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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.760 OF 2014**

Darshan Bharat Churiwala
and anr .. Applicants
V/s.
Surbhi Sanjiv Sharma
and anr .. Respondents.

Mr. A. H. H. Ponda, a/w Mr. Mangesh Bhogate,
for the Applicants.

Mr. Subhash Jha, and Ms. Rushita Jain i/by Law
Global, for the Respondent No.1.

Smt. P. P. Bhosale, APP for the Respondent
State.

CORAM : M. L. TAHALIYANI, J.

DATE : 15th January, 2015.

P.C.

This application has been filed under
Section 482 of the Code of Criminal Procedure,
challenging the order dated 9th July, 2014,
passed by learned Additional Sessions Judge,
Bombay, in Criminal Appeal No.624 of 2014. The
applicants Darshan Bharat Churiwala and Vinod
Madanlal Goel have been convicted by the trial

Court, for offence punishable under Section 138 of the Negotiable Instruments Act, 1881 on the complaint made by Sanjiv Ramesh Sharma. Now complainant Sanjiv Ramesh Sharma is dead and his legal representative Mrs. Surbhi Sanjiv Sharma is brought on record. The appeal is pending before the Sessions Court.

2. The grievance of the applicants is that their application filed under Section 391 of Code of Criminal Procedure, for recording further evidence has been turned down by the learned Additional Sessions Judge by impugned order.

3. Without going into the details of the order passed by the learned Additional Sessions Judge, it may be mentioned here that the application made by the learned advocate for the applicant was premature inasmuch as the appeal was not taken up for final hearing. At this stage I may refer to the provisions of Section 391 of the Code which reads thus :-

"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."

4. It is clear that the reasons are to be recorded for directing the additional

evidence to be taken by the Appellate court itself or by the trial Court. The Appellate Court has to give reasons as to why the additional evidence is necessary. In my opinion this finding could be given only after the appeal is taken up for final hearing and the oral and documentary evidence before the trial Court is considered by the Appellate Court. Only after examining the oral and documentary evidence recorded by the trial Court, the Appellate Court can decide whether the additional evidence is necessary or otherwise.

5. The Application for recording additional evidence was made by the applicant before the Appellate Court before the appeal was taken up for final hearing. As such the Appellate Court has no occasion to examine the evidence already on record. In my opinion, it was not necessary for the Appellate Court to pass such a lengthy order at that stage since

the appeal was not taken up for hearing finally. As stated earlier, the application was premature. In view of the facts and circumstances of the case, I pass the following order.

ORDER

I) The order dated 9th July, 2014, passed below Exh.2 in Criminal Appeal No.624 of 2014 is set aside as the application was entertained at a premature stage.

ii) Applicants are at liberty to move the Appellate Court for recording of additional evidence at appropriate stage.

iii) The Appellate Court is also at liberty to take suo-motu decision in this regard if it is found necessary.

iv) In view of the facts and circumstances of the case, the hearing of the appeal is expedited. The appeal be decided within a period of two months from the date of receipt of this order.

v) Application stands disposed of accordingly.

(M. L. TAHALIYANI, J.)