

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 23.02.2018
DELIVERED ON : 18.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN
Crl.R.C.No.112 of 2018
and
Crl.M.P.No.795 of 2018

- 1.DSK Bricks,
a partnership firm,
Old No.4/284, New No.4/475,
Vishnu Illam, V.S.K. Nagar,
K.Vadamadurai Post - 641 017
Coimbatore District
rep. by its Partner M.Senthil Kumar.
- 2.M.Senthil Kumar,
Partner, DSK Bricks,
No.25 B, Buvaneshwari Nagar,
Venkatapuram,
Coimbatore-641 025.
- 3.R.Devarajan,
Partner, DSK Bricks,
Old No.4/284, New No.4/475,
Vishnu Illam, V.S.K. Nagar,
K.Vadamadurai Post - 641 017
Coimbatore District. Petitioners
- K.M.Mohanasundaram ... Respondent

PRAYER : Criminal Revision Case is filed under Sections 397 and 401 of Cr.P.C. against the order dated 22.11.2017 passed in Crl.M.P.No.91 of 2017 in C.A.No.198 of 2017 on the file of the II Additional Sessions Judge, Erode.

For Petitioners: Mr.K.C.Karl Marx
For Respondent : M/s.S.Sithirai Anandan

ORDER

This Criminal Revision Case has been filed by the petitioners against the order dated 22.11.2017 passed in Crl.M.P.No.91 of 2017 in C.A.No.198 of 2017 on the file of the

learned II Additional Sessions Judge, Erode, allowing the petition filed by the respondent under Section 391 of Cr.P.C.

2. The petitioners are respondents and the respondent is the appellant in C.A.No.198 of 2017. C.A.198 of 2017 has been filed by the respondent against the judgment in S.T.C.No.182 of 2016 on the file of the learned Judicial Magistrate, Fast Track Court No.I, Erode, acquitting the petitioners.

3. Pending appeal, the respondent herein had filed Crl.M.P.No.91 of 2017 seeking permission of the Court to adduce further oral and documentary evidence before the appellate Court alleging that during the course of enquiry before the learned Judicial Magistrate, he was attacked by cancer and had initially taken treatment at Ramakrishna Hospital, Coimbatore. As per the advice of his family members, the respondent had taken treatment at Lilavathi Hospital and Research Centre, Mumbai and shifted his residence for one month to Mumbai. The respondent underwent treatment from 04.04.2016 till 15.04.2016 and surgery was conducted on 06.04.2016. Due to ailment, the respondent was not able to produce documents executed by the accused and other related documents to show his means to pay the value of the cheque before the learned Magistrate during enquiry. However, the learned Magistrate has simply held that the respondent has not proved the means to pay such huge amount and dismissed the complaint. According to the respondent, as against the dismissal of S.T.C.No.182 of 2016, the respondent preferred appeal. Since the respondent underwent surgery and due to his ailment, he was unable to produce the relevant records before the learned Magistrate. The respondent is now producing the documents along with the appeal. Hence, the respondent prayed permission of the Court to adduce further oral and documentary evidence on his side.

4. Resisting the petition, the petitioners have filed counter stating that the complaint was filed in the year 2014 stating that the petitioners 2 and 3 have received loan after executing promissory notes from the respondent, but the respondent did not produce documents while filing the complaint and during that period he was not diagnosed with cancer. It is stated that the respondent did not produce the promissory notes even during his examination in chief even then he was not diagnosed with cancer and the non-production of the documents by the respondent at that stage also has nothing to do with his cancer. It is further stated that during cross-examination of the respondent, it was specifically pleaded by the petitioners that the respondent has many unfilled documents in his custody and he will use the said documents according to his needs by filling up the same. It is further stated that after going through the judgment of the learned Judicial Magistrate, the respondent had created new documents according to his needs to

fill up the lacunae under the guise of sympathy. Moreover, the documents sought to be marked have no relevance to this case and prayed for dismissal of the petition.

5. The learned II Additional Sessions Judge, allowed the petition filed by the respondent. Aggrieved by the same, the petitioners have filed the Criminal Revision Case.

6. Assailing the order of the learned II Additional Sessions Judge, the learned counsel for the petitioners submitted that the learned Judge has allowed the petition sympathetically on the ground that the respondent has been affected with cancer during the time of trial. The learned Judge has not taken into account the fact that the respondent in his chief examination has specifically pleaded that the promissory notes have been misplaced and now he has chosen to take a different stand. He would submit that the learned Judge has not taken into account the fact that the other documents to show the means of income were all available at the time of filing the complaint and that the petition was filed only to fill up the lacunae after going through the judgment of the trial Court. The learned counsel further submitted that the learned Judge has not taken into account that there is every possibility to fill the documents at the later stage on going through the judgment of the trial Court.

