

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 402 OF 2017
IN
CRIMINAL APPEAL NO. 425 OF 2015**

Ranjan Dutta,
Age ; 55 years,
Proprietor of Data Infosis, Indian Inhabitant,
Having address at 2A, Ganesh Chandra Avenue,
4th floor, S-4, Commerce House,
Kolkata : 700 013.

... Applicant

Versus

1. State of Maharashtra
2. Samridhi E-Seva Solution Pvt. Ltd.
Through its Director, Shri Abhishek Bal,
address at 2nd floor, Prime Centre,
Model Colony, Shivajinagar, Pune-16.

... Respondents

Mr.Kapil P. Dave for applicant.

Mr.N.B. Patil, APP for respondent No.1-State.

Ms.Trupiti R. Shetty for respondent No.2.

CORAM: N. J. JAMADAR, J.

**RESERVED ON : 13TH NOVEMBER, 2019
PRONOUNCED ON : 22ND NOVEMBER, 2019**

JUDGMENT :

1. With the consent of the learned counsels for parties, heard finally at the stage of admission itself.
2. This revision application assails the legality, propriety and correctness of the order dated 28th June 2017, on an application (Exh.23) in Criminal Appeal No.425 of 2015 seeking permission to adduce

additional evidence, under section 391 of the Code of Criminal Procedure, 1973 ('the Code') passed by the learned Additional Sessions Judge, Pune, whereby the learned Sessions Judge was persuaded to reject the application.

3. The background facts leading to this application can be summarized as under :-

(a) The respondent No.2-the original complainant had lodged a complaint for the offence punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act, 1881'). It was the case of the complainant that the complainant had supplied the computer hardware and peripherals collectively called as 'Kit', 68 in numbers. Towards the payment of the price of the said kits and in discharge of the liability, the accused had drawn the cheque bearing No.96151 on 26-11-2012. On presentment, the cheque was returned unencashed on account of insufficiency of funds. Despite the service of the demand notice upon the accused on 12th December 2012, the accused failed to pay the amount covered by the cheque within the stipulated period. Hence, the complainant lodged the complaint leading to S.C.C. No.0401331 of 2013.

(b) The learned Judicial Magistrate, First Class, 32nd Court, Pune, by judgment and order dated 30th July 2015, returned the finding of

guilt. The accused was convicted for the offence punishable under section 138 of the Act, 1881, and sentenced to suffer simple imprisonment for one year. The accused was further directed to pay the compensation of Rs. 39,70,620/- with default stipulation. The accused-applicant challenged the said order of conviction and sentence before the learned Session Judge by preferring Criminal Appeal No. 425 of 2015.

(c) In the said appeal, the accused preferred an application (Exh.23) under section 391 of the Code seeking permission to adduce additional evidence in the form of the documents, including copies of the complaint lodged by the accused against the complainant with Bowbazar Police Station, Kolkata, receipts and purchase bills to show excess charges allegedly levied by the complainant, and the copy of the reply dated 4th January 2013 to the demand notice. It was asserted that though the documents were in existence during the trial on account of inadvertent omission, the said documents could not be produced on the record of the Court. The accused had, however, put questions to the complainant during the course of cross-examination, in his defence, which the documents, now sought to be produced would bolster up.

(d) The learned Sessions Judge was, however, not impressed with the grounds sought to be put-forth by the accused seeking

permission to lead additional evidence, in appeal. The learned Sessions Judge was of the view that the reason of inadvertent omission to produce the documents on record does not merit acceptance. The accused cannot be permitted to have a fresh trial. Hence, the application came to be rejected.

4. Being aggrieved by and dissatisfied with the impugned order, the accused has invoked the revisional jurisdiction of this Court.

5. I have heard Shri Kapil Dave, the learned counsel for the applicant, Shri N.B. Patil, the learned APP for respondent No.1-State and Ms. Trupti Shetty, the learned counsel for the respondent No.2-complainant, at some length. With the assistance of the learned counsels for the parties, I have also perused the material on record including the judgment of conviction and sentence passed by the learned Magistrate.

6. Shri Dave, the learned counsel for the applicant mounted a slew of challenges to the impugned order. First and foremost, the learned Sessions Judge completely misconstrued the nature of the application. Shri Dave was at pains to draw home the point that the inadvertence on the part of the learned advocate, who represented the accused before the trial court, was not the sole ground for seeking permission to lead additional evidence. On the contrary, the documents, which the accused intended to produce on the record of the Court by way of additional

evidence, were necessary for a just decision of the case. Secondly, the learned Sessions Judge was in error in not advertent to the fact that the accused had already put the defence during the course of cross examination of the complainant and, thus, the accused was not trying to bring something on record by way of an after-thought. Lastly, it was urged that having regard to the provisions contained in section 391 of the Code, which empowers the appellate court to take additional evidence, the learned Session Judge could not have rejected the application when the accused had demonstrated that the evidence sought to be led by the accused was necessary for obviating failure of justice.

