**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH**

**CRM-M-23768-2017 (O&M)**
**Reserved on : 07.12.2018**
**Pronounced on : 17.12.2018**

**Swaraj Mazda Ltd. (now known as SML ISUZU Ltd.) ...Petitioner**

**Versus**

**Vijay Pal Adhana ...Respondent**

**CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN**

Present:- Mr. M. S. Sachdeva, Advocate
for the petitioner.

Mr. Ramesh Kumar Bamal, Advocate
for the respondent.

**ARVIND SINGH SANGWAN, J.**

1. This order shall dispose of above-mentioned case as well as other four petitions* tabulated at the foot of the order as they are identical in nature and can conveniently be decided by a common order.

2. Prayer in these petitions is for setting setting aside the order dated 14.03.2017, vide which, the lower appellate Court had allowed two applications, filed by the respondent/accused, under Section 391 Cr.P.C., to lead additional evidence/documents.

3. Brief facts of the case are that the petitioner/complainant had filed six complaints under Section 138 of the Negotiable Instruments Act, 1881 *(for short 'N.I. Act')* with the allegations that the complainant is in the business of manufacturing and selling vehicles and their spare parts and had authorized the respondent/accused, being the proprietor of M/s Shivam Motors.

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4. During the process of business, the respondent/accused issued twenty cheques and the same having been dishonoured by the bank, the petitioner/complainant filed six complaints under Section 138 of the N.I. Act.

5. The trial Court, vide judgment dated 29.03.2014, allowed all the six complaints and held the respondent/accused guilty of commission of offence punishable under Section 138 of the N.I. Act and convicted him to undergo rigorous imprisonment for a period of one and a half years and to pay the compensation equivalent to the total amount of the cheques (in six complaints) under Section 357(3) Cr.P.C.

6. It is worthwhile noticing that in all the complaints, the complainant has led the same set of evidence i.e. General Manager Ashok Verma, who appeared as CW-1 and tendered his affidavit as Ex. CA along with documents Ex. C1 to Ex. C17 and closed primary evidence and thereafter, the respondent was summoned as accused.

7. In the pre-charge evidence, one Dhiraj Puri appeared as CW-1, who tendered his affidavit as Ex. CA and produced on record documents Ex. C1 to Ex. C16. This witness was cross-examined by the accused and in the cross-examination, he was put with certain documents which were marked as 'A' to 'D'. Thereafter, the evidence of the complainant was closed and after recording the statement of the accused, under Section 313 Cr.P.C., in which he pleaded innocence and false implication and stated that the cheques were issued with a specific direction not to present the same for encashment as he was transferring the payment directly from his bank account to the complainant since June, 2006 and there was an understanding that if the accused fails to pay the amount, only then the cheques were to be

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encashed, however, the complainant misused the cheques in September, 2007 by presenting the same in the bank for encashment.

8. Respondent-accused, in defence, appeared as DW-1 and produced on record certain documents. In cross-examination, this witness admitted that the complainant had also filed suit for recovery of Rs. 2,81,49,976/-, which was pending.

9. After the conviction of the respondent/accused in all the six complaints, he had filed six appeals before the lower appellate Court and had also moved two separate applications under Section 391 Cr.P.C. In the first application, it is stated as under:

> **"……….**
>
> **6. That the appellant wishes to file the following additional documents/evidence in the present criminal appeal.**
>
> **(i) Statement of bank account of appellant of Bank of India (date from 01.04.2006 to 17.01.2008) - which proves the defence of the appellant that the cheques in question were issued as security cheques in the year 2006 and not for payment in October, 2007.**
>
> **(ii) Statement of ICICI Bank Ltd. (date from 02.05.2006 to 31.03.2007) - which proves the payment by the appellant from his "Inventory Funding Account" to the complainant for the 5 vehicles mentioned in Exh D1.**
>
> **(iii) Statement of account of Swaraj Mazda Limited – which proves that the payment in respect the 8 cheques, which are subject matter of two appeals, have also been made.**
>
> **(iv) Cash Credit Record Slip of appellant's cheque book.**
>
> **(v) Proof that Saket Educational Society and DPS**

