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

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*Reserved on: 07.12.2023
Pronounced on: 05.02.2024*+ **CRL.M.C. 5428/2023 & CRL.M.A. 20570/2023****RAJESH MARWAH**

..... Petitioner

Through: Mr. Atul Sahi, Advocate

versus

STATE & ANR.

..... Respondents

Through: Mr. Naresh Kumar Chahar,
APP for State.
Mr. Raghav Sharma, Adv. for
R-2.**CORAM:****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****SWARANA KANTA SHARMA, J.**

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioner seeking quashing/setting aside the order dated 24.07.2023 passed by learned Additional Sessions Judge, Central District, Tis Hazari Court, Delhi in Appeal No.264 of 2022 titled as "Rajesh Marwah vs. Ankur Rastogi".

2. Briefly stated, the facts of the present case as borne out of the complaint filed under Section 138 of Negotiable Instrument Act,



1881 ('NI Act'), are that the accused had approached and requested the complainant for some financial assistance in the form of friendly loan in the first week of September, 2016. The complainant, considering the difficulty of the accused, had paid a sum of Rs.1,00,000/- as a friendly loan to the accused in the mid of September, 2016. The accused had assured the complainant that the same will be returned by August, 2017 and in discharge thereof, the accused had issued a post-dated cheque bearing No.263599, dated 10.08.2017, for Rs.1,00,000/- drawn on ICICI Bank Ltd., Sector-9, Rohini Branch, Delhi, being the payment of the aforesaid friendly loan amount in favour of the complainant. The accused had assured the complainant that the aforesaid cheque will be encashed upon its presentation. It is stated that the complainant had presented the cheque in question before his banker i.e. Punjab National Bank in Gokhle Market Branch, Delhi, for encashment but to the utter surprise and dismay of the complainant, the said cheque was returned back as dishonored with the remarks "Funds Insufficient" vide Debit Advice dated 14.08.2017 issued by the banker of the complainant. It is stated that the complainant had apprised the said fact of dishonouring the cheque in question to the accused and the accused had requested the complainant for its re-presentation after one month and had assured the complainant that the same will be honoured. Accordingly, as per the instructions of the accused, the complainant had re-presented the cheque in question before his banker but the said cheque had again got dishonoured with the remarks "Funds Insufficient" vide Debit Advice dated 27.09.2017 issued by the



banker of the complainant. Thereafter, the complainant had issued legal notice dated 03.10.2017 to the accused, however, the accused had failed to make the payment. Accordingly, the present complaint under Section 138 read with Section 142 of NI Act was filed by the complainant. The petitioner had then filed an application under Section 311 of the Cr.P.C. seeking recall of the complainant for cross-examination, which was dismissed vide 07.01.2023, passed by learned Metropolitan Magistrate, Central District, Tis Hazari Court, Delhi in CC No. 13981/2017. The petitioner had then approached this Court, assailing the said order, wherein this Court was pleased to uphold the order of the trial Court and dismiss the petition of the petitioner, vide order dated 01.12.2023.

3. Learned counsel for the petitioner argues that Appellate Court has erred in holding that the accused was provided with due opportunity to examine the complainant and/or that since he was an Advocate himself thus he ought to have known the procedure and practice to be adopted. It is further argued that the reasons as stated in the application U/s 311 of Cr.P.C. as also 391 of Cr.P.C. were not to fulfil any lacuna in the trial but to corroborate the defence with documentary evidence in this regard. It is argued that both the learned Trial Court and Sessions Court had failed to appreciate the statement of the accused in which he had denied of knowing the complainant and in fact even the complainant admitted to have been acting at the behest of the said Upender Gupta who was admittedly instrumental in hatching the entire conspiracy and thus it was imperative to confront witness with the email dated 20.02.2018.



It is argued that impugned complaint fails to satisfy necessary ingredients of the offence complained of. Further, the impugned complaint is an abuse and misuse of process of law and has caused travesty of justice and truth can come to fore only if the Complainant is confronted with the email dated 20.02.2018 and his relation with the said Upender Gupta.

4. *Per Contra*, learned counsel for the respondent no. 2 has opposed the petition stating that several opportunities were granted to the appellant for cross-examination of complainant-respondent by learned Trial Court and further, learned Trial Court had passed detailed and reasoned order on application under section 311 CrPC while dismissing the said application moved by the appellant-accused.

5. This Court has heard arguments addressed on behalf of both the parties and has perused the material on record.

6. In the present case, the impugned order was passed on 24.07.2023 *vide* which the application filed under Section 391 of Cr.P.C. on behalf of the present petitioner, who is accused before the learned Trial Court, was dismissed. The relevant portion of impugned order reads as under:

"8. In the impugned judgment of conviction, learned Trial Court had held that the appellant herein had failed to rebut the mandatory presumption of law and has also failed to controvert the story of the complainant or to establish his own story. It is also observed in the said impugned order that the accused in his plea of defence recorded on 07.08.2019 has admitted his signature on agreement in the month of July, 2017 and his signature on the Loan Agreement Ex.CW-I/A. The Loan agreement clearly states that friendly loan of Rs.3,30,000/-was received by the accused. The accused has admitted himself to be a practicing lawyer for several years earlier. The learned Trial Court has found highly



improbable that a person who has practiced as a lawyer, would sign an agreement without knowing the meaning of the contents thereof and its consequences and implications. The cheque in question is also admitted by the accused-appellant. In respect of issue of alleged e-mail dated 20.02.2018, learned Trial Court has held /observed in the impugned judgment that the complainant has denied the receiving of the said alleged e-mail or any knowledge of the same through Mr. Upendra Gupta, sent by the accused i.e. Mark A. It is also observed that the same has not been supported by any affidavit u/s 65B of the Indian Evidence Act. The alleged email that has been sent by the accused has not been reverted back to by the complainant or Upender Gupta. It is concluded by learned Trial Court that the accused has failed to prove that the email was received by the complainant or that the complainant in any manner approved of or confirmed his assertion that no money was received by the accused and thus, this self serving e-mail allegedly sent by the accused to the complainant failed to prove that no loan was received by the accused. It is also mentioned in the impugned judgment that despite the alleged email mentioning that 'if you use the said cheque, for the same you will be responsible for the consequences arising therefrom', the accused, who practiced as a lawyer for several years, has failed to initiate any legal action against the complainant for retaining his cheque or for declaring the loan agreement null and void

