2024:DHC:556

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

% ***Reserved on: 12.12.2023***
Pronounced on: 24.01.2024

\+ **CRL.M.C. 413/2023 & CRL.M.A. 1616/2023**

NILESH SHARMA ..... Petitioner
Through: Mr. Sudeep Dey, Mr. Ajit Singh and Mr. Abhinav Kumar, Advocates.

versus

KAMAL GARG ..... Respondents
Through: Mr. Nitin Mittal and Mr. Kailash Rana, 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 Mr. Nilesh Sharma, the petitioner herein, seeking setting aside of impugned order dated 25.11.2022, passed by learned Presiding Officer, Special Court (N.I. Act), South-West, Dwarka Courts, New Delhi (*'Trial Court'*)in Ct. Cases 26456/2017, titled as "Kamal Garg vs. Nilesh Sharma", whereby the learned Trial Court has dismissed the application filed by the petitioner under Section 311 of Cr.P.C. to call Sh. Vikas Kumar Sharma as defence witness.

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2. Briefly stated, the facts of the case as per the complaint filed by the complainant/respondent under Section 138 of Negotiable Instruments Act, 1881 (*'N.I. Act'*) are that the accused/petitioner was neighbor of the complainant and had been residing in the same vicinity. It was stated that the accused, by exploiting the friendly relationship with the complainant, had taken a friendly loan of Rs.4,00,000/- from the complainant on 29.01.2016. However, the accused had failed to repay the loan, leading to repeated requests and persuasion by the complainant. Thereafter, the accused had issued a cheque bearing no. 470761, dated 04.11.2017, drawn on Syndicate Bank, Nangloi No. 1, Najafgarh Road, Delhi-110041, for a sum of Rs.4,00,000/- towards the discharge of his loan amount. The complainant had accepted the cheque based on the representation and assurance of the accused that it would be honored. Upon presentation, the cheque was returned as dishonored by the banker of the accused *vide* return memo dated 09.11.2017 for the reasons 'Funds Insufficient'. Despite receiving a legal notice dated 21.11.2016, dispatched on 22.11.2016, by the counsel for complainant, demanding payment within 15 days, the accused had neither replied nor made any payment, even after being served with the notice of demand. Accordingly, the present complaint under Section 138 of N.I. Act was filed.

3. Learned counsel for the petitioner argues that the respondent herein had preferred the aforesaid criminal complaint under Section 138 of N.I. Act against the petitioner on the basis of a cheque purportedly issued by the petitioner herein. It is stated that the defence and case of the petitioner is that the cheque in question had been issued from

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account bearing no. 90151250001523, maintained with Canara Bank (formerly known as Syndicate Bank), Najafgarh Road No. 1. Nangloi, New Delhi 110041, by a proprietorship concern namely 'M/s. Shri Shyam Industries' and of which Sh. Vikas Kumar Sharma i.e. brother of the petitioner was the sole proprietor, and even though the petitioner is signatory of the cheque in question, the same has been signed by the petitioner as merely authorised signatory of the proprietorship concern 'M/s. Shri Shyam Industries' and was not issued by petitioner from his personal account. It is further stated that in order to prove the above stated facts, petitioner had filed a list of defence witnesses before the learned Trial Court wherein *inter alia* name of Canara Bank was also duly stated in order to seek production of documents pertaining to account opening along with other relevant documents with respect to account no. 90151250001523, however, the official of Canara Bank deposed before the learned Trial Court that all the records pertaining to opening/ownership of said account were not available with the bank as the same were burnt down in a fire and an F.I.R. to that effect was registered.

4. It is stated that in the said eventuality, the petitioner immediately preferred an application under Section 311 of Cr.P.C. seeking an opportunity to call Mr. Vikas Kumar Sharma i.e. proprietor of 'M/s. Shri Shyam Industries' as a defence witness to prove the aforesaid fact of the account belonging to his firm. It is also stated that *vide* the impugned order dated 25.11.2022, the learned Trial Court was pleased to dismiss the said application under Section 311 of Cr.P.C. It is argued that the provision of Section 138 of N.I. Act would get attracted against

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the petitioner herein only if the account in question was maintained by him and not otherwise. In this regard, learned counsel relies upon the the provision of Section 138 of N.I. Act which is reproduced below:

> "138 Dishonour of cheque for insufficiency, etc. of funds in the account-Where any cheque drawn by a **person on an account maintained by him** with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years), or with fine which may extend to twice the amours of the cheque, or with both: Provided that nothing contained in this section shall apply unless…."

