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

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Reserved on: 13.09.2023
Pronounced on: 18.09.2023

+ **CRL.M.C. 5752/2023**

SMT REETA KALONIA

..... Petitioner

Through: Mr. Ankit Kumar Lohan,
Advocate

versus

STATE & ANR.

..... Respondents

Through: Mr. Naresh Kumar Chahar,
APP for State
Mr. Anish Dewan, Advocate
for R-2

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') for setting aside the impugned order dated 04.08.2022 passed by learned Metropolitan Magistrate-01 (NI Act) Digital Court, Central District, Delhi ('Trial Court') in the Complaint Case No. 1440/2021, filed under Section 138 of Negotiable Instruments Act, 1881 ('NI Act') titled as '*Mehtab Singh vs. Reeta Kalonia*', whereby the application filed under Section 311 of Cr.P.C. by the petitioner was dismissed.



2. In the present case, the complainant/respondent no. 2 had filed a case under Section 138 N.I Act before the learned Trial Court alleging that the petitioner had approached the complainant in the month of January, 2020 being wife of neighbour of the complainant for a friendly loan of Rs. 15 lakhs to promote her boutique business. At the time of requesting for a friendly loan, the husband of the petitioner had categorically assured the complainant that the petitioner would return the money within a short period of time. The complainant looking into the friendly relationship with husband of the petitioner had given an amount of Rs. 7 lakhs in the month of January, 2021 in cash to the petitioner. It is alleged that to discharge liability, the petitioner had issued cheque bearing no. 031998 dated 20.11.2020 for a sum of Rs.7,00,000/- drawn on State Bank of India, Narela Branch, Delhi to the complainant/respondent no. 2 with assurance that the same would be encashed. However, upon presentation, the same was returned with remarks "Funds Insufficient" on 05.01.2021. Thereafter, a legal notice of demand was sent to the present petitioner by respondent no. 2 on 12.01.2021, however, the petitioner failed to make payment of the cheque amount. Accordingly, the present case under Section 138 of NI Act was filed by respondent no. 2.

3. After summoning, the learned Trial Court framed notice under Section 251 Cr.P.C. and upon moving an application under Section 145(2) NI Act, the case was listed for cross-examination of the respondent no. 2 before the learned Trial Court. The petitioner herein had partly examined the respondent no. 2 on 19.04.2022 and the



remaining evidence was deferred for the next date of hearing. Upon failure on part of petitioner to further cross-examine respondent no. 2 on several dates, the learned Trial Court *vide* impugned dated 21.07.2022 had closed the right of the petitioner to cross-examine the respondent no. 2. Learned Trial Court had thereafter dismissed the application moved under Section 311 of Cr.P.C. for recalling the complainant/respondent no. 2 for his cross-examination.

4. Learned counsel for the petitioner argues that the learned Trial Court did not appreciate that right of cross-examination by an accused in a criminal case to discredit the witnesses and to test veracity of the statement is the most vital part of a criminal trial, and that the application filed under Section 311 of Cr.P.C. was arbitrarily dismissed by the learned Trial Court. It was further argued by learned counsel for the petitioner that the learned Trial Court on one of the occasions had fixed time at 11:30 AM for taking up the matter as it is a virtual court, and the counsel for the petitioner was present at 11:30 AM, however, complainant and his counsel were not present and the matter was taken up only at 11:45 AM. However, learned counsel for the petitioner had appeared after five minutes, however, by that time, the time allotted by the learned Trial Court for leading evidence was over. It is submitted that the revision petition against the impugned order was withdrawn by the petitioner as it was not maintainable before the learned ASJ. It is now argued that the petitioner has partly cross-examined the respondent no. 2 on 19.04.2022, even in the absence of the petitioner but the learned Trial Court has closed the right to further cross-examine the witness



without appreciating the law on the point. It is, therefore, prayed that the petitioner must be given an opportunity to cross-examine the complainant/respondent no. 2.

5. On the other hand, learned counsel for respondent no. 2 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. Placing reliance upon order dated 08.03.2022 passed by learned Additional Sessions Judge-03, Central, Tis Hazari Courts, Delhi in Crl. Rev. No. 40/2022, it is stated that learned ASJ had directed the learned Trial Court to expedite the trial of case and conclude it within three months and it was further ordered that the Trial Court shall not grant more than two opportunities for cross-examination of the petitioner. It is argued that despite being granted about six opportunities, the petitioner and her counsel failed to cross-examine the complainant. It is also stated that the impugned order was passed on 04.08.2022 and the present petition has been filed after a period of about one year only to delay the trial. Thus, it is prayed that present petition be dismissed.

6. This Court has heard arguments addressed by learned counsel for the petitioner as well as for the complainant/respondent no. 2 and has perused the material placed on record.

7. In the present case, the impugned order was passed on 04.08.2022 *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 impugned order reads as under:



“An application u/s. 311 Cr.P.C. has been filed on behalf of the accused. In the application it is stated that the counsel for the accused could not appear before the court on 21.07.2022, as he had history of slip disk and was advised by the doctor to take bed rest. Therefore, the counsel for the accused could not appear on said date and the opportunity of the accused to cross examine the complainant was closed by the orders of this court. It is stated in the application that the witness/CW-1 be recalled and the accused be given an opportunity to cross-examine him.

The counsel for the complainant has opposed the application. He has submitted that on the last date of hearing, the proxy counsel for the accused had stated that the main counsel has fallen from stairs and therefore cannot appear. However, in the application, it is stated that the counsel has slip disc injury. He has contended that the accused persons want to only delay trial by making excuses.

