

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 653 OF 2016

Imran s/o Amanulla Pathan,
Age : 28 Years, Occ.: Business,
R/o : Prakash Nagar, Latur,
Dist. Latur.

... PETITIONER

VERSUS

Sayyed Mulayam Yunus,
Age : Major, Occ. : H.H. ,
R/o : Chowdhary Nagar,
Galli No.2, Backside Bajaj
Showroom Latur, Tq. and
Dist. Latur.

... RESPONDENT

....

Mr. Fayaz K. Patel, Advocate, for the Petitioner.
Mr. Anil M. Gaikwad, Advocate for the Respondent.

....

CORAM : PRAKASH D.NAIK, J.

Date of reserving the Judgment : 15th November, 2017

Date of pronouncing the Judgment : 19th December, 2017

JUDGMENT :-

With the consent of both the parties, the petition was heard for
final disposal.

2] Rule. Rule made returnable forthwith.

3] The petitioner is the original complainant. The complaint was filed for an offence under Section 138 of the Negotiable Instruments Act before the Court of Chief Judicial Magistrate, Latur which was numbered as STCC No. 719 of 2013.

4] The complaint was filed by the petitioner alleging that the accused and her husband had approached the complainant and demanded hand loan of Rs. 4,00,000/-. Since the petitioner was acquainted with the accused, he had withdrawn the amount from his bank and parted sum of Rs. 4,00,000/- to the accused. Towards the discharge of the liability, the accused issued cheque dated 13th February, 2013 of Yeshwant Nagri Sahakari Bank, Latur for an amount of Rs. 4,00,000/-. The said cheque was returned with intimation that the account is closed. The petitioner/complainant issued demand notice and in spite of that no payment was made and hence, the complaint was filed on 20th April, 2013.

5] The trial commenced. The evidence was recorded. Statement of the accused were recorded under Section 313 of the Code of Criminal Procedure. By Judgment and Order dated 28th July, 2015, the Trial Court was pleased to convict the respondent/accused for the offence under Section 138

of the Negotiable Instruments Act and she was sentenced to suffer S.I. for two months and was directed to pay a fine of Rs. 4,10,000/-. It was further directed that on realizing the fine, the same shall be given to the complainant in accordance with Section 357(1)(b) of the Code of Criminal Procedure.

6] The respondent/accused challenged the Judgment and Order dated 28th July, 2015 by preferring an appeal bearing Criminal Appeal No. 85 of 2015 before the Sessions Court at Latur. On 26th August, 2015, the respondent also preferred an application for suspension of sentence, pending the appeal. By order dated 27th August, 2015, the learned Additional Sessions Judge, Latur passed an order granting bail to the respondent on executing P.R. bond of Rs. 15,000/- with surety bond in the like amount. She was directed to co-operate with the Court to decide the appeal within five months. The notice was issued to complainant stating that as to why the fine amount imposed by the Trial Court shall not be stayed. The Court also observed that, the accused is a poor woman and the arguments were advanced by the Advocate for the accused that her cheque is misused by the complainant to recover the amount in another transaction with which she has no concern, and that she is ready to co-operate with the Court to decide the appeal within three months.

7] The petitioner appeared before the Court after receipt of the notice and filed say dated 28th September, 2015 opposing the grant of stay of payment of fine. In the said say, it was stated that the accused should be directed to deposit 50 % of the fine or compensation ordered by the Trial Court. It was also stated that the amount is due from the accused since 2012 and that the complainant has suffered financial loss. The Court thereafter, passed an order on 23rd October, 2015 after hearing both the parties. The Court observed that while issuing the notice on 27th August, 2015, the Court had directed the accused to co-operate with the Court to decide the appeal within five months. Two months are over and only three months are remaining. If the accused co-operate with the Court to decide the appeal finally within three months, the complainant can be asked wait for three months and no prejudice would be caused to him. It was, therefore, observed that in exceptional circumstances, the appellant /accused need not deposit the fine amount, but she has to co-operate with the Court in deciding the appeal within three months.

