



2024:DHC:6754



\$~127, 128 & 139

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

Pronounced on: 04.09.2024

+ CRL.M.C. 4078/2024 & CRL.M.A. Nos. 15504-05/2024

SHRI DHRUV JALAN

..... Petitioner

Through: Mr. Omkar Nath Pandey, Mr. Dhan Mohan, Ms. Preeti Thakur, Ms. Roshni Rani, Ms. Nishi Verma and Ms. Kavita Goel, Advs.

Versus

SMT. ROSY GAUR

..... Respondent

Through: Mr. Vaibhav Kush and. Ms. Sadhvi Gaur, Advs.

+ CRL.M.C. 4080/2024 & CRL.M.A.Nos.15508-09/2024

SHRI DHRUV JALAN

..... Petitioner

Through: Mr. Omkar Nath Pandey, Mr. Dhan Mohan, Ms. Preeti Thakur, Ms. Roshni Rani, Ms. Nishi Verma and Ms. Kavita Goel, Advs.

versus

SMT. ROSY GAUR

..... Respondent

Through: Mr. Vaibhav Kush and. Ms. Sadhvi Gaur, Advs.

+ CRL.M.C. 4122/2024 & CRL.M.A. Nos.15664-65/2024

SHRI DHRUV JALAN

..... Petitioner

Through: Mr. Omkar Nath Pandey, Mr. Dhan Mohan, Ms. Preeti Thakur, Ms. Roshni Rani, Ms. Nishi Verma and Ms. Kavita Goel, Advs.

versus

SMT. ROSY GAUR

..... Respondent

Through: Mr. Vaibhav Kush and. Ms. Sadhvi Gaur, Advs.

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CRL.M.C. 4078/2024 & connected matters

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CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petitions have been filed under Sections 482 Cr. P.C. seeking quashing and setting aside of three separate but identical worded orders of even date 29.04.2024 passed in three separate Complaint Cases filed by the respondent under section 138 Negotiable Instruments Act, 1881.
2. The impugned orders have been passed by the learned Metropolitan Magistrate South-East, Saket Court, New Delhi on two applications filed by petitioner in each of the aforesaid three complaints under Section 138 of the Negotiable Instruments Act. One application has been filed under Section 311 of CrPC for recalling of order dated 01.11.2023 passed by the learned Metropolitan Magistrate *vide* which defence evidence was closed and second application was filed under the same provision (Section 311 CrPC) for recalling of complainant's witness CW-1 for his cross examination.
3. The facts in all three cases are identical except that the subject cheques are different in each case. Even the *zimni* orders passed by the learned Metropolitan Magistrate in all the three criminal complaints are identical. Therefore, for the sake of brevity the relevant facts from complaint case no. 627909 of 2016, which have given rise to CrI.M.C. 4078/2024, are being referred to.
4. The case of the petitioner is that he had engaged Shri Yash Prakash as a counsel to defend his case and paid his fee till 12.02.2024 but



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unfortunately the said counsel neither properly advised nor defended the complaint on behalf of the petitioner/accused.

5. On 03.03.2020, the opportunity to cross-examine the witness CW-1 of the complainant/respondent was closed by the Court. Thereafter, on 19.07.2022, statement of the petitioner/accused was recorded under Section 313 Cr. P.C. on 06.09.2022. Subsequently, an application under Section 311 CrPC for recalling complainant's witness for cross-examination was filed by the petitioner/accused on 27.09.2022 which was allowed *vide* order dated 12.12.2022 and only one opportunity was given to cross-examine complainant/CW-1. As the counsel for the petitioner/complainant failed to cross-examine CW-1 despite opportunity, his right to cross-examine CW-1 was again closed on 24.08.2023.

6. Thereafter, the counsel for the petitioner/complainant did not lead defence evidence, therefore, right to lead defence evidence was also closed on 01.11.2023.

7. In the above factual backdrop, the aforesaid two applications came to be filed by the petitioner/accused under Section 311 Cr.P.C. on 13.03.2024 which were dismissed by the learned Metropolitan Magistrate *vide* impugned order dated 29.04.2024.

