

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

CRIMINAL WRIT PETITION NO. 1306 OF 2021

Rishabh Mahendra Shah	...Petitioner
Versus	
The State of Maharashtra and Anr.	...Respondents

....

Mr.Prashant Pandey a/w. Mr.Aiqan Memon a/w Ms.Harshita Shroff,
Advocate for the Petitioner.

Mr. Yashpal Thakur, Advocate for Respondent No.2.

Mr. A. R. Patil, APP for the Respondent – State.

....

Digitally signed
by
DNYANESHWAR
ASHOK ETHAPE
Date: 2023.05.23
10:46:03 +0530

CORAM : PRAKASH D. NAIK, J.

DATE : 3rd AUGUST, 2022

PC :

1. The Petitioner was tried for offence under Section 138 of the Negotiable Instruments Act vide C.C. No.135/SS/2013 pending before the Court of learned Metropolitan Magistrate, 50th Court at Vikroli, Mumbai. Vide judgment and order dated 7th May 2014, the Petitioner has been convicted for an offence under Section 138 of the Negotiable Instrument Act and sentenced to suffer simple imprisonment of six months. The Petitioner was directed to pay amount of Rs.20,00,000/- as compensation to the complainant within one months. The Petitioner had challenged the judgment of conviction by preferring appeal before the Court of Sessions at

Mumbai viz. Criminal Appeal No.498 of 2014. The said appeal has been admitted by the Sessions Court and its pending for final disposal.

2. During the pendency of appeal, the Petitioner filed an application under Section 391 of Cr.P.C. for adducing the additional evidence on record more particularly to exhibit certain documents before the appeal is decided. The Respondent No.2 opposed the said application by filing reply. The learned Sessions Judge vide order dated 2nd February 2021 disposed off the application with direction to both the parties to file affidavit and counter affidavit.

3. The petitioner is aggrieved by order dated 2nd February 2021 passed by Sessions Court.

4. Learned Advocate for the Petitioner submitted that, order passed by the learned Sessions Judge is contrary to law. The affidavit contemplated in the impugned order is not evidence. It would not be possible to conduct the cross-examination. The object of Section 391 of Cr.P.C. is to give an opportunity to the party to adduce additional evidence. The petitioner filed an application under Section 391 of Cr.P.C. to exhibit certain documents before the appeal is decided. The direction issued by appellate Court has no legal sanctity. If the prayer in the application under section 391 of Cr.P.C. are not allowed, grave prejudice would be caused to the petitioner.

Appellate Court has failed to consider the scope of section 391 of Cr.P.C. The learned Sessions Judge has committed an error in not taking into account the additional evidence for securing the ends of justice. If the additional evidence is allowed, the legal liability against the Petitioner will collapse.

5. Learned Advocate for the Petitioner has relied upon the following decisions:-

- (i) Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra and Ors.¹
- (ii) Premlal and Ors. Vs. Kunti Bai and Ors.²
- (iii) Zahira Habibulla H. Sheikh and Ors. Vs. State of Gujarat and Ors.³
- (iv) Ramdas Tureha Vs. State of U.P. and Ors.⁴

6. Learned Advocate for Respondent No.2 opposed the relief sought in the petition. It is submitted that the appeal is pending since 2014. The petitioner has not endeavoured to proceed with the appeal. The application was preferred to delay the proceedings. The petitioner had ample opportunity during the trial to adduce the evidence which was not opted by him. While appeal was likely to be taken up for hearing, the petitioner presented the application under Section 391 of Cr.P.C to lead additional evidence and to exhibit

1 AIR 2013 SC 58

2 MANU/CG/0834/2019

3 MANU/SC/0322/2004

4 MANU/UP/1652/2021

certain documents. The Petitioner had attempted to file print out of chats on the mobile purported to have exchanged between the petitioner and Respondent No.2 and the bank details regarding the payment purported to have been made to Respondent No.2. The Petitioner has claimed that, during the pendency of appeal, he has paid Rs.19,20,000/- to Respondent No.2 other than the payment Rs.12,00,000/- and 10,00,000/-. Respondent No.2 did not admit contentions regarding the alleged payment. It was not the defence of the Petitioner that the payment was made in lieu of disputed cheques which was subject matter of the appeal. Any events which had occurred subsequent to the commission of offence and determination of the guilt of the petitioner are neither relevant nor necessary for deciding the legality, validity and correctness of the impugned order. The Respondent No.2 is not shown to have issued any receipt or acknowledgment in favour of the petitioner for appropriating the alleged payment against the cheques which are the subject matter of appeal. The alleged subsequent payment cannot wipe out offence committed by petitioner. The Respondent No.2 does not admit the genuineness, authenticity of the copies of the documents which are attempted to be produced before appellate Court.