8] In pursuant to the order dated 23rd October, 2015, the respondent preferred an application before the Appellate Court on 19th January, 2016, which was purportedly an application under Section 391 of the Code of

Criminal Procedure (for short 'the Cr.P.C.) for recording the additional evidence of the witnesses namely Noorjahan Sayyad, Sikandar Shaikh and Sayyad Yunus Hanif for proper adjudication of the matter. The petitioner opposed the said application by filing say. The Appellate Court vide order dated 4th March, 2016, allowed the application and permitted the accused to file affidavit of three witnesses before the Court on the next date without fail and furnish copies to the respondent therein. The accused was directed to secure the presence of the witnesses for cross-examination at the hands of the complainant. The application was thus, disposed of vide order dated 4th March, 2016.

9] While passing order dated 4th March, 2016, the Court had observed that lacuna must be in factual matrix of the prosecution case. If there is any irregularity in conducting trial from the side of the prosecution and if, later on, it is tried to be cured, then it cannot be said to be an attempt to fill up the lacuna. It was further observed that in the present case, the accused took specific defence while examining the complainant and that the complainant had given certain admissions to that effect, which were held to be insufficient by the Trial Court. It was further observed that in paragraph 15, the Trial Court has stated that the accused ought to have examined the

witnesses referred to therein to support her contention and, therefore, the appellant wants to examine these witnesses. It was also observed that the Court cannot ignore statutory mandate under Section 143 of the Negotiable Instruments Act which mandates to decide the complaint within six months from its institution. Despite opportunities, accused did not examine these witnesses. The Court, therefore, proceeded to pass order dated 4th March, 2016 which is under challenge.

10] The learned Advocate for the petitioner submitted that, the application under Section 391 of the Code of Criminal Procedure for leading additional evidence is not maintainable. Although the respondent had several opportunities to lead evidence before the Court, she did not bother to examine herself and the witnesses, therefore, the order allowing the application for leading additional evidence is illegal and without jurisdiction. The respondent had preferred the application with a view to prolong the hearing of the appeal. Nothing has prevented the respondent to lead the evidence. It is submitted that, the respondent had initially preferred an application for seeking stay on depositing compensation amount. The Appellate Court passed an order that the respondent/accused shall co-operate in disposal of the appeal and temporary stay the order on depositing fine. The notice was

issued to the complainant. Even thereafter the order of stay was continued on the ground that the appeal would be heard within a period of three months thereafter as stated in the earlier order and that no prejudice would be caused to the complainant. The said order was passed taking into consideration that the complainant is a poor lady and is not in a position to deposit the amount. It is, thereafter, according to the petitioner the application for recording additional evidence was preferred which was allowed by the Court. It is submitted that the reasons assigned by the Court in allowing the application under Section 391 of the Cr.P.C. are contrary to law. It is submitted that the respondent had full opportunity to raise whatever defence available to her during the trial. The statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. She has categorically stated that she does not want to examine herself in support of her defence. Although there was opportunity to the accused to examine defence witnesses, the accused did not choose to do so. Merely on the ground that in the Trial Court has convicted the accused with observation that the accused did not examine the witnesses in support of her evidence, there was no occasion to allow the application for additional evidence. It is, therefore, submitted that the application may be rejected.

11] The learned counsel for the petitioner relied upon the decision of Supreme Court in the case of **Ajay Kumar Vs. Gaurav and Anr. delivered in Cri. Appeal No. 719 of 2009** and another decision of this Court in the case of **Maheshwar Kale Vs. Capt. Atul Divekar** reported in **2006 (1) MhLJ, 700**.

12] Per contra, the respondent contends that in the interest of justice, the application has been rightly allowed by the Court. It is submitted that no prejudice would be caused to the complainant. The defence of the accused is reflected in the cross-examination of the complainant and from the evidence which has come on record the prayer to examine the said witnesses, at this stage, cannot be rejected. It is submitted that the accused must be given an opportunity to defend and as a principle of fair trial, the accused has been rightly permitted to lead additional evidence. The Appellate Court has wide powers under Section 391 of the Cr.P.C. and, therefore, the order do not require interference. It is further submitted that, the Trial Court while convicting the accused has observed in paragraph 15 of the Judgment dated 28th July, 2015, that the accused has not examined Noorjahan and Sikandar Shaikh and no efforts were made to do so. The best evidence about the previous transaction was testimony of the said witnesses. But for reasons best known to the accused, therefore, she has not examined any witness. She did

