

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

CRL.M.C. 844/2020 and CRL.M.A. 3429/2020

Reserved on : 23.11.2021

Date of Decision : 02.12.2021

IN THE MATTER OF:

SANDEEP MEHTA

..... Petitioner

Through: Mr. Alok Bhachawat, Mr. Uday
Singh and Mr. S. Jeeva Nandan,
Advocates.

versus

RAKESH ARORA

..... Respondent

Through: Mr. Atul Bandhu, Advocate.

AND

CRL.M.C. 850/2020 and CRL.M.A. 3442/2020

IN THE MATTER OF:

SANDEEP MEHTA

..... Petitioner

Through: Mr. Alok Bhachawat, Mr. Uday
Singh and Mr. S. Jeeva Nandan,
Advocates.

versus

RAKESH ARORA

..... Respondent

Through: Mr. Atul Bandhu, Advocate.

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CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The above-noted petitions have been filed under Section 482 Cr.P.C. on behalf of the petitioner for setting aside of the order dated 08.08.2019 passed by the learned Metropolitan Magistrate, Patiala House Courts, New Delhi in Criminal Complaint Nos. 1335/2017 and 1336/2017 filed under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act), whereby the applications filed under Section 311 Cr.P.C. on behalf of the complainant/petitioner seeking his recall and re-examination have been dismissed.

2. Since the parties are same, both the above-noted petitions shall be disposed of by a common order.

3. Brief facts, shorn of unnecessary details, as borne from the material placed on record, are that the aforesaid Criminal Complaints came to be filed by the petitioner in the year 2017 under Section 138 read with Section 142 of the NI Act. In the said complaints, it was stated that the petitioner, who was a retired person, was looking for investment opportunities in property for rental/return income. In the last week of August, 2014, the respondent, claiming to be a big builder, approached the petitioner for selling his two properties i.e., i) *property bearing built up entire second floor without roof rights a part of free hold property no. 8/39, land area measuring 100 sq. yards, situated at Subhash Nagar,*

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Delhi, and ii) property bearing built up entire third floor with roof rights a part of property no. 1/75, land area measuring 100 sq. yards, situated at Subhash Nagar, Delhi along with common stair case, common passage, with proportionate rights of land underneath (hereinafter referred to as 'the properties'). It was alleged that while a consideration of Rs.80 lacs was agreed upon in respect of the first property, an amount of Rs.50 lacs was agreed upon for the second. Out of the sale consideration amounts of Rs.80 lacs and Rs.50 lacs, Rs.30 lacs and Rs.20 lacs were stated to have been paid as advance to the respondent, with regard to the respective properties, on 18.04.2014 and 01.09.2014, against receipts. As per averments in the Complaints, it was agreed between the parties that the remaining balance amount would be payable on or before 17.07.2014 and 28.02.2015, in connection with each respective property, at the time of registration of the sale deed. Be that as it may, the respondent failed to execute the sale deed in favor of the petitioner and later agreed to return the amounts received as advance payment, i.e. Rs.30 lacs and Rs.20 lacs. To this end, cheques bearing No. 000405 dated 28.08.2017 drawn on *Kotak Mahindra Bank, Punjabi Bagh, New Delhi* and No. 000014 dated 28.08.2017 drawn on *HDFC Bank, Rajouri Garden, New Delhi*, were issued in favor of the petitioner. However, on presentation, the aforesaid cheques got dishonored with the remarks '*funds insufficient*' and upon issuance of demand notice dated 28.09.2017, the respondent failed to make the payment of outstanding cheque amounts, resulting in filing of the aforesaid Criminal Complaints.

4. Mr. Alok Bhachawat, learned counsel for the petitioner, submits that initially Collaboration Agreements dated 13.10.2011 and 20.09.2013

were executed in favor of the respondent by the erstwhile owners of the properties aforementioned, whereby ownership rights were created in his favor. At the time of payment of Rs.30 lacs and Rs.20 lacs by the petitioner as advance, in respect of each transaction, *Bayana Agreements* dated 18.04.2014 and 01.09.2014, and respective Receipts of the same date were also executed. It is submitted that inadvertently the aforesaid documents could not be placed on record along with the complaint, and accordingly, applications under Section 311 Cr.P.C. for recalling and re-examining the complainant/petitioner were filed before the Trial Court, which came to be dismissed vide the impugned order. Learned counsel also submits that in the Criminal Complaints, categorical statements have been made that Rs.30 lacs and Rs.20 lacs were paid as advance to the respondent against the aforesaid Receipts. It is lastly submitted that even during his cross-examination, conducted on behalf of the respondent, the petitioner had stated that he had copies of the Agreements to Sell and the Receipts executed between the petitioner and the respondent, and the respondent's Collaboration Agreements with the owners, but the same were inadvertently not produced.

