IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR No.1141 of 2021 (O&M)
Decided on: 05.10.2021

Devinder Kumar

....Petitioners

Versus

Rajiv Bansal

....Respondents

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. Vipin Pal Yadav, Advocate
for the petitioner.

ARVIND SINGH SANGWAN, J.

Prayer in this revision petition is for setting-aside the order dated 22.07.2021 passed by the Additional Sessions Judge, Gurugram, vide which the application filed by the petitioner/accused – Devinder Kumar under Section 391 read with Section 311 Cr.P.C., to lead additional evidence was allowed.

Brief facts of the case are that the petitioner has filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short 'the N.I. Act'), against the respondent/accused – Rajiv Bansal. The trial Court, after recording the evidence, vide judgment of conviction and order of sentence dated 26.07.2016, held the accused liable of the offence and sentenced him to simple imprisonment for a period of 01 year for commission of the offence under Section 138 of the N.I. Act and to pay the compensation of Rs.20.00 lacs to the complainant.

It would be relevant to refer to the order dated 26.07.2016. The operative part of the said order, reads as under:-

"13. I have heard the rival contention of both the

parties and have minutely gone through the contents placed on record by both the parties. In the instant complaint, complainant contended that he has given a loan of Rs. 18,00,000/- to the accused through cheques. In his support, he examined CW1 to CW5 including himself. CW3 during his testimony categorically stated that Rs. 20 lacs were transferred vide two cheques bearing no. 012101 and 012102 of each Rs. 10 lacs from the account of complainant to the account of accused on 28.03.2012. Certified copy of which Ex. P11 & Ex. P12. On the perusal of above said documents as well as testimony of bank witness, it is crystal clear that two cheques were duly issued by the complainant in favour of accused and an amount of Rs. 20,00,000/- vide those cheques was transferred from his account to the account of the accused. However, the contention of accused that one RTGs of Rs. 15 lacs by complainant was done in favour of RBL and not in favour of accused. He further contended that RBL and Rajiv Bansal are two different identity and Rajiv Bansal is not concerned with RBL. On the other hand, counsel for complainant vehemently opposed the contention of accused by stating that Rajiv Bansal is the Director of RBL and the same has been proved by the testimony of CW5-Vipin Patni, Deputy Branch Manager of ICICI Bank, who submitted before the court that Rajiv Bansal is the Director of RBL Company. After hearing both sides and perusal of documents advanced by both the parties in this regard, this court is of considered view that matter involved in the instant case is relating to cheques in question amounting Rs. 18,00,000/-. It is the admitted fact by the accused that he has taken loan of Rs. 20,00,000/- from the complainant. This fact is also proved on the perusal of Ex. P11 & P12 which are certified copy of two cheques amounting Rs. 20 lacs. Therefore, there is no *issue of RTGs of Rs. 15 lacs in favour of RBL. Though, complainant during his testimony deposed before the court that he has given loan of Rs. 35 lacs out of Rs. 15 lacs were given through RTGs and remaining 20 lacs through cheques but the present matter is related to Rs. 20 lacs only which were given through cheques. Therefore, the question whether RBL and Rajiv Bansal are one and same person need not to be considered in the present complaint. As far as loan of Rs. 20 lacs is concerned, that is duly proved.*

14 & 15. XXXX XXXX XXXX

16. XXXX. The accused has contended that though he had taken loan of Rs. 20 lacs from the complainant but the same was repaid through RTGs and in cash. However, he did not adduce any document on record by which he could prove the factum of RTGs. He did not depose anywhere that RTGs, if any, was done by him in favour of whom and of what amount. He did not call any single bank witness to prove that alleged transaction. Though, complainant admitted that a repayment of Rs. 11 lacs, out of Rs. 35 lacs was done by accused through RTGs but accused did not adduce any evidence to prove whether the repayment of Rs. 11 lacs was against either Rs. 15 lacs through RTGs or Rs. 20 lacs through cheque. He examined DW1 in his favour who deposed before the court that Rs. 4.5 lacs were given by him to the complainant but he submitted that he did not take any receipt regarding such payment. The version of DW1, being highly doubtful, cannot be relied upon. Therefore, accused failed to prove his stand by not adducing any cogent evidence."

The respondent/accused preferred an appeal before the Lower Appellate Court and along with the appeal, he moved an application under Section 391 read with Section 311 Cr.P.C., for leading additional evidence.

In para 2 of the application, with regard to the observations made by the trial Court in para 16 of the judgment, it is stated as under:-

> *"2. That it has been admitted by the complainant himself that the appellant had returned a sum of Rs.11 Lacs through R.T.G.S., but inadvertently, the appellant could not produce his Bank Account Statements at the time of his evidence, showing that the amount of Rs.11 Lacs has been debited from his Bank Accounts and credited to the Bank Account of the complainant. However, the Account Statements of the appellant are already attached with the appeal filed by the appellant."*

The petitioner contested the application by way of filing a reply.

