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

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Reserved on: 16.11.2023
Pronounced on: 01.12.2023

+ **CRL.M.C.870/2023 & CRL.M.A. 3312/2023**

SHAILESH RAI

..... Petitioner

Through: Mr. Sanjay Gupta & Mr.
Shubhangam Thakur,
Advocates.

versus

SURENDER SINGH

..... Respondent

Through: Mr. Rajesh Bhatia, Mr.
Hemant Kakkar & Mr.
Naveen, Advocates.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C. ') has been filed on behalf of the petitioner for quashing of order dated 04.01.2023, passed by learned Metropolitan Magistrare-01, Central District, Tis Hazari Courts, in Complaint Case No. 516946/2016, registered under Sections 138 of the Negotiable Instruments Act, 1881('NI Act') titled as " *Surender Singh vs. Shailender Rai*".

2. Brief facts of the case, as per complaint filed under Section 138 of NI Act, are that the complainant was known to the accused and the accused used to come to the office of complainant along with



other common friends. The accused had approached the complainant for friendly loan for a sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) in the first week of January, 2015, on the ground that he was in dire need of the same for his project of tenders, and seeing his genuine requirement and need, the complainant had arranged a sum of Rs. 10,00,000, and paid the accused in the month of January, 2015 for a period of six months. After the expiry of six months, when the accused had failed to return back the said loan amount, the complainant had approached the accused and had demanded the amount. Initially, the accused had avoided the complainant on one pretext or the other, and when complainant had forced to clear the said loan amount, the accused had issued two post-dated cheques of Rs. 5,00,000/- each in the last week of July, 2015, bearing cheque no. 681672 and 681673, both dated 15.09.2015, drawn at Punjab National Bank, Sector-5, Rohini Branch, Delhi. The accused had assured that the said cheques will be honoured on their presentation. The complainant had then presented these cheques for encashment with his banker Punjab National Bank, Mall Road Branch, Delhi, but both the cheques had got dishonoured on the same day *vide* return memo dated 15.09.2015, with the remarks 'Funds Insufficient'. The complainant had then sent a legal notice dated 26.09.2015 to the accused, however, the accused had failed to make the payment. Thereafter, the present complaint was filed under Section 138 of NI Act.

3. Learned counsel for the petitioner/accused argues that the learned Trial Court has erroneously dismissed the application filed



under Section 311 of Cr.P.C. It is argued that the learned Trial Court has failed to appreciate that the reason given by the petitioner in application under Section 311, Cr.P.C. for recall of complainant was that CW-2 Sh. Anuj Kumar Tyagi had stated in his cross examination conducted on 30.03.2022 that “*the complainant did not hand over the loan amount immediately but after four-five days complainant gave the loan amount to the accused in the month of January.*”, whereas the complainant in his cross-examination had stated that “*I arranged some amount of the said 10 lakhs after selling my property and some I arranged from my friends*”. It is stated that from the aforesaid facts, it is clear that the complainant was not having financial capacity to advance the alleged loan when the alleged demand was made and he had to arrange part of it subsequently from other sources. It is stated that the financial capacity of the complainant is a relevant and important factor in a case under Section 138 of NI Act. It is argued that the learned Trial Court has erred in coming to the conclusion that application has been moved almost four years after completion of evidence of CW-1, because the petitioner, in the light of evidence of CW-2, wants to further cross-examine CW-1 to enquire about the details of property which the respondent had sold during short span of 4-5 days as well as names of his friends from which he had taken money, to ascertain the source and financial capacity of the complainant. Therefore, it is prayed that present application be allowed and impugned order be set aside.

4. Learned counsel for the respondent, on the other hand, argues that ample opportunities were granted for cross-examination of the



witness concerned, to the petitioner before the learned Trial Court. It is also stated that the witness sought to be recalled i.e. complainant/CW-1 was cross-examined four years back, and filing of application under Section 311 of Cr.P.C. is an abuse of process of law and a mere delaying tactic. It is also stated that a perusal of cross-examination of the complainant will also reveal that questions have been specifically asked to him regarding his financial capacity to advance loan. Therefore, it is prayed that present petition be dismissed.

5. This Court has heard arguments addressed by learned counsel for the petitioner and learned counsel for the respondent, and has gone through the case file and material placed on record.

6. At the outset, it will be necessary to refer to Section 311 of Cr.P.C., which provides 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.”

7. Further, the relevant portion of impugned order dated 04.01.2023, *vide* which the learned Trial Court had dismissed the application filed by petitioner under Section 311 of Cr.P.C., reads as under:

“Perusal of file shows that accused was given several opportunities to cross examine the complainant and thereafter, the complainant was cross examined on



13.11.2018. Thereafter, CW-2 was examined on 30.03.2022 and on 25.06.2022 and the matter was fixed for recording of S.A. U/s313 Cr.P.C. Thus, the application U/s 311 Cr.P.C. for re-examination of complainant has been moved almost after four year of the completion of cross examination of the complainant when the matter was already fixed for recording of S.A. U/s 313 Cr. P.C.

