

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3299 OF 2018

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Mrs. Pournima W/o. Kishor Pendke
aged about 57 years, Occ.- Business,
r/o. 34, Parag Apartment, Ring Road,
Kotwal Nagar, Nagpur

...Petitioner

Vs.

1. Ashok Manibhai Patel,
aged about 56 years, Occ. : Business,
having office at La-Kozy Mansion No.1,
Ground floor, 21, Chowpatty Sea Face,
Mumbai – 400 007

2. State of Maharashtra

... Respondents

Ms.Shilpa Pawar i/b Ms.Neha Bhide for petitioner.

Ms.Dimple Shah a/w. Mr.Siddhant Varil, Mr. Varun Shah and
Mr.Rahul Sabnis for respondent No.1.

Ms. Anamika Malhotra, APP for respondent No.2-State.

CORAM : N. J. JAMADAR, J.
Reserved for order on : 27th APRIL, 2022
Pronounced on : 6th JUNE 2022.

JUDGMENT :

1. Rule. Rule made returnable forthwith and with the consent of the learned counsels for the parties, heard finally at the admission stage.

2. The petitioner, who is convicted for an offence punishable under section 138 of the Negotiable Instruments Act, 1881 (The

N.I. Act, 1881') takes exception to an order passed by learned Additional Sessions Judge, Greater Bombay on an application (Exhibit 6) in Criminal Appeal No. 553 of 2016 dated 27th June 2018, whereby the prayer of the petitioner/appellant to lead additional evidence under section 391 of the Code of Criminal Procedure, 1973 ('the Code') came to be rejected.

3. The background facts leading to this petition can be stated in brief as under :

3.1 The respondent No.1-complainant lodged a complaint, being CC No.1335/SS/2015 (151/SS/2009) for the offence punishable under section 138 of the N.I. Act, 1881 with the allegation that the complainant had paid a sum of Rs.50,00,000/- believing the representation of the accused that the latter would execute an agreement for sale of the land situated at Nagpur. The accused could not execute an agreement for sale, as promised. Upon persuasion, the accused delivered two cheques; one of them being cheque No.0754270 drawn for a sum of Rs.35,00,000/- payable on 7th December 2008. Upon presentment, the said cheque ('subject cheque') was returned unencashed on account of insufficiency of funds. Despite the service of the demand

notice, the accused failed to pay the amount covered by the cheque and, thus, committed the offence punishable under section 138 of the N.I. Act, 1881.

3.2 The defence of the accused was two-fold. One, there was no transaction between the complainant and the accused and the subject cheque was delivered by way of security only. Two, the complainant was guilty of interpolating the date on the cheque and thereby the instrument was rendered void. It was alleged that the complainant had changed the date from '7-2-2008' to '7-12-2008' by inserting the figure '1' before the figure '2'. The accused had examined two hand-writing experts. A private hand writing expert, namely Mr. Kaushik, gave an opinion that the figure "1" in the month column of the date on which the cheque appeared to be payable was inserted before the figure "2" to make it payable on '7-12-2008' instead of '7-2-2008'. The learned Magistrate was, however, not persuaded to give primacy to the evidence of Mr. Kaushik to that of the Government hand-writing expert, who had expressed inability to give a definite opinion. Eventually, the accused came to be convicted for the offence punishable under

section 138 of the N.I. Act, 1881 and sentenced to suffer rigorous imprisonment for one month and pay fine of Rs.67,10,000/-, by judgment and order dated 25th June 2016.

3.3 The petitioner-accused preferred appeal, being Criminal Appeal No.553 of 2016. In the appeal, the petitioner preferred an application (Exhibit 6) seeking permission to lead additional evidence in the nature of tendering a photostat copy of the cheque, which bears the date '7-2-2008' and to lead the same in evidence as and by way of secondary evidence. In the application, the petitioner asserted that, after the decision by the learned Magistrate in the month of June 2017, while dealing with case documents, the petitioner found a photostat copy of the subject cheque. Since the photostat copy of the subject cheque clearly indicates that the subject cheque was payable on 7-02-2008, it is necessary to permit the petitioner to place the photostat copy of the subject cheque on the record of the court for a just decision of the case.

