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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 24.09.2019

+ CRL.M.C. 4853/2019

SANDEEP SINGH

..... Petitioner

Through Mr.Rajiv Bajaj, Adv.

versus

RANJANA GAWRI

..... Respondent

Through Mr.Shivendra Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

Crl. M.A. 36778-79/2019

1. Allowed, subject to all just exceptions.
2. Applications are disposed of.

Crl.M.C.4853/2019 & Crl.M.A. 36780/2019

3. Notice issued.
4. Learned counsel accepts notice on behalf of the respondent and with the consent of the counsel for the parties, the present petition is taken up for final disposal.
5. Vide the present petition, the petitioner seeks direction thereby to set aside the impugned order dated 05.08.2019 passed by the learned MM, West

District, Tis Hazari Courts, Delhi in Complaint Case No.7026 of 2017.

6. Brief facts of the case are that the respondent herein has filed a complaint under section 138 of the Negotiable Instruments Act, 1881 against the petitioner on the basis of cheque, bearing No.956138 drawn on Punjab National Bank, Chandni Chowk for an amount of ₹5,00,000/- dated 01.09.2017. The cheque in question was issued by the partnership concern M/s. H.R. Sons and the said cheque was signed by Late Sh. Kulvinder Singh.

7. As per the case of the respondent, the said cheque was handed over to the respondent and, on presentation, the same was dishonoured for the reason "*Account Closed*". Learned Trial Court summoned the petitioner vide order dated 07.11.2017 for the next date of hearing, i.e., 12.03.2018. Thereafter, on 12.03.2018, the petitioner was admitted to bail and at joint request, the matter was referred to the mediation cell and fixed for further proceedings on 03.07.2018. On the said date, the petitioner showed a copy of Deed of Dissolution of the Partnership concern M/s. H.R. Sons dated 10.04.2006 and the matter was fixed for hearing on maintainability on 18.09.2018. However, after framing of notice on 03.07.2018, the learned Trial Court has fixed the case for maintainability on 18.09.2018 and it was

observed that in view of defence taken by the petitioner, the complainant's evidence was dispensed with and the case was adjourned for 11.12.2018 for the purpose of recording the defence evidence. But unfortunately in the month of October 2018, the aunt (Taiji) of the petitioner, Smt. Bhupinder Kaur who resided with and was dependent upon the petitioner, was undergoing treatment for breast cancer. The said aunt had one son and two daughters. The son is a special child and both the daughters are married. Thus, it was not possible for them to visit Smt. Bhupinder Kaur so often. However, on 03.02.2019, she expired. As the petitioner was recovering from the same, he could not contact his counsel and prepare his defence. But on 07.05.2019, right of the petitioner to lead the defence evidence stood closed and the matter was listed for final arguments on 01.07.2019.

8. Further case of the petitioner is that he moved an application under Section 311 of the Code of Criminal Procedure for calling the complainant for cross-examination and vide order dated 05.08.2019, the Learned Trial Court dismissed the same.

9. Being aggrieved, the petitioner filed a criminal revision petition bearing no.304 of 2019 on 11.09.2019 before the Sessions Court challenging the order dated 05.08.2019, however, the same was dismissed as withdrawn

as not maintainable vide order dated 21.09.2019.

10. Counsel further submits that the respondent/complainant also filed a civil suit before Learned ADJ, Central District being CS(OS) No. 6102 of 2018 titled as "*Ranjana Gawri vs. Sandeep Singh*", seeking recovery of ₹26,56,500/- which is pending adjudication.

11. It is further submitted that the respondent has taken completely different stands in his plaint and his complaint. While in the plaint, he has stated that the cheque in question was handed over by the father of the Petitioner, whereas, in the complaint filed under section 138 of NI Act, he said that the said cheque was handed over by the Petitioner. Thus, the respondent has committed forgery.

12. Also submitted that father of the petitioner expired on 08.07.2014. Clause (c) of Section 42 of the Indian Partnership Act, 1932 deals with the dissolution of a firm on the happening of certain contingencies and the firm is dissolved by the death of a partner. Hence, the partnership concern stood dissolved after the death of his father.

