

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 521 of 2017**

- Manoj Kumar Soni S/o Kunji Lal Soni Aged About 46 Years R/o Mahima Jewellers, Ward No- 7, Mungeli Road, Lormi, Tahsil- Lormi, Revenue District- Mungeli & Civil District- Bilaspur, Chhattisgarh.

---- Applicant**Versus**

1. Smt. Anita Soni W/o Kamesh Soni Aged About 46 Years R/o Mahamai Ward, Sonapara, Mungeli, Tahsil & District- Mungeli, Chhattisgarh.
2. State Of Chhattisgarh Through Collector, Revenue District- Mungeli, Chhattisgarh.

--- Respondents

For the applicant	:	Mr. Hemant Gupta, Advocate
For respondent No.1	:	Mr. Dharendra Mishra, Advocate
For the State	:	Mr. Suryakant Mishra, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri**Order on Board****28.07.2017**

1. This revision is against the order dated 04.04.2017 passed by the learned Court of Additional Sessions Judge, Mungeli in Cr.A.No.68 of 2014 (Manoj Kumar Soni Vs. Smt. Anita Soni) whereby the application moved by the applicant accused u/s 391 of the Code of Criminal Procedure to adduce evidence at the appellate stage, was dismissed.
2. The brief facts of the case are that a complaint was filed by the respondent Smt. N.K. Soni before the JMFC, Mungeli u/s 138 of the Negotiable Instruments Act that a Cheque of Rs.5 Lakhs which was given for repayment of loan when was presented for encashment, was dishonoured with an

endorsement that the account holder do not have sufficient funds, consequently the offence has been committed.

3. The learned trial court after going through the entire facts had convicted the applicant by order dated 21.11.2014 passed in Criminal Case No.948/2014 and sentenced him to undergo one year simple imprisonment and to pay a fine of Rs.5000/-, in default of payment of fine, further 3 months imprisonment was ordered. Further additional compensation of Rs.4500/- was also ordered to be paid. When such judgment of conviction and order of sentence was subject of challenge before the Court of Additional Sessions Judge, during the pendency of appeal, an application u/s 391 of Cr.P.C., was filed by the accused/applicant stating that it was during the course of statement of accused, he has categorically stated that he wanted to adduce evidence in defence but the same has not been allowed, consequently he may be allowed to adduce evidence and for recording evidence, the case may be sent back to the Court of Judicial Magistrate. On such application, the Court of Additional Sessions Judge, by order dated 04.04.2017 dismissed the application on the ground that the application to adduce evidence by document D-1 & D-2 have been placed after the order passed by the JMFC, therefore, the same cannot be entertained and allowed and consequently it was dismissed. Hence this revision.

4. Learned counsel for the applicant placed reliance on a decision of this Court in ***Govind Chauhan Vs. Sriram Sonboir, decided on 12.12.2013 (reported in 2014 CGLJ 2411)*** and would submit that in the like nature of

cases, the Court had held that in order to advance the cause of justice on merits, the court in proper cases can always order to adduce evidence even at the stage of appeal, therefore, it is further submitted that in the instant case, simply the application has been rejected on the ground that acceptance of such prayer would amount to filing of application after passing the order/judgment of the trial Court. Therefore, the same is completely illegal and cannot be sustained. Consequently the application may be allowed.

5. Perused the order of the Court below. A perusal of the order would show that against the conviction and sentence dated 21.11.2014 passed by the JMFC u/s 138 of the N.I. Act, an appeal was preferred by the applicant on 10.12.2014. During the pendency of the said appeal, an application u/s 391 of Cr.P.C., was preferred. The same was dismissed on the ground that the documents purported to be adduced in evidence are after the order of the conviction, therefore, the same cannot be allowed.
6. For the above purpose, section 391 of the Code of Criminal Procedure is relevant here and quoted below:

“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.”

7. Hon'ble the Supreme Court in a case law laid down in ***(2001) 4 SCC 759 - Rambhau and another Vs. State of Maharashtra***, has laid an analogy of section 391 of the Code as under:

“4. Incidentally, Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code.

8. Further more, the Supreme Court in ***Zahira Habibulla H.Sheikh and another Vs. state of Gujarat and others (2004) 4 SCC 158*** has held in paras 47, 48 & 49 as under:

“47. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it

does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose, it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. the legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked

when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so.

9. In case of *Rambhau Vs. State of Maharashtra (2001) 4 SCC 759 (supra)* it was held that the object of Section 391 is not to fill up the lacuna but to sub-serve the ends of justice. The Court has to keep these salutary principles in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of evidence.
10. The reading of law laid down by the Supreme Court clearly leads to form an opinion that the legislative intent in enacting Section 391 appears to be the empowerment of the appellate Court to see that justice is done between the parties and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in allowing further evidence under Section 391 Cr.P.C.
11. If the said principle along-with the statute are translated into the facts of the present case, it would reveal that during the course of accused statement, the applicant has stated that he wanted to adduce evidence. The rejection of the application moved by the applicant u/s 391 Cr.P.C., touches upon only the fact that the documents purported to be used were sought after the judgment/order is passed. The spirit of section 391 would show that it is an exception to the general rule and it clothes the Court with power to effectively decide an appeal. Since the transaction is monetary transaction in between the parties, it resulted into initiation

of proceeding u/s 138 N.I.Act. If at all the evidence demonstrates the existing liability of the parties, then it can very well be placed before the Court so that the appellate Court can decide the case effectively. The reasons stated in the rejection application do not fall in line with the provisions of section 391 of Cr.P.C. and the principles laid down by the Supreme Court. Consequently the order dated 04.04.2017 is set aside. The application filed by the petitioner u/s 391 Cr.P.C., is allowed. The applicant shall be at liberty to procure the witnesses at his own and may adduce necessary evidence before the concerned Court.

12. The revision is allowed with the aforesaid direction or observations.

**Sd/-
GOUTAM BHADURI
JUDGE**