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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. 994/2023 & CRL.M.A. 3780/2023**

RAJESH MARWAH Petitioner

Through: Mr. Atul Sahi, Advocate

versus

STATE & ANR. Respondents

Through: Mr. Satish Kumar, APP for the
State

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioner seeking setting aside of order dated 07.01.2023, passed by learned Metropolitan Magistrate, Central District, Tis Hazari Court, Delhi in CC No. 13981/2017 titled as "*Ghanshyam Dass vs. Rajesh Marwah*" *vide* which his application under Section 311 of Cr.P.C. seeking recall of complainant for cross-examination was dismissed.

2. Briefly stated, the facts of the present case as borne out of the complaint filed under Section 138 of Negotiable Instrument Act, 1881 ('NI Act'), are that the accused had approached and requested



the complainant for some financial assistance in the form of friendly loan in the first week of September, 2016. The complainant, considering the difficulty of the accused, had paid a sum of Rs.1,00,000/- as friendly loan to the accused in the mid of September, 2016. The accused had assured the complainant that the same will be returned by August, 2017 and in discharge thereof, the accused had issued a post-dated cheque bearing No.263599, dated 10.08.2017, for Rs.1,00,000/- drawn on ICICI Bank Ltd., Sector-9, Rohini Branch, Delhi, being the payment of the aforesaid friendly loan amount in favour of the complainant. The accused had assured the complainant that the aforesaid cheque will be encashed upon its presentation. It is stated that the complainant had presented the cheque in question before his banker i.e. Punjab National Bank in Gokhle Market Branch, Delhi, for encashment but to the utter surprise and dismay of the complainant, the said cheque was returned back as dishonored with the remarks "Funds Insufficient" *vide* Debit Advice dated 14.08.2017 issued by the banker of the complainant. It is stated that the complainant had apprised the said fact of dishonoring of cheque in question to the accused and the accused had requested the complainant for its re-presentation after one month and had assured the complainant that the same will be honored. Accordingly, as per the instructions of the accused, the complainant had re-presented the cheque in question before his banker but the said cheque had again got dishonored with the remarks "Funds Insufficient" *vide* Debit Advice dated 27.09.2017 issued by the banker of the complainant. Thereafter, the complainant had issued legal notice dated 03.10.2017



to the accused, however, the accused had failed to make the payment. Accordingly, the present complaint under Section 138 read with Section 142 of NI Act was filed by the complainant.

3. Learned counsel for the petitioner, assailing the impugned order dated 07.01.2023, states that the learned Trial Court has erred in holding that the accused was provided with due opportunity to examine the complainant. It is stated that the learned Trial Court had overlooked and failed to appreciate the statement of the accused in which he had denied having known the complainant and even CW-1 had admitted to have been acting at the behest of his SPA Upender Gupta who was admittedly instrumental in hatching the entire conspiracy. It is stated that the complainant was wrongfully substituted by Upender Gupta by virtue of an alleged attorney dated 09.11.2017. However, CW-1 had neither brought on record the said attorney, nor was any such averment was made in the complaint or even the Memo of Parties, and the said special power of attorney has not been proved in accordance with law and Upender Gupta has not stepped into the witness box to stand the test of cross-examination qua the special power of attorney being executed in his favour. It is stated that denying the opportunity of cross-examination to the petitioner would cause great hardship to him in proving his case. It is further argued that the object of Section 311 of Cr.P.C. is to prevent failure of justice on account of mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witness. Therefore, it is prayed that present petition be allowed.



4. Learned counsel for respondent no. 2, on the other hand, argues that the learned Trial Court has rightly dismissed the application filed by the petitioner herein under Section 311 of Cr.P.C. and there are no reasons to interfere with the impugned order. It is argued that complainant had been extensively cross-examined on 26.07.2019. It is stated that the present petition has been filed with an ulterior motive i.e. to delay the trial in the present case as the matter is pending for final arguments. It is stated that the learned Trial Court had closed the right of the present petitioner to cross-examine respondent no. 2 considering that there was an unexplained delay of over three years in filing an application under Section 311 of Cr.P.C.

5. This Court has heard arguments addressed on behalf of both the parties and has perused the material on record.

6. In the present case, the impugned order was passed on 07.01.2023 *vide* which the application filed under Section 311 of Cr.P.C. on behalf of the present petitioner, who is accused before the learned Trial Court, was dismissed. The relevant portion of impugned order reads as under:

“...The principal ground agitated in support of the said application is that the Ld. counsel for the accused has inadvertently omitted to ask certain very important questions to the complainant in his cross examination on the ground of communication gap and the entire truth has not come on record.

Perusal of the record reveals that the said case pertains to the year 2017 whereby the complainant, cw-1 was cross examined on 26.07.2019 by the Ld. counsel. It is pertinent to note that the said application has been moved at a very belated stage after a gap of almost three years with no explanation for the delay.



Further the grounds stated in the application are also found to be inadequate considering that cw-1 had been extensively cross examined on 26.07.201g. It is well settled that the power u/s 311 Cr.P.C conferred upon the court is plenary in nature and the only pre condition is that the evidence sought to be adduced be necessary for the just decision of the case.