7. As against this, Ms. Trupti Shetty, the learned counsel for the respondent No.2-the original complainant would urge that the impugned order does not warrant any interference. On a bare perusal of the application, apart from the alleged inadvertence on the part of the learned advocate, no other ground has been urged in justification of the prayer for leading additional evidence. The resort to the provisions contained in section 391 of the Code cannot be had for filling up the lacuna, urged the learned counsel for the respondent No.2.

8. It was further submitted that, interestingly, the very same advocate, who represented the accused before the trial court appeared in support of the appeal before the court of sessions. The delay in seeking permission to lead additional evidence was also pressed into service to question the

bonafide of the accused. In these circumstances, no fault can be found with the impugned order, which also records that the applicant had preferred the application with a view to delay the disposal of the appeal, submitted the learned counsel for the respondent No.2.

9. The learned counsel for the applicant joined the issue of delay by placing reliance upon a judgment of the Supreme Court in the case of ***State of Gujarat Vs. Mohanlal Jitmalji Porwal & Anr.***¹, wherein the prosecution had sought to lead evidence in proof of certificate issued by the Mint Master, at an appellate stage, as the said document was not formally proved in evidence before the trial court. An objection was raised on the ground that there was delay of about six years in preferring the application. The Supreme Court set aside the order of the High Court of rejection of the prayer to lead additional evidence observing, *inter-alia*, as under :-

“3.....The High Court rejected the prayer on the ground that it did not consider it "expedient in the interests of justice to open a new vista of evidence" in view of the fact that the offence had taken place six years back. The mere fact that six years had elapsed, for which time-lag the prosecution was in no way responsible, was no good ground for refusing to act in order to promote the interests of justice in an age when delays in the Court have become a part of life and the order of the day. Apart from the fact that the alleged lacuna was a technical lacuna in the sense that while the opinion of the Mint Master had admittedly been placed on record it had not been formally proved the report completely supported the case of the prosecution that the gold was of the specified purity. To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender.”

1 (1987) 2 SCC 364

10. As the learned counsels for the parties premised their submissions on the scope and correct application of the enabling provision contained in section 391 of the Code, it would be apposite, at this stage, to extract the provisions of section 391 and consider the import thereof. Section 391 of the Code reads as under :-

“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.”

11. The text of sub-section (1), on a plain reading, indicates that a wide discretion is conferred in the appellate court to either take or direct to be taken the additional evidence. However, the discretion is controlled by two imperatives. One, the Court must come to a conclusion that the additional evidence is necessary. Two, the appellate court, if it admits the additional evidence, shall record reasons for the same. The expression, *“if it thinks additional evidence to be necessary”* indicates that it is not the right of a party to lead the evidence, but the evidence ought to be such which the

appellate court deems necessary to be led for a just decision of the case. The emphasis appears to be more on the requirement of the court to promote justice rather than the desire of a party to lead evidence in support or negation of the charge. Undoubtedly, the phraseology of subsection (1) of section 391 does not indicate the circumstances in which the discretion is to be exercised. However, having regard to the fact that the Code contains elaborate provisions for a fair trial by the trial court and the matter reaches the appellate court after conclusion of the trial, the recourse to the provisions contained in section 391 has to be made sparingly and in deserving cases where the dictate of justice commands.

12. A profitable reference can be made to a three Judge Bench judgement of the Supreme Court in the case of ***Rajeswar Prasad Misra Vs. The State of West Bengal & Anr.***², wherein the supreme Court expounded the scope of the provisions contained in section 428 of the Code of Criminal Procedure, 1898, the precursor to section 391 of the Code. The observations of the Supreme Court in paragraph 9 are instructive and they are extracted below :

“(9) Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be 'said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind

2 AIR 1965 SCC 1887

of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.....”

(emphasis supplied)

13. The aforesaid pronouncement in the case of **Rajeswar Prasad Misra** (Supra) was followed by the Supreme Court in the case of **Rambhau & Anr. Vs. State of Maharashtra** ³, and a note of caution was administered. The court observed, in clear and explicit terms, that the provisions contained in section 391 cannot be restored to, to fill up the lacuna, but to sub-serve the ends of justice. It was in terms observed that the additional evidence cannot be and ought not to be received in such a way so as to cause any prejudice to the accused. The observations of the Court in paragraphs 2 to 4 are of material significance. They read as under:-

“2 A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of Rejeswar Prasad Misra v. State of West Bengal and another (AIR 1965 SC 1887) in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.

3 (2001) 4 SCC 759

3 Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependant upon the fact-situation of the matter and having due regard to the concept of fair play and justice, well being of the society.

4 Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the C.P.Code.”

