IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1249 OF 2017

Randhir Bansilal Mangar ...Applicant

Versus

The State of Maharashtra and Another ...Respondents

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Mr.Yashpal Thakur i/by Mr.Mukund Pandya, Advocate for applicant.

Mr.Nilesh C. Ojha with Mr.Ravindra Mali, Vijay Karle, Shivchand Mishra, Dipali Ojha, Deepika Jaiswal, Snehal Surve, Siddhi Dhanskar, Abhishek Mishra, Pratik Jain, Advocate for respondent no.2.

Mr.Arfan Sait, APP, for Respondent No.1- State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 26th AUGUST, 2022.

PER COURT:

1. The applicant has challenged order dated 18th September, 2017 passed by learned Sessions Judge, Pune below Exhibit – 37 in Criminal Appeal No.406 of 2015, rejecting the said application whereby the applicant had sought permission to bring on record the additional documents.

2. The applicant is tried for offence under Section 138 of Negotiable Instruments Act, 1881 in relation to the complaint filed by Respondent No.2 before the Court of JMFC Pune. The proceedings were numbered as Summary Criminal Case No.906 of

2011. The case of the complainant is that the complainant and Kailash Ramchandra Chavan are doing business in real estate. The accused got acquainted with them in the year – 2007. The accused is also in the business of real estate. The accused had informed that he wants to purchase land for developer Hiranandani at Pawai, Mumbai. The accused also informed that Hiranandani wants to purchase land in Nashik and for that purpose the accused is directly dealing with him. The accused told the complainant and Kailash Chavan to bring good proposals, collect documents from landowners and fix the rates of land. The accused agreed to pay Rs.11,07,000/- to each of them. The landowners gave the amount to complainant and Kailash Chavan as it was agreed that they will be entitled to receive the amount from landowners and accused will receive the amount from Hiranandani. So far as purchasing of land at village Darumbare, Taluka Maval, the accused had informed the complainant that he had purchased 47.5 acres of land for Magestic Properties. This arrangement was there for procurement of land of 54.5 Acres. Accordingly the accused had given cash to Kailash Chavan and the complainant. Out of promises Rs. 20,00,000/- plus four-wheeler, the accused had paid Rs.4,00,000/- to each of them. The transaction had taken place from April 2007 to April 2008. Thereafter the accused had informed that instead of having transaction about purchase of land from Hiranandani through Megestic Properties Pvt. Ltd, the accused will have direct transaction with Hiranandani, concerned person of Evita Construction Private Limited and profit out of those transactions will be distributed amongst themselves. Through complainant and Kailash Chavan approximately 26 acres of land transaction was finalized for Hiranandani through accused. Average rate of per acre of land procured from villages was Rs.30,00,000/- to Rs.40,00,000/- and it was sold to Hiranandani i.e. Evita Construction Private Limited and others for Rs.90,00,000/- per acre. The accused had informed that, this was an independent arrangement between the accused, complainant and Kailash Chavan and Magestic Properties Pvt. Ltd. of Delhi should not informed about it. Considering the profit, the accused was to pay share of complainant and Kailash Chavan. 14 acres of land bearing Gat No.217 of Village Darumbre, Taluka Maval, Dist. Pune was also procured from Shri. Ramchandra Mahadu Kirwe and others by complainant and Kailash Chavan and 'Visar Pawtis' to that effect was executed directly with the accused. The original 'Visar Pawatis' were in control, power and custody of the accused. For long time the accused gave promises and did not settle the account of complainant and Kailash Chavan. The accused had agreed to give one flat of two bedrooms having approximate value of Rs.55,00,000/- to complainant and Kailash Chavan. Besides that, one more additional car was given to Kailash Chavan and complainant. After adjusting price of flat and cash, balance amount of profit was to be paid to complainant. In April 2010, the accused had informed that, it is not possible to procure the flat for them. It was also not possible to get car as promised and therefore after taking the accounts towards themselves, the accused was liable to pay Rs.5,20,00,000/- in discharge of the liability to pay the profit sharing in the land transaction. The accused had further informed that, instead of having payment to be made separately to complainant and Kailash Chavan, he would issue cheque in the name of complainant and accordingly the accused issued cheque of Rs.5,20,00,000/-. The accused had issued a cheque in discharge of his existing legal liability to pay the aforesaid amount. The said cheque was deposited by the complainant, however it was returned dishonoured with endorsement "Payment stopped by Drawer" vide Memorandums dated 27-10-2010. Notice was issued to the accused. Since the payment was not made, complaint was filed.

