

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

+ **Crl.M.C. 3485/2010 & Crl.MA 17131/2010 (stay)**

Date of Decision: 01.03.2012

CHARANJEET GABA

..... Petitioner

Through: Mr. G.B.Sewak, Advocate with
Ms.Tanmaya Mehta, Advocate.

Versus

ARJUN LAL AHUJA & ANR.

..... Respondents

Through: Mr.Naresh K.Daksh, Advocate.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. This is a petition under Section 482 Cr.P.C preferred by the petitioner assailing an order dated 14.10.2009 passed by learned ASJ, Karkardooma Courts in Criminal Appeal No.13/2009. Vide this order, the Appellate Court of learned ASJ set aside the judgment of conviction of respondents herein under Section 138, Negotiable Instruments Act ("the Act" for short).

2. This petition raises a short, but important question of law relating to powers of the Appellate Court under Section 391 Cr.PC. The respondents herein were convicted under Section 138 of the Act by learned MM vide his judgment dated 17.02.2006. They carried the matter in appeal before the Appellate Court of learned ASJ. Before the Appellate Court, they filed an application under Section 391 Cr.PC for leading additional evidence. The same was allowed by learned ASJ vide the impugned order. While allowing this application, the learned ASJ set aside the conviction and remanded the case back to learned MM to decide the matter afresh after taking into account

the additional evidence. It is this part of the impugned order of setting aside the conviction and directing the learned MM to decide the matter afresh after taking into account the additional evidence that is under challenge by way of instant petition.

3. So far as the reasoning given by learned ASJ regarding the desirability and necessity of additional evidence that was sought to be led by the respondents under Section 391 Cr.PC was not agitated by the respondents. Thus, I need not dwell into this aspect of the impugned order to see as to whether on merits the order of Appellate Court permitting respondents to lead additional evidence was justified or not. Assuming that the additional evidence that was sought to be led by the respondents was desirable and justified in terms of provisions of Section 391 Cr.PC, I propose to deliberate on the powers of Appellate Court under Section 391 Cr.PC as also to the course that was to be followed by the Appellate Court in allowing additional evidence.

4. For appreciating the provisions of Section 391 Cr.PC can be reproduced as under:

“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.”

5. This section contemplates that the Appellate Court may either record further evidence itself or direct it to be taken by the trial court. The powers of the Appellate Court in permitting recording of additional evidence though unbridled, has to be within the ambit and scope of provisions of this Section. For permitting additional evidence at the stage of hearing of appeal, the Appellate Court needed to satisfy that the additional evidence that was sought to be adduced at that stage was necessary. For recording such satisfaction, it was obligatory to record reasons. The expression, “*if it thinks additional evidence to be necessary*” is of wide amplitude. The Appellate Court is empowered to exercise the powers to weed out the infirmities in the course of furthering substantial justice.

6. The recourse to this power cannot be made as a matter of routine on the mere asking of any party. This power needs to be exercised sparingly and for well-founded reasons. Though it is not possible to lay down the detailed situations under which such power could be exercised, but some of the situations for exercise of this power may be illustrated as where due to oversight or difficulties, some evidence was not produced or where either party failed to produce evidence despite opportunity given or where the court on account of some carelessness or ignorance omitted to record some relevant evidence. This would all depend upon the facts and circumstances and the nature of additional evidence that was sought to be led at the appellate stage. Further, there is no restriction in the wording of Section 391 Cr.PC either as to the nature of the evidence or that it is to be taken for the prosecution only

or that the provisions are only to be invoked when formal proof of prosecution is necessary. There is also nothing in the provision limiting it to the cases where there have been some formal defects.

7. The main consideration for adopting this course has to be that the ends of justice have to be achieved and there should be no fritter on justice. Use of this provision has to be also cautiously allowed in the backdrop of the finality of criminal proceedings and also that it is not to be used for filling up the lacunae. Once all this is satisfied and it is found that additional evidence is necessary in the interest of justice and without which there would be failure of justice, the Appellate Court would be justified in permitting production of additional evidence.

8. Thus, so far as the powers of the Appellate Court in allowing additional evidence, I do not see any illegality in the impugned order. The question that arises for consideration is as to the course that was to be followed by the Appellate Court while allowing additional evidence. The Appellate Court could take additional evidence itself or direct the trial court to record the same. This section does not authorize the Appellate Court to set aside the conviction and remand the case back to the trial court for recording the evidence. Such additional evidence is taken in the manner prescribed in Chapter XXIII Cr.PC. The Appellate Court cannot order de novo trial while allowing adducing of additional evidence. The section does not envisage retrial. No doubt, the Appellate Court has the power to reverse the judgment of the trial court under Section 386 Cr.P.C, but that could not be done as a matter of routine and certainly not while disposing of an application under Section 391 Cr.PC. For reversing the judgment of trial court under Section 386 Cr.PC, different considerations and reasons need be examined by the

Appellate Court and for which imperative reasons are required to be recorded.
(*Ramakant Rai Vs. Madan Rai* AIR 2004 SC 77)

9. The learned ASJ while allowing the application under Section 391 Cr.PC has set aside the conviction order and ordered for the fresh decision. This is where grave error has been committed by the Appellate Court. The right course for the Appellate Court was to keep the conviction order in abeyance by staying its operation and to either record the evidence itself or to direct it to be recorded by the trial court and then to proceed to dispose of the main appeal in the light of such additional evidence.

10. In view of foregoing discussion, the impugned order of learned ASJ is untenable and thus set aside. The matter is remanded back to the Appellate Court of ASJ with the directions to proceed to record the additional evidence in the manner indicated above and then dispose of the appeal on merits. The parties are directed to appear before District & Sessions Judge, Delhi on 24.3.2012 at 2.30 pm.

11. The petition and the applications stand disposed of accordingly. Copy of this order be circulated to all Judicial Officers of District Courts.

M.L. MEHTA, J.

March 01, 2012/rd/akl