

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 1200/2020 and CRL.M.A. 4648/2020

Date of Decision: 22.11.2021

IN THE MATTER OF:

SHRI VIPIN KUMAR

..... Petitioner

Through: Mr. Varun Dhingra, Advocate

Versus

M/S HARISH ENTERPRISES PVT. LTD

..... Respondent

Through: Mr. Vijay Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present petition has been filed under Section 482 Cr.P.C. on behalf of the petitioner assailing the order dated 22.11.2016 passed by the learned Metropolitan Magistrate (NI Act), Central-01, Tis Hazari Courts, Delhi in CC No. 913/16, whereby the petitioner's right to cross-examine the complainant was closed and non-bailable warrants were issued against him. The petitioner has also assailed the order dated 21.01.2020 passed by the learned Metropolitan Magistrate-01 (NI Act), Central, Tis Hazari Courts, Delhi in CC No. 513321/16 (old CC No. 913/16), vide which his application, filed under Section 311 Cr.P.C. seeking recall of the complainant witness to cross-examine him, was dismissed and the right to lead defence evidence closed.

2. From a perusal of the material placed on record, it is apparent that the complaint in the present case came to be filed by the respondent on 24.12.2014 under Section 138 of the Negotiable Instruments Act, 1881

(hereinafter referred to as 'the NI Act'). In the said complaint, it was alleged that the petitioner/accused was the proprietor of one *M/s J.D. Collection*, which was engaged in the business of fabric and garments, having regular business dealing with the complainant/respondent, which was maintaining regular accounts in its books of account. It was further alleged that the petitioner was liable to pay Rs.7,27,163/- to the complainant as on 14.10.2014, alongwith interest at the rate of 3% per month. In discharge of the liability, a cheque for Rs.1,12,400/- bearing No. 099835 dated 24.07.2014 drawn on *IDBI Bank*, was issued by the petitioner towards part-payment of the outstanding debt. However, on presentation, the cheque got dishonored with the remarks '*funds insufficient*' and was returned to the complainant on 14.10.2014. A demand was raised by the complainant for payment of the outstanding amount vide legal notice dated 12.11.2014. When the petitioner failed to pay the outstanding amount under the cheque within the statutory period, the aforesaid complaint came to be filed under Section 138 NI Act.

3. After the complainant led pre-summoning evidence by way of affidavit alongwith supporting documents, the petitioner was summoned by the learned Metropolitan Magistrate, NI Act, East, Karkardooma Courts, Delhi vide order dated 24.01.2015. On 26.03.2015, the petitioner appeared before the concerned Court and was released on regular bail. A notice under Section 251 Cr.P.C. was framed against him. On request of learned counsel for the petitioner, two days' time was granted for moving of an application under Section 145(2) NI Act. In view of the Negotiable Instruments (Amendment) Ordinance, 2015, the complaint case was transferred to the learned Metropolitan Magistrate (NI Act), Central, Tis Hazari Courts, Delhi,

vide order dated 22.01.2016 passed by the learned CMM, Central, Delhi. On 18.05.2016, learned counsel for the complainant gave no objection to the petitioner's application under Section 145(2) NI Act and accordingly, the matter was put for cross-examination of the complainant on 24.08.2016. Thereafter, the petitioner remained unrepresented before the Trial Court, resulting in issuance of NBWs against him and forfeiture of personal bond and surety bond submitted on his behalf. On 22.11.2016, the petitioner's right to cross-examine the complainant was closed, in view of his continuing absence. Thereafter, on 22.11.2018, process under Section 82 Cr.P.C. was also issued against the petitioner. Vide order dated 10.01.2020, he was given last opportunity by the Trial Court to lead defence evidence, which opportunity was subsequently closed.

4. Learned counsel for the petitioner submits that the petitioner's non-appearance before the Trial Court was not intentional and cross-examination of the complainant witness is necessary for the petitioner to establish his innocence. It is submitted that one last opportunity may be granted for the same.

5. Learned counsel for the respondent, on the other hand, has opposed the prayer made in the present petition. It is submitted that the complaint pertains to the year 2014 and the case was listed for final arguments on 21.01.2020. On 15.02.2020, the final arguments were heard in part and the matter was listed for further final arguments/orders on 04.03.2020. Learned counsel also submitted that the petitioner is guilty of delaying the proceedings and cannot be permitted to abuse the process of law.

6. I have heard learned counsels for the parties and have also gone through the case records.

7. Before proceeding to render an opinion on the facts of the case, I deem it apposite to recapitulate the scope of judicial superintendence exercisable by this Court under Article 227 of the Constitution of India and Section 482 Cr.P.C., as explicated by the Supreme Court in State (NCT of Delhi) v. Shiv Kumar Yadav and Another reported as **2016 (2) SCC 402**.

