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

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Reserved on: 07.07.2023
Pronounced on: 12.07.2023

+ **CRL.M.C. 1040/2023 & CRL.M.A. 3986/2023**

RAJESH JINDAL

..... Petitioner

Through: Mr. Dhan Mohan, Mr. Ravi
Mishra and Ms. Tanisha Bhati,
Advocates

versus

SANJAY KHURANA

..... Respondent

Through: Respondent in person

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant petition has been filed under Section 482 of the Code of Criminal Procedure Code ('Cr.P.C') by the petitioner seeking quashing/setting aside of order dated 06.02.2023 passed by learned Metropolitan Magistrate (NI Act), North-West District, Rohini Courts, Delhi in CC No. 14756 of 2016 in case tilted as '*Sanjay Khurana vs. Sunil Jindal and others*' for the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

2. Briefly stated, the respondent had filed a complaint under Section 138 NI Act against Sunil Jindal, Rajesh Jindal and M/s Rex Apparels.



Accordingly, the petitioner had preferred an application under Section 145 (2) Cr.P.C. which had been allowed by the Learned Trial Court for cross examination of the respondent, in which only three questions had been asked by the learned proxy counsel of the previous counsel for the respondent before closing the complainant's evidence. The petitioner had filed another application before the Learned Trial Court for further cross examination of complainant/respondent (CW-1). Accordingly, on 06.02.2023, an application under Section 311 Cr.P.C. had been filed by the petitioner for recalling of complainant/respondent which had been dismissed by the Learned Trial Court on erroneous grounds. Accordingly, the petitioner has approached this Court.

3. Learned counsel for the petitioner states that the learned Trial Court has dismissed the application preferred by the petitioner under Section 311 Cr.P.C without assigning any reasons for its dismissal. Learned counsel draws the attention of this Court towards the cross-examination of respondent and states that only three questions have been asked to the witness and relevant questions were not asked by the previous counsel. It is further stated that petitioner may be granted only 30 minutes to conclude the cross-examination.

4. The complainant/respondent who is present in person states that the matter has been dragged for nine years and present petition is one of the delaying tactics adopted by the petitioner and the petitioner has been harassing him and delaying the trial.

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



6. At the outset, it will be appropriate to refer to Section 311 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.

7. The 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:

“...15.1 In the decision in **Jamatraj Kewalji Gowani v. State of Maharashtra**, this Court held in para 14:

14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court at or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction...”

14.3 In the decision in **Raj Deo Sharma 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.

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.”

8. Having given thoughtful consideration to the aforesaid legal position, in the opinion of this Court, a perusal of the cross-examination of the witness would reveal that the previous counsel has asked only three questions to the witness and did not cross-examine the witness on certain crucial aspects which is apparent from the record. Though ordinarily, change of counsel cannot be a ground for recalling the witness, in the circumstances as the present one where cross-examination was not conducted on the issues relevant to the proper adjudication of dispute, this Court is inclined to allow the present application. However, this Court also take notes of the fact that the case is at the stage of final arguments.

9. In these circumstances, the application is allowed on the following conditions:

- i) That a cost of Rs. 25,000/- is imposed on the petitioner which will be paid to the complainant before learned Trial Court, before being afforded opportunity to cross-examine the witness and will be a condition precedent to his cross-examining the witness;



- ii) The learned defence counsel will have maximum time of 60 minutes to cross-examine the witness/complainant.
- iii) The witness/complainant will be cross-examined in one single opportunity and in case any adjournment is sought, the opportunity to cross examine the witness shall stand closed.
10. Thereafter, the learned Trial Court will fix the shortest possible date for hearing final arguments and will dispose of the matter preferably within two months from the date of cross-examination of witness as ordered above.
11. In view thereof, the present petition stands disposed of.
12. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 12, 2023/kss

