

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.02.2018

DELIVERED ON : 22.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.R.C.No.113 of 2018
and
Crl.M.P.No.796 of 2018

M.Senthil Kumar ... Petitioner

Vs

K.M.Mohanasundaram ... Respondent

Prayer: Criminal Revision filed under Section 397 r/w 401 of Cr.P.C., to set aside the order dated 22.11.2017 passed by the learned 2nd Additional Sessions Judge, Erode in Crl.M.P.No.92 of 2017 in C.A.No.199 of 2017 allowing the petition filed under Section 391 of Cr.P.C. to adduce fresh evidence.

For Petitioner : Mr.K.C.Karlmarx

For Respondent : Mr.S.Sithirai Anandan

JUDGMENT

This criminal revision filed by the petitioner/respondent against the order passed by the Learned IInd Additional Sessions Judge, Erode in Crl.M.P.No.92 of 2017 in C.A.No.199 of 2017 allowing the petition filed under section 391 of Cr.P.C for adducing fresh evidence.

2.Brief case of the Revision Petitioner:

The petitioner/complainant filed the complaint in S.T.C.No.183 of 2016 against the respondent/accused under sections 138 read with 142 of Negotiable Instruments Act before the learned Judicial Magistrate, Fast Track No.I, Erode.

3.After trial, the learned Judicial Magistrate acquitted the respondent/accused under section 138 of Negotiable Instruments Act in his judgment dated 05.07.2017.

4. Aggrieved over the same, the appellant/complainant preferred appeal and the same was pending before the learned II Additional Sessions Judge, Erode in Criminal Appeal Number 199 of 2017. During the pendency of appeal, the appellant filed miscellaneous application under section 391 of Cr.P.C to adduce fresh evidence and marking of documents in CrI.M.P.No.92 of 2017. The respondent filed their counter opposing the same. After hearing both parties, the learned II Additional Sessions Judge allowed the application filed by the appellant/complainant on 22.11.2017. Aggrieved over the same, the petitioner/respondent preferred this criminal revision.

5. I heard Mr.K.C.Karlmarx, learned counsel for the petitioner and Mr.S.Sithirai Anandan, learned counsel for the respondent and perused the entire materials available on record.

5. The learned counsel for the petitioner submits that the order passed by the appellate Court permitting the respondent to adduce fresh oral and documentary evidence would enable the respondent/complainant to fill up the lacunae in their case and the petition was allowed sympathetically on the ground that the respondent/ complainant has been affected with gastric cancer during the time of trial.

6. The learned counsel for the petitioner submits that the learned judge has not taken into account the fact that the respondent has not filed these documents at the time of filing of the complaint and there is no reason for filing of these documents at the time of filing the complaint as he was not diagnosed with cancer.

7. The learned counsel for the petitioner submits that the learned judge has not taken into account the fact that the documents to show the means of income were all available at the time of filing the complaint and that the petition is filed only to fill up the lacunae after going through the judgment and the respondent has not expressed the said difficulty before the trial Court during chief or cross examination.

8. The learned counsel for the petitioner submits that the learned judge has failed to take note of the fact the petitioner herein has stated that the respondent has obtained signatures in several blank stamped papers and that he has already filed a suit in O.S.No.262 of 2015 before the learned 1st Additional District Munsif Court, Coimbatore seeking mandatory injunction directing the respondent to return back the security documents.

9.The learned counsel for the petitioner submits that the learned judge has failed to see that the respondent has given Rs.10,00,000/- on obtaining Memorandum of Deposit of Title Deeds from the Petitioner marked as Exhibit D1 and now makes a false claim that he has given Rs.30,00,000/- to the petitioner company, Rs.10,00,000/- to the petitioner and Rs.10,00,000/- to Petitioner partner Devarajan and that the respondent has filed another complaint against the company and its partners.

10.The learned counsel for the petitioner submits that the learned Judge has failed to note that the petitioner has feared that the respondent would use blank documents against them and filed the suit for mandatory injunction and that a specific question is also put in the cross examination as he would fill the blank documents any time to use the same against them to which he has answered in the negative.

11.I have given my considered thoughts to the submissions of both sides in the light of the grounds on which the application allowed by the appellate Court under Section 391 of Cr.P.C. and the material submitted therewith.