5. Per contra, Mr. Atul Bandhu, learned counsel for the respondent, has opposed the prayers made in the petitions. He submits that the respondent has taken a stand that the cheque in question was stolen by the petitioner for which a complaint has been filed, and at no point of time any Bayana Receipt or Agreement to Sell was ever executed by the respondent in the petitioner's favor. It is also submitted that the petitioner had various opportunities to place the aforesaid documents on record however, the said documents were neither filed along with the

complaint nor produced at the time of his examination. It is further submitted that the applications under Section 311 Cr.P.C. have been preferred at the fag end of the trial, as the matter is at the stage of final arguments. Lastly, it is submitted that by way of filing applications under Section 311 Cr.P.C., the petitioner is trying to fill up the lacuna in the case, which cannot be permitted.

6. In support of his contentions, learned counsel for the respondent has placed reliance on Kriplex Chits Pvt. Ltd. & Anr. v. State (Govt. of NCT of Delhi) & Anr. reported as **2007 SCC OnLine Del 1302**. He has also drawn the attention of this Court to the order dated 14.01.2020 passed by the Sessions Court in CR No. 602/2019 and 603/2019 titled as Sandeep Mehta v. Rakesh Arora, whereby the revision petition filed by the petitioner against the impugned order came to be dismissed as withdrawn.

7. I have heard learned counsels for the parties and perused the material placed on record.

8. Before proceeding to analyze the facts of the present case and recounting the position of law on the subject, I deem it apposite to reproduce Section 311 Cr.P.C. hereunder, which is as follows -

“311. Power to summon material witness, or examine person present.—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-

examine any such person if his evidence appears to it to be essential to the just decision of the case.

9. The scope of Section 311 Cr.P.C. has been considered by the Supreme Court in P. Sanjeeva Rao v. State of Andhra Pradesh reported as **(2012) 7 SCC 56**, where the Court held as under:-

"20. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs.

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23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. ... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

10. In Natasha Singh v. Central Bureau of Investigation (State) reported as **(2013) 5 SCC 741**, while referring to its earlier decisions in Mir Mohd. Omar and Others v. State of West Bengal reported as **(1989) 4 SCC 436**, Mohanlal Shamji Soni v. Union of India and Another reported as **1991 Supp (1) SCC 271**, Rajeswar Prasad Misra v. State of West Bengal and Another reported as **1966 (1) SCR 178**, Rajendra Prasad v. Narcotic Cell through its Officer in Charge, Delhi reported as **(1999) 6 SCC 110**, P. Sanjeeva Rao (Supra), T. Nagappa v. Y.R. Muralidhar reported as **(2008) 5 SCC 633**, the Supreme Court has held as under:-

"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the

summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardised. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same."

11. In the present case, the entire premise of filing of the Criminal Complaints was that the petitioner had paid the amounts of Rs.30 lacs and Rs.20 lacs as advance payment for purchase of the aforementioned two properties. On a perusal of the Criminal Complaints, it is noted that the petitioner has averred that amounts of Rs.30 lacs and Rs.20 lacs were paid against Receipts. It is also his case that the advance payments were made towards purchase of the aforesaid properties. Besides, in his cross-examination conducted on 18.12.2018, the petitioner had deposed that he was in possession of the original Bayana Receipt, Agreement to Sell and the Collaboration Agreements executed between the erstwhile owners of the properties and the respondent. In this backdrop, the applications

under Section 311 Cr.P.C. were filed on 22.07.2019, which came to be dismissed vide the impugned order on 08.08.2019.

12. The reliance sought to be placed by learned counsel for the respondent on the decision in Kriplex Chits Pvt. Ltd. (Supra) is entirely misplaced. In the said case, it was the accused who had sought to recall the complainant by virtue of his application, despite ample opportunities having been granted earlier to lead defence evidence. Notably, four applications were filed by him, even after closure of defence evidence. In fact, a transcript of the audio cassette which he sought to confront the complainant with by way of re-examination, was already on record way before the defence evidence came to be closed and yet, he failed to raise the questions. It was in this backdrop that the Court observed that allowing another application and a further opportunity to the petitioner/accused, who had already caused a delay of about two years in the trial, would amount to mockery of the law. In the present case, on the other hand, it is the complainant who seeks to re-examine himself to bring on record documents which were admitted by him during cross-examination but inadvertently not placed on record. *Prima facie*, it is also important in the interest of justice that the documents mentioned be brought on record for fair disposal of the case.

13. Further, considering that the factum of execution of the aforesaid Receipts was mentioned in the Criminal Complaints, while other documents were mentioned at the time of the cross-examination in as early as 2018, the petitioner's applications under Section 311 Cr.P.C. for his re-examination and placing on record of the aforesaid documents cannot be said to constitute '*filling up of lacuna*' in the case.

14. Accordingly, both the petitions are allowed, subject to payment of composite cost of Rs.10,000/- to be deposited by the petitioner with the *Delhi State Legal Services Authority* within two weeks from the date of passing of this order. The Trial Court shall give one opportunity to the petitioner to re-examine himself on one date, at which time the respondent shall also be at liberty to cross-examine the petitioner, but only on the said date.

15. With the above directions, both the petitions are disposed of, alongwith the pending applications.

16. A copy of the order be communicated electronically to the concerned Trial Court through the concerned District Judge.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 02, 2021

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