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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.M.C. 2273/2011

KHEM SINGH & ORS.

..... Petitioners

Through Dr. N.K. Khetrapal, Adv.

versus

STATE

..... Respondents

Through Mr. Mukesh Gupta, APP with ASI
Dharamvir Singh, CAW Cell

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

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08.11.2011

Crl.M.A. 17421/2011 (early hearing)

Dismissed as infructuous.

Crl.M.C. No.2273/2011 & Crl.M.A. No.8384/2011 (stay)

1. By the present petition, the Petitioners seek setting aside of orders dated 24th May, 2010 and 10th January, 2011 passed by the learned Metropolitan Magistrate and 5th February, 2011 passed by the learned Additional Sessions Judge, Delhi. The Petitioners further seek to recall PW1 Smt. Rajni and PW2 Shri Sri Chand for cross-examination.

2. Learned counsel for the Petitioners contends that the learned Courts have denied them the valuable right of cross-examination of the two most

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material witnesses, which would cause great prejudice to the Petitioners.

The learned Metropolitan Magistrate had erroneously closed the right to cross-examine PW1 Rajni, who is the complainant in FIR No. 375/2000 registered against the Petitioners herein. PW1 Rajni was partly examined on 29th September, 2009 and partly on 2nd March, 2010. The case was adjourned for 24th May, 2010 on which date the learned Magistrate closed the right to cross examine the witness in the absence of counsel for the Petitioner. This fact was not within the knowledge of the Petitioner till 28th September, 2010. Thereafter PW2 was produced on 28th September, 2010 for his cross-examination on which date learned counsel for the Petitioner came to know about the order dated 24th May, 2010. Learned counsel filed an application under Section 311 Cr.P.C. for recalling of witness but the same was declined and vide order dated 10th January, 2010 right to cross-examine of PW2 was also closed by the learned Metropolitan Magistrate.

- These orders were challenged before the learned Additional Sessions Judge which petition of the Petitioner was dismissed by the learned Additional Sessions judge vide order dated 5th February, 2011 without appreciating the facts of the case and ignoring the fact that non-cross-examination of the material witnesses would cause serious prejudice to the Petitioner. Thus, the impugned orders passed by the learned Metropolitan Magistrate and learned

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Additional Sessions Judge are erroneous in law as well as on facts and are liable to be set aside.

3. Per contra learned APP for the State contends that there is no illegality in the impugned orders as the Petitioners were granted sufficient opportunity to cross-examine the witnesses. It was a deliberate act on the part of Petitioners/accused to delay the cross-examination to delay the proceedings. Hence the present petition is devoid of merit and is liable to be dismissed.

4. I have heard learned counsel for the parties. Petitioner No.1 Khem Chand was married to PW1 Rajni. In the year 2000, PW1 Rajni filed a complaint being FIR No. 375/2000 at PS Karol Bagh under Section 406/498A IPC against the Petitioner. The Petitioner herein filed a petition for dissolution of marriage which was dismissed by the learned Addl. District Judge. The Petitioner appealed against the said order which appeal is still pending. Pursuant to charges being framed the case was fixed for prosecution evidence. On 19th January, 2004, the learned Presiding Officer was on leave and the matter was adjourned. Thereafter on 27th August, 2004 PW1 Smt. Rajni filed an application under Section 294/311 Cr.P.C. for placing certain documents on record, which was allowed by the learned Court vide order dated 31st July, 2006. In the year 2006, the prosecution started to examine its witnesses. Examination-in-chief of PW1 and PW2

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was conducted on 14th March, 2007 despite the request of learned counsel for the Petitioner for adjournment of the matter as he was held up. Thereafter, on 20th January, 2009, the learned Link Magistrate conducted examination-in-Chief of PW4 and as PW1 the complainant had not brought the case property, she was directed to bring the same on 5th May, 2009. On this date, the Petitioner being a Government employee was on election duty and an exemption application was filed on his behalf which was allowed by the trial Court and matter was adjourned for 20th July, 2009. Due to some personal difficulty the petitioner could not attend the Court and the matter was adjourned to 29th September, 2009, on this date PW1 was partly cross-examined. As PW1 had not brought her passbook, the cross-examination was deferred directing the PW1 to bring the passbook on the next date. On the next date of hearing, the Presiding Officer was holding plea bargaining Court and the matter was once again adjourned for 2nd March, 2010. PW1 was cross-examined on this date but due to ill-health of learned counsel for the Petitioner, the examination could not be concluded and cross-examination of PW1 was deferred. On 24th May, 2010 when the matter was listed, accused No.2 was hospitalized and an exemption application was moved and allowed by the learned Trial Court. On the same day, the learned Trial Court also closed the right of the Petitioners to further cross-examine

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PW1 as the counsel was not available. Thus, due to the repeated absence of the learned counsel for the Petitioner, the right to cross-examine PW1 was closed.

5. Thereafter on 28th September, 2010 when PW2 was produced for cross-examination, learned counsel for the Petitioner learnt about the closure of his right to cross-examine PW1 vide order dated 24th May, 2010. On the next date of hearing he filed an application under Section 311 Cr.P.C. for setting aside of order dated 24th May, 2010 and recalling of PW1 for cross-examination. This application of the Petitioner was kept pending for the next date. On 22nd December, 2010 PW Brahm Dutt was present but was discharged unexamined as the case property was not summoned and the matter was adjourned to next date subject to costs. Vide order dated 10th January, 2011 the learned Trial Court dismissed the application of the Petitioner for recalling of PW1 and also closed his right to cross-examine PW2 observing that the learned counsel for Petitioner stated that he would like to cross-examine PW2 only if his application under Section 311 Cr.P.C. is allowed.

6. It would be relevant to note that since 2004 the Petitioner has been diligently attending the Court on all the dates and it was only on two occasions when he could not cross-examine the witness, the learned Trial

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Court closed his right to cross-examine the witness. Also the application filed under Section 311 Cr.P.C. has been dismissed and the Court of Revision dismissed its petition in limine. Thus, a perusal of the impugned orders show that the Petitioner herein has not been granted sufficient opportunity to cross-examine the material witnesses. Right to cross-examine is a valuable right which cannot be taken away without granting sufficient opportunity to the accused.

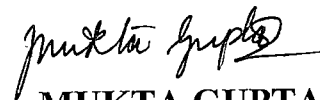
7. Hon'ble Supreme Court in *Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others* (2006) 3 SCC 374 held:

"The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one

of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.”

8. Thus, keeping in view the facts and circumstances of the case, I deem it fit to grant one more opportunity to the Petitioners herein to cross-examine PW1 and PW2. The impugned orders are set aside. The learned Trial Court is thus directed to summon PW1 and PW2 with advance intimation to the Petitioners and grant them one opportunity to cross-examine the two witnesses.

Petition stands disposed of.


MUKTA GUPTA, J

NOVEMBER 08, 2011
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