One of the reasons mentioned in the application is that the accused wants to question the complainant on the financial capacity. However, this court observes that the questions regarding the source of the amount lend to the accused were put to the complainant even during his cross examination on 13.11.2018. Thus, the accused had all the opportunities to further question the complainant regarding the source of funds for loan when the complainant was cross examined at length on 13.11.2018. Where the accused had appointed a counsel of his choice, who was given due opportunity and had duly conducted the cross examination, the accused person cannot be considered to be under any handicap and the same was also opined by the Hon'ble Supreme Court of India in the case of AG Vs. Shiv Kumar Yadav And Anr. CrI. No. 1899-1900 of 2015..."

8. A perusal of the trial court record reveals that in the present case, summons were issued to the accused/petitioner vide order dated 02.12.2015. Thereafter, Bailable Warrants were issued against him on 30.03.2016 and Non-Bailable Warrants were issued *vide* order dated 01.07.2016. Thereafter, process under Section 82 of Cr.P.C. had also been issued against the petitioner vide order dated 28.10.2016. Appearance on behalf of accused was ultimately marked before the learned Trial Court on 03.01.2017. Notice under Section 251 of Cr.P.C. was framed against the accused vide order dated 17.10.2017.

9. There is no dispute about the fact that the complainant herein was cross-examined before the learned Trial Court on 13.11.2018.



Thereafter,CW-2 i.e. the witness who,as per complainant, was present in the office of complainant when the complainant had advanced the loan to the accused, was examined and partly cross-examined on 30.03.2022, and further cross-examined and discharged on 25.06.2022.

10. In the present case, the ground on which the petitioner/accused seeks to cross examine the complainant/CW-1 is that he needs to be questioned about the details of property which he had sold to get money as well as the names of his friends from whom he had taken money, in order to ascertain the source and financial capacity of the complainant to advance loan to the petitioner. The delay of four years, in praying for recall of complainant for cross-examination, has been sought to be explained on behalf of the accused that it is only after the facts disclosed in cross-examination by CW-2 that there is a need to cross-examine the complainant regarding his financial capacity.

11. To appreciate these contentions, this Court has gone through the grounds mentioned in the present petition as well as the impugned order and the evidence on record. In the complaint and pre-summoning evidence, the complainant had stated that accused had approached him for grant of loan in January 2015 and the complainant had given him the loan in January 2015 itself. Further, the complainant was extensively cross-examined on 13.11.2018 and specific questions regarding his financial ability were put to him by the learned counsel for accused. Perusal of the evidence of CW-1 reveals that he had stated that he had arranged some amount out of the said Rs.10,00,000/- from selling his property and had arranged



some amount from his friends. He had also stated that at the time of giving the said friendly loan, he was an income tax payee. As regards his financial capacity, he had also stated that he used to run a gym and was also working as a property dealer, and his income was about Rs.1 to 1.5 lakhs per month from the gym business.

12. In light of such facts and circumstances, the prayer for recall of the complainant on the ground that he needs to be asked questions about what property he had sold and from what friends he had obtained loans, is without merit, since these questions could have been asked by the counsel for accused in the year 2018 itself, when the complainant had been cross-examined since he had specifically stated as to how he had advanced the money to the accused. This statement was made by the complainant in the year 2018 itself, and the failure on part of accused to cross-examine the complainant on these aspects cannot be justified by taking a plea that CW-1 is to be re-examined only in view of evidence of CW-2 which was recorded in the year 2022. As regards the issue that the financial capacity to advance loan is an important factor, it is to be noted that CW-1 in his cross-examination had stated specifically that he was an income tax payee, was running a gym business, working as a property dealer, and his income was about Rs.1 to 1.5 lakh per month, and thus, the argument that the complainant was not cross-examined on the point of financial capacity is also without any merit. On the other hand, CW-2 in his cross-examination had stated that he was not aware as to from where the complainant had brought the money, and he had also



stated that the complainant was a property dealer and he also used to run a gym.

13. It is important to note that as held by Hon'ble Apex Court in catena of judgments, recall of a witness under Section 311 of Cr.P.C. cannot be allowed in a routine manner and such power has to be exercised judiciously, with caution and circumspection, and not arbitrarily or capriciously. The discretionary power under Section 311 of Cr.P.C. is required to be balanced carefully with considerations such as uncalled for hardship to the witnesses and uncalled for delay in trial [Ref: *Ratanlal v. Prahlad Jat* (2017) 9 SCC 340; *Vijay Kumar v. State of U.P.* (2011) 8 SCC 136; *State (NCT of Delhi) v. Shiv Kumar Yadav* (2016) 2 SCC 402].

14. Thus, in view of the foregoing discussion, this Court is of the view that there is no infirmity with the findings of the learned Trial Court, and no ground is made out for recalling of the complainant in the present case.

15. Accordingly, the present petition alongwith pending application stands dismissed.

16. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

DECEMBER 1, 2023

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