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

Date of decision: 08th September, 2020

+ CRL.M.C. 1772/2020 & CRL.M.A. 12376/2020

SHRI ARUN KUMAR SHARMA Petitioner
Through Ms. Priyanka Garg, Adv.

versus

SHRI ADESH GOEL & ORS. Respondents
Through None

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

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

Crl. M.A.12377 /2020 (Exemption)

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

CRL.M.C. 1772/2020

3. Vide the present petition, the petitioner seeks direction thereby to set aside and quash the order dated 29.08.2020 passed by Ld.M.M.-04 (N.I.Act)/South-East, New Delhi in complaint case under Section 138 of the Negotiable Instruments Act, 1881 vide CT Cases/3007/2014 titled as Adesh Goel Vs. M/s. Zexus Air Services Pvt. Ltd., whereby the application under

Section 311 Cr.P.C. by petitioner/accused no.3 for recall of complainant for further cross examination was dismissed. Further seeks direction thereby to allow the application under Section 311 Cr.P.C. by petitioner/accused no.3 for recall of complainant for further cross examination.

4. The Respondent No.1/Complainant after examining his witnesses, filed an application under Section 311 Cr.P.C on 21.07.2015 for recalling the witnesses, however, allowed by the Trial Court on 20.01.2016. Further, another application u/s 311 was filed by complainant on 29.03.2016 for recalling of CW-8 and the same was also dismissed.

5. On 13.07.2016, while the Petitioner/ Accused No. 3 was cross examining the complainant, however, the Trial Court directed to complete the cross-examination of witness stating that the sufficient time has been given, consequently, several material and necessary questions were left in haste and could not be put to the complainant by Petitioner / Accused No. 3 to his prejudice. Thereafter, the Respondent No.1/Complainant closed the complainant evidence.

6. Learned counsel for petitioner further submits that after closing of complainant evidence, the said complainant, filed list of documents dated

14.12.2016 alongwith documents and the same were taken on record by the Trial Court. In addition to above, Respondent No.1/Complainant filed an application u/s 311 of Cr.P.C, after closing of complainant evidence, upon which arguments of both parties were heard by the Trial Court on 14.12.2016. But the Trial Court vide order dated 03.05.2017 held that complainant, at this stage, does not wish to press the application u/s 311 of Cr.P.C and the same was withdrawn.

7. Thereafter, the Petitioner/Accused No. 3 was cross examined by Respondent No.1/Complainant at length, however new documents were produced by Respondent No.1/ Complainant, for the first time, before the Trial Court at the stage of defence evidence and were put to the Petitioner/Accused No. 3 and defence witnesses for questions and suggestions. The Trial Court vide order dated 22.05.2019 recorded two such documents viz. appointment letter and Bank Statement for year 2016-17 produced by Respondent No.1/Complainant for the first time at the stage of defence evidence. The new documents which were produced by Respondent No./Complainant for the first time before the Trial Court at the stage of defence evidence and were put to the Petitioner/Accused No. 3 for questions and suggestions under his cross examination are enumerated as below:-

“i. Ex DW1/X1(Colly) - The ITR of the accused (2014-2015).

ii. Ex DW1/X2- Leave to defend application filed by the accused in the civil suit.

iii. Ex DW1/X3 - The letter of offer/appointment of the accused in M/s Zexus air services dated 07.12.2016.

iv. Ex DW1/X4 Account ledger enquiry/Statement of the bank account of the accused showing the salary received by the accused as an employee in the company. It is pertinent to note that his appointment as director in the year 2016 whereas the cheques in question pertain to the year 2014.

v. Ex DW1/X5 - PEN DRIVE placed on record by the complainant alleging that it contains the conversation held between the complainant, accused and accused friends.

vi. Ex DW 1/ X6 - Certificate U / s 65B.

vii. Ex DW 1 /X7 - Translated transcript of recording. It is pertinent to note that no certificate under U/s 65B along with translation was given by complainant, it does not show who translated it and without disclosing how and through which device, the conversation was recorded. The Trial Court has not recorded even during cross examination that which device was played from 17 min 10 sec - 17 min 17 sec in the court except a bare statement with regard to playing of the voice of the accused in the court, even the certificate filed by the complainant speaks about recording of the voice in computer and it states that it is a computer generated record which is very much evident that according to the complainant the voice was recorded in the computer and no original such device has been produced in the court to show the recording and it has never come on record where the said conversation was recorded.