Relevant excerpt from the case is reproduced hereunder:-

“28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 CrPC has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need

for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall i.e. denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.”

(emphasis added)

8. In the present case, on 26.03.2015, the Trial Court while framing the notice under Section 251 Cr.P.C. granted two days' time to the petitioner for filing application under Section 145(2) NI Act. In view of the no objection given by the learned counsel for the complainant on 18.05.2016, opportunity was granted to the petitioner to examine the complainant witness and the matter was directed to be listed on 24.08.2016. On the said date, the petitioner and his main counsel failed to appear, and a cost of Rs.1500/- was imposed on the petitioner, with a direction that it be paid to the complainant.

On the next date of hearing, the petitioner again remained unrepresented and, in this backdrop, his right to cross-examine the complainant was closed. Subsequently, on 10.01.2020, the Trial Court made it clear that one last opportunity was being given to the petitioner/accused to lead defence evidence and listed the matter for 21.01.2020. Till 21.01.2020, the petitioner chose not to seek recall of the complainant witness for his cross-examination, on which date his application, filed under Section 311 Cr.P.C. on the ground that his previous counsel had expired in 2016 and thus he had no contact with him, was taken up for hearing and dismissed. While dismissing the said application, the Trial Court also observed that despite grant of one final opportunity to lead defence evidence, the petitioner did not avail of the same. Noting further that the matter was more than 5 years old, the Court closed the petitioner's right to lead defence evidence as well.

9. The petitioner has taken a plea that his previous counsel had expired in course of the proceedings, and for that reason, he could not move the application under Section 311 Cr.P.C. seeking recall of the complainant witness in time. From the record of the case, it is apparent that on 24.08.2016, when the matter was listed for cross-examination of the complainant witness, a proxy counsel had appeared and moved an application on the petitioner's behalf for exemption from personal appearance and no such ground was raised before the Trial Court on that day. Only when the application under Section 311 Cr.P.C. came to be filed in the year 2020, the petitioner averred that on 22.11.2016, he was suffering from various ailments and his previous counsel had also expired, due to which he could not appear before the concerned Court.

10. It is worthwhile to note that the petitioner remained absent from the proceedings before the Trial Court for a substantial amount of time, causing unnecessary delay, and appeared only subsequent to issuance of process under Section 82 Cr.P.C. The application seeking recall of the complainant witness was also moved by the petitioner only when his right to lead defence evidence came to be closed and the matter was listed for final arguments.

11. As per the exposition of law outlined hereinabove, it is apparent that mere change of counsel cannot be a ground to recall a witness. It is further discernible that no prejudice would be caused to an accused if relief of recalling a witness is denied, considering that the accused was given sufficient opportunity to examine the witness but he failed to do the same.

12. At this stage, learned counsel for the petitioner has prayed that only one opportunity may be granted to the petitioner to lead defence evidence. He submits that if permitted, the petitioner undertakes to examine the defence witnesses in one day.

13. Doubtless, the petitioner is guilty of delaying the trial, however, this Court cannot lose sight of the fact that a fair trial is the hallmark of criminal procedure. It entails not only the rights of the victims but also the interest of the accused. It is the duty of every Court to ensure that fair and proper opportunities are granted to the accused for just decision of the case. In furtherance of the above, adducing of evidence by the accused in support of his defence is also a valuable right and allowing the same is in the interest of justice.

14. Accordingly, this Court is of the opinion that interest of justice would be served if the petitioner is allowed one last opportunity to lead defence evidence, subject to his examining the defence witnesses on one single day.

The cross-examination of all such defence witnesses shall also be conducted on the same day.

15. It has been informed that the next date of hearing fixed before the Trial Court is 15.01.2022.

16. In view of the undertaking given on behalf of the petitioner, it is directed that the matter be listed before the concerned Trial Court on 10.12.2021 for the petitioner to take appropriate steps for leading his defence evidence. The same shall however be subject to payment of cost of Rs.10,000/- to be payable to the respondent, within a period of three weeks from today.

17. It is clarified that the Trial Court shall grant only one opportunity to the petitioner and in case, the petitioner fails to avail the said opportunity, the Trial Court shall proceed further with the matter in accordance with law.

18. Considering the fact that the complaint case relates to the year 2014, the Trial Court shall make an endeavor to expedite the trial and conclude the same within a period of three months from the date of passing of this order.

19. With the above directions, the present petition is disposed of alongwith the pending application.

20. A copy of this order be communicated electronically to the concerned Trial Court.

(MANOJ KUMAR OHRI)
JUDGE

NOVEMBER 22, 2021

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Click here to check corrigendum, if any