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

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Reserved on: 25.04.2024
Pronounced on: 02.05.2024

+ **CRL.M.C. 3197/2024 && CRL.M.A. 12344/2024 (Stay)**

AIMS SANYA DEVELOPERS PVT. LTD.
& ORS.

..... Petitioners

Through: Mr. Mayank Goel & Ms.
Diganta Das, Advocates.

versus

BRAHAMA INTERNATIONAL LLP

..... Respondents

Through: Mr. Pradeep Aggarwal, Mr.
Arjun Aggarwal, Mr. Pawas
Agarwal and Mr. Bhaskar
Aditya, Advocates.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. By way of present petition filed under Section 482 of the Code of Criminal Procedure, 1973, the petitioners seek quashing of impugned order dated 12.12.2023 passed by learned Metropolitan Magistrate (NI Act), Digital Court- 02, South Saket Courts, Delhi, in CC NI Act No. 105/2020.

2. Brief facts of the case, as per the complaint filed under Section 138 read with 141 of Negotiable Instruments Act, 1881 ('NI Act'), are that the accused persons had allegedly informed the complainant that they were developing commercial complex known as Landmark



Towers in Sector 15, Noida, Uttar Pradesh, and they had allotted a unit on the 8th floor of Tower-B, in the upcoming project to the complainant. In pursuance of the same, the complainant had paid a sum of Rs. 95,96,388/- to the accused persons as booking amount. It is stated that under an assured return plan, the accused persons had been playing certain amount of money to the complainant and the complainant had been encashing the cheque issued by the accused persons upto March, 2016. However, when the complainant had approached the accused persons for the balance assured return and the possession of the unit in the commercial complex, the accused persons had showed their inability to hand over the same, and had rather agreed to return the principal amount with assured returns to the complainant. In discharge of the same, the accused persons had issued three cheques amounting to Rs. 93,55,487/-, Rs. 13,14,832/- and Rs. 7,01,244/-. However, when the complainant had presented the cheques for encashment with its banker, the same had been dishonoured. Thereafter, on the assurance of the accused persons, the complainant had again presented the cheque for encashment but the same had again got dishonoured. Thereafter, statutory legal notices were sent to the accused persons, calling upon them to pay the amount in question. Upon their failure to pay the amount, the present complaint under Section 138/141 of NI Act was filed by the complainant against the accused persons, i.e. the petitioners herein.

3. Learned counsel appearing on behalf of the petitioners submits that the right of the accused persons/petitioners to cross-examine the complainant was closed by the learned Trial Court *vide* order dated



13.09.2023, after which the petitioners had moved an application under Section 311 of Cr.P.C. to recall the complainant for cross-examination. It is argued that the said application has been arbitrarily dismissed by the learned Trial Court *vide* impugned order dated 12.12.2023, thereby dis-entitling the petitioners from putting their best defence to the complainant. It is further stated that the learned Trial Court did not appreciate that the scope of Section 311 of Cr.P.C. is wide enough and thus, the Court failed to appreciate this cardinal rule of law to meet ends of justice. It is further submitted that the learned Trial Court erroneously rejected the application on the ground that appointment of new counsel is not a valid ground to recall the complainant, whereas the reason for appointing a new counsel was the absence/ non-appearance of the previous counsel on several dates of hearing. Therefore, it is prayed that the present petition be allowed.

4. On the other hand, learned counsel appearing on behalf of the respondents argue that the impugned order does not suffer from any infirmity and the learned Trial Court has rightly held that engagement of a new counsel is not a valid ground for allowing an application under Section 311 of Cr.P.C. It is further argued that the opportunity to cross-examine the complainant was closed by the learned Trial Court after giving various opportunities to the accused persons, which they had failed to avail without any valid reason for the same.

5. This Court heard arguments addressed on behalf of both the parties by their learned counsels, and has also gone through the case file.



6. A perusal of the record reveals that the complaint in this case had been filed in the year 2020 against the accused persons. The learned Trial Court, on 19.05.2022, had allowed the petitioners to cross-examine the complainant, however, *vide* order dated 13.09.2023, the right of the petitioners/accused persons to cross-examine the complainant had been closed. Thereafter, the application filed under Section 311 of Cr.P.C. was dismissed by the learned Trial Court *vide* impugned order dated 12.12.2023.

7. A perusal of order dated 13.09.2023 discloses that despite being granted the last and final opportunity to conduct the cross-examination of the complainant, the counsel for the accused/petitioners had not appeared again before the learned Trial Court, and had also not paid the cost of Rs. 9,000/- in compliance of previous orders. Moreover, it also appears from the reading of order that though the AR of the complainant was physically available for the purpose of cross-examination, the accused persons or their counsel had given no prior intimation regarding the absence of main counsel and further that no reasons had been given as to why the main counsel for the accused persons were not available on the said date.

8. This Court also notes that the learned Trial Court has dismissed the application under Section 311 of Cr.P.C. considering the facts that despite grant of several opportunities, the accused persons were not taking this matter seriously. It was also noted that the present complaint was in one of the top 10 matters of the learned Trial Court pertaining to year 2020. The learned Trial Court has



further opined that engagement of new counsel is not a valid ground to allow application under Section 311 of Cr.P.C.

9. Therefore, having considered the reasons recorded by the learned Trial Court in orders dated 13.09.2023 and 12.12.2023, this Court is of the opinion that the accused persons/petitioners were granted various opportunities to cross-examine the complainant over a period of more than one year and four months, however, the petitioners had failed to avail the said opportunity and their counsel had remained absent on several dates of hearings. Even the cost imposed on the accused person by the learned Trial Court had not been deposited on 13.09.2023, rather an opportunity was again sought on the pretext that the main counsel for the accused persons was unavailable, without informing any reasons for such unavailability.

10. As repeatedly held by Hon'ble Apex Court in catena of judgments, the exercise of power under Section 311 of Cr.P.C. for recall of witness is not a matter of course and such power 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. It is also to be kept in mind that the present complaint case is pending before Digital Court NI Act, since the year 2020, and the



trial was being delayed since the matter was at the stage of cross-examination of the complainant itself for a long period of time, and the learned Trial Court was already adopting a lenient approach in granting multiple opportunities to the accused persons.

12. Thus, considering the overall facts and circumstances of the case, this Court is not inclined to allow the present petition.

13. Accordingly, the present petition is dismissed along with pending application if any.

14. Nothing expressed hereinabove shall tantamount to an expression of opinion on the merits of the case.

15. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 02, 2024/at