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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1423 OF 2016

Archana Snehal Kamble ... Applicant
vs.
The State of Maharashtra & Anr. ... Respondents

Mr. Kini i/b. Mr. Suresh Dubey for the Applicant.
Mr. Sachin Pawar a/w. Mr. Himanshu Mahajan.
Mr. S .V. Gavand, APP for the State.

CORAM : A. K. MENON, J.
DATE : 4th JULY, 2017

P.C.:

1. By this application the applicant has challenged the rejection of an application filed under section 391 of the Criminal Procedure Code whereby the applicants sought to bring in additional evidence.

2. Mr. Kini, learned Counsel appearing for the applicant submitted that in or about June, 2012 the applicant had filed an application before the Sessions Court seeking permission to lead additional evidence. It is the case of the applicant that the Magistrate Court has passed order on 2nd June, 2012 convicting the accused under Section 138 of the Negotiable Instruments Act on or about 2nd June, 2012 and while doing so the Magistrate held that the accused had not examined any defence witness. The only defence the applicant had taken was that the cheques were given as security. The Magistrate held that the only other defence of the accused is that she had paid entire amount in cash. However, no oral or documentary evidence was produced to substantiate such payment. In the circumstances, the Magistrate held that the accused had failed to rebutt the presumption under the Act and concluded that despite a legally enforceable liability the cheque had been dishonoured. In the circumstances accused came to be convicted.

3. Mr. Kini, the learned Counsel for the applicant invited my attention to the accused's statement under section 313, copy of which is annexed at Exhibit -B from which he pointed out that the accused had clearly stated that she intended to lead evidence and had answered question no. 9 in the affirmative, to the effect that she wanted to examine herself on oath.

4. Secondly, the applicant had deposed that she would also examine witnesses. In view of the aforesaid statement, it was contended that the application under section 391 ought to have been allowed by the Sessions Court. However, by the impugned order dated 30th June, 2016 the learned Judge rejected the application by reason that the case was adjourned 14 times to record evidence but the applicant herself had submitted the matter be kept for judgment. Thus the Court held that the applicant had failed to examine herself or examine any defence witnesses and the learned magistrate had passed the order of conviction.

5. Mr. Kini submitted that there was no basis to conclude that on 15 dates the accused had failed to examine herself. He referred to the roznama before the trial court to demonstrate that on several occasions complainant and Advocate were absent. Mr. Kini relied upon decision of the single Judge of this Court in ***Munugala Dayakar Aliappa vs. The State of Maharashtra and Anr. [Criminal Application No. 4056 of 2006]*** and he submitted that it was a fit case for interference.

6. In that behalf what is material to note is that even though the under section 313 statement was recorded on 18th July. 2011 the Roznama indicates that after 18th July, 2011 out of 15 dates when the matter was listed, the Court was on leave on 4 days and on one day there was a strike. The accused was present on 8 occasions and other occasions accused was either absent or exemption was granted. Although under section 391 application before the Sessions Court the applicant has sought to blame her Advocate for not having informed her of the need to lead evidence, her Advocate was present alongwith the accused on various occasions, but did not examine the applicant as defence witness and evidence was closed.

7. Thus after 18th July, 2011 the accused and her Advocate were both present on several dates, including on 19th October, 2011 when the matter was adjourned for settlement and when the complainant and his Advocate were absent. Once again on 12th December, 2011 the complainant and Advocate were absent but the matter was adjourned. On 9th January, 2012 complainant and

Advocate were present and the matter was adjourned for the defence witness. Once again on 28th February, 2012 the accused was present with her Advocate but the matter was adjourned for settlement . Both parties were absent on 27th March, 2012. On 23rd April, 2012 accused was absent but her Advocate was present and exemption was sought and was granted. The matter came to be adjourned again to 17th May, 2015. Matter came to be adjourned accused was present, her Advocate was absent. However, no application was made for change of Advocate. Thus it is seen that the case made out in the application seeking to find fault with her Advocate is suspect. Moreover, it is evident that this is a case of "no evidence". The question of additional evidence under section 391 would arise only if some evidence had been led as in the case of Aliappa (supra) relied upon by the applicant. In the circumstances, the impugned order is not perverse and cannot be faulted and no case for interference is made out.

8. Therefore, I pass the following order :

(i) Application the dismissed.

(ii) No order as to costs.

(A. K. MENON, J.)