

ORDER ON APPLICATION FILED UNDER SECTION 311
READ WITH SECTION 244 OF CODE OF CRIMINAL
PROCEDURE,1973

Advocate for accused No.2 to 8, 11, 13 to 16, 18 to 29, 31 to 39, 41 to 45, 47 to 55, 57 to 60, 62 to 64 has filed this application under Section 311 read with Section 244 of Code of Criminal Procedure, 1973 for recall of C.W.1 for cross-examination by these accused persons. It is stated in the application that, complainant examined himself as C.W.1 before the court while giving evidence before charge and got marked the documents at Ex.P.1 to Ex.P.78. Evidence of C.W.1 was concluded on 22.02.2017 by way of examination-in-chief. Thereafter, the case was posted for hearing before charge. Present accused persons have not cross-examined C.W.1. In fact, the case was directly posted for hearing before charge. Due to inadvertence or through oversight, C.W.1 was not subjected to cross-examination. It is very much necessary to cross-examine the said witness so as to avail the opportunity to substantiate the innocence of the accused persons. It is also necessary to give proper and adequate opportunity for accused persons to oppose the unsubstantiated allegations made against them and to rebut the evidence of the complainant. On all these grounds, they sought for allowing the application.

2. This application is opposed by complainant by filing objections interalia contending that, it is false, frivolous and untenable either on law or on facts. This application is filed at the belated stage of the case. Evidence of the complainant before framing the charge was commenced on 21.01.2017 and completed on 20.02.2017. Thereafter, arguments were also heard on behalf of the complainant. When the case is posted for hearing arguments on behalf of accused, just to adjourn the case for no reason, the present application came to be filed. Accused persons have taken so many adjournments for arguing the case on framing of charge. Accused persons are filing frequent applications and still the case is going on without any results. What prevented the accused persons to submit before the court when the matter was directly posted for hearing before the charge that they have to cross-examine C.W.1. The accused persons kept quiet and heard arguments on behalf of complainant. Thereafter, counsel for the accused persons took adjournment for arguing the same on behalf of accused persons. It shows deliberate intention of the accused persons to postpone the case without any reason. The court might have posted the case directly for hearing after examination -in-chief of C.W.1. Then what was the necessity for accused persons to take time for hearing on framing of charge. Accused persons have not at all chosen to post the case for cross-examination of C.W.1. Material allegations contained in the application are denied in toto.

Accused persons have obtained certified copy of evidence of C.W.1 and they have not brought to the notice of the court. This application is filed only to drag on the proceedings. On all these grounds, he sought for rejection of the application.

3. Heard arguments of learned counsel for the accused persons and learned counsel for the complainant at length on application. Scrutinized the records of the case.
4. On Scrutiny of records of the case and having heard arguments, following points arise for consideration:

1. **Whether C.W.1 is to be recalled for cross-examination on behalf of accused persons in respect of evidence led by him before framing of charge?**

2. **What order?**

5. My findings to the above points as under:

Point No.1: In the Affirmative.

Point No.2: As per the final order for the following;

REASONS

6. **REASONING ON POINT NO.1:** The present complaint is filed by the complainant under Section 200 of Code of Criminal Procedure, 1973 against accused No.1 to 64 for the offence

punishable under Section 500, 501, 463 read with Section 149 of Indian Penal Code, 1860. In substance, it is averred by the complainant that, accused persons in prosecution of their common object have submitted requisition to several authorities containing defamatory materials against the complainant. Moreover, defamatory articles were also published in Arjuna Patrike. Records reveal that, complainant has led his evidence on 21.01.2017 and 20.02.2017. On 20.02.2017, examination-in-chief of the complainant was concluded and the court has posted the matter for hearing before the charge. Now the accused persons have come up with an application seeking leave of the court for cross-examination of complainant.

7. Indisputably, this is the case instituted otherwise than the police report. Under such circumstances, it falls within the ambit of Chapter XIX of Code of Criminal Procedure, 1973. Therefore, trial of this case is covered by Section 244 to 247 and conclusion of the trial is covered by Section 248 to 250 of Code of Criminal Procedure, 1973. Section 244 of Code of Criminal Procedure, 1973 deals with evidence for prosecution. This provision inter alia lays down that, after appearance of accused, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Section 245 deals with when accused shall be discharged, Section 246 contemplates the procedure when accused is not discharged. These three provisions fall for consideration at present. The word employed in Section 244 of Code of Criminal Procedure, 1973 is "evidence". Therefore,

the term evidence is to be understood with reference to Section 135 of Indian Evidence Act, 1872. The said section lays down that, the order in which witness are produced examined shall be regulated by the law and practice for the time being relating to civil and criminal proceeding and in the absence of such law by the discretion of the court. Further the term "Evidence" is also to be understood with reference to Section 138 of Indian Evidence Act, 1872. As per this Section, the witnesses shall be first examined in chief, if adverse party so desires, cross-examined, then if the party calling him so desires reexamined. Therefore, it becomes crystal clear that, examination includes examination-in-chief, cross-examination and re-examination. Keeping this principle in mind, let me consider the present application.

8. Through the present application accused persons are seeking permission of the court to cross-examine the complainant in respect of his evidence given by him before framing of charge. In the light of legal provisions as noticed hereinabove, let me consider whether at the time of leading evidence by the complainant before framing of charge as contemplated under Section 244 of Code of Criminal Procedure, 1973, permission can be given to accused person/s to cross-examine the complainant and his witnesses. In this connection, it is relevant to place reliance on the decision of **Hon'ble Supreme Court of India reported in (2009) 14 SCC 115 (Ajoy Kumar Ghose Vs. State of Jharkhand and Another)** wherein it is held as under:

“51. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of [Section 244\(1\) Cr.P.C.](#) The accused can show, by way of the cross-examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored”.

9. Principles laid down in this decision, make it abundantly clear that, even at the time of evidence before charge, accused persons are entitled to cross-examine the complainant and his witnesses. It appears from the records of case on 20.02.2017, the order sheet of the court reveals that, examination-in-chief of the complainant was concluded. Order sheet does not reveal that, accused persons have submitted that there is no cross-examination on their behalf. The court has directly proceeded to post the matter for hearing before the charge. Under these circumstances, it appears that, there is fault on the part of the court. It is also well established legal principle that, due to fault on the part of the court, parties shall not suffer. Therefore, viewed from this angle, an opportunity shall be

given to accused persons to cross-examine the complainant notwithstanding the fact that, this application is filed belatedly. Considering all these aspects of the case and totality of the circumstances, I answer the point No.1 in the **Affirmative.**

10. REASONING ON POINT NO.2:- For the reasons stated above, I proceed to pass the following:

ORDER

Application filed by the Accused No. No.2 to 8, 11, 13 to 16, 18 to 29, 31 to 39, 41 to 45, 47 to 55, 57 to 60, 62 to 64 under Section 311 read with Section 244 of Code of Criminal Procedure, 1973 is hereby allowed.

Complainant-P.W.1 is recalled for cross-examination by accused persons before framing the charge.

Considering peculiar circumstances of the case, there will be no order as to costs

**(GUDI VASUDEV RADHAKANT)
ADDITIONAL SENIOR CIVIL JUDGE &
J.M.F.C. HAVERI.**