

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.12.2019	DELIVERED ON: 03.01.2020
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THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

CRL.O.P.NO.21973 OF 2019

AND

CMP.NO.11407 OF 2019

M.Nagarajan

... Petitioner

Vs.

M.Navarajan

...Respondent

PRAYER:

Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to set aside the order passed in Crl.M.P.No.2454 of 2019 in C.A.No.350 of 2017 pending on the file of the First Additional Sessions Judge, Chennai.

For Petitioner : Mr.C.Rajan

For Respondent : Mr.M.Shankar

ORDER

This petition has been filed by the accused/appellant to set aside the order passed by the First Additional Sessions Judge, Chennai, in Crl.M.P.No.2454 of 2019 in C.A.No.350 of 2017 dated 24.06.2019.

2. The respondent herein had filed a private complaint against the petitioner herein alleging that the petitioner herein had committed an offence punishable under Section 138 of the Negotiable Instruments Act. Based on the said complaint, the learned Metropolitan Magistrate, Fast Track Court No.IV, George Town, Chennai-1, had taken the case on file in C.C.No.4045 of 2013 and after full trial, he convicted the petitioner herein and sentenced to undergo six months simple imprisonment and to pay a compensation of Rs.1,50,000/- to the respondent herein and in default to undergo a further period of two months simple imprisonment.

3. Aggrieved by the same, the petitioner herein had filed an appeal in C.A.No.350 of 2017 on the file of the First Additional Sessions Judge, Chennai. During pendency of the said appeal, the petitioner herein had filed an application under Section 391 Cr.P.C., in Crl.M.P.No.2454 of 2019 seeking permission of the Appellate Court for adducing additional evidence by marking the certified copies of the plaint in O.S.No.193 of 2013 on the file of the Sub-Judge, Valliyur and written statement filed by the defendants in the said suit.

4. The learned First Additional Sessions Judge, Chennai in Crl.M.P.No.2454 of 2019 in C.A.No.350 of 2019 has passed an order on 24.06.2019 which reads thus:-

"Both side present. The contention of the petitioner being appellant is that this application to receive additional evidence be taken before the main appeal being taken up for disposal on merits. In the case of Ravichandran and Others -Vs- Paramasivam, of the Hon'ble High Court of Madras, reported in CDJ-2014-MHC-337, it had been held that the application under Order 41 Rule 27 of CPC should be heard along with the appeal on merits and in the case of Parasmal Jain and Others -Vs- M.Rajesh of the Hon'ble High Court of Madras, reported in CDJ-2015-MHC-5946, it had been held that Section 391 Cr.P.C., is akin to Order 41 Rule 27 of CPC. As this is an application to receive additional evidence filed under Section 391 of Cr.P.C., it would be appropriate to consider this application along with the appeal on merits to consider whether the additional evidence is necessary for the purpose. Hence, for enquiry call along with the main appeal. Call on 17.07.2019."

5. Challenging the aforesaid order, the accused/appellant has filed the present petition.

6. The learned counsel for the petitioner has submitted that in the event of the petitioner's application in Crl.M.P.No.2454 of 2019 is dismissed by the Appellate Court at the time of pronouncing the judgment in the appeal, the petitioner would not have a chance to challenge the same and hence, the Appellate Court should not have posted Crl.M.P.No.2454 of 2019 along with the main appeal. He further submitted that Crl.M.P.No.2454 of 2019 should have been heard independently and a separate order should have been passed and in such a case, the aggrieved person

may challenge the said order before this Court.

7. In support of the aforesaid contentions, the learned counsel for the petitioner has relied upon the following decisions:-

1) Premier Automobiles Limited, Bombay Vs. Kabirunissa and Others, CDJ 1990 SC 518.

2) Brig.Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh and Others, CDJ 2019 SC 078.

3) Rambhau Vs. State of Maharashtra, CDJ 2001 SC 294 = 2001 (4) SCC 759.