12.Section 391 of Cr.P.C. deals with the discretion of the appellate Court to take further evidence, or direct it to be taken.

13.Section 391 of Cr.P.C. reads as follows:

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."

14.The rights of the parties to lead additional evidence and the duty and responsibility of the Court in this regard at the trial and appellate stage in a criminal case is regulated by the provisions of Section 311 of Cr.P.C. and Section 391 of Cr.P.C. respectively. Since no such prayer was made for leading additional evidence during the course of trial, the considerations that are essential to be kept in view in terms of Section 311 of Cr.P.C. may not arise at the appellate stage and this request, at this stage, basically would be regulated by the provisions of Section 391 of Cr.P.C.

15.Essentially, there is a difference in the wording of Section 311 of Cr.P.C and that of Section 391 of Cr.P.C. Both relates to the power of the Court for taking of additional evidence, one at the stage of trial and another at the appellate stage. To say that same consideration would arise in both the situations, would not be very appropriate. There is an essential difference in both the stages. Section 311 of Cr.P.C. is available before the Court at a stage when both the parties are in the process of leading evidence and the Court is yet to come to any conclusion in regard to guilt or otherwise of the person being prosecuted before it. Section 311 of Cr.P.C. has been subject matter of interpretation in large number of cases by various Courts including the Hon'ble Supreme Court. The consistent view has been that this Section is in two parts and leaves very wide discretion with the Court to summon any witness at any stage of enquiry, trial or other proceedings, who may be a person as a witness or is in attendance whether summoned or not. The Court has also power to recall and reexamine any person already examined. The second part of the Section, however, is differently worded and provides that the Court shall summon and examine or recall and reexamine any such person if his evidence appear it to be essential to the just decision of the case. The second part of the Section has been held to be mandatory and it accordingly mandates the Court to summon and examine recall and reexamine any person if his evidence appears to be essential to the just decision of the case. Word 'appears' used in the Section would further signifies that evidence should be seen to be essential for the just decision of the case for the Court to permit the same.

16.This wide discretion apparently is not available before the Appellate Court while exercising power under Section 391 of Cr.P.C. It is worded also differently. It reads that in dealing with any appeal under this chapter, the appellate Court if it thinks additional evidence to be necessary, it shall record its reason and may either take the evidence itself or direct it to be taken by the Magistrate etc. The words "essential to the just

decision of the case" are obviously missing in Section 391 of Cr.P.C. This appears to be with reason and purpose. At the stage of Section 311 of Cr.P.C., the Court is yet to arrive at a decision whereas the Appellate Court is dealing with a case when the decision has already been made and the question before it is whether such decision is to be interfered with or not in an appeal. It is in this context, the legislature has provided that the additional evidence, if thought necessary, may be taken either by the Court itself or it may direct the Magistrate to do so. There is another added obligation on the part of the Court and that is to record its reasons while directing this additional evidence to be so recorded at appellate stage. The obligation, thus, is apparently different at the stage of appeal. It is, thus, not possible to accept the view that the consideration for allowing additional evidence at the stage of appeal would be the same as would be before the trial Court while exercising jurisdiction under Section 311 of Cr.P.C. Neither the wording nor the context nor the stage can lead to such a view as has been canvassed.

17. It is clear from the provisions of Section 391 of Cr.P.C. that the discretion is given to the appellate Court to take further evidence by itself or direct the Sessions Court or the Magistrate to take additional evidence in appropriate cases by recording reasons for taking additional evidence. The discretion vested in the appellate Court under Section 391 of Cr.P.C. to take additional evidence is not intended to fill up the lacuna in the prosecution evidence or to make out a case different from the one already on record. It is also pertinent to note in this case that additional evidence is sought to be adduced by the appellant in the guise of further evidence at the appellate stage by cutting at the very root only to fill up the lacunae after going through the judgment passed by the learned trial Court and the respondent has not expressed the said difficulty before the trial Court during chief or cross examination.

18. In the background as afore-mentioned, it is now to be seen if there is any infirmity in the impugned order for leading additional evidence is allowed.

