

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

CRIMINAL WRIT PETITION NO. 2298 OF 2022

Vipul Pravinchand Parekh ...Petitioner

Versus

Messers Indian Chemical Corporation And Ors. ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 2299 OF 2022**

Vipul Pravinchand Parekh ...Petitioner

Versus

Messers Indian Chemical Corporation And Ors. ...Respondents

**WITH
CRIMINAL WRIT PETITION NO. 2300 OF 2022**

Vipul Pravinchand Parekh ...Petitioner

Versus

Messers Indian Chemical Corporation ...Respondent

CRIMINAL WRIT PETITION NO. 2301 OF 2022

Vipul Pravinchand Parekh ...Petitioner

Versus

Messers Indian Chemical Corporation
And Ors. ...Respondents

....

Mr. Mehul Rathod a/w Mr. D. Bhayani i/by M/s. KUT Legal, Advocate
for the Petitioner.

Mr. Vishal Kanade Ms. Neha Mehta, Mr. Mufaddal Paperwala, Mr. Umair Merchant i/by Neha Mehta & Co. Advocate for the Respondent.
Mr. H. J. Dedhia, APP for the Respondent – State in Writ Petition No.2298 of 2022.
Mr. S. R. Agarkar, APP for the Respondent – State in Writ Petition No.2299 of 2022.
Mr. A. R. Patil, APP for the Respondent – State in Writ Petition No. 2300 of 2022.
Mr. Arfan Sait, APP for the Respondent – State in Writ Petition No. 2301 of 2022.

CORAM : PRAKASH D. NAIK, J.

DATE : 8th JULY, 2022.

PER COURT:

1. The Petitioner is convicted for offence under Section 138 of the Negotiable Instruments Act, 1881 (for short “NI Act”) in C.C.No.5604217/SS/2019; C.C.No.5603681/SS/2019; C.C.No. 5604649/SS/2019 & C.C. No.5604645/SS/2019 vide Judgment and Order dated 16.10.2019 passed by the Court of Metropolitan Magistrate, 56th Court, Mazgaon, Mumbai, in each complaint. In C.C.No.5604217/SS/2019, the Petitioner is convicted and has been sentenced to suffer imprisonment of six months and directed to pay compensation of Rs.30,00,000/- to the complainant. In C.C.No. 5603681/SS/2019, the Petitioner is sentenced to suffer

imprisonment of six months and directed to pay compensation of Rs.75,00,000/- to the complainant. In C.C.No. 5604649/SS/2019, the Petitioner is sentenced to suffer imprisonment of six months and directed to pay compensation of Rs.17,00,000/- to the complainant. In C.C. No.5604645/SS/2019, the Petitioner is sentenced to suffer imprisonment of six months and directed to pay compensation of Rs.12,00,000/- to the complainant.

2. The judgment of conviction in each complaint has been challenged by preferring Appeals before the Court of Sessions for greater Bombay, viz. Criminal Appeal No.893 of 2019, Criminal Appeal No.890 of 2019, Criminal Appeal No.889 of 2019 and Criminal Appeal No.891 of 2019.

3. During the pendency of appeal, the Petitioner preferred applications under Section 391 of Cr.P.C. seeking permission to lead additional/further evidence in each appeal. The application was opposed by the complainant by filing affidavit-in-reply. Vide separate orders dated 11.04.2022, the applications under Section 391 of Cr.P.C. were rejected by the Sessions Court.

4. The Petitioner is challenging the Orders dated 11.04.2022 passed by the Sessions Court rejecting the prayer for additional/further evidence by preferring these Petitions under Article 227 of the Constitution of India.

5. Learned Advocate for the Petitioner submitted that, the impugned orders are erroneous and contrary to law. The Petitioner is in business of trading chemicals and allied products. The Respondent No.1 is a partnership firm which is importer, distributor and stockiest of chemical raw material. The Petitioner and Respondent No.1 were having running account for their business since 2016, whereby the Petitioner used to buy the chemicals from the Respondents and sell it to his clients. The Petitioner had issued post-dated cheques to the Respondents by way of security. In October 2018, the Petitioner received complaint from his client M/s. Kataria Plastics Pvt. Ltd. about the quality of chemical supplied and during the period from November 2018, the said goods were supplied by the Respondents to Petitioner. The dispute was in respect to aggregate amount of Rs.1,13,00,000/- worth goods supplied by Respondent No.1. The Petitioner had filed the suit seeking injunction against the Respondents. The Respondents registered an FIR against Petitioner. The Respondents filed four complaints for offence under Section 138 of NI Act. The total amount of cheques which was subject matter of the complaints was Rs.1,13,06,760/-. The Petitioner was convicted in all the complaints for offence under Section 138 of the NI Act. The appeal preferred by Petitioner challenging the conviction is pending before