7. The learned counsel next submitted that the discretion vested in an appellate Court under Section 391 of Cr.P.C. to take additional evidence is not mainly intended to fill up the lacunae in the respondent's case. In the case on hand, in order to fill up the lacunae, the respondent had filed the petition and the learned II Additional Sessions Judge erred in allowing the petition. Therefore, the learned counsel prayed for setting aside the order of the learned II Additional Sessions Judge.

8. Per contra, the learned counsel for the respondent submitted that the First Appellate Court after taking note of the factual aspects, permitted the petitioner to adduce further evidence and therefore, there is no need to interfere with the same.

9. I heard Mr.K.C.Karl Marx, learned counsel for the petitioners and Mr.S.Sithirai Anandan, learned counsel for the respondent and also perused the materials available on record.

10. It appears that before the trial Court, the respondent (complainant) was examined in chief on 15.9.2016 and was also cross-examined on 05.04.2017. During cross-examination of P.W.1, Ex.R1 was marked. On the side of the respondent, Exs.P1 to P16 were marked. The trial Court, acquitted the petitioners

by giving benefit of doubt. Against which, the respondent preferred the Criminal Appeal.

11. According to the respondent, he was attacked by cancer and was taken treatment at Mumbai from 04.04.2016 to 15.04.2016 by staying there and during treatment, he underwent surgery on 06.04.2016. In order to show that he was taken treatment for his ailment at Mumbai, the respondent had produced medical records before the first appellate Court and having satisfied with the medical records, the first appellate Court permitted the respondent to adduce oral evidence.

12. It is the say of the petitioners that the respondent has no means to advance huge amount to them as loan and in order to fill up the lacunae, the respondent had filed the petition after seeing the judgment of the learned Judicial Magistrate. Moreover, the respondent was trying to make an unfortunate ailment as his fortunate for filling up the lacunae in this case.

13. The financial capacity of the respondent to advance loan amount to the petitioners 2 and 3 has been clearly stated by the respondent in paragraph 6 of the affidavit filed in support of the petition. Moreover, the said aspect is a matter of evidence. As stated supra, having satisfied with the reasons only, the first appellate Court, permitted the respondent to adduce oral evidence. The petitioners have not disputed the ailment of the respondent and the treatment undergone by him at Mumbai.

14. Section 391 of Cr.P.C. Provides:

- (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."

15. It is settled that the discretion vested in an Appellate Court under Section 391 of Cr.P.C. to take additional evidence is not mainly intended to fill up the loopholes and/or lacunae in the prosecution evidence. Although the power of the appellate Court is unfettered, the recourse to exercise this power ought not to be made, ordinarily, in a situation where either of the parties had not availed the opportunity to adduce evidence.

16. It is also settled that the power of the appellate Court to take additional evidence in appeal is vested based on the view that the 'concept of justice' does not suffer and to rectify an irregularity in the considered opinion of this Court. Undoubtedly, Section 391 of Cr.P.C. is to be exercised with great care and circumspection so that the additional evidence for prosecution may not operate in any manner detrimental to the interest of an accused.

17. Section 391 of Cr.P.C. empowers the appellate Court to take additional evidence to be necessary, if it thinks fit, however, shall record reasons for taking such evidence. In the case on hand, the first appellate Court, in its order, recorded reasons for adducing further evidence of the respondent. This Court is satisfied with the reasons recorded by the first appellate Court in its order. Moreover, the respondent had not filed the petition seeking permission of the Court to adduce further evidence to fill up the lacunae. Since the respondent was suffering cancer and was taking treatment at Mumbai at the relevant point of time, he could not able to produce the relevant documents during trial/when he was examined. According to the respondent, those documents are vital documents to prove his case. Admittedly, before the learned Judicial Magistrate, the respondent examined himself and marked 16 documents. But on the side of the petitioners, nobody was examined.

18. Considering the facts and circumstances of the case and also in the interest of justice, the first appellate Court allowed Crl.M.P.No.91 of 2017. I find no error in the order of the first appellate Court and the order of the first appellate Court is reasoned one. No valid grounds have been made out to interfere with the order of the first appellate Court and therefore, the Criminal Revision Case is liable to be dismissed.

19. Accordingly, the Criminal Revision Case is dismissed.
No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

1.The Judicial Magistrate, FTC No.1,
Erode.

2.do Thro Chief Judicial Magistrate,
Erode.

3.The II Additional Sessions Judge,
Erode.

4.do Thro Principal Sessions Judge,
Erode.

+1cc to Mr.K.C.Karl Marx, Advocate sr.no.87816

+1cc to M/s.S.Sithirai Anandan, Advocate sr.no.87740

Cr1.R.C.No.112 of 2018
and
Cr1.M.P.No.795 of 2018

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