

(2022) 04 DEL CK 0128

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 953 Of 2022, Criminal Miscellaneous Application No. 4068 Of 2022

B.B. Lal Aggarwal

APPELLANT

Vs

State Govt Of Delhi & Anr

RESPONDENT

Date of Decision : 04-04-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 91, 251, 309, 311, 313, 397(2), 482
Negotiable Instruments Act, 1881 — Section 138, 145(2)

Citation : (2022) 04 DEL CK 0128

Hon'ble Judges : Talwant Singh, J

Bench : Single Bench

Advocate : Rakesh Munjal, Jagdeep Sharma, Lokesh Kumar, Mukul Talwar, Sunil Kumar, Ankit Dixit, Surender Kumar, Piyush Sharma

Final Decision : Dismissed

Judgement

Talwant Singh, J

1. The Petitioner, i.e., B.B. Lal Aggarwal, has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') praying for the following reliefs:

"a. Set aside / quash the impugned order dated 25-01-2022 passed by the Ld. District & Session Judge, Distt. Shahdara, Karkardooma Courts, Delhi in Criminal Revision No.6/2022 titled as Shri B.B. Aggarwal Versus The State & Ors.

b. Set aside/ quash the impugned order dated 21-12-2021 passed by the Ld M.M. District Shahdara, Karkardooma Courts, Delhi in Complaint Case No.814/2014, titled as DAP Buildcon Pvt. Ltd. Versus Shri B.B. Lal Aggarwal.

c. Set aside/ quash the impugned order dated 09.04.2019, passed by the Id. ASJ, Sh. Gurdeep Singh, Shahdara District, Karkardooma Courts, Delhi, in Crl no 25/19 titled as B.B. Lal Aggarwal v. DAP Buildcon Pvt. Ltd.

d. Impugned order dated 19.05.2018, 24.07.2018, 12.11.2018 and 15.12.2018, passed by the Ld.MM Sh. Prayank Nayak, Shahdara district, Karkardooma Courts in Complaint Case no.814/2014, titled as M/S DAP Buildcon Pvt. Ltd. versus B.B. Lal Aggarwal.

e. Grant opportunity to the petitioner to cross examine the complainant witness as CW1 in the complaint case no.814/2014 titled as DAP Buildcon Pvt. Ltd. Versus Shri B.B.Lal Aggarwal”.

2. The immediate cause for filing of the present petition is passing of an impugned order dated 25.01.2022 by learned Principal District & Session Judge (hereinafter referred to as 'PDSJ'), Shahdara in CrI.Rev. 06/2022. The brief history of the case has been captured in the following words in the order of the learned PDSJ as under:

“9. Perusal of the record reveals that the complaint case u/s 138 of NI Act was instituted before the Ld. Trial Court on 01.04.2014. On that day, CW1 Sh. D.B. Jain was examined and discharged and revisionist/accused was ordered to be summoned for 08.09.2014. On 02.06.2016, notice u/s 251 CrPC was served upon the accused/revisionist. Ld. Counsel for the revisionist/accused sought time to file application u/s 145(2) of NI Act. However, on no objection of Ld. Counsel for the complainant-therein, filing of application u/s 145(2) of NI Act was dispensed with and the accused-therein was allowed to cross-examine the witness of the complainant. Thereafter, the matter was fixed for cross-examination of CW1 on various dates of hearings and even cost of Rs.10,000/- was also imposed upon the revisionist/accused on 24.04.2017. Further, last opportunity was given to the accused/revisionist to cross-examine the complainant subject to cost of Rs.75,000/- vide order dt. 19.05.2018 by the Ld. Trial Court. On 24.07.2018, cost of Rs.35,000/- was paid and the request of Ld. Counsel for the accused-therein for one more opportunity to cross-examine the witness as she was recently engaged, was allowed subject to cost of Rs.25,000/- to be paid to the complainant for 26.10.2018. Again on 12.11.2018, main counsel for the accused-therein was not available and last opportunity was given for cross-examination of CW1 subject to cost of Rs.50,000/- by the Ld. Trial Court. Vide order dt 15.12.2018, the accused-therein failed to pay the entire remaining cost and opportunity to cross-examine the complainant stood closed. Against the said order dt. 15.12.2018, the accused-therein filed a revision petition, which was also dismissed by the Ld. ASJ-01, Shahdara, Delhi on 09.04.2019 therein the Ld. ASJ observed and opined that in view of the repeated adjournments sought on one ground or the other, which was sought to be compensated by way of cost to the other party, the revisionist has not only abused the process of court but also availed adequate opportunity to cross-examine but failed. On 22.01.2019, the statement of accused u/s 313 Cr.P.C. was recorded and the opportunity was given to lead defence evidence. The accused/revisionist examined three witnesses i.e.DW1, DW2 and DW3 and DE was closed vide order dt 28.02.2020 and the matter before the Ld. Trial Court was fixed for