9. The appellant has examined himself as DW-1 before learned Trial Court and in his cross-examination he has admitted that agreement Ex.CW-1/1 was executed between him and the complainant. He has also admitted that he never asked the complainant to return his cheque. He has also admitted that he had sent e-mail to Upender Gupta not to present the cheque in question. He has also admitted that he was aware that he had filled payee name on the cheque as Ankur Rastogi. He has also admitted that on the date of presentation of cheque, there was no sufficient balance in his account. The appellant herein did not examine the said Upender Gupta in his defence evidence before learned Trial Court to prove his defence. In the present application also, the appellant has not stated that he want to examine the said Upender Gupta as additional evidence in the present appeal. The appellant want to cross-examine further complainant-respondent as an additional evidence.

10. In view of above discussion, I do not find merits in the present application under section 391 of the CrPC, and therefore, same is rejected.”

7. In the given facts and circumstances, it will be useful to refer to Section 391 of Cr.P.C., which is reproduced as under:



“S. 391 Appellate Court may take further evidence or direct it to be taken:

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.”

8. The Hon'ble Apex Court in *Ajitsinh Chehuji Rathod v. State of Gujarat* 2024 SCC OnLine SC 77 had recently, while considering the implications of Section 391 of Cr.P.C. held as under:

"9. At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 Cr.P.C. should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice."

9. This Court notes that the present petitioner had filed an application under Section 311 of Cr.P.C. for cross-examination of respondent no. 2 before the learned Trial Court on 07.01.2023 after a delay of more than three years and five months from the date of cross-examination of CW-1 i.e. on 26.07.2019. The present petitioner, in his application filed under Section 311 of Cr.P.C. before the learned Trial Court had stated that the complainant needs to be confronted with several documents in relation to his previous alleged



relation with one Upender Gupta, without which the complainant's version would go un rebutted, and such questions could not be put to the complainant as there was communication gap between the accused and his counsel.

10. This Court notes that the learned Trial Court, while dismissing the application of present petitioner filed under Section 311 of Cr.P.C., had considered this ground and had observed that the complainant had been extensively cross-examined on 26.07.2019, and the accused had failed to show any sufficient cause to justify the delay of more than three years or any reason as to why the recall of CW-1 for further cross-examination was essential for just decision of the case.

11. The Petitioner was convicted for offence under Section 138 NI Act *vide* order dated 20.10.2022 passed by learned Trial Court. The Petitioner had preferred an Appeal bearing No. 264/2022 titled as "Rajesh Marwah Vs. Ankur Rastogi", and had then filed an application under Section 391 of CrPC, which was dismissed *vide* order dated 24.07.2023 by the learned .

12. Upon thorough examination of the evidence presented, including the cross-examination of the complainant Ghanshyam Dass, this Court notes that that the complainant Ghanshyam Dass was extensively questioned with regard to his association with his attorney and the individual named Upender Gupta. During his cross-examination on 26.07.2019, the complainant disclosed that he has known accused Rajesh Marwah for approximately 7-8 years through his attorney, Mr. Upender Gupta. Furthermore, it was revealed that



the complainant has had a relationship with Mr. Upender Gupta for approximately 15-20 years, and had entrusted him with the authority to settle the matter at hand through a Special Power of Attorney (SPA). Detailed inquiries regarding the transactions involved in the case and the roles of both Upender Gupta and the complainant Ghanshyam Dass were addressed during the cross-examination of CW-1. Therefore, this Court acknowledges that the complainant was specifically questioned regarding the issues raised by the petitioner, and the relevant responses have been duly recorded in the cross-examination of CW-1 dated 26.07.2019.

13. This Court also takes note that the appellant, identified as DW-1 before the learned Trial Court, during cross-examination, acknowledged the existence of agreement Ex.CW-1/1 between himself and the complainant. Furthermore, he admitted to never requesting the return of his cheque from the complainant. Additionally, he confessed to sending an email to Upender Gupta instructing not to present the aforementioned cheque. It was further disclosed that he was fully aware of having filled the payee name on the cheque as Ankur Rastogi. Moreover, he admitted that his account did not have sufficient funds on the date of the cheque's presentation. It is also noted that the appellant opted not to call Upender Gupta as a witness to substantiate his defense during the proceedings before the learned Trial Court. It is also noted that in the current application, the appellant has not expressed a desire to summon Upender Gupta as additional evidence in the present appeal. Instead, the appellant seeks



to conduct further cross-examination of the complainant-respondent as an additional evidence.

14. In the aforesaid facts and circumstances, it is clear that the petitioner had extensively questioned the complainant in his cross-examination, and there is no ground to further examine the complainant. In these circumstances, this Court is of the opinion that the provisions of Section 391 of 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, and abuse of process of law, especially in cases where complainant has already been cross-examined in detail and no grounds are shown to recall the witness.

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

16. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

FEBRUARY 5, 2024/ns