$~30

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

\+ CRL.M.C. 2586/2017 & CRL. M.A. No. 10742/2017

DEVENDER DAMLE ..... Petitioner

Through Mr. J.P. Sengh, Sr. Advocate with Mr. Shekhar Dasai, Ms. Manisha Mehta and Ms. Mrigna Shekhar, Advs.

versus

SMT CHETNA VERMA & ANR .... Respondents

Through Mr. Sachin Mishra, Ms. Priya Mishra, Mr. Ayush Dua and Mr. Chirag Sharma, Advs. with respondent no. 1 in person

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

O R D E R

% **15.11.2017**

Petitioner filed an application under Section 391 Cr.P.C. during pendency of the appeal, which has been dismissed by the Appellate Court, vide order dated 27th May, 2017 for the reasons recorded therein.

Trial court has noted that Appellate Court has power to take additional evidence only in suitable cases and this power cannot be exercised to fill-up the lacunae. Section 391 Cr.P.C. is exception to the general rule that an appeal must be decided on the evidence which was there before the trial court and the power being an exception shall always have to be exercised with the caution and circumspection so as to meet the ends of justice.

Brief facts are that the petitioner was convicted by the trial court under Section 138 of the Negotiable Instruments Act, 1881 after a full-fledged trial wherein opportunity was granted to parties to lead evidence. Petitioner was even permitted to summon the income tax returns of the respondent no. 1, from the Income Tax Department for the years 2006-2007 onwards. In fact, income tax returns for all these years were even produced by the Income Tax Department except for the income tax returns for the assessment year 2006-2007. As regards assessment year 2006-2007 is concerned, it was stated that record was not traceable, in view of the shifting of the office. Photocopy of the income tax return, for the year 2006-2007 was filed by the respondent no. 1 during the trial. Petitioner filed application under Section 391 Cr.P.C. in appeal, in view of the letter dated 13th December, 2016 of the Income Tax Department written to the petitioner thereby seeking certain information under Section 133(6) of the Income Tax Act, 1961 regarding loan transaction of respondent no. 1, which is involved in this case. A perusal of this letter shows that scrutiny in respect of assessment year 2009-2010 is being conducted. It appears that assessment has been re-opened on the complaint of petitioner.

It emerges from the record that assessment for the years 2006-2007 and 2007-2008 has not been opened. Merely because certain information regarding payment of interest has been asked from the petitioner with regard to the present loan transactions would not mean that assessment for the years 2006-2007 and 2007-2008 has also been opened. It is noted here that income tax returns for the years 2008-2009, 2009-2010, 2010-2011, 2011-2012 are already on record, wherein loan transaction, which is subject matter of this case, has already been reflected. Complaint under Section 138 of the Act has been filed in the year 2010. Loan transaction is duly reflected in the assessment years 2008-2009 and 2009-2010, that is, well before the filing of complaint. Accordingly, there is no reason to presume the entries in the year 2008-2009 and 2009-2010 to be manipulated, only in absence of income tax returns for the assessment year 2006-2007, photocopy whereof is otherwise on record.

In Ashok Tshering Bhutia vs. State of Sikkim, 2011 (3) Mh.L.J. 150 the Supreme Court observed as under:-

> “Additional evidence at appellate state is permissible, in case of a failure of justice.

> However, such power must be exercised sparingly and only in exceptional suitable cases where the Court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary object of the provisions of Section 391 of Criminal Procedure Code is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the Court or for vindication of an innocent person wrongfully accused, where the Court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary."

For the foregoing reasons, I am of the view that Appellate Court has rightly dismissed the application under Section 391 Cr.P.C., more so, when the income tax returns for the years 2008-2009 and 2009-2010 are available on record.

Petition is dismissed with costs of ₹25,000/- to be deposited by petitioner with Delhi High Court Legal Services Committee. Miscellaneous application is disposed of as infructuous.

Dasti.

A.K. PATHAK, J.

NOVEMBER 15, 2017
r.bararia