final arguments on 27.03.2020.

Thereafter, the matter was listed for final arguments on many dates and on 06.03.2021, an application u/s 311 CrPC was filed on behalf of the accused and on 21.12.2021 the impugned order was passed by the Ld. Trial Court.”

3. The discussion regarding the merits of the revision petition, based on the arguments addressed by the parties before learned PDSJ and the findings are as under:-

“In the present revision petition, the revisionist-herein/accused-therein pleaded that on 18.01.2019, the revisionist paid all the cost but the Ld. Trial Court did not give any opportunity for cross-examination of CW1. There is neither any mentioning of paying of such cost nor any request on behalf of the revisionist/accused to cross-examine CW1 in the proceedings of the Ld. Trial Court from 15.12.2018 to 20.02.2021 when the matter was at the stage of final arguments before the Ld. Trial Court. The revisionist-herein/accused therein engaged a new counsel who appeared on 24.07.2018 but she also did not take any step to cross-examine the witness/CW-1 before the Ld. Trial Court. Even, the revision against the order dt.15.12.2018, whereby the opportunity of the revisionist-herein/accused-therein to cross-examine the witness was closed, was also dismissed by the Ld.ASJ-01, Shahdara, Delhi on 09.04.2019. In the present revision petition, the revisionist/accused has not given any reason as to what prevented him to move the said application u/s 311 CrPC at the appropriate stage. The revisionist has failed to explain as to why the application u/s 311 CrPC was filed in March 2021 when the DE was already closed and the matter was at the stage of final arguments. The pleading of the revisionist/accused in the present revision petition appears to be baseless since the revisionist also had every right and opportunity as per procedure and law to raise such objection, which he has not done so within a reasonable time in this case. It is pertinent to mention here that the defence witnesses have already been examined and the matter is at the stage of final arguments before the Ld. Trial Court. Therefore, if such a process for allowing to cross-examine the witness, who was not cross-examined by the revisionist/accused till the case reached at the stage of final arguments and that too after availing sufficient opportunities by the revisionist/accused, is allowed then there would be endless process of the trial of the case, which is already pending for more than seven years. It seems that the accused /revisionist did not bother to avail the opportunities to cross-examine the witness. It shows that the revisionist/accused was not taking any interest about the proceedings of the case and also for his interest at the appropriate stage and now he is trying to delay the process of law by reverting back the case to the stage of cross-examination of CW1. Several opportunities were given for cross-examination but the Ld.Counsel for the revisionist did not prefer to cross-examine CW-1, which shows the conduct of the revisionist towards the proceedings and orders of the court. The complainant should not suffer due to delay tactics of the revisionist/accused. The aforesaid judgments relied upon by the Ld. Counsel for the

revisionist are not applicable in the facts and circumstances of the present case. In view of the discussions made above and facts and circumstances of the case, this revision petition is devoid of any merits and the same is dismissed.”

4. By the present petition not only the impugned order dated 25.01.2022 has been challenged but side by side the order dated 21.12.2021, which was challenged before the learned PDSJ is also challenged. It is interesting to note that an order passed by learned ASJ Shri Gurdeep Singh on 09.04.2019 in CR. No. 25/2019 as well as orders passed by learned Metropolitan Magistrate (hereinafter referred to MM) on 19.05.2018, 24.07.2018, 12.11.2018 and 15.12.2018 are also challenged by way of the present petition, which was filed on 24.02.2022. How the orders passed in the years 2018 and 2019 can be challenged in 2022, this is the first objection raised by the learned senior counsel appearing for respondent no.2.