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**Indrapuram mentioned in Exh D1 are the same entity/organization.**

**(vi) Specimen copy of balance confirmation form.**

**…………"**

10. It is further stated in the said application that aforesaid documents are necessary for the just decision of the criminal appeals and the same could not be produced before the trial Court. In para 3 of the said application, it is stated that the accused has taken a defence that the cheques were not issued in discharge of legally enforceable debt or liability and are only security cheques which are not in discharge of any liability and as against the details given in Ex. D1, instead of 11 vehicles, 8 vehicles were taken and payment has already been made through Inventory Funding Account of ICICI Bank, Palwal and the entire amount stands paid.

11. In the second application, it is stated that the initial onus to prove that the cheques in question were issued to discharge the admitted/existing legally enforceable debt or liability was upon the complainant/company, however, the complainant/company failed to produce the complete account statement and books of account maintained by it in the usual course of business along with the supporting vouchers/receipts and acknowledgments of goods. It is further stated in this application that during the course of cross-examination of the complainant, a specific question was put to produce the complete account statement w.e.f. 2002 to 2007 but the complainant refused to produce the complete account statement for the said period. It is further stated that despite the fact that Dheeraj Puri (authorized representative of the complainant/company), in his cross-examination, was asked to produce the documents/invoices to prove the complete entries made in the account but the same were not produced by the complainant.

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This witness had admitted the encashment of drafts/cheques but the same were not credited or the amount was not reversed in this regard and the details of the fictitious entries made against the accused were also detailed in the application.

12. The respondent/accused in para 14 of the second application stated as under:

> **"14. The appellant, by way of additional evidence wants to produce the certified copies of Civil Suit, written statement, order dated 29/02/2016, statement of witness along with complete account statement, and othyer relevant documents from the Civil Suit file No. RBT-CS706096/2010/2013 titled as Swaraj Majda Ltd. vs. Vijay Pal Adana. The appellant wants to produce Bank certificate and account statement regarding encashment of two cheques. These documents are very much essential in order to prove that the appellant is not liable to pay single penny, rather, the appellant is entitled to recover the amount more than One Crore which includes pending claims and interest on the amount. If further shows that appellant has been convicted by the trial Court on the basis of wrong and incomplete record produced by the then complainant. The certified copies of Civil Suit-annexure A-1, Written Statement-annexure A-2, ordre dated 29/02/2016 annexure A-3, Affidavit of witness-Shri Arun Kumar Malhotra-A4, his cross examination-annexure A-5, complete account statement of cheque No. 526903 cleared on 6/6/2003 for Rs. 5,82,000/- and account statement regarding encashment of cheque No. 668337 for amounting to Rs. 5.00 lacs. Copies of bank certificate and account statement are enclosed as annexure A-7 and A-8**

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> **which will prove the innocence of the appellant. Copies of fictitious invoices without any acknowledgement and vehicle delivery receipts, account statement issued by the respondent showing the entry of fictitious entries of invoices and receipts of drafts but not crediting the amount in the account of appellant, which will prove the innocence of the appellant. Certified copy of invoices, account statement and other documents are enclosed as annexure A-9 to A-."**

13. It is further stated in this application that the evidence which has come from the side of the complainant in the civil suit is the complete statement of account which shows that no outstanding liability is pending against the complainant and, thus, it was stated that the additional evidence be allowed as it has come subsequent to closing of the evidence before the trial Court and could not be produced at that time.

