

**IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE, NO.I,
PERUMBAVOOR**

Present : Sri. ANISH BABU M.B.

JUDICIAL FIRST CLASS MAGISTRATE

Dated this the 28th day of January, 2023

CMP 105/2023 IN ST 3953/2016

Respondent/Complainant : K.K Mathukunju, S/o Kuriakose,
Kiliyathu House, Iringol Kara,
Perumbavoor Village.

(By Adv. C.P Mathew)

Petitioner/Accused : Safeer, S/o Ummar, Mukkada House,
Mudickal Kara, Marambilly Village.
(By Adv. Ajeesh M. Ummar)

ORDER

This petition is filed under Section 311 of the Code of Criminal Procedure, 1973 with a prayer to recall PW1.

2. It is stated in the petition that now the case is posted for the evidence of the accused after closing the evidence of the complainant on 15.12.2022. It is further stated that his counsel was not present on that day. It is further stated that though the complainant was examined, the accused had failed to cross examine the complainant on account of absence of his counsel. It is also stated that there is no laches or fault on his part and if he is not allowed to cross examine the complainant it will cause irreparable loss and hence prayed that the prosecution evidence may be reopened and recall PW1

for cross examination in the interest of justice.

3. The respondent/complainant filed an objection stating that the present petition is lacking bonafides and not sustainable. According to the learned counsel for the complainant, the present petition is filed as a part of dilatory tactics. It is stated that the complainant was examined on 02.04.2022 and the accused had also examined under section 313 of CrPC. Thereafter, this court had allowed a petition moved by the accused and in order to enable the cross examination, the complainant has been recalled. Moreover, though the complainant was present on 15.12.2022 and waited till post lunch session, the accused had not cared to cross examine the complainant and hence prayed that the petition may be dismissed with costs.

4. Heard the learned counsel on both sides.

5. The ST No. 3953/2016 is filed before this court alleging that the accused has committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. On perusal of the proceedings, it can be revealed that the case has been adjourned for several times for complainant evidence from 19.02.2019 onwards and lastly the complainant was examined as PW1 on 02.04.2022 and the application

filed by the accused for adjourning the cross examination was also rejected. The accused was examined under section 313 (1) (b) of CrPC on 11.04.2022. Thereafter, the accused had moved CMP No. 913/2022 under section 311 so as to enable him to cross examine the complainant. This court vide order dated 20.08.2022 had allowed the said petition and posted it to 24.09.2022 for cross examination of PW1. The case has been adjourned again at the instance of the complainant and specifically posted to 15.12.2022 as last chance. On 15.12.2022, both parties present in the morning session and the counsel representing the learned counsel for the complainant submitted that the case may be considered post lunch session since the concerned counsel had some personal inconvenience in the morning. But after lunch break, it was informed by the accused that his counsel would be available at 3.15 pm only and though the court, the complainant and his counsel waited till 3.20 pm, the learned counsel for the accused had not appeared nor the accused had cross examined the PW1 on that day. Eventually, the complainant's evidence again closed. Since the accused had already examined under 313 as early as on 11.04.2022, the matter was posted to 12.01.2023 for defence evidence, if any.

6. According to the learned counsel for the complainant, now

the case is posted for defence evidence after the examination of the accused under section 313 of Cr.PC and the present petition is filed as a part of dilatory tactics. The learned counsel for the complainant vehemently submitted that the powers under Section 311 of the Code of Criminal Procedure must be sparingly used and also must be very cautious while exercising the power under Section 311 at a belated stage. **The Hon'ble Apex Court of India in Vinod Kumar v. State of Punjab, reported as AIR 2015 SC 1206 : (2015) 3 SCC 220** had held as follows;

'Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurize the witness and to gain over him by adopting all kinds of tactics. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The Court has a sacred duty to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till

late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded.'

Very recently, the **Hon'ble Supreme Court of India in Mukesh Singh v. State of Uttar Pradesh & Anr., reported as 2022 LiveLaw (SC) 826**, has held that "we would like to observe that the learned trial judge may take a note of the judgment of this Court in reference to Section 309 Cr.P.C. and not only expedite the trial but the examination-in-chief/cross-examination is to be recorded either on the same day or on the day following but no long adjournment should be granted while recording the statement of prosecution witnesses." It is specifically stated in the petition that the learned counsel for the accused had failed to cross examine the PW1 on account of the personal inconvenience of his lawyer. **In Re Expeditious Trial of Cases Under Section 138 of N I Act 1881, the Hon'ble Apex Court of India as reported as AIR 2021 SC 1957 : 2021 (3) KLT 10**, had expressed its anxiety to cut down delays in the disposal of complaints Under Section 138. On perusal of the proceedings, it is revealed that the ST 3953/2016 has been adjourned for several times for complainant evidence from 19.02.2019 onwards and lastly the complainant was examined as PW1 as early as on 02.04.2022. Moreover,

the accused had already been allowed to cross-examine PW1 as ordered in an earlier 311 petition (CMP No. 913/2022). Once this court already allowed his prayer under section 311 CrPC in order to enable the accused to cross examine the PW1 for ends of justice, then the accused must be eveready for the same without any excuse. The petitioner/accused has not even assigned any specific reason in this petition. It is crystal clear that the very attempt of the accused is to use section 311 petition as a tool to procrastinate the trial. The explanation offered by the petitioner/accused is not at all acceptable and there is no basis to recall PW1 for cross examination again and again under one pretext or another and this court is of the considered view that the present application has been filed as an abuse of the process of law and the same is liable to be dismissed.

In the result, the petition is dismissed.

(Pronounced by me in open Court on this the 28th day of January, 2023)

Sd/-

Judicial First Class Magistrate-I,

Perumbavoor

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Judicial First Class Magistrate-I,

Perumbavoor