5. The sum and substance of the present petition is that learned senior counsel appearing for the revisionist has prayed for one opportunity to cross-examine CW-1, who had appeared on behalf of respondent no.2 as a witness in the complaint case no. 814/2014 titled as M/S DAP Buildcon Pvt. Ltd. Vs. B.B. Lal Aggarwal before the learned MM. It has been submitted that the petitioner was not afforded any opportunity to cross-examine the said witness as he was not having money to pay costs imposed by the learned MM from time to time as well as for paying professional fees to his lawyer. The submission of learned senior counsel Mr. Rakesh Munjal, appearing for petitioner is that this Court has ample power under Section 311 Cr.P.C. for affording one opportunity to petitioner to cross-examine CW-1. The matter is stated to be listed before learned MM on 22.03.2022 for final hearing and prior to the said date; one opportunity has been prayed by the petitioner for cross-examination of CW-1.

6. However, Mr. Mukul Talwar, learned senior counsel appearing for respondent no.2 has submitted that the foundation of the revision petition, which was filed before the learned PDSJ, itself was shaky as an order passed by the learned MM under Section 311 Cr.P.C. is an interlocutory order and the same cannot be challenged by filing a revision petition. Learned senior counsel for respondent no.2 has relied upon the judgment of the Supreme Court in the matter of Sethuraman vs. Rajamanickam (2009) 5 SCC 153. Since no revision petition was maintainable before learned PDSJ, so the present petition filed against the final outcome of the said revision is again not maintainable.

7. While giving background of the matter in question, it has been submitted on behalf of the Respondent No.2 that the present respondent had filed a civil suit against the present petitioner, wherein a decree has been passed in favour of respondent no.2 and a sum of more than Rs.2.00 Crores is due to be paid by the petitioner to the respondent under the said decree, which has not been challenged till date by filing an appeal by the present petitioner. The orders passed till 2019 in revision petition before the learned ASJ and earlier orders passed by learned MM have become final and the same cannot be challenged.

The petitioner had dragged the matter before the learned MM for a long time for settlement and not even one single paise was paid as per the settlement. The evidence of the complainant as well as defence evidence stands concluded. No purpose will be served by cross-examining CW-1. DW-1 in his evidence has admitted the transaction and his only defence is that the cheques in question were taken by force by CW-1 and one Shri Parvin Jain. The said Shri Parvin Jain was summoned by the present petitioner as a witness, who was put a leading question by the learned counsel for the petitioner and in response thereto Mr. Parvin Jain denied the specific suggestion that the cheques were taken by coercion. Moreover, the ground of wrongly closing the cross-examination of CW-1 can be taken in appeal against the final judgment, if the present petitioner is convicted.

8. The order sheets of the court of learned MM show that on 24.04.2017, the complainant had filed his fresh affidavit and copy was supplied to learned proxy for counsel appearing on behalf of the accused, who sought adjournment for cross-examination for want of the accused, which was strongly opposed by learned counsel for the complainant. However, in the interest of justice, the matter was adjourned to 17.07.2017. On the adjourned date, previous cost was paid and the present petitioner/accused undertook to pay the cheque amount within 90 days, so the matter was adjourned to 23.10.2017 for payment. On 23.10.2017, the matter was referred to Mediation, where the parties settled the dispute and in the order sheet of 20.12.2017, it was mentioned that they will be bound by the said Mediation Settlement. The matter was listed for payment on 06.03.2018. In the order dated 11.04.2018, it has been mentioned that the accused was not making payment as per settlement and the counsel for complainant requested that the matter be tried. However, counsel for the accused sought one more opportunity, so the last opportunity was granted to comply with the agreement, failing which the matter was ordered to be tried on merits and the same was adjourned to 19.05.2018.