(emphasis supplied)

14. In the case of **Zahira Habibulla H. Sheikh & Another vs. State of Gujarat and Ors.**⁴, in the backdrop of the peculiar facts of the case therein, after adverting to the aforesaid pronouncement in the case of **Rambhau & Anr.** (Supra), the Supreme Court enunciated the object and scope of section 391 of the Code. The Supreme Court observed, *inter-alia*, as under :

“47The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48 The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to

4 (2004) 4 SCC 158

see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49 There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court....."

50 In Rambhau and Anr. Vs. State of Maharashtra (2001 (4) SCC 759) it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The Court has to keep these salutary principle in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of reasons."

(emphasis supplied)

15. The aforesaid pronouncements were again followed by the Supreme Court in the case of **Ashok Tshering Bhutia Vs. State of Sikkim** ⁵ and again the extraordinary and exceptional nature of the power to admit additional evidence, at the appellate stage, was underscored. The observations in paragraphs 28 and 29 read as under :

"Additional Evidence:

28 Additional evidence at appellate stage 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

⁵ (2001) 4 SCC 402

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.

29 *The primary object of the provisions of Section 391 Cr.P.C. 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. (Vide [Rajeswar Prasad Misra v. The State of West Bengal & Anr.](#), AIR 1965 SC 1887; [Ratilal Bhanji Mithani v. The State of Maharashtra & Ors.](#), AIR 1971 SC 1630; [Rambhau & Anr. v. State of Maharashtra](#), AIR 2001 SC 2120; [Anil Sharma & Ors. v. State of Jharkhand](#), AIR 2004 SC 2294; [Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.](#), (2004) 4 SCC 158; and [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#), AIR 2010 SC 2352)."*

(emphasis supplied)

16. In the backdrop of the enunciation of the aforesaid legal position, reverting to the facts of the case in order to appraise the correctness of exercise of the discretion of by the appellate court, it is pertinent to note that the application preferred by the accused seeking permission to lead additional evidence indicates but the ground that the said evidence, though in existence, could not be led before the trial court on account of the inadvertence of the learned advocate for the accused. Paragraph 5 of the application indicates both the documents which were sought to be tendered by way of additional evidence and the reason for non-production before the Magistrate. It is thus extracted below :-

"5That your applicant states that the Learned Lawyer who conducted the case on behalf of the Applicant before the Learned Trial Court has inadvertently omitted to tender certain documentary evidences being a General Diary lodged by the Applicant on 21st November 2012 with the Bowbazar Police Station, Kolkata and also the complaint sent through Speed Post through the Bowbazar Police Station, Kolkata, certain receipts whereby the complainant/respondent No.2 acknowledged the receipt of the return kits, documents showing that a blank cheque was issued by the Appellant/Applicant as security one in favour of the complainant/Respondent No.2, quotations and purchase bills of the similar kits collected by the Appellant/Applicant at the relevant point of time showing that the complainant/ Respondent No.2 unnecessarily charged extra from the Appellant/Applicant and the reply dated 4th January 2013 given by the Learned Advocate for the Appellant/Applicant of the demand notice dated 12th December 2012 issued by the Learned Advocate for the Complainant/Respondent No.2 to the Appellant/Applicant."

17. The aforesaid contentions (underlined) in the application belie the endeavour of the learned counsel for the applicant/accused that the inadvertence on the part of the accused advocate was not the sole ground for seeking permission to lead additional evidence. It is not the case of the accused that the documents were not in his possession or power. Nor the accused claimed that the documents, though in existence, could not be tendered before the learned Magistrate due to any other hindrance. The submission of the learned counsel for the applicant that the defence, (which the documents now sought to be tendered represent) was already taken during the course of cross examination, by way of suggestions to the witness of the complainant, in the circumstances of the case, does more harm than good to the cause of the submission of the accused. From

the perusal of the cross examination of the witness of the complainant, it becomes evident that the witness had conceded in the cross examination that the accused had filed complaint against him and his father for cheating. It defies comprehension that despite eliciting such an admission during the course of cross examination, the accused failed to place on record the documents in support thereof, which are now sought to be produced by way of additional evidence.

18. The learned counsel for the applicant then urged that the learned Magistrate had placed a heavy burden upon the accused to rebut the presumptions contained in sections 118 and 139 of the Act, 1881. The learned Magistrate simply discarded the defence on the ground that the accused had not replied to the demand notice, though it was the claim of the complainant that the accused had sent a reply to the demand notice raising false contentions. The perusal of the judgment of the learned Magistrate reveals that the learned Magistrate had, in fact, construed the omission to place on record the copy of the reply, adversely to the accused.