14. The operative part of the impugned order, passed by the lower appellate Court, reads as under:

> **"…..**
>
> **7. After having heard learned counsel for the parties at length and after having perused the case file minutely, this Court has arrived at the conclusion that both applications in hand deserve to be allowed because all the documents which the applicant wants to prove on the file cannot be fabricated and all these documents shall definitely relate to the controversy in question and in case all these documents are allowed to be proved on the file, then they shall definitely assist the Court in arriving at the right conclusion. No doubt, these documents could be proved by the applicant during the trial, but this fact alone is not**

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> **sufficient to decline the request made by him because ultimate object of the Court is to arrive at the truth and it is better to allow the applicant to adduce proper evidence than to decline it only in order to dispose off the appeal at the earliest because expediency cannot be given effect to at the cost of justice and at the cost of repetition, it is again reiterated that all the documents which the applicant wants to prove on file are relevant for disposal of the present appeal and the entire record cannot be fabricated at all.**
>
> **….."**

15. Learned counsel for the petitioner/complainant has argued that it is well settled proposition of law that the evidence, which was in the knowledge of a party and was not brought on record, cannot be produced as an additional evidence at the appellate stage.

16. Learned counsel for the petitioner/complainant has further argued that in the first application, filed under Section 391 Cr.P.C., it is stated that the accused came to know about the evidence after engaging a new counsel and the same cannot be a ground for allowing him to lead additional evidence.

17. Learned counsel for the petitioner has further argued that no reasons have been assigned as to why the proposed evidence could not be brought on record while leading the defence evidence and no specific reason has been given in the application as to how the proposed evidence is relevant to decide the controversy and how will it enable the Court to reach a just and fair conclusion?

18. Learned counsel for the petitioner has further argued that the evidence led in the civil suit, filed by the petitioner, is not admissible in the

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present case.

19. In reply, learned counsel for the respondent/accused has submitted that the impugned order was passed on 14.03.2017 and the present revision petitions were filed after a delay of four months and in the intervening period, statement of witnesses AW1 to AW3, i.e. three witnesses in the additional evidence, has already been recorded and certain documents have been exhibited.

20. Learned counsel for the respondent/accused has further argued that examination-in-chief of AW-1 also stands recorded and the cross-examination has been deferred as in the meantime, while issuing notice of motion, the operation of the impugned order was stayed by this Court.

21. Learned counsel for the respondent has referred to the statement of CW1 Dhiraj Puri, Deputy Manager, who has only produced on record the account statement and in the cross-examination, this witness has admitted as under:

> **"There was no credit limit in respect of dealership. No statement showing the yearly balance confirmation was maintained. The statements of account were supplied to the dealer every month. I have not filed any document to prove that every month statement regarding supplies made was issued to the accused. I have filed a consolidated statement as on 31.03.2007.**
>
> **.......**
>
> **The request of learned counsel for accused that the witness should be directed to produce the above stated statement of account has been objected to by counsel for complainant. In view of the order of revisionist Court wherein one effective opportunity**

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**has been granted to the accused to cross-examine this witness, counsel for accused is directed to complete the remaining cross-examination and his request shall be considered at later stage."**

22. Learned counsel for the respondent has further referred to cross-examination of the aforesaid witness, where again this witness has stated as under:

**"...**

**My Statement of account Ex. C16 establishes the receipt of payments. It is wrong to suggest that we have deliberately not filed the complete statement of account from 2002 to 2007.**

**.......**

**Ques: Can you present the statement of account for the period 2002-2007 before this Hon'ble Court?**

**Ans: I can present the statement of account only after a period of Ex. C12. Vol: It is not conveniently possible because of confirmation of balance account."**

23. Learned counsel for the respondent has, thus, submitted that despite this witness having admitted that the complete statement of account is available with the complainant, the same was not produced by the complainant as the onus was on the complainant to produce said documents and an objection was raised by the counsel for the complainant and the trial Court has observed that the said request will be considered at a later stage, however, without considering the same, the main trial was concluded.

24. Learned counsel for the respondent has further argued that in the said application, all the details have been given that the complete statements of account have come on record by way of evidence which was led in the civil suit and the primary question to be decided in the

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proceedings, under Section 138 of the N. I. Act, is whether in pursuance to the issuance of a cheque, which is legally enforceable debt or liability, and the proposed evidence which shows that the amount of more than one crore rupees has not been credited in the accounts of the complainant, the leading of additional evidence is necessary to dispel the onus on the basis of the evidence which was led before the trial Court and the evidence which the accused wants to lead is only to clear the details of the accounts.