the Court of Sessions. The Petitioner preferred an application in each appeal seeking permission to lead additional/further evidence. The Petitioner had sought permission to examine representative of Kataria Plastics Pvt. Ltd., representative of Cera Laboratory and permission to further cross-examine Respondent No.1 as per Section 391 of Cr.P.C. The Petitioner had supplied the goods to M/s. Kataria Plastics Pvt. Ltd. who raised the issue of inferior quality of goods with the Petitioner. The complainant had misused the cheques. Goods supplied by Respondent No.1 were tested by Cera Laboratory. The defence of Petitioner was based on the fact that, the goods supplied by Respondent No.1 were of inferior quality and therefore the Petitioner was not liable to pay anything to Respondents. The cross examination of respondent was not conducted effectively. The Advocate representing Petitioner failed to bring the true facts on record. It is necessary to examine representative of Kataria Plastics Pvt. Ltd and representative of Cera Laboratory on oath to bring the truth before the court and rebut the presumption. No prejudice would be caused to the complainant as they would have an opportunity to cross examine the witness. The additional evidence will bring the true and correct facts on record and the same is necessary to decide the appeal. The purpose of Section 391 of Cr.P.C. is not only for

bringing the new facts on record but also to bring facts in the interest of justice. The evidence sought to be brought on record by the Petitioner goes to the root of the matter. The learned Sessions Judge has committed an error in rejecting the application. The learned Sessions Judge has failed to appreciate the scope of Section 391 of Cr.P.C. and various decisions on exercise of powers under Section 391 of Cr.P.C.

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

- i) *Rajendra Prasad Vs. The Narcotic Cell Through its officer in charge, Delhi*¹.
- ii) *Zahira Habibulla H. Sheikh and Ors. Vs. State of Gujarat and Ors*².
- iii) *Gautambhai Bababhai @ Shantibhai Patel Vs. State of Gujarat*³.
- iv) *N.P. Selvam Vs. R. Balashanmugam*⁴.
- v) *Rameshbhai Jayendrabhai Modi Vs. State of Gujarat*⁵.

7. Learned Advocate for the respondent Nos.1 to 3 submitted that, the learned Sessions Judge has rightly rejected the application preferred by the Petitioner/accused. The applications were preferred to delay the proceedings before the Sessions Court which

1 AIR (1999) SC 292.

2 AIR (2004) SC 346.

3 LAWS (GJH) 2011 12 279

4 LAWS (MAD) 2009 7 475

5 LAWS (GJH) 2013 1 389

is evident from the rojnama. The attempt by accused is to filling up lacuna by preferring such applications. The defence of the Petitioner is that the goods were of inferior quality and although there was sufficient opportunity to the Petitioner, he did not examine the witnesses as prayed for in the application under Section 391 of Cr.P.C. The Petitioner was not precluded from adducing the evidence before the trial was concluded pursuant to his conviction. The complainant has been cross examined by defence. The Petitioner has made after thought attempt to adduce additional evidence which cannot be permitted. The Petitioner has contended that, he had filed a civil suit before the Civil Court. However, the civil Court refused injunction to the Petitioner. The learned Sessions Judge has assigned cogent reasons for rejecting the applications preferred by the Petitioner. The grounds urged by the Petitioner are devoid of merits.

8. The Petitioner was tried for offence under Section 138 of the NI Act in respect to dishonour of cheques. Four complaints were filed by Respondent No.1 for offence under Section 138 of the NI Act. The trial Court has convicted the Petitioner in all four complaints and the appeals challenging the judgment of conviction are pending before the Sessions Court.