viii. Ex DW1/X8 - RTI reply received by the complainant. ”

8. Learned counsel for petitioner further submits that defence witness, DW-2, Shri R. K. Sharma Ex- Director of M/s. Zexus Air Services, Respondent No.2/Accused No.1 was examined and the following documents were put to him during cross-examination for the first time by Respondent No.1/Complainant before the Trial Court:-

“i. DW2/B-certificate of incorporation;

ii. DW2 I C-RTI reply containing Form 32 and Form 11 alongwith certificate under section 65B Evidence Act;

iii. Ex.DW2/D-ITR for assessment year 2014-15 of Ms. Zexus Air Services Pvt. Ltd.;

iv. Ex.DW2/GNOC in favour of Ms. Zexus Air Services Pvt. Ltd. as available on website of Director General of Civil Aviation;

v. Ex.DW2/H - Criminal case filed against M/s. Zexus Air Services Pvt. Ltd.;

vi. Ex.DW2/I-calls received by him; Ex.DW2/J his profile at LinkedIn .

vii. The other documents put to DW2 were not admitted VIZ. Ex.DW2/E-loan and three promissory notes which was part of record of a Civil case filed by the accused, Ex.DW2/F-email purportedly sent by then CMD Mis. Zexus Air Services Pvt. Ltd. ”

9. Thereafter, defence witness, DW3, Manager Accounts in Ms. Zexus

Air Services Pvt. Ltd. was examined and the following documents were put to him during cross-examination for the first time by Respondent No.1/Complainant before the Trial Court:-

“i.Ex DW3 I DX 2 - DIR 12 of the company.

ii. Ex DW3/DX 3 - MGT-7 of the Company.

iii.ExDW3/DX4, ExDW3/DX4, ExDW3/DX5, ExDW3/DX 6 - company documents.

iv. Ex DW3/DX 7 - Death Certificate of Shri Surender Kumar Kaushik

v. Ex DW3/DX 8 - The passport.

vi. Ex DW3/DX 9- Documents concerning the security clearance of the employees of the company.

vii. Ex DW3/DXI0 - Emails and documents of the company.

Ex DW3/DX 11 - Certificate of the experience of the complainant”

10. Learned counsel for petitioner submits that the Petitioner/Accused No. 3 discovered during the defence evidence (vide Ex.DW2/H) about a complaint vide CT Cases 8423/2017 to initiate criminal proceeding for the offence of cheating filed under Section 200 Cr.P.C by Respondent No.1 /Complainant against Petitioner/Accused No.3 along with other accused persons and notice of which was not served upon Petitioner/Accused No. 3. Learned counsel further submits that Petitioner/Accused No. 3 was, hitherto, unaware of this

complaint case against him filed by Respondent No.1 / Complainant.

11. However, the complaint vide CT Case No.8423/2017 to initiate criminal proceeding for the offence of cheating filed under Section 200 Cr.P.C filed by Respondent No.1/Complainant against Petitioner/Accused No.3 along with other accused persons was dismissed on absence of grounds for cheating against Petitioner/Accused No. 3 and other accused persons. Therefore, the Petitioner/Accused No.3, upon discovery of new documents put up by Complainant to the Petitioner, DW -1 and his witnesses at the stage of defence evidence during cross-examination including the complaint vide CT Cases 8423/2017 to initiate criminal proceeding for the offence of cheating filed under Section 200 Cr.P.C by Respondent No.1 /Complainant against Petitioner/ Accused No.3 along with other accused persons. Learned counsel for petitioner further submits that learned Trial Court dismissed his application filed under Section 311 Cr.P.C. ignoring the aforesaid fact and without application of mind.