25. Learned counsel for the respondent has lastly argued that the civil suit is still pending and since all the documents were put to the witnesses during their cross-examination, the evidence is admissible evidence as the respondent/accused has already led the statement of account in additional evidence and three witnesses have already been examined.

26. After hearing learned counsel for the parties, I find no merit in the present petitions.

27. By way of present petitions, petitioner/complainant seeks quashing of the impugned order, vide which, the lower appellate Court has allowed the respondent/accused to lead additional evidence under Section 391 Cr.P.C. Section 391 Cr.P.C. contemplates a further inquiry by taking additional evidence when the conviction by the lower Court has been based upon some evidence which might legally support it but which in the opinion of the appellate Court is not quite satisfactory.

28. The intention of the Legislature in enacting this Section is to empower the appellate Court to see that justice is done between the prosecutor and the person being prosecuted, and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this Section.

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29. Hon'ble Apex Court in ***Bir Singh vs. State of U.P., AIR 1978 Supreme Court 59*** has held that as per provisions of Section 391 Cr.P.C., additional evidence can be allowed to be taken at the stage of appeal when there is likelihood of failure of justice. Though the appellate Court has power to take additional evidence in a suitable case, yet the discretion should not be exercised to fill up gaps or *lacuna* in the prosecution evidence.

30. In ***State of Gujarat vs. Mohan Lal Jitamali Porwal, AIR 1987 Supreme Court 1321***, the Apex Court has held that if the additional evidence is required to promote the interest of justice, production of additional evidence should not be refused on the ground of delay.

31. Though, there is no dispute that it is well settled principle of law that the appellate Court should exercise its powers sparingly and only in a suitable case allow an application for leading additional evidence, yet, in the present case, considering the nature of dispute between the parties and the fact that the complainant/petitioner had failed to produce on record the complete statement of accounts, despite the fact that initial onus was on the complainant to prove that the accused/respondent has issued the cheques in discharge of a legally enforceable debt or liability, the appellate Court has right allowed the accused/respondent to lead additional evidence.

32. The evidence, which is now sought to be produced, is admittedly the evidence in the shape of documents which is the statement of accounts of the complainant itself who has produced it subsequently in the civil suit where the complainant is praying for a decree of recovery of the amount and, therefore, the proposed additional evidence goes to the root of the case and will enable the appellate Court to come to a just conclusion

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about the existence of liability of the accused/respondent. Needless to say, CW-1 deliberately did not produce the statement of account despite a specific question was put to him.

33. Even otherwise, it is admitted case of the parties that three witnesses have already been examined before the Court during the pendency of these petitions and the proposed additional evidence has already come on record and stands exhibited.

34. Therefore, finding no illegality or irregularity in the impugned order, these petitions are hereby dismissed.

A photocopy of this order be placed on the file of other connected cases.

**December 17, 2018** **(ARVIND SINGH SANGWAN)**
*Waseem Ansari* **JUDGE**

*Whether speaking/reasoned* *Yes/No*

*Whether reportable* *Yes/No*

| Sr. No. | CASE NO. | PARTIES NAME |
|---|---|---|
| 1 | CRM-M-23801-2017 (O&M) | Swaraj Mazda Ltd. (now known as SML ISUZU Ltd.) vs. Vijay Pal Adhana |
| 2 | CRM-M-23799-2017 (O&M) | Swaraj Mazda Ltd. (now known as SML ISUZU Ltd.) vs. Vijay Pal Adhana |
| 3 | CRM-M-27339-2017 (O&M) | Swaraj Mazda Ltd. (now known as SML ISUZU Ltd.) vs. Vijay Pal Adhana |
| 4 | CRM-M-27380-2017 (O&M) | Swaraj Mazda Ltd. (now known as SML ISUZU Ltd.) vs. Vijay Pal Adhana |

**December 17, 2018** **(ARVIND SINGH SANGWAN)**
*Waseem Ansari* **JUDGE**

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