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

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Reserved on: 18.09.2023
Pronounced on: 17.10.2023

+ **CRL.M.C. 6753/2023, CRL.M.A. 25255/2023**

PAWAN DHANPATRAI MALHOTRA Petitioner

Through: Ms. Shriya Chanda, Advocate

versus

MAHENDER KHARI Respondent

Through: Mr. Aditya Singh Shitiz,
Advocate along with
respondent.

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, 1973 ('Cr.P.C.') by the petitioner seeking setting aside of order dated 11.04.2023 passed by learned Principle District & Sessions Judge, South District, Saket District Courts, Delhi ('learned Sessions Court').

2. Briefly stated, facts of the present case are that complaint under Section 138 of Negotiable Instruments Act, 1881 ('NI Act') was filed by the respondent/complainant against the petitioner alleging dishonor of the cheques bearing no. 886175, 886176 and



886177, all dated 15.07.2019 for a sum of Rs. 6 lacs each, which had got dishonoured *vide* bank returning memos dated 11.10.2019 with remarks “Insufficient Funds”. The complainant in the same complaint had also alleged the dishonor of cheque bearing no. 886178 dated 15.10.2019 for an amount of Rs.6 lacs which was dishonoured *vide* return memo dated 23.10.2019 with remarks “Insufficient Funds”. After dishonour of the said cheques, respondent/complainant had sent a common legal notice dated 06.11.2019 to the petitioner and after the petitioner had failed to discharge his liability, the complainant had filed a common complaint i.e. Complaint No. 1398/2020 titled “Mahinder Khari v. Pawan Dhanpat Rai Malhotra” under Section 138 of NI Act.

3. The accused/petitioner had moved an application under Section 219 of Cr.P.C. contending that under Section 219 of Cr.P.C., a maximum of 3 cheques can be tried together which had got dishonoured in a span of 12 months and thus, the complaint in its present form was not maintainable. Learned Metropolitan Magistrate (South), NI Act, Saket, Delhi (*‘Trial Court’*) *vide* order dated 16.04.2022 had dismissed the application preferred under Section 219 of Cr.P.C. by the petitioner/accused and had put up the matter for framing of notice. Thereafter, the right of the accused to cross-examine the complainant/CW-1 was closed by learned Trial Court *vide* order dated 20.03.2023. The petitioner had then filed a criminal revision petition against the said order before the learned Sessions Court and *vide* order dated 11.04.2023, the order dated 20.03.2023 passed by learned Trial Court was set aside and an opportunity was



given to the petitioner/accused for cross-examination of complainant/CW-1 subject to the payment of Rs.1 lakh to the complainant.

4. By way of present petition, the petitioner has assailed the order dated 11.04.2023 passed by learned Sessions Court and seeks its setting aside.

5. Learned counsel for the petitioner argues that the learned Sessions Court has failed to pass any order in respect of the prayer of the petitioner pertaining to Section 219 of Cr.P.C. and had only passed the impugned order on the aspect of cross-examination which was allowed subject to payment of Rs.1 lakh to the complainant. It is now argued that the cost imposed *vide* the impugned order dated 11.04.2023 has been paid by the petitioner, however, since no speaking order with respect to all the prayers was passed by the learned Sessions Court, on that ground alone, the impugned order should be set aside. It is further argued that the learned Sessions Court has committed an error in not passing any order with respect to the inherent defect in the complaint of the respondent, and the Courts below have failed to take note of the fact that the complaint is barred under Section 219 of Cr.P.C. It is submitted that in the revision petition filed before the learned Sessions Court, the challenge *per se* was not only to the right of the petitioner to cross-examine the complainant but also on the legal tenability and maintainability of the complaint considering bar under Section 219 of Cr.P.C. Thus, it is prayed that impugned order be set aside.



