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

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Reserved on: 22.01.2024

Pronounced on: 24.01.2024

+ **CRL.M.C. 493/2024 & CRL.M.A. 1954/2024**

SURESH KUMAR

..... Petitioner

Through: Mr. Anshu Mahajan, Advocate
versus

STATE AND ANOTHER

..... Respondents

Through: Mr. Satish Kumar, APP for the
State
Mr. R.L. Sinha, Advocate for
R-2

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 instituted on behalf of petitioner seeking setting aside of order dated 13.12.2023 passed by learned Metropolitan Magistrate-03, NI Act, South East, Saket Court, New Delhi, in *CT Cases 635099/2016*, titled as "M/s Indraprastha Travels Ltd. vs. Suresh Kumar".

2. Briefly stated, facts of the present case are that the respondent no. 2 herein had filed a complaint under Section 138 of Negotiable Instruments Act, 1881 ('N.I. Act') against the present petitioner. During the course of trial, learned Magistrate *vide* order dated 14.02.2019, had closed the right of the petitioner to cross-examine



the respondent no. 2 by observing that no ground for grant of adjournment was made out. Thereafter, the petitioner had filed an application under Section 311 of Cr.P.C. before the learned Magistrate, which was dismissed *vide* order dated 02.08.2019. The petitioner had then moved before this Court by way of *CRL.M.C. 4604/2019*, assailing order dated 02.08.2019 passed by learned Magistrate. This Court was pleased to grant one opportunity to the petitioner *vide* order dated 20.10.2023 to cross-examine the respondent no. 2/complainant and it was also directed that the petitioner shall not ask for any further opportunity to cross examine the complainant witnesses, and further that the trial shall be concluded preferably within a period of six months. The relevant portion of order dated 20.10.2023 reads as under:

“5. The counsel for the petitioner stated that the petitioner should be given another opportunity to cross-examine the respondent no. 2 so that the petitioner can be able to produce his defence during the trial.

6. The counsel for the respondent no. 2 argued that on 04 occasions, the cost was imposed on the petitioner for not cross-examining.

7. Fair trial is a basic fundamental right even to the accused, which also includes adequate opportunity to cross-examine the witnesses of the prosecution/complainant. The petitioner should have been given another opportunity to cross-examine the complainant witnesses. After considering all facts, the impugned order dated 02.08.2019 is set aside and the petitioner is given another opportunity to cross-examine the complainant witnesses on the dates so fixed by the trial court.

8. It is made clear that the petitioner shall not ask for any further opportunity to cross-examine the



complainant witnesses and the trial court is directed to conclude the trial, preferably, within a period of 06 months from the date of receipt of this order.

9. At the request of the counsel for the respondent no. 2, the counsel for the petitioner is directed to supply the copy of the complete paper-book along with annexed documents to the counsel for the respondent no. 2 within a week from today. The present petition along with pending application, stands disposed of.”

3. Learned counsel for the petitioner argues that the arguing counsel for the petitioner was not in India on 13.12.2023 i.e. when the matter was listed before the learned Trial Court. It is argued that the impugned order dated 13.12.2023 was passed without considering the valuable right of the accused to cross-examine the complainant. It is further argued that the learned Trial Court had not granted effective opportunity to the petitioner which in itself is a violation of the order of this Court. Thus, it is prayed that the petitioner be given one last opportunity to cross-examine the complainant/respondent no. 2.

4. Learned counsel for respondent no. 2 opposes the present application and argues that the petitioner herein was afforded one last opportunity by this Court *vide* order dated 20.10.2023 which he had failed to avail. It is stated that complainant herein is about 80 years of age and considering the facts and circumstances of the case, the present petition ought to be dismissed.

5. This Court has heard arguments addressed by learned counsel for the petitioner as well as learned counsel for respondent no. 2, and has perused the material on record.

6. In the present case, as noted in preceding paragraphs, the



petitioner herein was granted one last opportunity, by this Court *vide* order dated 20.10.2023, to cross-examine the respondent no. 2 and directions were also issued for expeditious disposal of present complaint case. However, despite being granted one final opportunity, without imposing any other condition, and even though the learned Trial Court was requested to conclude trial within six months, the petitioner again failed to avail the said opportunity on the next date of hearing i.e. 13.12.2023, when the impugned order was passed.

7. The impugned order also records that the present case is one of the oldest matters pending in the court concerned, and the cross-examination of complainant was to be conducted on 04.05.2018. However, due to delaying tactics adopted by the petitioner herein, substantial delay had been caused in the adjudication of present case. The relevant portion of impugned order dated 13.12.2023 reads as under:

“In view of the specific direction of the Hon'ble High Court of Delhi vide order dated 20.10.2023 whereby, accused has been directed not to ask further opportunity for cross-examining the complainant witnesses and to cross-examine the complainant witnesses on the date so fixed by the Trial Court.

Also, the present complaint was filed on 20.01.2015 and it is one of the oldest matter of this Court. Further, notice was served on the accused on 14.03.2017. Further, matter was listed for cross-examining for complainant on 04.05.2018 but it was apprised on behalf of accused that revision petition has been filed against order dated 24.03.2018 due to which matter was adjourned by this Court. On 14.12.2018, it was apprised on behalf of accused that revision petition as above had been withdrawn, however, neither accused nor the



main counsel was present that day due to which matter was adjourned for cross-examination of complainant and last and final opportunity was granted to the accused. On 14.02.2019, right to cross-examine the complainant qua accused was closed as again adjournment was sought by the accused on the ground of non availability of his counsel. Statement of accused under Section 313 Cr.P.C. was recorded on 14.02.2019. On 27.03.2019, matter was fixed for DE, however, steps for DE were not taken by the accused and his counsel who were present that day. Final opportunity was granted for DE on 27.03.2019. Another opportunity was granted for DE on 02.05.2019 subject to cost imposed on accused. Thereafter, rather than taking steps to lead DE, application under Section 311 Cr.P.C. was moved on behalf of accused.

The above account illustrates the dilatory tactics writ large in the record of the case adopted by the accused and making a mockery of the proceedings despite being afforded repeated opportunities to cross-examine the complainant. In view of this, right to cross-examine the complainant witness by the accused stands closed.”

8. This Court is of the opinion that there is a difference between the opportunity granted so that there is no failure of justice, and an opportunity granted, which will result in miscarriage of justice. The Courts have to strike a delicate balance between the two situations while passing orders in such cases.

9. The Hon'ble Apex Court has held in catena of judgments 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, 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].

10. The present case is of the year 2016 which means that about eight years have passed since a case pertaining to Section 138 of N.I. Act case was filed and has been dragged on one pretext or the other. A case, which should have been concluded years ago, has not been concluded as yet. The complainant herein, who is now about 80 years of age, is at a delicate journey of his own age and wants to access justice in his lifetime. In this Court's view, the judicial system cannot perpetuate injustice by again delaying the proceedings by way of granting another opportunity to the petitioner herein where a 80 years old complainant is again confronted with another order of a higher Court which gives another opportunity to the accused on the ground of ensuring just decision of the case. The opportunity for ensuring just decision of the case already stood granted which was not availed by the petitioner and granting another one would amount to causing injustice due to delay to an old gentleman who is 80 years of age and is awaiting justice for last 08 years.

11. Thus, considering the overall facts and circumstances of the case as discussed hereinabove and taking into account the conduct of petitioner herein, no case for grant of any further opportunity, in the name of justice, is made out.

12. Therefore, the present petition stands dismissed. Pending application stands disposed of.



13. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J
JANUARY 24, 2024/at