19. Though this Court, at this stage, is not required to deal with the legality, propriety and correctness of the judgment recorded by the learned Magistrate, yet, in the backdrop of the challenge to the impugned order, it would be necessary to note that in view of the provisions contained in sections 118 and 139 of the Act, 1881, onus lay upon the accused to

dislodge the presumptions that the cheque was drawn for consideration and in discharge of a legally enforceable debt or liability. Whether the accused succeeded in rebutting the said presumptions of law warrants adjudication. However, mere failure to place on record the copy of the reply could not have been construed as a failure to dislodge to the presumption especially when it was the claim of the complainant that the accused had replied the statutory demand notice raising false contentions.

20. The situation which, thus, obtains is that so far as the endeavour of the accused to lead evidence in the nature of the documents to demonstrate that the cheque was drawn by way of security only and to contest the quantum of liability for which the cheque was allegedly drawn, the omission to place on record the said documents before the trial court, is clearly in the realm of lacuna for reasons more than one. Firstly, it is not the case of the accused that those documents were not in existence or he was not aware of the contents of those documents. Secondly, the accused having taken the defence by putting the questions in the cross-examination to the complainant's witness cannot be heard to say that the documents could not be produced on account of inadvertence. Thirdly, the accused had the opportunity to make amends either by tendering those documents during his examination under section 313 of the Code or by leading evidence in his defence. Lastly, the endeavour of the accused to tender those documents and lead evidence, at this stage, conceivably for the purpose of dislodging the presumptions contained in sections 118 and

139 of the Act, would reopen the entire trial, partaking the character of retrial so far as the burden upon the accused to overturn those presumptions. In the facts of the case, no justifiable ground is made out for such a course, which would have been permissible had there been a resultant failure of justice. Thus, to the extent of those documents, excluding the reply to the demand notice, the learned Sessions Judge was within his rights in rejecting the application.

21. As regards the reply to the demand notice, different considerations come into play. As a matter of fact, the factum of reply to the demand notice was unequivocally admitted by the complainant, albeit, with a rider that the reply contains false assertions. It could not have therefore been disputed that the accused had given reply to the demand notice. In this backdrop, the learned Magistrate could not have drawn an adverse inference for failure to give reply to the demand notice for non-production of the said reply on the record of the Court. As the factum of reply to the demand notice was indisputable, in my considered opinion, to prevent failure of justice, the accused can be permitted to place the said reply on the record of the Court. However, this would not be construed as an opportunity for the accused to lead evidence aliunde in proof of the correctness of the contents of the said reply.

22. The learned counsel for the respondent No.2 would urge that even the aforesaid course of permitting a party to produce document at an

appellate stage, in exercise of the power under section 391 of the Code, is impermissible. It was urged that the term “evidence” used in section 391 implies ‘recording of evidence’ only and not ‘production of documents’. To bolster up this submission, the learned counsel for the respondent No.2, placed a strong reliance upon a judgment of this Court in the case of ***M/s. Gandhi Sales (A Partnership Firm now dissolved) through its erstwhile partner Pankaj Gandhi & Ors. Vs. Prakash M. Khandelwal***⁶, wherein the learned Single Judge has observed, *inter-alia*, that the scheme of section 391 of the Code does not contemplate production of documentary evidence. Plain reading of section 391 of the Code clearly shows that the word ‘evidence’ used in the sub-sections of section 391 is oral evidence only.

23. The aforesaid judgment proceeds on the premise that the word ‘take’, with its grammatical variations, controls the word ‘evidence’ in sub-sections (1) to (4) of section 391. With a lot of respect, I find it rather difficult to agree with the aforesaid proposition. The reasons are not far to seek. Firstly, such an intendment and restrictive scope of section 391 is not discernible from the text of the said section, which, as adverted to above, confers a wide discretion on the appellate court. Secondly, under the Evidence Act, 1872, the word “Evidence” means and includes :-

“(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

6 2017 All. M.R. Criminal 4590

(2) [all documents including electronic records produced for the inspection of the Court],
such documents are called documentary evidence.”

Thus, a document tendered for the perusal of the Court is as much evidence as the statement made before the Court. Thirdly, as extracted above, the three Judge Bench of the Supreme Court, in the case of **Rajeswar Prasad Misra** (Supra) has observed that once the Court comes to the conclusion that a case for adducing additional evidence is made out, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. Thus, to restrict the powers of the appellate court to receive only oral evidence and exclude documentary evidence from its purview, would be in complete derogation of the letter and spirit of the provisions contained in section 391 of the Code.

24. The upshot of the aforesaid consideration is that the application deserves to be partly allowed. Hence, the following order :

ORDER

- (i) The application stands partly allowed.
- (ii) The impugned order stands quashed and set aside to extent it rejects the application of the accused to produce the copy of the reply to the demand notice,

dated 4th January 2013.

(iii) The application for leading additional evidence (Exh.23) stands allowed only to the extent of producing the copy of the said reply dated 4th January 2013.

[N.J. JAMADAR, J.]