It is natural that the party cross examining may at the conclusion of the cross examination, feel that the cross examination could have been conducted more to its own liking or that certain questions other than the ones already asked could be put to the witness to improve the case of the party cross examined. Some remorse is bound to exist in the mind of the opposite party at each and every stage of the trial. However, it must be kept in mind that the party cross examined must effectively use the opportunities provided to it and no resort can be had to the power u/s311 Cr.P.C merely upon whims and fancies or to subsequently fill up the lacunae in the previous cross examination or to further protract the proceedings merely on an apprehension that the earlier cross examination suffers from omission to ask certain questions.

In the ultimate analysis, the accused has not been able to show any sufficient cause to justify the delay or any reason as to why the said evidence would be deemed to be essential for the just decision of the case.

The reliance placed by the accused and the decisions of "Godrej Pacific Vs. Computer Joint (2009)" 2 SCC 415 and "MVL Industries Vs' IFCI Factors" (ManuiDE t340312015), "Mauktika Energy Vs' Asia Pragati catfin" (Manu/DE to46612o2o),Natasha Singh Vs CBI (2013),' 3 SCC 741 and "P sanjeeva Vs. State of Andra Pradesh (2012)" 78 SCC 56 do not deviate from the general principles enshrined in section 311 Cr. P.C. and are merely the reiteration of raw regarding delineation of power of court when it deals with an application u/s 311 Cr. P.C.

For the foregoing reasons, the said application is dismissed..."

7. In the given facts and circumstances, it will be useful to refer to Section 311 of Cr.P.C., which is reproduced 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.”

8. It has been repeatedly held in catena of judgments by Hon’ble Apex Court, that recall of witness is not a matter of course and power under Section 311 of Cr.P.C. has to be exercised judiciously, with caution and circumspection, and not arbitrarily or capriciously. Such power is to be exercised on the basis of facts and circumstances of each case, and the discretionary power has to be balanced carefully with considerations such as uncalled for hardship to the witnesses and uncalled for delay in trial [Ref: *Vijay Kumar v. State of U.P.* (2011) 8 SCC 136; *State (NCT of Delhi) v. Shiv Kumar Yadav* (2016) 2 SCC 402; *Ratanlal v. Prahlad Jat* (2017) 9 SCC 340].

9. This Court notes that the present petitioner had filed an application under Section 311 of Cr.P.C. for cross-examination of respondent no. 2 before the learned Trial Court on 07.01.2023 after a delay of more than three years and five months from the date of cross-examination of CW-1 i.e. on 26.07.2019. The present petitioner, in his application filed under Section 311 of Cr.P.C. before the learned Trial Court had stated that the complainant needs to be confronted with several documents in relation to his previous alleged relation with one Upender Gupta, without which the complainant’s version would go unrebutted, and such questions could not be put to



the complainant as there was communication gap between the accused and his counsel.

10. This Court notes that the learned Trial Court, while dismissing the application of present petitioner filed under Section 311 of Cr.P.C., had considered this ground and had observed that the complainant had been extensively cross-examined on 26.07.2019, and the accused had failed to show any sufficient cause to justify the delay of more than three years or any reason as to why the recall of CW-1 for further cross-examination was essential for just decision of the case.

11. Through the present petition, petitioner prays that impugned order passed by learned Trial Court on 07.01.2023 dismissing the application filed under Section 311 of Cr.P.C. be set aside on similar grounds i.e. the petitioner had to pose certain questions in relation to alleged attorney Upender Gupta.

12. This Court has perused the material on record including evidence i.e. cross-examination of complainant Ghanshyam Dass which reveals that he was extensively questioned in regard to his attorney and relation with one Upender Gupta. This Court notes that complainant, in his cross-examination dated 26.07.2019, had stated that he knew accused Rajesh Marwah for the past 7-8 years through his SPA Sh. Upender Gupta. It was also stated that the complainant knows Sh. Upender Gupta for the last 15-20 years and that he had given the authority to Sh. Upender Gupta in the present case to settle the amount by means of an SPA. Further, specific questions regarding the transactions in the present case and the role of Upender



Gupta as well as complainant Ghanshyam Dass were also put to CW-1 in his cross-examination. Thus, this Court observes that complainant was questioned specifically with regard to the grounds raised by the present petitioner and the same have been recorded in cross-examination of CW-1 dated 26.07.2019.

13. In the aforesaid facts and circumstances, it is clear that the petitioner had extensively questioned the complainant in his cross-examination, and had filed an application under Section 311 of Cr.P.C. after an unexplained delay of more than three years and five months. In these circumstances, this Court is of the opinion that the provisions of Section 311 of Cr.P.C. cannot be used to delay the proceedings or to cause inconvenience to the other party as that also amounts to miscarriage of justice by delaying the proceedings under Section 138 NI Act, and abuse of process of law, especially in cases where complainant has already been cross-examined in detail and no grounds are shown for recall of the witness.

14. In view thereof, this Court does not find any merit in the present petition and the same stands dismissed along with pending application, if any.

15. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J
DECEMBER 1, 2023/zp