3. On commencement of trial, the evidence was recorded. On completing recording of evidence and after hearing both the sides, the Court of learned 26th JMFC, Pune, vide judgment and order dated 14th July, 2015 convcited the applicant/accused for offence under Section 138 of Negotiable Instruments Act, 1881 and sentenced to suffer simple imprisonment till rising of Court. He was directed to pay amount of Rs.5,20,00,000/- to the complainant by way of compensation under Section 357(3) of the Code of Criminal Procedure, 1973 within two months and in default to suffer simple imprisonment for six months.

4. The judgment of conviction was challenged by the applicant by preferring Criminal Appeal No.406 of 2015 before the Court of Sessions at Pune. The appeal is pending for final hearing. The applicant preferred an application for taking on record additional documents which has been rejected by order dated 18th September, 2017 which is under challenge before this Court.

5. Learned Advocate for the applicant submitted as under :-

i. The impugned order is contrary to law.

ii. The additional documents are required to be taken on record. The documents would enable the applicant to prove himself innocent.

iii. The relevant documents which are required to be taken on record during hearing of the appeal are copy of complaint dated 23-12-2010 addressed by the complainant to the Commissioner of Police, statement of account of State Bank of Hyderabad for the period 01-01-2007 to 01-04-2011, statement of account of the applicant at Kotak Mahindra Bank for the period 01-04-2007 to 06-12-2010, statement of account of applicant's wife at HSBC Bank, Pune, main branch dated 28-04-2009.

iv. The applicant is real estate consultant in Pune. He used to procure pieces and parcels of land for and on behalf of his clients M/s. Majestic Properties Pvt. Ltd and Prayas Buildwell Pvt. Limited from and out of the funds provided by them. The applicant had hired the respondent No.2 and CW No.2 Mr. Kailash Chavan and Abhijit Choudhary as helpers. The applicant had also made payments to Respondent No.2 and CW No.2, from and out of the funds received from the from Magestic Properties Pvt. Ltd and Prayas Buildwell Pvt. Ltd. On 30-04-2010, the applicant made full and final payment to the complainant and Mr. Kailash Chavan as well as Mr. Abhijit Choudhary. The applicant had made payment to the respondent

No.2 to the tune of Rs.30,00,000/- from July 2008 upto 30-03-2010, while Mr. Kailash Chavan received about Rs.11,50,000/- and Mr. Abhijit Choudhary received Rs.11,50,000/-.

v. The applicant had signed crossed blank cheque on 30-04-2010 bearing number 000295 drawn on Kotak Mahindra Bank for some proposed future transactions to be filled later for giving out to a farmer, if in case one of the deals went through. The respondent No.2 and CW No.2 were closely involved in the aforesaid new proposed transaction and the said cheque was given to them for being handed over to the farmer in case the deal went through. However, the proposed transaction was not finalised and the cheque remained unutilized. Respondent No.2 should have returned unutilized cheque to the applicant. The applicant could not trace back the aforesaid blank cheque. He issued stop payment notice to his bankers about the said cheque on 14-05-2010. The applicant had made entry of the cheque in booklet for record of all payments made by him during the same period. However, on 10-10-2010, the applicant received E-mail claiming total sum due to Respondent No.2 to the tune of Rs.1,26,30,000/-. One month prior to receiving of the said

E-mail the applicant had issued an E-mail to the Chartered Accountant setting out every factual detail pertaining to the full and final payment paid to Respondent No.2. The said E-mail makes it clear that the claim of the complainant is false.

vi. On 15-11-2010, the applicant being an authorized signatory of M/s. Prayas Buildwell Pvt. Ltd and M/s. Majestic Properties Pvt. Ltd had handed over vacant and peaceful physical possession of certain piece and parcel of land to M/s. Evita Constructions Pvt. Ltd. as instructed by Majestic Properties Pvt. Ltd and Prayas Buildwell Pvt. Ltd.

vii. The applicant received legal notice dated 24-11-2010 from complainant. It is only after receipt of the notice, the applicant came to know that the missing cheque was attempted to be illegally encashed by the Respondent No.2. This was the same cheque that was missing and was in fact in the possession of complainant. There is no agreement in existence, whether written or oral from applicant and Respondent No.2. There is no bill or invoice of any nature for an amount of Rs.5,20,00,000/- raised by the Respondent No.2 on the applicant. There was no assurance or commitment given to respondent by the applicant for any sum paid to the complainant.

viii. The complainant fraudulently misused cheque which was dishonoured by the bank and the instructions were given to stop the payment.

