

**227 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRR-727-2018 (O&M)
Date of decision-25.04.2019**

Naresh Kumar

....Petitioner

Vs.

Harish Kumar

...Respondent

CORAM:- HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. S.S.Khurana, Advocate for the petitioner.

Mr. Nikhil Kumar, Advocate for the respondent.

MANOJ BAJAJ, J.

Petitioner-Naresh Kumar is a complainant in a case under Section 138 of Negotiable Instruments Act, 1881 which ended in conviction of respondent-Harish Kumar through judgment dated 08.10.2015. A criminal appeal bearing No.391/2015 is pending before the Sessions Judge, Rewari against the said judgment of conviction and order of sentence. The grievance of the complainant/petitioner relates to the impugned order dated 03.02.2018 whereby 'second application' brought by convict under Section 391 Code of Criminal Procedure for adducing additional evidence stood allowed by the Appellate Court.

The facts in brief leading to the present revision petition are as under:-

- (i) Petitioner brought a complaint under Section 138 of Negotiable Instruments Act, 1881 on the ground that the cheque bearing

No.330455 dated 27.05.2011, for a sum of Rs.4,30,000/- drawn at State Bank of Patiala, Gurgaon, issued by respondent (convict) was dishonoured on account of “insufficient funds”. As per the complainant, he had advanced a friendly loan of Rs.4,30,000/- to the respondent and the cheque was issued by the respondent towards discharge of his legal liability.

(ii) After examination of the complainant and preliminary evidence, the trial Court proceeded to summon the accused, who was served with the notice of accusation vide order dated 24.09.2012. The accused did not plead guilty and claimed trial. Thereafter, the complainant adduced his evidence in support of the case set up by him. The defence also adduced its evidence and two witnesses were examined i.e. Ashok Kumar as DW-1 and Satish Kumar as DW-2. Besides two documents, Exhibit D-1 and D-2 were also tendered in evidence. The defence set up by the accused was that the cheque in question was not issued in favour of the complainant, whereas it was actually issued in favour of Sunil Kumar in the year 2006 for different purpose and the said cheque was misused by the complainant. However, it was admitted that the complainant and accused were partners and a dispute erupted between them and complainant had demanded back his money. According to the defence, the money was returned, but some dispute arose with regard to the interest.

(iii) After examining the evidence on record, the trial Court proceeded to hold the respondent guilty for the offence punishable under Section

138 of Negotiable Instruments Act, 1881 vide its judgment dated 08.10.2015 and sentence of one year of simple imprisonment was inflicted upon the respondent/convict. Also compensation of Rs.5,00,000/- was also ordered to be paid to the petitioner.

(iv) Dissatisfied with the said judgment of conviction and order of sentence, the respondent preferred criminal appeal No.391 of 2015 . During the pendency of the appeal, the convict moved an application dated 18.04.2017, under Section 391 Cr.P.C for adducing additional evidence. The permission of the Appellate Court was sought to prove the documents Mark D-1 and D-2 by way of secondary evidence, in case, the complainant refuses to admit the said documents. Further a prayer was made to place on record the inquiry report of Deputy Superintendent of Police, Kosli pertaining to the cheque in question. The said application was contested by the complainant and after hearing the rival contentions, the appellate court vide its order dated 12.04.2017, partly allowed the said application i.e. in respect of the inquiry report of the Deputy Superintendent of Police. However, rest of the prayer in respect of documents Mark D-1 and D-2 was declined. The said documents were alleged to be the part of the diary (photocopies of the diary) maintained by the complainant (petitioner). The said documents as well as the diary were denied by the complainant during the trial proceedings, as well as before the Appellate Court. Thereafter, the appeal remained pending for addressing arguments by the parties. On 03.11.2017, the respondent

(convict) moved second application for leading additional evidence under Section 391 Cr.P.C for proving the documents Mark D-1 and D-2 through FSL Madhuban. The Appellate Court vide impugned order dated 03.02.2018 proceeded to allow the application and gave permission to the appellant (respondent) to prove the documents Mark D-1 and D-2.