9. On 19.05.2018, it was noted that three defaults had been made by the accused in making payment, so as per agreement if there were defaults, the matter was to proceed on merits. The matter was still at the stage of cross-examination. Counsel for accused sought one more opportunity to cross-examine the complainant. This opportunity was granted subject to costs of Rs.75,000/-, keeping in view the fact that the cheque amount is Rs.94.00 lacs. The case was adjourned to 24.07.2018 for cross-examination. On this adjourned date, a new counsel appeared for the accused. Only part payment of costs of Rs.35,000/- was made. Counsel for accused sought one more opportunity to cross-examine the complainant. The said opportunity was again granted but subject to further costs of Rs.25,000/- and the matter was adjourned to 26.10.2018. The main counsel for the accused was not present on 12.11.2018, it was noticed that the matter was adjourned on earlier occasions and previous costs were not paid by the accused. Last opportunity was granted to accused, subject to payment of Rs.50,000/-, to cross-examine the complainant on 15.12.2018. It was also noted

that the date was given as per the convenience of the counsel for the accused. On 15.12.2018, it is noted that previous costs had not been paid by the accused. It was submitted that accused could arrange Rs.65,000/- only and he was not in a position to pay the entire costs. It was time and again made clear to the accused that he would be permitted to cross-examine the complainant subject to payment of complete costs. Three opportunities had been given to the accused to cross-examine the complainant and pay the costs. Since the entire costs was not paid, so no further opportunity was given to cross-examine the complainant and his right to cross-examine the complainant was closed and the matter was adjourned to 22.01.2019 for recording the statement of accused.

10. This order was challenged by the present petitioner/accused by filing a criminal revision bearing CR No. 25/2019 before the learned ASJ, who passed the order dated 09.04.2019 dismissing the revision petition by a detailed order. Relevant portion of the order passed by the learned ASJ is reproduced hereunder:-

"7. Firstly the cited judgment of Nova Vision (Supra), the cost was imposed on account of non-appearance of the accused and therefore, it was argued that there is no power to impose cost while dismissing the application for appearance. The Hon'ble High Court of Delhi held that there is no provision of imposition of cost. However, Section 309 Cr.P.C. provides where the matter is listed for examination of the witnesses the proceedings can be adjourned or postponed subject to the payment of cost by the prosecution or the accused. In the case of D. K. Associates vs Chander Bhan, the Hon'ble High Court of Delhi held that the Ld. MM and ASJ has ample power to impose cost in view of Section 309 Cr.P.C. Therefore the cited judgment of Nova Vision Electronics Pvt. Ltd. & Anr. vs State & Anr.(Supra) is not applicable to the facts of the present case. Moreover, the issue is not challenged before this court that the order of imposition of the cost was illegal or improper, but the issue is whether the closer of the opportunity to cross-examine was proper. Keeping in view the repeated adjournments sought on one ground or the other which was sought to be compensated by way of cost to the other party, the revisionist has not only abused the process of court but also availed adequate opportunity to cross-examine but failed. I do not find any irregularity, impropriety or illegality by order of Ld. MM.

8. The present revision petition is dismissed".

11. Thereafter the trial proceeded as usual before the learned MM. The statement of accused was recorded and defence evidence was also recorded wherein the present petitioner/accused examined three witnesses and the matter progressed upto the stage of final arguments. At that belated stage, the present petitioner/accused moved an application under Section 311 Cr.P.C. for recalling of cross-examination. This application was dismissed by learned MM vide order dated 21.12.2021. The operative portion of the said order is reproduced hereunder:-

"I have perused the file carefully.

It is settled law that u/s 311 Cr.P.C. if court deems it necessary in the interest of justice and for just decision of the case, court may at any stage, may summon any person as witness. But it is also settled that the powers under Section 311 Cr.P.C. has to be exercised judiciously and not arbitrarily.

Perusal of record shows that many opportunities have been given to accused for cross-examination of complainant and even revision petition is dismissed. In this scenario, this court cannot exercise its power u/s 311 Cr.P.C. as the matter is very old and at very mature stage and allowing the application at this stage of trial will result in protracting the trial and will result in failure of justice.

