioners argued that the accused-respondent has moved an application to examine as defence witnesses, the witnesses already examined by the complainants as their witnesses, and the learned trial Magistrate very strangely allowed his application to the extent of summoning Nazir Ahmad Joo, Manager J&K Bank Branch Chadoora as his witnesses, unmindful of the fact that both these witnesses had already

been examined by the complainants and cross examined by the accused, therefore, there was no occasion to call these witnesses again for their examination as defence witnesses.

11. He would further argue that the trial court has adopted a novel method to invoke Section 540 Cr.PC without there being any application in this regard and the application moved by the accused to cite the witnesses, examined by the complainants, to be called as witnesses on behalf of the accused. He has drawn the attention of this Court to the application moved by the respondent/accused, whereon the impugned order was passed and wherein it has been stated that Nazir Ahmad Joo, who is one of the complainants, to disclose his service particulars from the day he joined the Government service as adhoc/temporary or on contract till he was regularized and thereafter, with the further direction to furnish details of his account with different Banks within India including the State of J&K and also data-wise details of the amount he had transferred from his accounts to the account of the accused with J&K Bank Ltd. Branch Chadoora from time to time in the years 2009-11. Furthermore, Manager concerned J&K Bank Branch Chadoora was asked to produce all the details of Account No. CC/508 of the accused and the names of those, from whose accounts money has been credited to the account of accused for the years 2009, 2010 and 2011. Another direction was to produce specimen signatures and seal impression of accused reserved with the Bank and details about the refusal of disposal of cheques, besides to give details of any house loan facility to the accused. Learned counsel for the petitioners argued that these questions have been already asked to these witnesses while being examined as complainants' witnesses during the cross examination by the accused and after being satisfied the witnesses had been discharged. He has further argued that Patwari Halqa Wathora was also not required to be examined by the defence, as for the disposal of the complaint under Section 138 N.I.Act, the property of the accused is irrelevant, therefore, Patwari Halqa Wathora has also been wrongly summoned by the court below.

12. Learned counsel for the respondent, on the other hand, argued that the trial court has rightly allowed the application of the respondent-accused, as Nazir Ahmad Joo, Manager J&K Bank Branch Chadoora and Patwari Halqa Wathora were important witnesses to narrate the facts so as to determine the dispute between the parties. He has further argued that the trial court has rightly and legally invoked the provisions of Section 540 Cr. PC, for accepting the application of the respondent-accused and issued process to these witnesses. He further argued that no illegality has been committed by the learned Magistrate, so as to invoke the jurisdiction in terms of Section 561-A Cr. PC, to be exercised for quashment of the impugned order.

13. Before appreciating the rival submissions, it is made clear that as noticed, the application moved by the respondent-accused has been allowed by the learned Magistrate invoking the provisions of Section 540 Cr. PC without being prayed therefor. It is a fact that one of the witnesses sought to be examined by the accused namely Nazir Ahmad Joo is one of the complainants who had also been examined as the complainants' witness, so is the case of Manager J&K Bank Branch Chadoora who had already been examined as complainants' witness and that both these witnesses have been subjected to lengthy cross examination by the respondent-accused before they were relieved without any resistance.

14. The respondent-accused had all the liberty to cross examine the witnesses examined by the complainants on all the aspects and even beyond the scope of examination-in-chief, therefore, it appears that the accused either with a motive to delay the proceedings or with a view to harass the complainants, have given the names of

complainant Nazir Ahmad Joo and Manager J&K Bank Branch Chadoora to be called as witnesses on his behalf. Learned Magistrate without disclosing as to why after thorough cross examination of these two witnesses while being examined by the complainants, respondent-accused has chosen to cite them as his witnesses for being examined afresh. The trial Magistrate has taken the help of Section 540 Cr. PC with an object of aim of every court to discover truth.

15. In the considered opinion of this Court the trial Magistrate on an application moved by the accused-respondent has invoked the provisions of Section 540 Cr.PC without asking for it. The question to be decided by the learned trial Magistrate was as to whether the witnesses examined by the complainants can be asked to appear as witnesses for the defence. Even if the learned Magistrate was of the view that certain clarifications were required to be made by these witnesses while being cross examined and re-examined during trial, it could not be legally tenable to call these witnesses on behalf of the opposite party. At the most these witnesses could have been summoned as complainants' witnesses for their further cross examination, if same was required. Learned Magistrate, in the considered opinion of this Court, has misdirected himself to allow the application of the respondent-accused to the extent of calling CWs-Nazir Ahmad Joo and Manager J&K Bank Branch Chadoora to be examined by the accused as his witnesses. It is yet to be heard that a witness can depose on both sides. It is also not clear as to what the Patwari Halqa Wathora has to prove about the details of the property of the accused when the accused himself can do that and for a complaint under Section 138 N.I Act, the property, if any of the accused-respondent, is not relevant at all.

16. On a perusal of the statements recorded by the court of two witnesses already examined by the complainants and sought to be examined by the accused, the queries that are cited to be proved have already put to them while being cross examined by the accused. It appears that the accused, not only to delay the trial of the complaint against him but also to frustrate the same, has adopted this novel method to ask the court to call witnesses examined by the complainants to be examined afresh as witnesses on his behalf in defence.

17. Provision of Section 540 Cr.PC is to be invoked by the courts only in order to meet the ends of justice, for strong and valid reasons, and this power has to be exercised with great caution and circumspection. The determinative factor should therefore, be whether the summoning/re-calling of the witnesses is in-fact essential to the just decision of the case. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, therefore, fair trial includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is a constitutional as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. The exercise of this power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice. Exigency of the situation, fair play and good sense should be the safeguard, while exercising this discretion. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

18. Keeping these principles in mind, to examine the case on hand, it has to be stated that the learned Magistrate while passing the impugned order has completely ignored the

principal objectives with which the provision under Section 540 Cr.PC has been brought into the statute book.

19. Having regard to the above discussions and the facts and circumstances of the case, it is held that the witnesses examined by one party cannot be allowed to be examined on behalf of the opposite party at its instance. Learned Magistrate has, thus, erroneously passed the impugned order by misdirecting himself to invoke Section 540 Cr. PC to summon the witnesses already examined by the complainant to be called as witnesses on behalf of the accused-respondent. Learned Magistrate has also not applied his mind as to whether Patwari Halqa Wathora was required to be produced by the accused-respondent so as to prove his property, as the property of the accused-respondent, was not the relevant factor in a complaint under Section 138 N.I.Act. The impugned order thus, suffers from illegality and amounts to abuse of process of court.

20. As a sequel to the afore-stated reasons and to secure the ends of justice, the impugned order is required to be set aside, partially, the impugned order is resultantly quashed to the extent of calling Nazir Ahmad Joo, Manager J&K Bank Branch Chadoora and Patwari Halqa Wathora, as witnesses on behalf of the accused-respondent.

21. Petition is thus, disposed of accordingly.

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