8. The learned counsel appearing on behalf of the petitioner submits that the previous counsel of the petitioner/accused had asked the petitioner not to appear in the matter giving him to understand that he will handle the cases. He submits that the previous counsel did not advise the petitioner properly and further he had been negligent in defending the complaint cases.

9. He submits that the petitioner/accused cannot be made to suffer for the negligence of his counsel. He further submits that one opportunity may

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be afforded to the petitioner to cross-examine the complainant's witness as well as to lead defence evidence. He places reliance on the decision of the coordinate bench of this Court in ***Rajesh Jindal V. Sanjay Khurana 2023 SCC OnLine Del 4117.***

10. The petition is opposed by the learned counsel appearing on behalf of the complainant/respondent. He submits that the matter has been dragged for nine years and the present petition is again delaying tactics adopted by the petitioner. He submits that earlier also petitioner/complainant had filed an application under Section 311 Cr.P.C. citing reason of his counsel's negligence. At that stage, the learned Metropolitan Magistrate had granted indulgence to the petitioner and had allowed his application for recalling complainant's witness for cross-examination, but the opportunity so granted was not availed by the petitioner/accused. Thereafter, the petitioner did not avail the opportunity to lead defence evidence. He submits that the matter before the learned Metropolitan Magistrate is at the final stage of pronounce of judgment post hearing of arguments. He, therefore, urges that the present petition may be dismissed.

11. I have heard the learned counsel for the petitioner, as well as, the learned for the defendants and have perused the material on record.

12. It appears from the record that petitioner's right to cross-examine complainant/CW-1 was closed even earlier also *vide* order dated 24.12.2019. However, on an application filed by the petitioner under Section 311 CrPC, the learned Metropolitan Magistrate *vide* order dated 12.12.2022 allowed the said application and granted only one opportunity to cross-examine complainant/CW1 subject to cost and the matter was fixed for Complainant's evidence on 23.03.2023.

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13. However, the petitioner/accused did not avail the opportunity to fullest. The learned counsel for the petitioner/accused had partly cross-examined the complainant only on one date and thereafter neither the petitioner/accused nor his counsel had appeared. Further, cost was also not paid by the petitioner/accused despite grant of sufficient opportunities. Accordingly, right of the petitioner/accused to further examine complainant/CW-1 was again closed *vide* order dated 24.08.2023.

14. Thereafter, sufficient opportunities were granted to the petitioner/accused to lead defence evidence. On 13.09.2023, the petitioner/accused or his counsel did not appear and the proxy counsel appearing for him made a request for an adjournment. In the interest of justice last and final opportunity was granted to petitioner/accused subject to cost of Rs.5,000/- and accordingly, the matter was fixed for defence evidence on 01.11.2023. However, on the said date neither the cost was paid nor the petitioner/accused appeared, therefore, the right of the petitioner/accused to lead defence evidence was closed *vide* order dated 01.11.2023. Further, NBWs were also issued against the petitioner/accused for 07.12.2023

15. The order dated 25.01.2024 also records that out of total cost of Rs.66,000/- imposed on the petitioner he had only paid cost of Rs.16,000/-.

16. On 21.02.2024, when the matter was fixed for final arguments, a new counsel appeared and filed fresh *vakalatnama* on behalf of the petitioner/accused. The learned Metropolitan Magistrate considering the previous conduct of the petitioner/accused and further having regard to the fact that the matter pertains to the year 2015 observed that the petitioner/accused is resorting to dilatory tactics and thus, declined the

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request for an adjournment. The learned Metropolitan Magistrate thereafter, proceeded to hear the arguments and also granted liberty to the parties to file written submissions and reserved the judgment. The matter was thus, directed to be fixed for clarification, if any, otherwise for judgment on 13.03.2024.