6. *Per contra*, learned counsel for the respondent argues that the petitioner is only delaying the trial and the application filed under Section 219 of Cr.P.C. by the petitioner, who is an accused before the learned Trial Court, was decided by a detailed order on 16.04.2022, but the said order has never been challenged before any Court by the petitioner and the same has thus, attained finality. It is therefore argued that there was no occasion for the learned Sessions Court to have passed any order regarding non-maintainability of the complaint when evidence had already been recorded by the learned Trial Court and even the petitioner has not specifically challenged the order dated 16.04.2022 in the revision petition in which the impugned order was passed. It is also stated that as regards the cost of Rs.1 lakh imposed upon the petitioner *vide* impugned order, the learned Trial Court had also noted in the proceedings before it that the petitioner had been seeking adjournments on one ground or the other and thus, the cost imposed upon the petitioner subject to payment of which he was allowed to cross-examine the complainant was justified in the facts of the case. It is also stated that after the impugned order was passed, though the petitioner had paid the cost to the complainant, he had again sought an adjournment before the learned Trial Court and thus, his right to cross-examine the complainant had again been closed and the matter had been listed for recording the statement of accused. However, it is submitted that the petitioner has not been appearing before the learned Trial Court and even Non-Bailable Warrants against him. Thus, it is prayed that present petition be dismissed.



7. This Court has heard arguments addressed by learned counsel for the petitioner and learned counsel for the respondent and has perused the material placed on record.

8. The petitioner has contended before this Court that the order dated 11.04.2023 passed by the learned Sessions Court be set aside on the ground that the Court has failed to record its findings on the maintainability of complaint filed under Section 138 of NI Act in view of the bar of Section 219 of Cr.P.C.

9. To appreciate the contentions raised in the present case by both the parties, this Court has perused the order sheets of the learned Trial Court placed on record by the learned counsel for respondent and has examined the contents of the revision petition filed before the learned Sessions Court by the accused/petitioner and the impugned order dated 11.04.2023 passed while disposing of the said revision petition.

10. In the present case, the learned Trial Court had closed the right of the petitioner to cross-examine the complainant, after considering the fact that the petitioner had sought adjournments on several dates, that are 21.07.2022, 19.10.2022, and 02.03.2023. Again on 20.03.2023, an adjournment was sought on the ground that the accused wished to challenge the order dated 16.04.2022 passed by learned Trial Court *vide* which the application filed by accused under Section 219 of Cr.P.C. was dismissed. However, considering the facts and circumstances of the case, the learned Trial Court, *vide* order dated 20.03.2023, had closed the right of the accused to cross-



examine the complainant. The relevant portion of the said order reads as under:

“Adjournment is sought by Id. Counsel for the accused on the ground that she wishes to challenge order dated 16.04.2022 passed by this Court.

Perusal of the file shows that on the last date of hearing, one last and final opportunity was granted to both the sides for the purpose of cross examination of CWI. Today, CWI is present, but adjournment is again sought on behalf of the accused.

Ld. Counsel for the accused submits that she wishes to challenge order dated 16.04.2022 passed by this Court. Pertinently, till date, the accused has not challenged the said order. A perusal of the file also shows that time and again adjournments have been sought by the accused for the purpose of cross examination of CWI on one or the other ground. The present matter was fixed for CE on 26.05.2022 and till date, CWI has not been completely, cross examined. From the entire perusal of the record, it appears that the accused is deliberately trying to delay the proceedings of the Court. In view of the same, right of the accused to cross examine CWI is hereby closed.”