4) K.Thakshinamoorthy Vs. The Inspector of Police, SPE/CBI/ACB, Chennai, MP.(MD).No.1 of 2011 in CrI.A.(MD).No.544 of 2007 dated 14.03.2012.

8. Per contra, the learned counsel for the respondent has submitted that since the application is filed under Section 391 Cr.P.C., the said application has to be heard along with the main appeal and then only the Appellate Court can take a decision, as to whether, additional evidence is necessary for deciding the appeal. He further submitted that the Appellate Court has exercised its discretion that the said application has to be considered along with the main appeal and in the said discretion, this Court need not interfere. He further submitted that it is purely a discretion of the Appellate Court either to dispose of the said application separately or along with the main appeal. He further submitted that in this case, the Appellate Court has decided to hear the said application along with the main appeal and that it would not cause any prejudice to the petitioner and therefore, he prayed to dismiss the petition.

9. In support of the aforesaid contentions, the learned counsel for the respondent has relied upon the following decisions:-

1) Parasmal Jain and Others, Vs. M.Rajesh (Criminal Revision Case Nos.224 to 226 of 2015) dated 31.07.2015.

2) Ravichandran and Ors. Vs. Paramasivam, MANU/TN/2925/2013 =2014 (3) CTC 421.

3) Rambhau Vs. State of Maharashtra, CDJ 2001 SC 294 = 2001 (4) SCC 759.

10. In Rambhau Vs. State of Maharashtra, (cited supra) the Hon'ble Supreme Court in para No.4 has observed as follows:-

"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 to lacuna but to subserve 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 C.P.Code."

11. From the aforesaid decision, it is clear that the application filed under Section 391 of Cr.P.C., is akin to application filed under Order 41 Rule 27 of CPC. With regard to the aforesaid position of law there is no quarrel among the parties because the learned counsel for both the parties relied upon the aforesaid decision.

12. In Premier Automobiles Limited, Bombay Vs. Kabirunissa and Others, (cited supra), during pendency of the appeal before the Appellate Court, an application for admitting additional evidence under Order 41, Rule 27 of the Code of Civil Procedure was filed by the appellants, which remained undisposed of. Even while pronouncing its judgment disposing of the appeal finally, the Appellate Court did not advert to it. It was only after the case was disposed of that the application for additional evidence was rejected by a short order, observing that the appellants had sufficient opportunity to produce the documents in the trial Court, and it had failed to do so. Under the said circumstances, the Hon'ble Supreme Court has held that the Appellate Court will, in the first instance, hear and dispose of the application under Order 41, Rule 27, Civil Procedure Code and only thereafter take up the final hearing of the appeal.

13. In M/s. Eastern Equipments & Sales Limited Vs. ING. Yash Kumar Khanna Appeal (Civil) No.3178 of 2008 dated

30.04.2008, the Hon'ble Supreme Court has held that in order to decide the pending appeal in which the application under Order 41 Rule 27 of CPC was filed ought to have been taken by the Appellate Court along with the application for acceptance of additional evidence under Order 41 Rule 27 of CPC.

14. A similar view was taken by the Hon'ble Supreme Court in the subsequent judgment in Muzaffar Ali Vs. Dasaram, Appeal (Civil) No.85 of 2009 (Arising out of SLP(C) No.6241 of 2008 dated 12.01.2009 wherein the Hon'ble Supreme Court has directed the High Court, it decide the Second Appeal along with the application under Order 41 Rule 27 of CPC on merits.

15. Though in Premier Automobiles Limited, Bombay Vs. Kabirunissa and Others, (cited supra) the Hon'ble Supreme Court has directed the Appellate Court that in the first instance, hear and dispose of the application under Order 41, Rule 27 of CPC and only thereafter take up the final hearing of the appeal, in the subsequent decisions it has held that the application which was filed under Order 41, Rule 27 of CPC shall be heard along with the main appeal.