5. Therefore, it is argued that in the present case, the cheque in question has not been issued from the bank account maintained by the petitioner. It is further stated that the Hon'ble Apex Court has held in several judgments that the powers under Section 311 of Cr.P.C. are very wide and can be exercised at any stage of trial for the purpose of reaching a just decision. Learned counsel for the petitioner states that the petitioner be granted one opportunity to examine only one additional defence witness i.e. Sh. Vikas Kumar Sharma to prove the fact that the account in question belongs to the proprietorship concern and not to the petitioner herein, and in these terms, the petition be allowed.

6. Learned counsel for respondent, on the other hand, has opposed the present petition arguing that the same has been filed with sole

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purpose of delaying the matter and that defence evidence already stands closed after examining four defence witnesses including petitioner himself. It is argued that the learned Trial Court has rightly dismissed the application filed by the petitioner under Section 311 of Cr.P.C. since the same was filed at a belated stage and the grounds raised therein and in this petition were not raised initially by the petitioner in his defence. Therefore, it is prayed that this petition be dismissed as it is without any merit.

7. This Court has heard arguments address by both the parties and has perused the material on record.

8. After hearing arguments and going through the case file, this Court is of the opinion that

9. The contention of the learned counsel for the accused/petitioner herein is that the cheque in question had been issued on an account maintained in Canara Bank, which is not personal account of the accused, rather, it belongs to 'M/s Shri Shyam Industries' which is a proprietorship concern of Sh. Vikas Kumar Sharma who is the brother of the petitioner herein. It has been emphasized that since the bank official from Canara Bank, who was examined as a defence witness, had deposed the record pertaining to the said bank account was burn down in a fire, for which an FIR was also registered, it is crucial to examine the witness Sh. Vikas Kumar Sharma to prove the said information about the account.

10. In this Court's opinion, since the account details of the account from where the cheque in question was issued has been destroyed due to fire regarding which FIR was lodged by the concerned Bank, it may

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be essential on part of accused to examine an alternative witness to prove that the cheque in question had been issued from an account, which is not personal account of accused, but belongs to 'M/s Shri Shyam Industries' which is proprietorship concern of Sh. Vikas Kumar Sharma i.e. brother of petitioner and the petitioner herein was acting as its authorized signatory. This Court, however, is also of the opinion that the petitioner could have immediately moved an application to summon Sh. Vikas Kumar Sharma as defence witness after examination of the concerned bank official from Canara Bank who had deposed that the record had been destroyed in fire.

11. Considering that the purpose of Section 311 of Cr.P.C. is to advance the cause of justice and to reach just decision of the case, but at the same time, also keeping note of the fact that the case in question pertains to the year 2017 and is an old case, this Court passes the following order:

i. The order dated 25.11.2022, passed by the learned Trial Court is set aside;

ii. The petitioner herein is granted one single opportunity to examine Sh. Vikas Kumar Sharma as defence witness, only for the sole purpose of proving that the cheque in question was issued from an account which belongs to 'M/s Shri Shyam Industries' which is proprietorship concern of Sh. Vikas Kumar Sharma;

iii. No adjournment shall be sought by learned counsel for the petitioner nor shall be granted by the concerned learned Trial Court;

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iv. A cost of Rs. 15,000/- is imposed on the petitioner herein which will be paid to the complainant for the delay caused in examination of the witnesses and moving the application;

v. No other witnesses remain to be examined as per submissions made by counsel for the petitioner. Therefore, the learned Trial Court shall proceed as per law after examination of this defence witness and will make endeavour to dispose of the case within two months from the next date of hearing.

12. In view of above terms, the present petition stands disposed of.

13. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JANUARY 24, 2024
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