The power to summon u/s. 311 Cr.P.C. is discretionary in nature and is to be exercised when the evidence of the witness appears to be essential for just decision of the case. However, the provision u/s. 311 Cr.P.C. cannot be misused or abused by the parties.

In the present case, application of the accused u/s. 145(2) N.I. Act for cross examination of the complainant was allowed on 03.01.2022. Thereafter, effective opportunities for cross examination of the complainant were given to the accused on 07.03.2022, 19.04.22, 04.05.2022, 04.06.2022, 28.06.22 and 21.07.2022. On all of these dates, the accused and his counsel failed to cross examine the complainant. This appears to be deliberate and wilful avoidance to cross examine the complainant for one reason or the other.

In this case, more than five opportunities have been granted to the accused to cross examine the complainant, however, since the accused has failed to utilize the same, this court cannot further allow the accused to cross examine the complainant. The discretionary power of the court u/s. 311 Cr.P.C. cannot be subverted to surpass an order of the court which is already on record. Therefore, application u/s. 311 Cr.P.C. stands dismissed.”



8. It is also important to note the order dated 21.07.2022 *vide* which opportunity to cross-examine the witness/complainant was closed by the learned Trial Court, which had led to filing of application under Section 311 of Cr.P.C., reads as under:

“Matter is listed today for cross examination of the complainant, however, adjournment is sought on behalf of the accused on the ground that main counsel for the accused has fallen down from the stairs and has hurt his back.

Perusal of the record reveals that the matter has been listed for cross examination of the complainant on 19.04.2022, 04.05.2022, 04.06.2022, 28.06.2022 and for today. Ample opportunities have been given to the accused to cross examine the complainant, however, opportunities have not been utilized by the accused. Further, Ld. Revision Court *vide* order dated 07.03.2022 has directed this court to dispose of present matter within three months from the date of said order.

Despite fixing short dates of hearing, accused has not availed any opportunity to cross examine the complainant. Therefore, right of the accused to cross examine the complainant is closed by the orders of this court.”

9. 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.”

10. As repeatedly held by Hon’ble Apex Court in catena of judgments, the 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, 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].

11. In the present case, this Court notes that the application filed by the petitioner/accused under Section 145 of NI Act seeking cross-examination of the complainant/respondent no. 2 was allowed by the learned Trial Court on 03.01.2022 and thereafter, several opportunities for cross-examination of the complainant were granted to the accused, i.e. the petitioner before this Court, on 19.04.2022, 04.05.2022, 04.06.2022, 28.06.2022 and 21.07.2022. However, despite being given almost five opportunities, the accused had failed to cross-examine the witness. The observations to this effect stand recorded in orders dated 21.07.2022 and 04.08.2022.

12. This Court cannot also ignore the fact that a revision petition had earlier been preferred by the complainant against order of dismissal of his application under Section 143A of NI Act, and while disposing of the petition, the learned learned Additional Sessions Judge-03, Central, Tis Hazari Courts, Delhi *vide* order dated 08.03.2022 in Criminal Revision No. 40/2022 had requested the learned Trial Court to expedite the trial of the case and dispose of the case within three months. It had also directed the learned Trial Court to not grant more than two opportunities for the cross-examination of



the complainant. It was in light of this direction that the learned Trial Court was fixing short dates of hearing, however, the accused despite being aware of the order for disposal of the matter within three months from the date of the said order, did not avail repeated opportunities to cross-examine the complainant. Thus, the petitioner was granted five opportunities to cross-examine the witness, however, she had failed to cross-examine the complainant on one ground or the other.

13. Judicial discipline and proprietary demands that the orders of the superior court have to be followed and complied with in its true letter and spirit. Therefore, the learned Trial Court despite a heavy pendency has been granting repeated opportunities to the learned counsel for the complainant not once but on five occasions. On the one hand, learned Trial Court was to comply with the direction of the superior court to conclude the trial within three months and was giving shorter dates, on the other hand, the accused was not cross-examined the witness on one ground or the other. As far as the contention that on one of the dates, by the time the counsel for the petitioner/accused had reached the Court, the time allotted to them was over is concerned, it is to be noted that the virtual courts have to work on time slot basis so as to ensure that no inconvenience is caused to any of the parties. Learned counsel for the petitioner as well as the petitioner were aware about the time allotted to them and, therefore, they should have utilised the time allotted to them on the date so fixed. Moreover, even though the petitioner has tried to explain the reasons for not availing the opportunity to cross-examine



the complainant on two occasions i.e. non-availability of counsel due to health issues and time slot getting over by the time the counsel had reached the Court, neither any explanation has been offered in the petition nor was it addressed during the course of arguments despite being asked by this Court as to why the opportunity to cross-examine the complainant was not availed on other two or three occasions.

14. The present case does not pertain to grant of one or two opportunities, rather the grant of five opportunities by the learned Trial Court, which was a lenient approach adopted by the Court to ensure that no prejudice was caused or any injustice was done to the petitioner/accused, even though the learned ASJ *vide* order dated 08.03.2022 had ordered that not more than two opportunities shall be granted to the accused to cross-examine the complainant and endeavor shall be made to conclude trial within three months. This Court is also seized of the fact that the present petition has been filed after a period of one year from the date of passing of the impugned order.

15. In the aforesaid set of facts and circumstances, it is clear that it was the petitioner/accused herself who had not availed five opportunities for cross-examination of the witness. In these circumstances, this Court is of the opinion that the provisions for Section 311 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, or for abuse of process of law.



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

17. The judgment be uploaded on the website forthwith

SWARANA KANTA SHARMA, J

SEPTEMBER 18, 2023/kd