16. In Brig. Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh & Others, (cited supra), the Hon'ble Supreme Court has not issued any guidelines as to whether the application under Section 391 Cr.P.C., to be heard and disposed of independently or along with the main appeal. In that case, considering the facts and circumstances of the case, the Hon'ble Supreme Court has held that the Appellate Court failed to exercise the power under Section 391 of Cr.P.C., properly. So the said decision will not help this Court to decide the issue whether the application filed under Section 391 of Cr.P.C., has to be disposed of independently or not.

17. In K.Thakshinamoorthy Vs. The Inspector of Police, SPE/CBI/ACB, Chennai, MP.(MD).No.1 of 2011 in CrI.A.(MD).No.544 of 2007 dated 14.03.2012, (cited supra) also the question as to whether the application which is filed under Section 391 of Cr.P.C., has to be disposed of independently or not did not arise. Hence, the said decision also will not help the petitioner.

18. In Parasmal Jain and others, Vs. M.Rajesh, (cited supra), also the question as to whether the application filed under Section 391 of Cr.P.C., has to be disposed of separately or not did not arise.

19. In Ravichandran and others Vs. Paramasivam, (cited supra) this Court while dealing with the application filed under Order 41 Rule 27 of CPC has held that the said application shall be heard along with the main appeal and if the Court comes to the conclusion that the said application is liable to be dismissed, the Appellate Court can dismiss the said application at the time of pronouncement of the judgment in the appeal on merits. Further it was held that in case, the Court comes to the conclusion that the application filed under Order 41 Rule 27 of CPC has to be allowed, then it has to pass a separate order and thereafter follow the procedure contemplated under Order 41 Rule 28 of CPC for recording additional evidence. Since the application which was filed under Section 391 of Cr.P.C., is akin to the application filed under Order 41 Rule 27 of CPC, the procedure which has been prescribed by this Court in Ravichandran and others, Vs. Paramasivam (cited supra) can be followed in this case also.

20. In Satishkumar Vs. Raj Kumar, (Criminal Revision No.3714 of 2018 dated 14.02.2018) a similar question arose before the Punjab - Haryana High Court wherein the said High Court has observed as follows:-

"It is the contention of learned counsel for the petitioner that an application for additional evidence under Section 391 Cr.P.C. was filed by the petitioner before the Appellate Court which application has been ordered to be taken up along with the main appeal at the time of final arguments. Counsel contends that had the application under Section 391 Cr.P.C. been considered and decided first and rejected, the petitioner would be able to avail the remedy to challenge the same before this Court. Because of the application being ordered to be heard along with the main appeal, the petitioner would lose that opportunity and chance to challenge the said order and, therefore, prejudice would be caused to the petitioner.

She, therefore, contends that the present petition be allowed and the learned Appellate Court be directed to consider and decide the application under Section 391 Cr.P.C. preferred by the petitioner for additional evidence prior to taking up the main appeal for arguments.

Having considered the submissions made by learned counsel for the petitioner and on going through the provisions of Section 391 Cr.P.C., I find that there is no mandate as such for deciding the application at an earlier date than the one which is

fixed by the Appellate Court for final disposal of the appeal. That discretion has been given to the Appellate Court to be exercised in the given facts and circumstances of each case. The discretion as has been exercised by the Appellate Court cannot be faulted with merely because the petitioner apprehends that the application for leading additional evidence preferred by him under Section 391 Cr.P.C. would not be accepted. In any case, the Appellate Court has directed the application under Section 391 Cr.P.C. to be considered and decided at the time when the appeal is listed for arguments. Obviously, in case the Appellate Court comes to a conclusion that the application for additional evidence is to be allowed as the evidence which is being sought to be produced is required for just and proper decision of the case, the Court would take further appropriate steps. This approach, in any case of the Appellate Court, appears to be fully justified keeping in view the fact that when the case is open for arguments, Court would be aware of all the details and evidence led by the parties before it.