17. The present applications under Section 311 CrPC came to be filed by the petitioner/accused on 13.03.2024 when the matter was fixed for pronouncement of judgment. The learned Metropolitan Magistrate noting the aforesaid facts and the conduct of the petitioner/accused dismissed the applications of the petitioner/accused by observing as under:

“6. Perusal of record reveals that matter had been pending for cross-examination of complainant since 11.07.2018. Thereafter, the right of cross-examination of complainant by accused was closed vide order dated 24.12.2019. Statement of accused could be recorded only on 19.07.2022. Subsequently, an application under Section 311 Cr.P.C. for recalling the complainant witness for cross examination came to be filed on 27.09.2022 which was allowed vide order dated 12.12.2022 and only one opportunity was given for the same. As the accused didn't completely cross examine the complainant on the third date after the application was allowed, and no one appeared on his behalf, his right to cross examine the complainant was again closed on 24.08.2023. After giving three opportunities, when no list of defence witnesses was filed, right to lead defence evidence was also closed on 01.11.2023. Since no one appeared on behalf of the accused, NBWs were also issued against him. It is pertinent to note that despite sufficient opportunities, accused didn't address final arguments either. This application was filed on 13.03.2024 after four dates of closing the right to lead DE.

7. The reasons given in the application today are also the same which were existing on the date when application for recalling the complainant witness was filed for the first time



which in the interest of justice and with a view to afford an opportunity to accused to put forth his defence was allowed on 12.12.2022. Today again, applications have been moved on the ground of negligence of his previous counsel, that too, at the stage of judgment.

8. *It has also been mentioned in the application that accused has acted diligently and has hardly sought any adjournment. This argument is meritless. In fact, conduct of the accused has been questionable and he has been seeking adjournments on one pretext or the other. He can't keep on changing his counsels and then put blame on the previous ones especially when his own conduct is apparently male fide.*

9. *When a question was put by this court regarding conduct of accused, Ld. Counsel for accused astonishingly answered that accused was acting on the advice of his previous counsel which he keeps at a higher pedestal than orders/directions of the court. Upon giving an opportunity to retract his submission, Ld. Counsel for accused refused to do so and said 'Jo such hai hum to wahin bata raine hain'. He further said that he has no objection if it is recorded as an argument for his application. Further, no proof is annexed with the application showing any 'ill-advice' on the part of his previous counsel.*

10. *This submission coupled with conduct of accused shows that accused has deliberately disregarded the directions of this court and delayed the proceedings. He has also not paid cost of Rs.50,000/- imposed on him on various dates of hearing.*

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14. *In these circumstances, the present application appears to be only a tool to protract the matter and gain time. Allowing such an application would mean giving premium to the delay tactics of the accused and allowing the accused to take benefit of his own wrong in delaying the trial."*



18. To appreciate the controversy involved in the present petition, apt would it be to refer to the provisions of Section 311 CrPC, which reads as under:

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

19. The provision of Section 311 CrPC is couched in widest possible terms. It envisages that if evidence of any witness appears to the Court to be essential to the just decision of the case, it is the duty of the Court to summon and examine or recall and re-examine such person. It also trite that wide discretionary power should be exercised judicially and not arbitrarily. The power under Section 311 CrPC must be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and same must be exercised with care, caution and circumspection. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Ratanlal v. Prahlad Jat, (2017) 9 SCC 340.***

20. It is also settled proposition of law that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person¹ but in the context of present case even assuming *arguendo* that the evidence of CW-1 or defence witnesses, is essential for the just decision of

¹ *Raj Deo Sharma v. State of Bihar; (1999) 7 SCC 604*
Rajaram Prasad Yadav v. State of Bihar & Anr. (2013) 14 SCC 461



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the case, this Court cannot be unmindful of the fact that when earlier the opportunity of the petitioner/accused to cross-examine the complainant / CW-1 was closed, the learned Metropolitan Magistrate, on an application filed under Section 311 CrPC, had granted one final opportunity to cross-examine CW-1, however, the counsel for the petitioner/accused cross-examined CW-1 only once and thereafter did not appear to further cross-examine CW-1. In this backdrop, the learned Metropolitan Magistrate was constrained to again close the right of the petitioner/accused to cross-examine CW-1. Thus, it is a case where opportunity in fact was granted to the petitioner/accused but he did not avail of the same.