11. Aggrieved by the said order, the petitioner/accused had preferred a revision petition before the learned Sessions Court. The learned Sessions Court had, *vide* order dated 11.04.2023, allowed the revision petition of the petitioner by setting aside the order dated 20.03.2023 passed by the learned Trial Court, and had granted the petitioner one effective opportunity to cross examine the complainant subject to the payment of a cost of Rs. 1 lakh. The relevant portion of the order reads as under:

“6. Without going into the details of the conduct of the parties, this court is of the opinion that on a concession by the respondent one effective opportunity can be afforded to the petitioner/ accused for cross-examination of CW-1, subject to payment of Rs.1,00,000/- as costs payable to the complainant. Trial Court shall ensure that not more than one effective



opportunity is afforded to the petitioner/ accused to cross examine the CW-1. It is directed that CW-1 shall appear before the Trial Court on 01.05.2023 and on the said date, he will be cross-examined by the counsel for the petitioner, subject to payment of costs and to convenience of the court. It is made clear that in case on the adjourned date, petitioner or his counsel is not available or costs are not paid, opportunity shall be deemed to have been declined and impugned order shall be restored.

7. For the reasons noticed above, Order dated 20.03.2023 passed by MM-01, NI Act, South, Saket, New Delhi, is set-aside. Parties are directed to appear before the trial court on 01.05.2023.

8. Revision petition is, accordingly, disposed of. A copy of this order be sent to the Trial Court and a copy be given dasti to both parties. Revision file be consigned to record room.”

12. Admittedly, the petitioner has already paid the cost imposed by the learned Trial Court for the purpose of conducting cross-examination of the complainant, and as clear from the contents of present petition and the arguments addressed before this Court, the petitioner has sought setting aside of the impugned order dated 11.04.2023 *only* on the ground that in the said order, learned Sessions Court had failed to consider the contentions raised by the petitioner/revisionist therein regarding the maintainability of the complaint case under Section 219 of Cr.P.C. and had not passed any order qua the same.

13. In this regard, this Court notes that the impugned order dated 11.04.2023 records the arguments addressed by both the parties before the learned Sessions Court which relate only to the issue of right of accused to cross-examine the complainant. Furthermore, a perusal of the contents of revision petition i.e. CR No. 123/2023 filed



by the petitioner/accused before the learned Sessions Court reveal that the prayer in the said petition was to only set aside the order dated 20.03.2023 passed by the learned Trial Court. As already taken note of in the preceding discussion, by virtue of order dated 20.03.2023, the right of petitioner herein to cross-examine the complainant had been closed on the ground of repeated adjournments being sought on behalf of accused, including the adjournment sought on 20.03.2023 on the pretext that the accused wanted to challenge the order dated 16.04.2022. It is crucial to note at this juncture that though the contention regarding complaint being non-maintainable in view of bar under Section 219 of Cr.P.C. was raised before the learned Trial Court on 20.03.2023, it was only in respect of seeking adjournment for the purpose of challenging the order dated 16.04.2022 *vide* which such application under Section 219 of Cr.P.C. had been dismissed by the learned Trial Court. However, as clear from the bare perusal of the records, the order dated 20.03.2023, which was impugned before the learned Sessions Court, did not record any observations on the maintainability of the complaint under Section 219 of Cr.P.C., rather only pertained to the right of accused to cross-examine the complainant.

14. It is also not in dispute that the petitioner/accused has till date not challenged the order dated 16.04.2022 passed by the learned Trial Court *vide* which his application under Section 219 of Cr.P.C. was dismissed and though he had made references to the said order in his criminal revision petition filed before the learned Sessions Court and had taken a ground that the proceedings in the present



complaint case were bad in law due to bar under Section 219 of Cr.P.C., the petitioner had still not assailed the order dated 16.04.2022 but had only challenged the order dated 20.03.2023 by virtue of which the learned Trial Court had closed his right to cross-examine the complainant.

15. Therefore, in the opinion of this Court, there was no occasion for the learned Sessions Court to have recorded any findings on the issue of whether the complaint was maintainable or not since the same was not an issue before the learned Sessions Court. Thus, there are no grounds to set aside the order dated 11.04.2023 passed by the learned Sessions Court.

16. Needless to say, if the petitioner is aggrieved by the order dated 16.04.2022 passed by the learned Trial Court, he has to avail the remedies to available to him, as per law.

17. Accordingly, the present petition stands dismissed alongwith pending applications.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 17, 2023/ns