It goes without saying that the application for additional evidence has to be considered and decided prior to the final appeal being decided or along with the main appeal itself. The contention of the counsel for the petitioner, therefore, cannot be accepted.

The order dated 06.11.2017 as passed by the learned Additional Sessions Judge, Faridabad, cannot be faulted with.

The present petition being devoid of merit, therefore, stands dismissed."

21. The aforesaid decision will squarely apply to the facts of this case. Therefore, the discretion as has been exercised by the Appellate Court cannot be faulted with, merely because the petitioner apprehends that the application for leading additional evidence preferred by him under Section 391 Cr.P.C., would not be accepted. The approach of the Appellate Court, appears to be fully justified keeping in view the fact that when the case is open for arguments, Court would be aware of all the details and evidence led by the parties before it. Whether, the application for additional evidence has to be considered and

decided prior to the disposal of the appeal or along with the main appeal is purely discretion of the Appellate Court. In this case, the Appellate Court has exercised its discretion and decided to take up the said application along with the main appeal. This court does not find any infirmity in the said order.

22. For the aforesaid reasons, this Court is of the view that this petition is devoid of merits. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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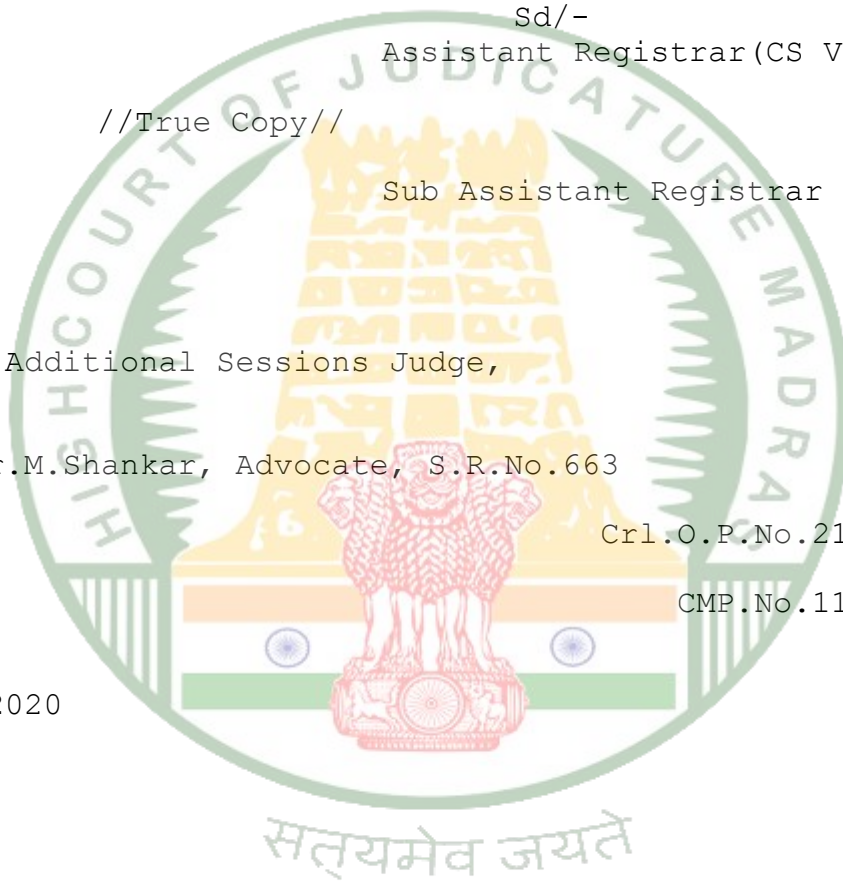
To

The First Additional Sessions Judge,
Chennai.

+lcc to Mr.M.Shankar, Advocate, S.R.No.663

Crl.O.P.No.21973 of 2019
and
CMP.No.11407 of 2019

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