7. The petitioner has been convicted for an offence under Section 138 of the Negotiable Instrument Act. The petitioner has preferred

an appeal challenging the judgment of conviction on 7th May 2014. The appeal was filed on 2nd June 2014. On 5th January 2019, the Petitioner filed an application under Section 391 of Cr.P.C. in Criminal Appeal No.498 of 2014. In the said application it was contended that, applicant/appellant is filing additional evidence and the same may be taken on record before the appeal is being decided as the same is vital change in circumstance regarding legal liability. The appellant has paid the respondent during the pendency of the appeal, Rs.19,20,000/- other than payment of Rs.12,00,000/- and 10,00,000/-. It was prayed that, the appellant may be permitted to file additional evidence and the same may be taken on record. The Additional evidence be taken on record and be read in evidence for deciding the appeal. The petitioner has annexed the additional documents which are in the nature of chats between the petitioner and complainant, certificate under section 65(b) of the Indian Evidence Act and bank details of the petitioner in regard to payment to complainant.

8. From the tenor of the application under section 391 of Cr.P.C., it appears that the petitioner is contemplating to file additional evidence in respect to the alleged payment made during the pendency of appeal other than the payment referred to therein. Thus, the petitioner is trying to place on record certain events which are

occurred allegedly after his conviction. The application itself does not satisfy the requirement of Section 391 of Cr.PC. The respondent No.2 has denied the claim of the Petitioner. The application also mentioned that, the petitioner is filing additional evidence and the same may be taken on record for adducing additional evidence in accordance with section 391 of Cr.PC. The documents cannot be tendered by filing an application with prayer to take the said documents on record and treat his evidence for deciding the appeal. In this context, the learned Sessions Judge has passed the order dated 2nd February 2021 observing that, the application discloses that the appellant wish to lead the additional evidence only in respect of making payment of Rs.19,20,000/- during the pendency of appeal and Rs. 22,00,000/- during trial of the case. There is no question of leading any additional evidence in respect of the fact which could not be brought to the notice of the trial Court. There is no dispute that the appellant could not bring the necessary facts before the trial Court. Now so far as the effect of making payment allegedly more than the amount of cheque in question during the pendency of appeal is concerned, same will be considered while hearing of the appeal. Being a subsequent development, the parties may bring that development on record by way of affidavits and counter affidavits along with appropriate documents. The same will be considered at

the time of hearing of the appeal. With this understanding the application is disposed off. Both the parties were directed to argue on appeal on next date positively since the appeal is of 2014. The decisions relied upon by learned counsel for the petitioner are of no assistance to him. In the case of Zahira Habibulla Sheikh and Others (supra) the accused were acquitted and judgment of acquittal was confirmed. Appeals were preferred before Supreme Court. One of the appellant had contended that she was forced to turn hostile by threats. The state had prayed for acceptance of evidence under Section 391 and Section 311 of Cr.P.C. In peculiar circumstances, apex Court directed re-trial of the case. It was observed that legislative intent in enacting section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under section 391. In the case of Ayaubkhan Noorkhan Pathan Vs. The State of Maharashtra and Ors. (supra) it was observed that Affidavit is not evidence within the meaning of section 3 of Indian Evidence Act. In premlal and Ors. Vs. Kunti Bai and Others (supra) it was observed that Affidavit is not evidence under the Evidence Act. The decision in Ramdas Tureha Vs. State of

U.P. and Ors. (supra) dealt with scope of section 391 of Cr.PC. The ratio of these decisions is not applicable to the present case. In the light of factual matrix of the case and observation made hereinabove, the relief sought in this petition cannot be granted.

ORDER

- (i) Writ Petition No.1306 of 2021 is rejected and disposed off.
- (ii) The hearing of Criminal Appeal No.498 of 2014 pending in the Court of Sessions at Greater Mumbai is expedited. The Sessions Court is requested to dispose of the appeal within a period of six months.

9. At this stage, the learned counsel for the Petitioner requested for continuation of interim relief granted by this Court vide order dated 12th March 2021. Since the petitioner intends to challenge this order before apex Court. Request for extension of interim relief is rejected.

(PRAKASH D. NAIK, J.)