Considering the facts and circumstances and the record, the application u/s 311 Cr.P.C. filed on behalf of the accused stands dismissed.

Put up for final arguments on 17.01.2022".

12. This order was challenged by filing CrI.Rev. 06/2022 and the same was disposed of vide impugned order dated 25.01.2022. This order dated 25.01.2022 has been challenged before this court. The operative portion of the same has already been quoted hereinabove in the preceding paragraph.

13. In my view, the learned MM had given ample opportunities to the present petitioner/accused to cross-examine CW-1. The complaint was filed in the year 2014 and the summoning order is dated 01.04.2014. We are in March, 2022 and till date this complaint is still at the stage of final arguments. The affidavit in evidence was filed by respondent No. 2 on 24.04.2017. Number of opportunities were given to the present petitioner to cross-examine the said witness. Cost was imposed from time to time. In the meantime, the accused entered into a settlement with the complainant but he did not abide by terms of the same. Lastly on 15.12.2018, when the previous costs of Rs. 1,15,000/- was not paid by the present petitioner/accused and the learned trial Judge had made it clear time and again that the opportunity to cross-examine CW-1 cannot be granted unless and until the previous costs was paid but the accused failed to pay the entire remaining costs except Rs.65,000/- so, under these compelling circumstances, the learned MM had no option but to close the opportunity of the accused to cross-examine the complainant.

14. This order was challenged before the learned ASJ, who passed the order dated 09.04.2019 dismissing the revision petition but the same was not challenged further; hence the said order has become final. The accused had appeared before the learned MM and the matter progressed from one stage to another in the meantime, wherein the statement of the accused was recorded. He himself wanted to appear as defence witness. He was given an opportunity to do so. Further, he had examined two more witnesses; one of which is Shri Parvin Jain. After the defence evidence was over and the matter was listed for final arguments, the present petitioner/accused moved an application under Section

311 Cr.P.C. at a belated stage in March, 2021, which was disposed of by the learned MM on 21.12.2021. The same was challenged before learned PDSJ, who dismissed the revision petition vide order dated 25.01.2022.

15. There is a force in the argument of learned senior counsel appearing for the respondent no.2 to the effect that in view of the judgment in the matter of Sethuraman (supra) no revision petition was maintainable. Relevant portion of the said judgment is reproduced hereunder:-

"5.....Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application u/s 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred u/s 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondent/accused and the only defence that was raised, was that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e. one on the application u/s 91 Cr.P.C. for production of documents and other on the application u/s 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, u/s 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed".

16. The present petitioner/accused had changed the counsel in between who had sought further opportunity to cross-examine CW-1. The learned trial Court had granted the said opportunity. The present petitioner/accused had chosen not to cross-examine CW-1. A coordinate bench of this Court in Sushil Ansal vs. State of NCT of Delhi CrI.M.C.2107/2021 dated 15.12.2021 had held as under:-

"16. Thus, the consistent view of this Court is a mere change of counsel would not suffice to recall witness to put certain suggestions in the manner, the new counsel desires. The petitioner had engaged earlier counsel of his choice. He made a decision not to cross-examine, not one but 18 witnesses, probably, because the petitioner is facing charge of conspiracy only, and hence such decision viz not to cross-examine 18 witnesses cannot be said to an inadvertent act but may be a part of his strategy. Since considerable delay has taken place, the plight of victim, also cannot be ignored. The petition being devoid of merits is thus dismissed. Pending application, if any, also stands disposed of".

17. In view of the above, it is clear that no revision lies against dismissal of an application filed under section 311 CrPC; the petitioner was given ample opportunities to cross-examine the Complainant; the petitioner failed to avail the said opportunities because he did not pay the costs; there had been frequent changes of counsel for the present petitioner, who failed to cross-examine the

witness in question despite opportunities granted by the Court; hence, I do not find any merit in the petition. The same is hereby dismissed.

18. However, the present petitioner, if ultimately convicted, may take the ground of not getting an opportunity to cross-examine CW-1 as one of the grounds in appeal, if he is advised to file the same before the competent court.