

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

CRL.M.C. 89/2020 & CRL M.A. 390/2020

Reserved on : 27.01.2020

Date of Decision : 29.01.2020

IN THE MATTER OF:

RACHNA MALAVIYA

..... Petitioner

Through: Mr.M.N.Dudeja, Advocate with
Mr.Aditya Mishra, Advocate.

Versus

STATE, NCT OF DELHI & ANR.

..... Respondents

Through: Dr.M.P.Singh, APP for Sate with
SI Niraj Kumar.
Mr.Vinod K.Singh, Advocate for respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present proceedings have been instituted by the petitioner/complainant, assailing the order dated 18.12.2019 passed by District & Sessions Judge in C.R.No.317/2019 arising out of FIR No.520/1998 registered under Sections 498-A/323 IPC and Sections 3 & 4 of Dowry Prohibition Act at Police Station Trilokpuri, whereby the application of respondent no. 2/accused to recall the prosecution witnesses was partially allowed.

2. To decide the present petition, I deem it necessary to trace back the history of the present case which relate to a FIR that was registered in the year 1998.

3. The order framing charge against the accused/respondent no.2 was passed on 11.08.2006. During trial, the complainant's examination-in-chief was concluded, but for one reason or the other, her cross-examination was not concluded by respondent no.2/accused. Eventually, the trial court on 29.07.2017, while noting that the cross-examination of the petitioner/complainant was pending since 15.10.2016, closed the opportunity of respondent no.2/accused for further cross-examination. The aforesaid order was passed in the presence of respondent no.2/accused.

4. Subsequently, other prosecution witnesses were examined but respondent no.2/accused failed to cross-examine each one of them despite number of opportunities granted by the Trial Court. While closing the opportunity of respondent no.2/accused to cross-examine PW-3/Ashwini Gulati, the Trial Court in its order dated 20.09.2017, observed that the witness was examined on 28.02.2012 but not cross-examined till that date by respondent no.2/accused.

5. In between, the respondent no.2/accused filed applications through his counsel seeking exemption from his personal appearance on various dates. On all such dates, he was represented through his counsel.

6. On 07.12.2017, the prosecution evidence was closed. Respondent no.2/accused was summoned to appear on 20.12.2017 for recording of his statement under Section 313 Cr.P.C.

7. On 20.12.2017, respondent no.2/accused consented that his statement be recorded in absence of his counsel. The statement of respondent no.2/accused was partially recorded. On the next date, i.e., on 01.02.2018, the Trial Court offered legal aid to respondent no.2/accused,

which he declined and after recording no objection, his statement was further partially recorded. On 22.02.2018, respondent no.2/accused informed that he had engaged a counsel but noting the absence of the counsel, the Trial Court again offered legal aid to respondent no.2/accused, which was declined. The trial court recorded partial statement of respondent no.2/accused and the case was re-notified. On 24.03.2018, respondent no.2/accused was present along with his counsel and his remaining statement under Section 313 Cr.P.C. was recorded. At request of the respondent no.2/accused, the matter was re-notified for 28.04.2018 to enable him to lead defence evidence.

8. On 28.04.2018, respondent no.2/accused again sought an adjournment to engage a new counsel. The matter was adjourned for 19.05.2018. Respondent no.2/accused appeared along with his counsel but since no DW was present, the case was re-notified. On 07.07.2018, the counsel for the accused sought adjournment, and last opportunity was granted to him to lead defence evidence. On 11.07.2018, once again, learned counsel for respondent no.2/accused prayed for an adjournment on the ground that respondent no.2/accused was still trying to find witnesses. The trial court, noting that sufficient opportunity was already granted, closed the opportunity to lead defence evidence. The matter was re-notified for final arguments.

9. On 04.08.2018, respondent no.2/accused sought adjournment on account of non-availability of his counsel. The Trial Court was constrained to observe that respondent no.2/accused, who was a CEO of Promodom Communications Ltd., was financially sound but was adopting delaying tactics. A cost of Rs.5,000/- was imposed and the matter was listed for 20.08.2018.

10. On 20.08.2018, respondent no.2/accused moved an application seeking opportunity to lead defence evidence, for waiver of cost and to adjourn the matter for 2/3 months. Noting the past conduct of respondent no.2/accused and the guidelines of the Supreme Court in Hussain and Anr vs. Union of India reported as (2017) SCC OnLine 235, the application was dismissed and the matter was re-notified for arguments on 11.09.2018.

11. On 29.09.2018, the counsel for respondent no.2/accused offered to explore the possibility of settlement which was declined by the petitioner/complainant. The Trial Court issued NBWs against respondent no.2/accused. On 20.10.2018, the NBWs were cancelled and last & final opportunity was granted to respondent no.2/accused for final arguments on 31.10.2018. The matter was adjourned on two subsequent dates and finally put up for 27.11.2018, on which date, the counsel for the respondent no.2/accused sought time to file written submissions.