The Lower Appellate Court vide impugned order dated 22.07.2021, allowed the application filed under Section 391 read with Section 311 Cr.P.C., for additional evidence. The operative part of the said order, reads as under:-

> *"6. The nature of the evidence sought to be produced is documentary. Essentially, the appellant-convict seeks to bring in evidence which might be explanatory of the transactions between the parties. In the initial complaint under Section 138 of NI Act, the respondent-complainant had contended that the convict had taken a friendly loan of Rs.18 lacs and in discharge of this loan, the three cheques of Rs.10 lacs, Rs.5 lacs and Rs.3 lacs were issued which were later dishonoured. The complainant in his crossexamination has admitted that actually he had given a loan of Rs.35 lacs, out of which Rs.15 lacs were given through RTGS and the remaining Rs. 20 lacs were given through cheques. The Ld.Trial*

Court in its judgment in para no.6 has made certain observations that the accused did not adduce any document on record by which he could prove the factum of RTGS to establish that he had repaid some amount. The observation of the Court touches the core of the matter which relates to the financial transactions between the parties and issuance of cheques was a part of the mode of making those transactions. Rivetingly, the complaint was regarding a loan of Rs.18 lacs but the story of Rs.35 lacs was later introduced and now it must be explained, for the just decision of the case. The analysis of the bank statements of Devender Kumar, Rajiv Bansal as well as the company M/s RLB Enterprises Pvt. Ltd. is likely throw light on the root of the matter and may eventually help in reaching to the conclusion that the cheques in question were issued in discharge of legally recoverable debt. In this sense, the proposed evidence is essential for the just decision of this case. In any case, the respondent will have the opportunity to cross-examine the witness who brings such additional evidence. Largely, it is only a matter of putting the statements on record and analyzing the transactions. Of course, the perspectives given to such transactions would be a part of the respective contentions and those shall be taken up at the time of final disposal of the appeal. It is not that the appellant is taking a new defence. Such suggestions were given during the cross-examination of the complainant. The oversight of the previous counsel or the laxity to bring in affirmative evidence on such aspects cannot impede the right of the appellant to bring in admissible evidence in the shape of bank statements.

7. For the aforesaid reasons, the present application u/s 391 r/w Section 311 Cr.P.C. filed on behalf of the applicant-accused for additional evidence is hereby *allowed. Needless to say that any expression of this order shall not be construed to be opinion of the merits of the appeal."*

Counsel for the petitioner has argued that once the trial Court has recorded a finding that the accused has failed to prove his stand that one RTGS of Rs.15.00 lacs was done by the complainant in favour of RBL and RBL and Rajeev Bansal are 02 different identity and therefore, the complainant could not prove his defence by adducing any cogent evidence.

Counsel for the petitioner has further submitted that the finding of the trial Court is clear on this aspect that DW-1, who appeared in favour of the respondent/accused did not depose that RTGS, if any, was done by him in favour of whom and about what amount.

It is also submitted that allowing the application at this belated stage will adversely affect the right of the complainant as the trial Court has recorded a categoric finding that once the signatures on the cheques are proved, the presumption should go in favour of the complainant/petitioner.

After hearing the counsel for the petitioner, I find no merit in the present revision petition, for the following reasons:-

(a) It is well settled principle of law as held by the Hon'ble Supreme Court in the judgment <u>"Rambhau vs State of Maharashtra", Criminal Appeal No.636 of 1995</u>, that the Appellate Court has wide power under Section 391 Cr.P.C. to allow additional evidence even at an appellate stage subject to the condition that the same

is not going to cause any prejudice to the accused or amounts to re-trial or change the nature of the case of the accused or not to fill up the lacuna but to serve the ends of justice.

It is also held by the Hon'ble Supreme Court that the Appellate Court can take take additional evidence to rectify irregularity committed by the prosecution but not to rectify a defect and lacuna in the prosecution. The same principles of law is applicable for leading the defence evidence.

(b) In the instant case though, the initial burden was on the petitioner/complainant to prove the payment and receipt of the part payment, however as noticed above, the trial Court has put up the onus on the complainant by observing that he has failed to prove his stand by not adducing any cogent evidence.

(c) The admitted case of the parties is that the complainant set up his case that he has given a loan of Rs.80.00 lacs to the accused through cheques and CW-3 has stated that Rs.20.00 lacs were transferred vide 02 cheques of Rs.10.00 lacs each from the account of the complainant Devinder Kumar to the account of the accused – Rajiv Bansal on 28.03.2012 as per copy of the cheques Ex.P-11 and Ex.P-12.

(d) The complainant has also admitted that a repayment of Rs.11.00 lacs out of total Rs.35.00 lacs was done by the accused through RTGS, however, the

petitioner/complainant did not lead any specific evidence to prove whether the repayment of Rs.11.00 lacs was against the amount advanced through cheques or through RTGS and the trial Court has wrongly put the onus on the accused whereas it was for the complainant himself to prove this fact while leading the evidence and therefore, I find no illegality in the order passed by the Appellate Court that the bank statement of the petitioner/complainant Devinder Kumar, the respondent/complainant Rajiv Bansal as well as the company M/s. R.B.L. Enterprises Private Limited will clear this aspect of the case and will eventually help the Court to reach at a definite conclusion if the cheques were issued in discharge of legally enforcible liability or a recoverable debt and therefore, the proposed evidence to record the statement of the bank official will neither change the defence of the accused nor a new defence is being set up.

Needless to say that the petitioner/complainant will have a right to cross-examine the witness and put up his own case.

Accordingly, I find no merit in the present revision petition and the same is hereby dismissed.

(ARVIND SINGH SANGWAN)
JUDGE

05.10.2021
yakub

Whether speaking/reasoned Yes/No

Whether reportable: Yes/No