13. Learned counsel further submits that it is necessary for a fair trial that the petitioner is given an opportunity to adduce defence evidence to present

a proper and just defence against the allegations made by the complainant. Further, no legally enforceable debt liable to be recovered against the Petitioner by the complainant/respondent exists. The impugned order has been passed without any basis as the procedure adopted by the court below is against the law. The court did not give an opportunity to lead evidence nor application under section 145(2) of N.I Act was permitted to be moved. The court below has not recorded any statement under section 313 Cr.P.C. of the respondent/complainant.

14. To strengthen his arguments, learned counsel for the petitioner has relied upon the case of *Duni Chand vs. Godawari in Cr.Memo No.349/2016* decided on 12.07.2017 by the High Court of Himachal Pradesh at Shimla. While referring the judgments of Hon'ble Supreme Court in para 16 and based upon that, in the said judgement it was held that the following principles will have to be borne in mind by the courts while dealing with an application under section 311 Cr.P.C.:

“17.1. Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?”

17.2. The exercise of the widest discretionary power under Section 311 Cr.P.C should ensure that the

judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and reexamine any such person.

17.4. The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said 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.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall.

him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

17.9. The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion.

The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

17.11. The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

15. Thus, the counsel for the petitioner submits that the Petitioner could not get an opportunity to place his defence before the court below and the

case is listed for arguments. Thus, there is probability of his getting convicted unnecessarily. Furthermore, the grounds which can be taken before the Trial Court would not be allowed in the appeal.

16. On the other hand, learned counsel appearing on behalf of the respondent submits that the petitioner was summoned vide order dated 11.07.2017 and he appeared on 12.03.2018, thereon, bail was granted and at joint request, the matter was referred to mediation. However, mediation failed. Thereafter, on 30.07.2018, notice under section 251 Cr.P.C. was framed. Had the petitioner been aggrieved by the order dated 30.07.2018, he would have challenged the same before the appropriate forum, however, he failed to do so. Thereafter, on 18.09.2018, CE was dispensed with and the case was listed for defence evidence on 11.12.2018. But the petitioner failed to lead defence evidence. Consequently, last opportunity was granted to the petitioner with cost of ₹5,000/- and thereafter the matter was fixed for 28.02.2019. However, on the said date, the learned Presiding Officer was on leave and the matter was fixed for 07.05.2019. Even on the said date, the petitioner failed to place on record his defence evidence. Therefore, finding no alternative, learned Trial Court closed the DE and the matter was fixed for final arguments on 05.08.2019.

17. The fact remains that on 12.03.2018, the matter was referred to mediation and thereafter on 30.07.2018, the order was passed by the Trial Court on two counts (i) Framing of notice under section 251 Cr.P.C. and (ii) listing on 18.09.2018 on maintainability of the complaint. Once notice is framed under section 251 Cr.P.C., the matter shall be decided after recording the evidence of both the parties. Had the Trial Court been of the view that there was some issue relating to maintainability, the Trial Court would not have framed the notice under section 251 Cr.P.C. on 30.07.2018.

18. Be that as it may, since the petitioner did not challenge the order dated 30.07.2018, that order attained finality. However, vide the present petition, order dated 05.08.2019 is under challenge, whereby, the learned Trial Court has dismissed the application under section 311 Cr.P.C. and fixed the matter for final hearing.

19. It is not in dispute that after framing of notice under section 251 Cr.P.C., the complainant's evidence was dispensed with. Thus, the petitioner could not get a chance to cross examine the respondent. He moved an application under section 311 Cr.P.C. and the same was dismissed. Thus, there is no defence on record from the side of the petitioner. In that

eventuality, if there is no defence of the petitioner, the Trial Court has no option but to convict the petitioner.

20. It is pertinent to mention here that despite last opportunity granted vide order dated 11.12.2018, the petitioner failed to place on record the evidence. However, the fact remains that on the next date of hearing, i.e.28.02.2019, the Presiding Officer was on leave. Thus, the learned Trial Court should have considered the application under section 311 Cr.P.C., so that some material could come on record to decide the case fairly.

21. Accordingly, I hereby set aside the order dated 05.08.2019 passed by the Learned Trial Court. Consequently, the court is directed to give one opportunity to the petitioner to cross examine the respondent/complainant with cost of ₹25,000/-. Out of the cost amount, ₹10,000/- shall be paid in favour of the Library Fund, Bar Association, Tis Hazari Courts and ₹15,000/- in favour of the respondent/complainant.

22. The petition is, accordingly, allowed and disposed of.

23. Order *dasti*.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 24, 2019/ab