19. The case of the Petitioner is that the complaint was filed in the year 2014 stating that the respondent received a loan after executing pronotes in favour but he did not produce the documents while filing the complaint and during that period he was not diagnosed with cancer and did not produce the pronotes even during his examination-in-chief even then he was not diagnosed with cancer and the non production of the

documents by the complainant at that stage also has nothing to do with his cancer. Now the respondent/ complainant after going through the judgment of the learned trial Court has created the documents, according to the need for filling up the lacunae. Moreover the documents sought to be marked has no relevance to the case. The respondent never attempted to produce the documents before the lower Court and he never sought time before the lower Court for producing documents and the lower appellate Court ought to have appreciated the conduct of the complainant coupled with the facts of the case.

20.The case of the respondent is that during the course of enquiry before the trial Court, he was attacked by gastric cancer. Though he have taken treatment at Ramakrishna Hospital, Coimbatore his family members advised him to go to Lilavathi Hospital and Research Centre at Mumbai for better treatment and shifted his residence for one month to Mumbai and admitted in Lilavathi Hospital, Mumbai and surgery was also conducted on 6.4.2016. In order to show that he underwent treatment for cancer and herewith producing the test report issued by Reliance Life Sciences, Mumbai, the discharge summary issued by Lilavathi Hospital and Research Centre, Mumbai and the discharge summary issued by Asian Cancer Institute Mumbai and unable to produce the relevant records and the same are filed along with memorandum of appeal. The documents filed along with the memorandum of appeal are to be marked on his side.

21.It is to be borne in mind that a criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty.

22.In Machander Vs. the State of Hyderabad, reported in AIR 1955 SC page 792, the Hon'ble Supreme Court made very relevant observations in regard to re-opening of the case where some questions had not been asked to the accused while rejecting the prayer for retrial the Hon'ble Supreme Court observed as under:-

" We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial judges omit to do their duty. Justice is not

one-sided. It has many facets and we have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go. Except in clear cases of guilty, where the error is purely technical, the forces that are arrayed against the accused should no more be permitted in special appeal to repair the effects of their bungling than an accused should be permitted to repair gaps in his defence which he could and ought to have made in the lower Courts. The scales of justice must be kept on an even balance whether for the accused or against him, whether in favour of the State or not and one broad rule must apply in all cases."

23. Thus, the Hon'ble Supreme Court has clearly observed that neither the prosecution nor the accused should be permitted to repair the effects of their bungling and they are not to be permitted to repair gaps in their case or in the defence left if any, which the accused could and ought to have made in the lower Courts. The scale of justice, as per the above observations of the Hon'ble Supreme Court, are to be kept on an even balance whether for or against the accused or whether in favour of the State or not and one broad rule is to apply to all cases.

24. The present attempt on the part of the respondent/appellant/ complainant cannot be termed as a attempt to repair the gaps which may have been left in his defence and which he ought to have made up while the trial was on before the Trial Court. It is now a stage of appeal. Delay and necessary for cross-examination are two different things. Application cannot be used as a tool to delay the proceedings. If a delay is justifiable, the Court will always come to the rescue of any party as the journey of the Court is to find truth. In the case on hand, despite of sufficient opportunity, the complainant had adduced evidences before the trial Court. The question of leading additional evidence under Section 391 of Cr.P.C. arise only when some evidence is adduced before the trial Court by the party seeking additional evidence. From the perusal of Section 391 of Cr.P.C. it is clear that it provides for leading of additional evidence only. When no evidence has been led before the trial Court, the question of leading additional evidence

before the appellate Court under Section 391 of Cr.P.C. will not arise to fill up the lacunae and the lower appellate Court is right in allowing the application. The impugned order, thus, will not call for interference in exercise of revisional jurisdiction.

25.This criminal revision is dismissed and the order passed by the Learned IInd Additional Sessions Judge, Erode in CrI.M.P.No.92 of 2017 in C.A.No.199 of 2017 is confirmed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vs

To

The IInd Additional Sessions Judge,
Erode.

+1 cc to M/s.S.Sitharai Anandan, Advocate, S.R.No.5104

+1 cc to M/s.K.C.Karl Marx, Advocate, S.R.No.4364

copy to: The Section Officer,
Criminal Section,
High Court, Madras.

Judgment made in
CrI.R.C.No.113 of 2018
and
CrI.M.P.No.796 of 2018

VSN-II (CO)
SSM(21/02/2019)

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