3.4 The respondent No.1-complainant resisted the application by contending that the entire exercise was

malafide. Controverting the claim of the petitioner that the petitioner could lay hand on the photostat copy of the subject cheque, the respondent No.1 asserted that the petitioner had procured a tampered photostat copy of the cheque by manipulation. An endeavour was made by the respondent to demonstrate as to how easily a photostat copy of a document can be procured by using devices like whitener and/or hiding a part of the document. The respondent denied that the additional evidence sought to be tendered by the petitioner is necessary for a fair decision of the appeal.

3.5 The learned Additional Sessions Judge was persuaded to reject the application holding *inter-alia* that the defence of the petitioner that there was unauthorised interpolation in the date of the subject cheque was already raised by the petitioner-accused and even evidence of handwriting expert was led to buttress the said defence. In that backdrop, in the opinion of the learned Additional Sessions Judge, the said exercise was not warranted as there was already evidence on record in the form of the opinion of the handwriting expert.

3.6 Being aggrieved, the petitioner has invoked the writ jurisdiction.

4. I have heard Ms.Shilpa Pawar, the learned counsel for the petitioner and Ms.Dimple Shah, the learned counsel for the respondent No.1, at some length. With the assistance of the learned counsels for the parties, I have also perused the material on record including the application seeking permission to lead additional evidence and a photostat copy of the cheque annexed thereto.

5. In order to properly appreciate the controversy raised in the instant petition, it may be apposite to extract, at this stage itself, the relevant averments in paragraph Nos. 4 and 5 of the application :

4] It is most respectfully submitted, that while dealing with the case documents, in the month of June 2017, she found a photostat of the cheque bearing No.0754270, dated 07-02-2008, with her, which clearly shows that, the said cheque has been tampered with the date/s of the cheque in question, by the complainant/respondent. Therefore, the same could not be filed before the Trial Court.

5] It is further most respectfully submitted that, in the interest of justice, the photocopy of the cheque in question may kindly be taken on record as additional evidence and also consider the same as secondary evidence, so as to meet the ends of justice. The appellant hastens to submit that the contention that cheque bearing No.0754270 never

issued on 07-02-2008 and that the complainant has tampered with the date and that there exists no legally enforceable liability on 07-12-2008, can be fortified from the opinion of the expert. The appellant submits that, in order to conclude the fair and conclusive decision of the appeal the instant application may kindly be allowed, in the interest of justice. Indeed, no effective and complete adjudication of the controversy is possible in absence of the secondary evidence, as prayed for.

6. From the perusal of the aforesaid averments, it becomes abundantly clear that the sole reason ascribed by the petitioner to lead additional evidence by invoking the provisions contained in section 391 of the Code is the discovery of the photostat copy of the cheque in the month of June 2017. Thus, according to the petitioner, it could not be tendered before the trial court. Indeed, there are averments in the application to the effect that the additional evidence sought to be led by the petitioner is necessary for a fair and just decision of the case.

7. In the aforesaid backdrop, the learned counsel for the petitioner strenuously submitted that the learned Additional Sessions Judge approached the controversy from an incorrect perspective. The fact that the petitioner had already raised the defence of interpolation in the contents of the cheque and led evidence in support thereof by examining the handwriting experts

could not have been justifiably arrayed against the petitioner. The very premise of the application of the petitioner that the additional evidence sought to be led by the petitioner would lend credence to the defence, was completely lost sight of by the learned Additional Sessions Judge. Instead, the learned Additional Sessions Judge proceeded on the premise that since the expert evidence was already on record, it was not necessary to permit the appellant to lead additional evidence. This approach of the learned Additional Sessions Judge, according to learned counsel for the petitioner, runs counter to the very object of incorporating of an enabling provision under section 391 of the Code.

8. To bolster up this submission, the learned counsel for the petitioner placed a strong reliance on a judgment of the Supreme Court in the case of *Brig. Sukhjeet Singh (Retd.) MVC Vs. The State of Uttar Pradesh & Ors.*¹, wherein, after adverting to the provisions contained in section 391 of the Code and the previous pronouncements, the Supreme Court observed that from the law laid down by the Supreme Court, it is clear that there are no fetters on the power under section 391 of the Code of the

¹ (2019) 16 SCC 712

Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.

