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

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+ **CRL.M.C. 219/2020 & CRL.M.A. 977/2020**

BABU & CO & ORS.

.... Petitioners

Through: Mr. Randhir Kumar, Advocate

versus

DEEPANSHU GOEL

.... Respondent

Through: Mr. A.K. Jain and Mr. Nikhil
Malhotra, Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

12.12.2022

SWARANA KANTA SHARMA, J. (ORAL)

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the petitioners for setting aside the order dated 06.12.2019 ("*impugned order*") passed by learned Metropolitan Magistrate, Central District, Tis Hazari Courts, Delhi in CC No. 525875/2016 titled as "*Deepanshu Goel v. Babu & Co & Ors.*" whereby the right of the petitioners/accused persons to lead defence evidence was closed.

2. The brief facts of the case are that a complaint under Section 138 of the Negotiable Instruments Act, 1881 ("N.I. Act, 1881") was filed by the respondent against the petitioners on the ground that a cheque bearing no. 439142 dated 15.02.2014 for Rs. 68,85,974/- issued by the petitioners to the respondent was dishonored and returned unpaid due

to insufficient funds. During the pendency of the complaint case, petitioners were provided various opportunities to lead their evidence but despite the same, petitioners failed to do so. An application under Section 311 Cr.P.C. was moved on behalf of the petitioners, which was allowed in part by the learned Trial Court on 28.09.2019, and petitioners were allowed to lead the defence evidence. However, the learned Trial Court closed the said right of petitioners by virtue of order dated 06.12.2019.

3. Learned counsel for the petitioner submits that on 06.12.2019, petitioner could not appear before the learned Trial Court as he was not well, however, his son had appeared in the same court in CC No. 530357/2019 in which the son of the petitioner was an accused. It is further submitted that son of the petitioner was ready with the evidence by way of an affidavit of the petitioner, but the learned Trial Court refused to accept the same. It is stated that petitioners may be given one more opportunity to lead the evidence, assuring that petitioners will not take any adjournment on the next date of hearing before the learned Trial Court.

4. On the other hand, learned counsel for the respondent states that even before the learned Trial Court, despite 30 opportunities being granted to the petitioners, the case did not move forward as petitioners have been very irregular in appearing before learned Trial Court as well as due to the non-availability of their counsel. It is stated that the passing of impugned order was a result of irregularity in appearing before the learned Trial Court due to which the right of the petitioners to lead defence evidence was closed *vide* order dated 06.12.2019.

5. I have heard the arguments on behalf of both the parties and have gone through the material on record.

6. A perusal of the order sheets of learned Trial Court placed on record, shows that the petitioners had earlier filed an application under Section 311 Cr.P.C. for further cross-examination of the complainant as well as an application under Section 91 Cr.P.C. seeking direction to complainant to produce the documents as mentioned in application. Both the applications were dismissed by the learned Trial Court *vide* order dated 03.08.2019. Subsequently, statements of accused persons were recorded under Section 313 Cr.P.C. and an application was moved on behalf of petitioners/accused persons to lead defence evidence and examine defence witnesses. The same was allowed *vide* order dated 28.09.2019, which is reproduced hereinunder:

“...Matter is listed today for order on the application u/s 311 Cr.P.C moved on behalf of accused.

As per the list of witnesses filed by the accused there are 13 witnesses to be examined in defence evidence. For the time being, the application of accused is allowed to with respect of three witnesses mentioned at Sr. No. 1,2 and 3 i.e. Sh. Jagdish Kumar. Ms. Rama Arora and Sh. Vijay Kumar.

With respect to the other witnesses, order the shall remain pending.

Put up for DE on 21.10.2019 at 2.00 PM...”

7. Thereafter, on subsequent dates, matter could not be taken up due to either adjournment being sought on behalf of petitioners or due to the the presiding officer of learned Trial Court being on leave.

Finally, the right of petitioners to lead defence evidence was closed by the following order dated 06.12.2019:

“...Matter is listed today for DE. Accused side has failed to made DE despite various opportunities.

Right of accused to lead DE stands closed.

Put up for final arguments on 17.01.2020 at 2.00 PM...”

8. Before going into the facts of the case, it would be appropriate to reproduce Section 311 of the Cr.P.C., which reads as under:

“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. As evident from the reading of aforesaid provision, this Court has wide power to summon a witness if it appears to be essential for the just decision of the case. Needless to mention that although wide powers have been conferred on this Court, such discretion has to be exercised judiciously and with caution. Need for such recalling of a witness has to be weighed in the light of facts and circumstances of every case.

10. The Hon’ble Supreme Court recently in ***Varsha Garg v. The State of Madhya Pradesh & Ors., 2022 SCC OnLine SC 986***, held as under:

“32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.”

11. Hon’ble Supreme Court in ***Rajaram Prasad Yadav v. State of Bihar & Anr. (2013) 14 SCC 461*** laid down guidelines regarding exercise of powers under Section 311 Cr.P.C. The relevant portion reads as under:

14.3. In the decision in Raj Deo Sharma (2) v. State of Bihar, the proposition has been reiterated as under in para 9: (SCC p. 613)

“9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the

prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

(emphasis supplied)

15.6. In P. Sanjeeva Rao v. State of A.P. the scope of Section 311 CrPC has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paras 20 and 23, which are as under: (SCC pp. 63-64)

“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. The following passage is in this regard apposite: (SCC p. 432, para 6)

“6....In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

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. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Raval, that the prosecution may suffer prejudice on account of a belated recall, may not be

wholly without any basis. Having said that, 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.

(emphasis supplied)

12. Learned counsel for the petitioners prays that only one opportunity may be granted to the petitioners to lead defence evidence and the petitioners undertake to examine the defence witnesses in that single opportunity.

13. It is clear from the facts and material on record that petitioners are at fault in delaying the trial of the present case, and despite having been granted ample amount of opportunities, they have failed to lead defence evidence. However, this Court cannot lose sight of the fact that a fair trial is the hallmark of criminal justice system. It is the duty of every Court to ensure that a fair opportunity is granted to the accused for just decision of the case. The present case involves denial to the petitioners, an opportunity to lead defence evidence, after which the matter had been put up for final arguments. The present case, under Section 138 of N.I. Act, 1881, pertains to dishonor of a cheque amounting to Rs. 68,85,974/-.

14. Considering the overall facts and circumstances of the case, the impugned order dated 06.12.2019 is set aside and opportunity is

granted to the petitioners to lead defence evidence, subject to the following conditions:

- (i) Cost of Rs.25,000/- is imposed on the petitioners, to be paid to respondent.
 - (ii) The petitioners shall be allowed to file the evidence by way of affidavit before the learned Trial Court, and examine the defence witnesses, as mentioned in order dated 28.09.2019 passed by learned Trial Court, in one single opportunity, on a date to be fixed by the learned Trial Court.
 - (iii) No further opportunity shall be granted in case opportunity to lead defence evidence is not availed by the petitioners on the said date.
15. With the aforesaid directions, the present petition is disposed of alongwith the pending applications.
16. A copy of this order be communicated through the Registry to the concerned Trial Court for information and compliance.

SWARANA KANTA SHARMA, J

DECEMBER 12, 2022/zp