not step into the witness box. The accused has failed to rebut presumption under the Act through the cross-examination of complainant. It is, therefore, submitted that in the light of the said observations, the respondent was justified in preferring application for recording additional evidence. The Appellate Court is empowered to pass an order in consonance with Section 391 of the Cr.P.C. The complainant would have an opportunity to cross-examine witnesses, if allowed to depose before the Court. It is, therefore, submitted that the objections of the complainant to the application are devoid of any merits. It is submitted that in accordance with Section 391 of the Cr.P.C., the Appellate Court may take further evidence or direct it to be taken by the Trial Court if it takes additional evidence is necessary. It is, therefore, submitted that the accused be permitted to raise his defence in proper perspective. The cheque has been misused by the complainant. It was deposited on account of different transaction which the accused intends to prove by appropriate defence which was missed out during the trial, but not extraneous to the proceedings. It is, therefore, submitted that the Appellate Court has rightly passed the impugned order.

13] The learned counsel for respondent relied upon the decision of the Supreme Court in the case of **Zahira Habibulla H. Sheikh and another**

Vs. State of Gujarat and others reported in **AIR 2004 SUPREME COURT 3114(1)**.

14] On hearing both the parties and scanning the material on record what appears is that the respondent was charged for commission of offence under Section 138 of the Negotiable Instruments Act. The case of the complainant is that hand loan was advanced to the accused in a sum of Rs. 4,00,000/-. In discharge of the liability, the accused, according to the complainant had issued a cheque of Rs. 4,00,000/-. The said cheque was dishonoured, the demand notice was issued. The complainant was filed under section 138 of the Negotiable Instruments Act. The trial commenced. The evidence of the complainant was recorded. Statement of the accused recorded under Section 313 of the Code of Criminal Procedure. The Trial Court vide order dated 28th July, 2015 convicted the respondent for the offence punishable under Section 138 of the Negotiable Instrument Act and sentenced to imprisonment and for payment of fine.

15] The Trial Court has analyzed the evidence on record and convicted the respondent. The complainant examined himself in support of his complaint. He was subjected to detail cross-examination, the Trial Court has observed that nothing material proof to come on record to cast doubt on

his oral evidence. The complainant has supported his case. In support of the complaint, the complainant also examined another witness who did not depose in consonance with the version of the complainant. The defence of the accused was that the disputed cheque was deposited by way of security. The niece of the accused has purchased property from the complainant. The husband of the accused had given blank cheque to the complainant. It is also contended that one signature showing as executed an agreement of sale in favour of the complainant in which he had paid amount of Rs. 5,00,000/- as earnest money. However, the complainant could not perform the contract with signature and was demanded the refund of earnest money, the husband of accused is acted as an agent to recover the earnest money from saving, the complainant has exercised the cheque given by the husband of accused during earlier transaction of Noorjahan. However, it is necessary to note that assuming that the accused has defence, there was an opportunity for her to examine the said witnesses. The application to examine the witnesses, is after thought and speaks volume of doubt about the intention of the accused. The statement of the accused recorded under Section 313 of the Cr.P.C. , wherein she stated that she do not want to examine any witness. The observations made by the Trial Court in paragraph 15 are dealing with the argument

advanced by the accused and the complainant. The observation does not invite invocation of Section 391 of Cr.P.C. The respondent, therefore, is not entitled to prefer such an application and the Appellate Court has mechanically allowed the same. It has to be noted that the respondent had preferred an application for stay on depositing fine amount. The Appellate Court granted interim stay and directed the appellant to co-operate with the hearing of appeal within five months. Thereafter, the petitioner opposed the said relief. However, the Court proceeded to pass an order on 23rd October, 2015, that in view of the earlier order two months have already passed and it is only question of three months in which the accused is required to co-operate in disposal of appeal and no prejudice would be caused, if the sentence is suspended. Surprisingly, to prolong the hearing of appeal application was preferred by accused on 19th January, 2016 under Section 391 of the Cr.P.C. It is, therefore, apparent that the intention of the respondent is to delay the hearing of the appeal, the accused cannot be allowed to fill up the lacuna. There are no valid grounds to allow additional evidence.

16] Section 391 of Cr.P.C. reads as follows :-

'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.'

17] On reading the said provision it is clear that, the Appellate Court if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by the trial Court.