12. This Court has perused the impugned order dated 29.08.2020 whereby recorded that an application under Section 311 Cr.P.C. which was filed via email on 20.08.2020 was not forwarded to the complainant side for necessary action. Vide the said application, applicant therein sought 15 days

adjournment and from the averments in the application, it was seen that the complaint in CT cases 8423/2017 was filed in 2017 and it was dismissed in 2017 itself. The complainant has admitted that the Ld. MM dismissed the application uncontested at the initial stage for the reason that no prime facie allegations of cheating, etc. were there. Ld. MM was of the opinion that as per allegation only Section 138 N.I. Act complaint was made out and it was already pending (subject matter of present complaint).

13. It is further recorded that prayer sought in the said application for adjournment for 15 days was not warranted for two reasons. Firstly; the complaint was filed in 2017 and dismissed then, yet the accused side including petitioner waited till March 2020 to apply for certified copy of the complaint.

14. Moreover, during arguments, it was admitted by accused side that they came to know about this complaint and dismissal in 2018 itself, yet the question arose before the Trial Court that as to why they waited till 2020, which is not explained. Moreover, the said complaint was dismissed uncontested at initial stage and no opinion as to merits were expressed, thus, there is no evidence in the complaint which needs to be put to the complainant for any further cross examination. At the most, the CT cases 8423/2017 was an unsuccessful attempt by the complainant to initiate a parallel criminal

proceedings for cheating against the accused arising out of the same transaction which is subject matter of the present case. Cause of action for both these complaints are different and since nothing was expressed on merits of Section 138 of N.I. Act complaint, any decision in CT Cases 8423/2017 can have no bearing on the merits of the present case. The application dated 20.08.2020 moved via email for the purpose that certified copy of CT Cases 8423/2017 is awaited therefore has no merits and is liable to be dismissed.

15. The main application of the petitioner moved under section 311 Cr.P.C., however, the Ld. M.M. after going through the same opined that the application is vague and there are general averments. The only ground stated is that few documents were put to the defence witnesses which have to be put to the complainant for further cross examination. The petitioner has not specified as to which documents need to be put and how the said is relevant in bringing home the defence of the accused. Ld. M.M. further opined that at this juncture, if the defence of the accused taken at the time of framing notice under section 251 Cr.P.C. is considered, wherein the accused side states that he has substantiated his defence in his application under section 145(2) N.I. Act. The defence raised in the application were that (1) the accused was never a director or employee or in any manner connected with Ms.Zexus Air

Services Pvt. Ltd.; and (2) the accused never approached the complainant to get any job done from the Ministry of Civil Aviation being not related to Ms. Zexus Air Services Pvt. Ltd. and therefore there was no occasion for him to draw the present cheque in question for any liability. It was further defended that the cheque in question was given towards a proposed loan to be given by the accused to the complainant, which was later refused by the accused and the complainant misused the cheque in question.

16. Keeping in view the aforesaid fact, learned Trial Court opined that from the records available, this has been a consistent stand/defence of the accused and he has cross-examined the complainant. The present application states that further cross-examination is warranted for new documents which were put by complainant to defence witnesses. Although the accused side made no endeavour to substantiate as to which documents it wishes to put to complainant. Accordingly, Ld. Trial Court further opined that the records shows that DW1/accused during his cross-examination was put 2 old cheque Ex.CW1/1B and Ex.CW1/1C which were admittedly drawn by the accused/DW1. DW1/X1 (Collectively) was admitted as printout of facebook account of the accused/DW1. Ex.DW1/X1 was admitted to be the certified copy ITR of the accused/DW1. Ex.DW1/X2 was admitted to be leave to

defend filed by the accused/DW1. Ex.DW1/X3 offer letter and Ex.DW1/X4 account ledger were put to the accused/DW1. Ex.DW1/X5, Ex.DW1/X6 and Ex.DW1/X7 that are voice recording, certificate under section 65B Evidence Act and translated transcript, respectively, was placed on record and from those recording voice from 17min:07 sec. to 17min:17sec. put to the accused was admitted by the accused/DW1. Ex.DW1X8 was complaint copy received through RTI which is alleged to have been written by the accused/DW1.