21. It is also evident from the *zimni* orders of the learned Metropolitan Magistrate that despite repeated opportunities the petitioner did not even come forward to lead defence evidence. Even the cost imposed on the petitioner/accused was not paid. Further, the justification put forth for not availing the opportunity so granted to cross-examine CW-1 and to lead defence evidence, was negligence of an earlier counsel. Incidentally, the same ground, as noted by the learned Trial Court, was also taken by the petitioner/accused in his earlier application filed under Section 311 CrPC which was allowed affording him one final opportunity to cross-examine CW-1. The Metropolitan Magistrate even had to resort to issuance of the non-bailable warrants to the petitioner/accused to secure his presence.

22. Intriguingly, the present applications came to be filed by the petitioner/accused on 13.03.2024 after four dates of closing his right to lead defence evidence and that too, at a stage when the matter was fixed for pronouncement of judgment. Evidently, the conduct of the petitioner/accused was such which did not warrant of further indulgence

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being granted to him by the learned Metropolitan Magistrate. The learned Trial Court having regard to above noted circumstances and the fact that the complaint is of the year 2015 rightly observed that the applications appear to be only a tool to protract the matter and gain time.

23. At this juncture, reference to the decision in **A.G. Vs. Shiv Kumar Yadav & Ors., (2016) 2 SCC 402**, can profitably be made, wherein while disapproving the order passed by the High Court allowing the prayer under Section 311 CrPC made by a newly engaged counsel it was observed that “.....it has normally to be presumed that the counsel conducting a case is competent particularly, when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of counsel, can have serious consequences on conduct of trials and the criminal justice system.....”

24. A coordinate bench of this Court in **Vijay Vs. State (Govt of NCT of Delhi) (2015 SCC OnLine Del 12812)** had refused to interfere with the orders of learned trial court rejecting an application under Section 311 CrPC in complaint case filed under Section 138 of the N.I. Act, 1881 on the ground of negligence of previous counsel. The Court observed as under:

“16. In the present case, the reason assigned by the counsel for the defence, for seeking re-examination of the witnesses, is that the material witnesses were not put to relevant questions by the erstwhile counsel conducting the case. It is a matter of normal presumption that when a counsel is permitted to conduct a case, his competence is known to the party engaging him. If, with change of advocate on all occasions, such a prayer would be entertained, it would have serious repercussions on the conclusion of trial and ultimately on the efficacy of the criminal justice system. The witnesses who are sought to be recalled cannot be permitted to face the hardship of appearing



in Courts repeatedly. Recalling witnesses on mere asking also delays the expeditious conclusion of a trial. Thus, when the prayer of the petitioner for the recall of the witnesses is not based on any just and adequate grounds, a Court proceeding ought not be permitted to be degenerated into a weapon of harassment of witnesses and under no score can a trial be halted or delayed for flimsy/inexplicable reasons.”

25. Again, a coordinate Bench of this Court in **Aditya Sarda vs. Arjun Singh, 2023 SCC OnLine 8283**, in a petition filed against the order of the learned Trial Court dismissing an application of the accused under Section 311 CrPC, which was moved at the stage of final arguments, observed as under:

“10. This Court notes that there were ample opportunities available to the petitioner/complainant for summoning of additional witnesses and the application under Section 311 of Cr. P.C. was preferred only at the stage of final arguments. In these circumstances, this Court is of the opinion that the provisions of Section 311 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 trial, or for abuse of process of law.”

26. The decision in **Rajesh Jindal (supra)** relied upon by the petitioner is not applicable to the facts of the present case. In the said case the Court allowed the application under Section 311 Cr.P.C. on the ground that the previous counsel of the accused had not conducted the cross examination on the issues relevant to the present application, which is not the case in the present petition. Besides that, in the present case the opportunity to cross examine the witness was once granted earlier which was not availed by the petitioner / accused. The conduct of the petitioner in defending the complaint, as noted above, was lackadaisical and the learned Metropolitan



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Magistrate rightly observed that the petitioner / accused was resorting to dilatory tactics by repeatedly filing applications under Section 311 Cr.P.C.

27. Under the circumstances and the position of law noted above, this Court finds that the learned trial court was justified in dismissing the applications of the petitioners/accused. Thus, the impugned order does not suffer from any illegality or impropriety warranting interference.

28. Accordingly, the petitions are dismissed along with the pending applications, if any.

VIKAS MAHAJAN, J

SEPTEMBER 04, 2024

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