18] The Appellate Court allowed the said application on the application of respondent and more particularly on the basis of the observations made by the Trial Court while convicting the appellant. Thus, respondent/appellant intends to controvert the observation made by the Trial Court while convicting the respondent by adducing the purported evidence. The application was not within the spirit and scope of Section 391 of the Cr.P.C. The accused did not enter into witness box nor she intended to examine any witness after her statement under Section 313 of the Cr.P.C.

19] In the case of **Ashok Vs. State of Sikkim 2011 (4) SCC 403**, the Apex Court has held that, the provision of Section 391 of the Cr.P.C. cannot be pressed into service in order to fill up the lacuna in the prosecution case. The Appellate Court, however, in paragraph 12 of the impugned order has observed that, the Trial Court in paragraph 15 has considered examination of the witness is in support of her defence and, therefore, the appellant/accused wants to examine those witnesses, in support of her case.

20] In the decision of **Ajay Kumar Garg Vs. Gaurav and Anr. in Criminal Appeal No. 719 of 2009**, the Supreme Court has observed that, ' a bare reading of Section 391 of Cr.P.C. makes it clear that the Section invests

the Appellate Court with the power to record additional evidence, provided it is satisfied, for the reasons to be recorded, that additional evidence is necessary. Since Section 391 of Code is an exception to the general rule that an appeal should be decided on evidence which was before trial Court, power under the Section has to be exercised with caution and circumspection so as to meet the ends of justice and not as a matter of course.

21] In **Rambhau and Anr.Vs. State of Maharashtra, 2001 CriLJ 2343**, the Supreme Court has held that, the object of Section 391 is not filling lacuna, but to subserve the ends of justice. An admission of additional evidence should not operate in a manner prejudicial to the prosecution or the defence. Though wide discretion is conferred by the Court, the same has been exercised judicially and the legislature had put the safety valve by requiring recording of reasons is a condition precedent for exercise of power under Section 391 of the Code and an order bereft of reasons would tantamount to non-application of mind, rendering the exercise of power under the Section, bad in law.

22] The learned counsel for the respondent/accused has placed strong reliance on the decision of the Supreme Court in the case of **Zahira Habibulla H.Sheikh** (supra), the Supreme Court has dealt with the scope of

Section 391 and the powers of the Appellate Court to consider additional evidence. It was observed that the object of Section 391 is to sub-serve the ends of justice and get the truth. Section 391 is 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, Section 391 of the Cr.P.C. 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 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 provisions has to be exercised with great care. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before the Court or vindication of an innocent person in the said case. In the said case, the application to lead additional evidence was rejected which order was challenged before the Supreme Court. The accused were acquitted, it was observed that, if the acquittal is unmerited, based on tainted

evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorized witnesses, it is no acquittal in the eye of law and no sanctity or credibility can be attached and given to the findings. In the circumstances, the Court has held that it was imperative to exercise power under Section 391 of the Cr.P.C. It is also observed that the powers can be exercised even on the application of the accused who claims to be innocent as has been observed in the same decision, however, in the present case, there was no justification for preferring such an application. The respondent had raised the defence that she has been falsely implicated and the complainant was exhaustively cross-examined by the accused in support of her defence and in spite of that the complainant did not examine any other witness. In the circumstances, it is an attempt to fill up the lacuna and with an intent to delay the proceedings before the Appellate Court.

23] The complainant did not step into witness box. The complainant did not examine any witness, therefore, the question of recording additional evidence cannot be allowed as a routine manner. The person who wants to lead additional evidence has to establish his case that at the relevant time, he or she did not get opportunity to lead evidence or there should be sufficient cause for leading additional evidence. In the present case, in her statement

under Section 313 of Cr.P.C. specifically the accused refused to examine himself or any witness. The application is, therefore, not bonafide. Section 391 is not incorporated with intent to exercise the power enshrined therein when the party failed to lead the evidence before the Trial Court. In the circumstances, the order passed by the Appellate Court is required to be set aside and pass the following order :

ORDER

1. Criminal Writ Petition No. 653 of 2016 is allowed.
2. The impugned order dated 4th March, 2016 passed by the learned Assistant Sessions Judge, Latur below Exh. 18 in Criminal Appeal No. 85 of 2015 is quashed and set aside.
3. The petition stands disposed off.

[PRAKASH D.NAIK, J.]

shp