In these circumstances, the present revision petition has been preferred by the complainant to challenge the order dated 03.02.2018 passed by the Appellate Court on the ground that the Appellate Court has exceeded its jurisdiction in allowing the second application.

Learned counsel for the parties have been heard and I have gone through the case file carefully.

Learned counsel for the petitioner (complainant) has contended that the Appellate Court has fell into a serious error of law in allowing the second application under Section 391 Cr.P.C, thereby accepting the prayer of the convict to adduce secondary evidence in respect of documents Mark D-1 and D-2, as the same prayer previously stood declined by the same Court. According to him, there is no change of circumstances and the Appellate Court has adopted casual approach in exercising the power under Section 391 Cr.P.C. Learned counsel further contended that conduct of the respondent (convict) was ignored as this material was produced by him during the trial however, he failed to prove the same. Not only this even the grounds of appeal do not contain any reference of these documents which are now being sought to be proved at this belated stage.

On the other hand, learned counsel appearing on behalf of respondent (convict) in support of the impugned order has contended that the Appellate Court has exercised the discretion for justifiable reasons. According to him, in case the convict is allowed to lead this additional evidence, no prejudice would be caused to the complainant who shall get an opportunity to rebut the said evidence. According to him, the order passed by the appellate Court does not warrant any interference in the revisional jurisdiction. However, it is not disputed by learned counsel that previously similar application filed by him stood declined by the same Court.

Before proceeding further to adjudicate the controversy involved in the present revision petition, it would be appropriate to go through the provisions as contained in Section 391 Cr.P.C. The said section 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.

A bare reading of the above clearly indicates that the above provision comes as an exception to the general rule that the Appellate Court shall examine and decide the appeal on the basis of the material and evidence adduced before the trial Court. The solitary aim and object behind injecting this extra ordinary power with the Appellate Court is to strengthen it to find out the truth. At the same time, such power which is discretionary in nature is to be exercised sparingly and only in suitable cases and that too with caution and circumspection only to meet the ends of justice. At the same time, Appellate Court has to be careful to ensure that the said provision is not put to misuse.

The power enshrined under Section 391 Cr.P.C is nearly similar to the power vested with the trial Court as envisaged under Section 311 Cr.P.C for recalling, re-examining or summoning the additional evidence. The discretionary power exercised during trial is different in nature, whereas at the appellate stage it becomes distinct for the reason that the trial Court has passed a final judgment of conviction or acquittal, attaching clarity to at least one of the versions as set up by the complainant (prosecution) or the accused. Therefore, exercise of such a power at an appellate stage is warranted only in suitable cases, where it is apparent to the Appellate Court that the evidence sought to be adduced through additional evidence would be just and necessary for the effective decision of appeal. This clearly means

that evidence sought to be adduced must be a credible evidence, which is not only directly related to the issue, but capable of belief as well. At the same time, the Court must record the satisfaction that the said evidence was not available with the applicant during the course of the trial.

Considering the nature and object of the provision no straightjacket formula can be laid down for exercise of power under this section, as it is dependant upon the factual aspect of the occurrence/offence or other evidence on record. Therefore, it is desirable that the exercise of this power is warranted only when the Court has definite reasons to believe that the additional evidence sought to be adduced at the appellate stage would certainly lead it at least close to the truth, of which the trial Court was previously deprived.

Now turning to the facts of this case, whereupon there is no conflict between the parties. It is noticed that firstly the documents marked D-1 and D-2 respectively, were within the knowledge of the accused and an attempt was made by him to prove those before the trial Court. The said documents are alleged to be part of the diary maintained by the complainant, however, the application moved by the convict does not reveal it to be relevant to the defence set up by him before the trial Court. These documents Mark D-1 and D-2 are on record of the case file and have been perused. Mark D-1 is just a calculation sheet which appears to be on a rough paper and do not contain signatures of any of the parties. The figures contained in the document do not appear to be connected with cheque amount in question which is for a sum of Rs.4,30,000/-. Similar is the status

of the another document Mark-D-2. Apparently, the documents do not appear to be relevant to the defence set up by the accused/convict. These documents were not referred to in the grounds of appeal by the convict while preferring the appeal before the Appellate Court.