12. On 28.11.2018 & 07.12.2018, final arguments were heard and the matter was listed for clarification on 20.12.2018.

13. On 20.12.2018, respondent no.2/accused filed another application under Section 311 Cr.P.C., which was directed to be listed for hearing on 09.01.2019. Again, on that date, respondent no.2/accused was absent and the proxy counsel sought adjournment. The application was dismissed and the matter was adjourned to 29.01.2019 for clarification.

14. The respondent no.2/accused sought adjournments on one ground or the other. He was arrested and released on bail. In between, respondent no.2/accused again offered to settle the matter. The opportunity was granted but no settlement could be arrived at. Once

again, on 24.07.2019, time was granted to respondent no.2/accused to address final arguments. Thereafter, on many dates, last opportunity was sought and the same was granted, to address final arguments.

15. On 23.11.2019, another application under Section 311 Cr.P.C. came to be filed by respondent no.2/accused through a new counsel seeking recall of PW-1, PW-2 and PW-4 to PW-9. The Trial Court vide order dated 26.11.2019 dismissed the aforesaid application.

16. Respondent no.2/accused assailed the aforesaid order dismissing his application before the Sessions Court through a Criminal Revision Petition. The Sessions court, vide impugned order allowed the recall of PW-3/Ashwini Gulati, PW-9/Malviya Gulati and PW-6/Dr. Kishan Sahai for 28.01.2020. It is this order which has been impugned in the present proceedings.

17. One of the grounds of challenge of the impugned order is that that the same was passed without issuing a notice to the petitioner/complainant. Further, while filing the criminal revision petition before the Sessions court, respondent no.2/accused suppressed the factum of dismissal of his earlier applications filed under Section 311 Cr.P.C.

18. The impugned order has been passed in a Criminal Revision Petition filed under Section 397 Cr.P.C. An order dismissing application under Section 311 Cr.P.C. is interlocutory in nature and a revision petition against the same is barred under Section 397(2) Cr.P.C. (Refer: Sethuraman v. Rajamanickam, reported as **(2009) 5 SCC 153**). The impugned order is liable to be set aside on this short ground only.

19. Having traced the history of the case and the conduct of respondent no.2/accused, I deem it necessary to refer to the scope and power of the court under Section 311 Cr.P.C. which was observed by the Supreme Court in the decision rendered in Swapan Kumar Chatterjee v. Central Bureau of Investigation reported as **2019 SCC OnLine SC 161**, where it was held as under:-

“12. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.”

13. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.

*14. In the instant case, the case was registered in the year 1983. 29 prosecution witnesses have already been examined. The application of the prosecution to examine Mr. H.S. Tuteja was allowed in the year 2004. However, prosecution has failed to keep him in court for his examination. Thereafter, multiple applications have been filed to summon him and all of them have been allowed. However, the prosecution has failed to procure his attendance in the court.”
(emphasis added)*

20. In view of the above enunciation of law and the facts of the present case, there is no doubt in the mind of this court that the present is a case of gross abuse of the process of the court by respondent no.2/accused. Resultantly, the impugned order passed by the District & Sessions Judge is set aside. The present petition is allowed and the order passed by the trial court dismissing the application of respondent no.2/accused under Section 311 Cr.P.C. is upheld. The pending application also stands disposed of.

21. Lastly, this Court is constrained to note that despite hearing final arguments on multiple dates right from 28.11.2018 onwards, the trial court repeatedly adjourned the matter either for clarification or written submissions or re-hearing final arguments. Despite noting that the present case was one of the oldest cases pending before it, the Trial court continued to grant one opportunity after the other to the learned counsel for respondent no.2/accused to address final arguments. So much so, on 11.09.2019, while noting that final arguments were already tendered by the learned counsel for respondent no.2/accused and written submissions were also on record, the trial court yet again, granted further liberty to the counsel to file written submissions. Subsequently, on 24.10.2019, the matter was again put up for further final arguments. The saga does not end here. Once again, on 26.11.2019, while dismissing the application of respondent no.2/accused under Section 311 Cr.P.C., the trial court put the matter for final arguments on 07.12.2019.

22. At this stage, I deem it profitable to reproduce the observations of Supreme Court in the case of Anil Rai v State of Bihar, reported as **(2001) 7 SCC 318**, where it was held as under:-

“It has been held time and again that justice should not only be done but should also appear to have been done. Similarly whereas justice delayed is justice denied, justice withheld is even worse than that.” (emphasis added)

23. Once again, the aforesaid principles were re-emphasized by the Supreme Court in Anita Kushwaha and Ors. V Pushap Sudan and Ors., reported as **AIR 2016 SC 3506**, where it was held as under:-

“30 (iii) The process of adjudication must be speedy.

“Access to justice” as a constitutional value will be a mere illusion if justice is not speedy. Justice delayed, it is famously said, is justice denied. If the process of administration of justice is so time consuming, laborious, indolent and frustrating for those who seek justice that it dissuades or deters them from even considering resort to that process as an option.....” (emphasis added)

24. In view of the peculiar facts and circumstances of the case, the matter is directed to be listed before the Trial Court, at the first instance, on 07.02.2020 for directions, on which day, the trial court shall fix the date for hearing the final arguments conclusively without any further delay.

25. A copy of this judgment be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 29, 2020
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