9. Section 391 of Cr.P.C. empowers the appellate Court to take further evidence or direct it to be taken. In dealing with any appeal under the said 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 the Magistrate, or when the Appellate Court is a High Court, by a Court of Sessions or a Magistrate. It is settled law that the legislative intent in enacting Section 391 of Cr.P.C. 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. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the Appellate Court. [*Zahira Habibulla H. Sheikh and Ors. Vs. State of Gujarat and Ors.* (supra)]. The

object of Section 391 is not filling lacuna, but to sub-serve the ends of justice. An admission of additional evidence should not operate in a manner prejudicial to the prosecution or the defense. Though wide discretion is conferred by the Court, the same has to be exercised judicially and the legislature had put the safety valve by requiring recording of reasons is a condition precedent for exercise of power under Section 391 of the Code and an order bereft of reasons would tantamount to non-application of mind, rendering the exercise of power under Section, bad in law. (*Rambhau and Anr. Vs. State of Maharashtra*⁶). In *Ajay Kumar Garg Vs. Gaurav and Anr.*⁷ it is observed that, a bare reading of Section 391 of Cr.P.C. makes it clear that, the Section invests the Appellate Court with the power of record additional evidence, provided it is satisfied, for the reasons to be recorded that additional evidence is necessary. Since Section 391 of the Code is an exception to the general rule that an appeal should be decided on evidence which was before trial Court, power under the Section has to be exercised with caution and circumspection so as to meet the ends of justice and not as a matter of Course.

10. The Petitioner has been convicted by the Court of learned Metropolitan Magistrate vide Judgment and order dated

⁶ 2001 4 SCC 759

⁷ (2017) 11 SCC 469

16.10.2019. The Appeals were preferred before the Sessions Court challenging the conviction in November - 2019. The applications under Section 391 of Cr.P.C. were preferred in March 2022. During the trial the complainant adduced the evidence. The witness of the complainant was cross examined by the accused. The Petitioner had sufficient opportunity to place on record the evidence and conduct examination of witnesses. The Petitioner had availed an opportunity to testify himself and produced on record the documents of M/s. Kataria Plastics Pvt. Ltd. The complainant was cross examined on this aspect. The Petitioner was also cross examined at the instance of the complainant. The Petitioner/accused has examined himself in his defence and he has been extensively cross examined by the complainant. During his evidence, letters of M/s. Kataria Plastics Pvt. Ltd. were placed on record. The contention of the accused is that, he has raised the defence of providing the inferior quality of goods, in the reply to the statutory demand notice issued by the complainant. Thus, the accused was aware about the defence to be raised. The learned Sessions Judge, vide Order dated 11.04.2022 has observed that the record shows that, ample opportunities were granted to the accused to lead evidence. Nothing is brought on record by the accused that, he was precluded from adducing/bringing such

evidence on record. Non examination of the witnesses claimed by the Petitioner is not an ambiguity but lacuna on the part of the Petitioner/accused. The report of Cera Laboratory was not placed on record. Section 391 of Cr.P.C. cannot be used to fill up lacuna. The learned Magistrate appreciated the evidence and delivered the judgment of conviction. The grounds raised by the accused for leading additional evidence are not sufficient and proper to attract the provisions of Section 391 of Cr.P.C. I do not find any reason to deviate from the view taken by the appellate Court. In the present case, the accused was aware of his defence and he had sufficient opportunity to lead evidence. He had examined himself as defence witness. After the conviction, the attempt is made to fill up lacuna which cannot be permitted. No ground is made out to permit the Petitioner to adduce additional/further evidence. The Petitioner has not established that he did not get opportunity to lead evidence and there is sufficient cause for leading additional evidence. The application was not bonafide. The object of Section 391 of the Code is not for filling up lacuna but to sub-serve the ends of justice and the discretion under the said provision has to be carefully exercised with caution and circumspection so as to meet the ends of justice. The application under Section 391 is devoid of merits. The Petitioner was granted sufficient opportunity to produce

evidence and conduct cross examination. The Petitioner have produced evidence and cross examined witness and on the basis of evidence the trial Court has convicted Petitioner. The merits of appeal would be examined by Appellate Court. After a period of three years of filing appeal, the Petitioner had preferred the application for additional evidence. Hence, the Petitions are bereft of merits and deserves to be dismissed.

ORDER

Criminal Writ Petition Nos. 2298 of 2022,
2299 of 2022, 2300 of 2022 & 2301 of 2022 are dismissed.

(PRAKASH D. NAIK, J.)