The nature of these documents was previously noticed by the Appellate Court while rejecting the first application on 12.04.2017 and the following observations were made by the Appellate Court:-

“After hearing the contents of both the parties and records, it comes out that so far the powers of Appellate Court to allow additional evidence as per the provisions under Section 391 Cr.P.C. is concerned, the same are settled when the Appellate Court can permit additional evidence if it thinks the same to be necessary for the due decision of the case and also relevant. Accordingly, so far as the defence on the basis of documents Mark D-1 and D-2 as produced during the trial by the applicant-accused are concerned, during the course of arguments, it is admitted case of the learned counsel for the applicant-accused that both these documents are alleged to be photo copies of a diary allegedly maintained by the respondent-complainant and the original of the same is with the respondent-complainant but during the trial as well as in the appeal the respondent-complainant denied the existence of any diary with him and alongwith the contents the documents D-1 and D-2. As such, the applicant cannot be allowed to prove these documents further as the existence of these documents is not proved, especially when he has already led evidence on this aspect by examining his witness and thus, the plea of the learned counsel for the applicant-

accused on this aspect is without any basis and liable to be rejected.”

The above observation made by the Appellate Court appears to be correct in the background of the facts of this case and the defence set up by the convict. Even the convict accepted this order and did not challenge it further to seek the said permission of adducing additional evidence. The order of rejection of application has given detailed reasons while examining the Mark D-1 and Mark D-2 and their relevance.

The second application was moved exactly after seven months of the first rejection order and the application echoes the voice of the previous one, but without any material change in the facts and circumstances to seek indulgence of the Appellate Court again on the same issue. However, the appellate Court this time proceeded to allow the application by completely ignoring its first verdict, thereby reviewing the order dated 12.04.2017 which had attained finality. The Appellate Court has further ignored the conduct of the convict who expressed lack of certainty about the existence of these documents Mark D-1 and D-2 as according to him, the diary was either in possession of the complainant or his brother.

The scope and ambit of Section 391 Cr.P.C came up for analysis before the Hon'ble Supreme Court in “***Brig.Sukhjeet Singh Vs. State of Uttar Pradesh and others***”, 2019 (1) R.C.R. (Criminal) 895, wherein the following observations were made pertaining to the exercise of extra ordinary power:-

“14. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the

appeal by the Appellate Court to secure ends of justice. The scope and ambit of Section 391 Cr.P.C. 19 has come up for consideration before this Court in Rajeswar Prasad Misra Vs. State of West Bengal and Another, AIR 1965 SC 1887. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He held 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. Following was laid down in Paragraph Nos. 8 and 9:- “8. Since a wide discretion is conferred on appellate courts, the limits of that courts’ jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section. 9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, 20 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 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.....”

In view of the above, this Court has no hesitation in holding that the Appellate Court has exceeded its jurisdiction in entertaining the second application on the same cause and allowing the same without recording any satisfaction in respect of the effectiveness of the said evidence, that too in the nature of the offence committed.

The order dated 03.02.2018 passed by the appellate Court suffers from grave illegality and impropriety and therefore, is not sustainable and warrants interference by this court in the revisional jurisdiction.

Resultantly, the petition is allowed and the impugned order dated 03.02.2018 is set aside and the second application filed under Section 391 Cr.P.C for adducing additional evidence by the complainant stands dismissed.

(MANOJ BAJAJ)
JUDGE

25.04.2019

vanita

Whether speaking/reasoned :
Whether Reportable :

Yes	No
Yes	No