17. In the impugned order, learned Trial Court observed as under:-

“8. Further record shows that DW2 was one of the Director of Ms. Zexus Air Services Pvt. Ltd. from 2013 to 2017 and DW2/A was put to him which was identified as a letter dated 21.06.2015 written by then CMD (since deceased) of Ms. Zexus Air Services Pvt. Ltd. to accused. DW2 admitted the following documents put to him during cross-examination- DW2/B-certificate of incorporation; DW2/C-RTI reply containing Form 32 and Form 11 alongwith certificate under section 65B Evidence Act; Ex.DW2/D-ITR for assessment year 2014-15 of Ms. Zexus Air Services Pvt. Ltd.; Ex.DW2/GNOC in favour of Ms. Zexus Air Services pvt. Ltd. as available on website of Director General of Civil Aviation; Ex.DW2/H-criminal case filed against Ms. Zexus Air Services Pvt. Ltd.; Ex.DW2/I-calls received by him; Ex.DW2/J his profile at LinkedIn. The other documents put to DW2 not admitted were Ex.DW2/E-loan and three promissory note which was part of record of a Civil case filed by the accused; Ex.DW2/F-email purportedly sent by then CMD Ms. Zexus Air Services Pvt. Ltd ..

9. Accused side also called in DW3 in defence who was Manager Accounts in Ms. Zexus Air Services Pvt. Ltd. And all the documents presented by DW3 from Ex.DW3/1 to Ex.DW3/4 i.e. authority letter in favour of DW3, confirmation of loan account, statement of bank account of Ms. Zexus Air Services Pvt. Ltd., statement of account showing repayment of loan of Rs.25 Lacs, respectively; and all documents put to DW3 during cross examination from Ex.DW3/X1 to Ex.DW3/X11 that are bank statement, Form No. DIR 12, Form no. MGT7, ITRs, death certificate, passport, NOC, experience certificate were all documents pertaining to accounts or business operation of company Ms. Zexus Air Services Pvt. Ltd. and its then CMD Sh. Suriender Kumar Kaushik.

10. From the records above, it cannot be gathered as to which document the accused side wants to put to the complainant in his further cross-examination. Most of the documents are either admitted by the defence witnesses or pertains to Ms. Zexus Air Services Pvt. Ltd. Be that as it may, accused side despite being given ample opportunities, has failed to explain which document put to any of the defence witness would probably substantiate his defence taken at the time of framing of notice under Section 251 CrPC. The application therefore, for recall of complainant for further cross-examination is completely baseless. From the above discussion, this Court sees no such document which needs to be put to the complainant for further cross-examination, which would substantiate the defence of the accused in the present case. It is a settled principle of law that Section 311 Cr.P.C. cannot be allowed to fill in any lacunae in the trial or to delay the trial, as was also held in Umar Mohammad & Ors. v. State of Rajasthan, (2007) 14 SCC 711. The application dated 20.08.2020 filed on the email seeking 15 days adjournment as well as application under section 311 Cr.P.C. are hereby dismissed. Nothing expressed in this Order shall have a bearing on the merits of the present case.”

18. In addition to above, learned Trial Court has considered the fact that the complainant is a Senior Citizen and the matter is pending for more than five years. This Court directed the Trial Court to expedite the trial. Accordingly, Trial Court deemed it appropriate to grant only one opportunity to both the sides to complete their oral arguments. Parties are at liberty to file written submission by 10.09.2020. Ld. Trial Court further clarified that no further adjournment shall be granted.
19. In view of above facts, filing of application at belated stage which does not prejudice to the rights and contention of the petitioner, I am of the view such application is delay tactics to get the trial delayed.
20. Learned counsel for petitioner has relied upon the judgment in the case of *P. Sanjeeva Rao v. State of A.P.:* (2012) 7 SCC 56; *Venu Madhava K. vs. State (NCT of Delhi): 2017 SCC OnLine Del 12064* and *Mannan Shaikh v. State of W.B.:* (2014) 13 SCC 59, however, the judgments relied upon by learned counsel for petitioner are of no help in the present case.
21. Accordingly, I find no illegality and perversity in the impugned order dated 29.08.2020 passed by the Trial Court.

22. In view of above, the petition is dismissed.
23. Pending application also stands disposed of.
24. The order be uploaded on the website forthwith.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 08, 2020
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