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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.343 OF 2019

M/s. Shripal Electricals and Anr.	... Applicant
Versus	
Anchor Electricals Pvt. Ltd.	... Respondent

Mr. V. Balasubramanian for the Applicant.
Mr. Sandeep R. Karnik for the Respondent.

**CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 14th FEBRUARY 2020.**

P.C.:

- 1 Heard the respective counsel.
- 2 The applicant herein impugns the order passed by the Sessions Judge, Greater Bombay in application below Exh.8 in Criminal Appeal No.808/2017 vide order dated 1st April 2019.
- 3 The facts of the case, in nutshell, are as follows :-

 The applicant herein is convicted by the Chief Metropolitan Magistrate, Mumbai for the offence punishable under section 138 of the Negotiable Instruments Act and sentencing him to suffer Simple Imprisonment for one year and compensation of Rs.1,69,75,000/-, in default, to suffer further simple imprisonment for two months vide judgment and order dated 23rd November 2017. Being aggrieved by the

said judgment and order, the applicant preferred Criminal Appeal No.808 of 2017 before the Sessions Court at Mumbai. During the pendency of the appeal, the applicant has filed an application below Exh.8 under section 391 of the Code of Criminal Procedure. It is contended in the said application that upon receipt of the statutory notice in December 2012 the complainant had returned the cheque without supplying the material on the basis of the web order. The applicant then produced a report from the private agency engaged in cyber related claim dated 26th July 2014, which confirmed that the cheque was indeed received by the respondent prior to the filling up of the cheque and presentation of the same by the respondent. It was contended that the learned Metropolitan Magistrate has not appreciated the provisions of section 65(B) of the Indian Evidence Act in its proper perspective and that no person from Truth Lab Agency who verified the cheque was examined. It was also contended that the learned Magistrate has not considered citations produced by the applicant in its proper perspective and only in order to remove any ambiguity, the application under section 391 of Criminal Procedure Code was filed by way of abundant caution.

4 At the outset, it has to be appreciated that in fact, there was no compliance of section 65B of the Indian Evidence Act, moreover, the applicant had not examined any officer from Truth Labs Agency in order to

substantiate the report which was given on 26th July 2014. The applicant had not filed any application before the learned Metropolitan Magistrate seeking to refer the said cheque to any Government Agency and moreover, the cheque was not referred to Truth Labs with the permission of the Court. It is apparent on the face of the record that there was no compliance of section 65B of the Evidence Act. Section 65B of the Evidence Act reads thus:-

“[65B. Admissibility of electronic records.—

(1)

(2)

(3)

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.”

5 The learned counsel for the applicant has vehemently submitted that the application under section 391 was filed by way of abundant caution.

6 The very purport of section 391 of Cr.P.C. is not to fill up the lacuna in the course of recording of evidence but to see that justice appears to be done and must be done. In fact, the application under section 391 of Cr.P.C is ambiguous.

7 The learned counsel for the applicant has placed reliance upon a judgment of the Apex Court in the case of ***Brig. Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh & Ors., reported in Criminal Appeal No.148 of 2019*** dated 25th January 2019 wherein the Court has considered the provisions of section 391 of Cr.P.C. The learned counsel has drawn attention of this Court to paragraphs 12 and 13 of the judgment wherein the Apex Court has held that in an appeal from a conviction, the Appellate Court can exercise power under section 386(b).

8 Further, in paragraph 14 of the said judgment, the Apex Court has held that the power to take additional evidence under section 391 is, thus, with an object to decide the appeal by the Appellate Court to secure ends of justice.

9 However, in the same judgment, the Hon'ble Apex Court has relied upon the judgment in the case of ***Rambhau and Ors. vs. State of Maharashtra***¹, wherein it was observed as follows :-

“A word of caution, however, ought to be introduced for guidance, to wit (sic) 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.”

10 The learned counsel for the respondent has placed reliance upon the same judgment cited (supra) i.e. ***Rambhau and Ors. Vs. State of Maharashtra***, wherein the Hon'ble Apex Court has held that :

“The purpose of introduction of section 391 of Cr.PC. in the statute book has been for the purpose of making evidence available to the Court not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer. It is not to fill up the lacuna but to subserve the ends of justice. No set of principles can be set forth for the exercise of power under section 391 since the same are dependent upon the facts of the case of the matter and having due regard to the concept of fair play and justice, well being of the society. The 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.”

11 In the present case, there is no exigency to remand the matter for the purpose of adducing additional evidence or to examine any witness from Truth Lab Agency. The Metropolitan Magistrate had rightly held that for want of compliance of section 65B of the Evidence Act. Report of Truth

1 MANU/SC/0309/2001

Lab cannot be relied upon. Rest of the merits of the matter can be appreciated by the Appellate Court. In view of this, the application being sans merit stands rejected. The learned Appellate Court to decide the appeal uninfluenced by the observation of this Court.

(SMT. SADHANA S. JADHAV, J.)

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