9. Per contra, the learned counsel for the respondent No.1 stoutly submitted that the application for leading additional evidence under section 391 of the Code constituted a link in the chain of dilatory tactics adopted by the accused to defeat the legitimate claim of the complainant. The learned counsel urged with a degree of vehemence that the very premise of the application that, the photostat copy of the subject cheque was found in the year 2017, though the cheque was drawn in the year 2008, does not appeal to human credulity. There is no explanation much less reasonable one for not asserting the fact that a photostat copy of the cheque with the date 7-2-2008 was in existence at any point of time till the application came to be preferred.

10. Placing reliance on a judgment of the Supreme Court in the case of *Ashok Teharsing Bhutia Vs. State of Sikkim* ², wherein a note of caution was administered that exercise of the power of

² (2011) 4 SCC 402

permitting the additional evidence at the appellate stage must be sparing and only in exceptionally suitable cases where the court is satisfied that additional evidence would serve the interests of justice, the learned counsel for the respondent No.1 submitted that the case at hand does not warrant exercise of such power.

11. Section 391 of the Code reads as under :

“391. Appellate Court may take further evidence or direct it to be taken. :

(1) In dealing with any appeal under this 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 a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.”

12. In the case of ***Ranjan Dutta Vs. State of Maharashtra & Anr.***

³ , I had an occasion to consider the nature and import of the provisions contained in section 391 of the Code, in the context of

³ 2020(1) Bom.C.R. (Cri.) 707

the afore-extracted text and the governing precedents. The observations in paragraph Nos.11 to 15 are material and hence extracted below :

11 The text of sub-section (1), on a plain reading, indicates that a wide discretion is conferred in the appellate court to either take or direct to be taken the additional evidence. However, the discretion is controlled by two imperatives. One, the Court must come to a conclusion that the additional evidence is necessary. Two, the appellate court, if it admits the additional evidence, shall record reasons for the same. The expression, “*if it thinks additional evidence to be necessary*” indicates that it is not the right of a party to lead the evidence, but the evidence ought to be such which the appellate court deems necessary to be led for a just decision of the case. The emphasis appears to be more on the requirement of the court to promote justice rather than the desire of a party to lead evidence in support or negation of the charge. Undoubtedly, the phraseology of sub-section (1) of section 391 does not indicate the circumstances in which the discretion is to be exercised. However, having regard to the fact that the Code contains elaborate provisions for a fair trial by the trial court and the matter reaches the appellate court after conclusion of the trial, the recourse to the provisions contained in section 391 has to be made sparingly and in deserving cases where the dictate of justice commands.

12 A profitable reference can be made to a three Judge Bench judgement of the Supreme Court in the case of ***Rajeswar Prasad Misra Vs. The State of West Bengal & Anr.***⁴, wherein the supreme Court expounded the scope of the provisions contained in section 428 of the Code of Criminal Procedure, 1898, the precursor to section 391 of the Code. The observations of the Supreme Court in paragraph 9 are instructive and they are extracted below :

“(9) *Additional evidence may be necessary for a variety of reasons which it is hardly necessary*

4 AIR 1965 SCC 1887

(even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be 'said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise....."

(emphasis supplied)

13. The aforesaid pronouncement in the case of **Rajeswar Prasad Misra** (Supra) was followed by the Supreme Court in the case of **Rambhau & Anr. Vs. State of Maharashtra** ⁵, and a note of caution was administered. The court observed, in clear and explicit terms, that the provisions contained in section 391 cannot be restored to, to fill up the lacuna, but to subserve the ends of justice. It was in terms observed that the additional evidence cannot be and ought not to be received in such a way so as to cause any prejudice to the accused. The observations of the Court in paragraphs 2 to 4 are of material significance. They read as under:-

"2 A word of caution however, ought to be introduced for guidance, to wit: 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 re-trial or to change the nature of the case against the accused. This Court in the case of Rejeswar Prasad Misra v.

⁵ (2001) 4 SCC 759

State of West Bengal and another (AIR 1965 SC 1887) in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.

3 *Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependant upon the fact-situation of the matter and having due regard to the concept of fair play and justice, well being of the society.*

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 the lacuna but to sub-serve 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 the C.P.Code."*

(emphasis supplied)

14. In the case of ***Zahira Habibulla H. Sheikh & Another vs. State of Gujarat and Ors.***⁶, in the backdrop of the peculiar facts of the case therein, after adverting to the aforesaid pronouncement in the case of ***Rambhau & Anr.*** (Supra), the Supreme Court enunciated the object and scope of section 391 of the Code. The Supreme Court observed, *inter-alia*, as under :

"47The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person

6 (2004) 4 SCC 158

wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48 The 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.

49 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....."

50 In *Rambhau and Anr. Vs. State of Maharashtra* (2001 (4) SCC 759) it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The Court has to keep these salutary principle in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of reasons."

(emphasis supplied)

15. The aforesaid pronouncements were again followed by the Supreme Court in the case of ***Ashok Tshering Bhutia Vs. State of Sikkim***⁷ and again the extraordinary and exceptional nature of the power to admit additional evidence, at the appellate stage, was underscored. The observations in paragraphs 28 and 29

⁷ (2001) 4 SCC 402

read as under :

“Additional Evidence:

28 Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity.

29 The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. ([Vide Rajeswar Prasad Misra v. The State of West Bengal & Anr.](#), AIR 1965 SC 1887; [Ratilal Bhanji Mithani v. The State of Maharashtra & Ors.](#), AIR 1971 SC 1630; [Rambhau & Anr. v. State of Maharashtra](#), AIR 2001 SC 2120; [Anil Sharma & Ors. v. State of Jharkhand](#), AIR 2004 SC 2294; [Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.](#), (2004) 4 SCC 158; and [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#), AIR 2010 SC 2352).”

(emphasis supplied)

16. In the backdrop of the enunciation of the aforesaid legal position, reverting to the facts of the case, in order to appraise the correctness of the exercise of discretion by the appellate court, in the light of the averments in the application, extracted above, it

becomes evident that the sole ground sought to be put-forth by the petitioner-accused is of chancing upon a photostat copy of the cheque in the month of June 2017, post pronouncement of the judgment by the trial court. Interestingly, in paragraph 4 of the application, what the petitioner asserts is that the photostat copy of the cheque was found while dealing with the case documents. The petitioner neither asserts that she was not in possession of the document nor was she unaware of the existence of the said document. Moreover, it is not the case of the petitioner that the photostat copy of the cheque was allegedly found while perusing some other record. In contrast, the petitioner asserts that the photostat copy of the cheque was indeed found while dealing with the case documents. Meaning thereby, while perusing the documents pertaining to the subject prosecution.

17. At this stage, the time lag of almost 9 years assumes critical significance. According to the complainant, the subject cheque was delivered in the month of December 2008. The accused asserts discovery of its photostat copy in the month of June 2017. It would be difficult to accede to the submission on behalf of the petitioner that the petitioner could not have asserted the existence of or produced the photostat copy of the cheque, despite due

diligence.

18. Secondly, the nature of the documents sought to be adduced by way of additional evidence also assumes importance. A photostat copy by its very nature is vulnerable to allegations of manipulation. Different considerations come into play when a copying process in itself ensures correctness of copy's contents qua the original. In the absence of any contemporaneous material in the nature of acknowledgment or otherwise, a plea that a photostat copy of the instrument in question was found after about 9 years of its execution to bolster up the defence that when the original instrument was delivered, it was in a state, which the photostat suggests, cannot be readily acceded to. While considering a prayer for leading additional evidence, at the appellate stage, if the additional evidence sought to be led is of such character that its existence and authorship cannot be disputed, such evidence lends assurance to the exercise of discretion. Where, the evidence sought to be led is of impeachable character, like a photostat copy of a negotiable instrument, the exercise of discretion to allow leading of such evidence is conditioned by a greater caution.

19. In the case at hand, if the petitioner is allowed to lead the

evidence, as proposed, it has the propensity to reopen the entire trial, partaking the character

20. the aspect of the date on which the subject cheque was payable.

21. In the totality of the circumstances, the learned Additional Sessions Judge, in my view, committed no error in disallowing the applicant to lead additional evidence. In any event, the exercise of discretion by the learned Additional Sessions Judge is not vitiated by such elements of perversity or unreasonableness as would warrant exercise of extraordinary writ jurisdiction.

22. The conspectus of the aforesaid consideration is that the petition deserves to be dismissed.

23. Hence, the following order :

O R D E R

The Petition stands dismissed.

Rule discharged.

In the circumstances, there shall be no order as to costs.

(N.J. JAMADAR, J.)