ix. The applicant forwarded complaint dated 23-12-2010 to the Commissioner of Police, Pune setting out all the facts and requesting the Police to take action. After waiting for the Police to take action, the applicant through his Advocate once again addressed letter dated 25-08-2015 to the Police Commissioner, Pune to enquire the status of the complaint dated 23-12-2010 under the provisions of Right to Information Act. The Police authorities have replied vide their letters dated 02-09-2015 and 20-10-2015 wherein they have acknowledged the receipt of the complaint dated 23-12-2010. During recording of the evidence of the applicant, the above letters could not be produced as they were not in existence and the examination in chief and cross examination of the applicant was completed on 18-12-2014. The fact that the applicant had filed complaint against the respondent way back on 23-12-2010 and had been following up with the Police authorities stands established by the said documents.

x. It is submitted that, for the just decision of the case, the appellate Court was empowered to take additional evidence on record. Additional evidence at appellate stage is permissible in case of failure of justice. Section 391 of Cr.P.C. is an exception to general rule that the appeal must be decided on the evidence which was before the trial Court. Merely on the ground that the documents were not relied upon during the trial, the Court cannot reject the application for additional evidence. The Sessions Court ought to have noted that in the facts and circumstances of the case for the just decision of the case, additional evidence was required as the additional evidence sought to be lead by the complainant was necessary.

xi. In addition to the aforesaid documents, the applicant also seeks liberty of this Court to place on record before the appellate Court, the Memorandum of understanding executed between Prayas Buildwell Pvt. Ltd. through the applicant and Magestic Properties Pvt. Ltd with M/s. Evita Constructions Pvt. Ltd. and another Memorandum of understanding dated 29-11-2007 between Magestic Properties Pvt. Ltd. & Mr. Niranjan Hiranandani. These documents are also vital and important which would falsify the claim of the complainant. These documents were not available at the relevant time. Hence, the applicant may be permitted to prefer application before the appellate Court to adduce additional evidence in the form of two memorandum of understanding.

6. Learned Advocate for Respondent No.2. submitted that there is no infirmity in the impugned order dated 18th September, 2017. No reasons mentioned by the applicant as to why he did not file these documents in the trial Court. The applicant cannot be permitted to bring on record the additional documents. The applicant is trying to fill up lacuna which is impermissible under the law. The powers under Section 391 of Cr.P.C. are required to be exercised in exceptional cases. The applicant has created new grounds. Due care ought to have taken by applicant and his Advocate. The claim of applicant is false. The complaint under Section 138 of Negotiable Instruments Act, 1881 was filed on 11th January, 2011. The trial Court recorded the evidence. The applicant had examined himself and another person as defence witnesses. The alleged complaint was made to the Police on 23-12-2010. The application through RTI was allegedly forwarded in the year – 2015. The applicant had examined himself as defence witness. His cross examination conducted at the instance of

complainant on 18-12-2014. He has stated that he has not filed any complaint in respect of theft of the cheque. He denied the suggestion that in relation to avoid legal consequences he had falsely mentioned about theft of the cheque. Nothing had prevented accused from bringing on record the documents which were already in force. The statement of the accused was recorded under Section 313 of Cr.P.C. Question No.9 indicate that it was put to the accused that it has come in evidence that in discharge of liability to pay profit sharing, he issued the cheque dated 30-04-2010 for Rs.5,20,00,000/- in favour of the complainant. The reply given by him was it is incorrect. The cheque was given without mentioning name and amount. Thus, the accused keeps on changing his defence. His pleadings in the application for adducing additional evidence is contrary to his defence. The documents were tried to be brought on record after a period of two years. The defence of the accused is false. Strict action for perjury is required to be initiated against the applicant. The application may be rejected. For initiating frivolous application before the Sessions Court and this Court, heavy costs may be imposed against the applicant.

7. Learned counsel for the respondent No.2 relied upon the

following decisions :-

i) ABCD V/s. Union of India and Others, (2020) 2 SCC 52.

ii) Sciemed Overseas Inc. V/s. BOC India Limited and Others (2016) 3 SCC 70.

iii) Baduvan Kunhi V/s. K.M.Abdulla in W.A.No.969 of 2016 passed by the High Court of Kerala at Ernakulam.

8. The complaint filed by Respondent No.2 relates to dishonour of cheque bearing No.000295 dated 30-4-2010 drawn on Kotak Mahindra Bank, Camp Pune. The case of the complainant is that the cheque was issued in discharge of liability to pay profit share in the land transaction. Complaint was filed by Respondent No.2 on 11-01-2011. Learned J.M.F.C. Pune issued process on 17-02-2011. Evidence of complainant was tendered in the form of affidavit in evidence. The complainant/respondent No.2 was examined through Advocate for accused/applicant on 14-03-2013. The evidence of CW-2 was tendered by affidavit and he was cross examined on 11-07-2013. On behalf of complainant CW – 3 was examined and cross examined on 03-12-2013. CW 4 was examined and cross examined on 17-02-2014. CW No.5 was examined and cross examined on 19-04-2014. Applicant/accused examined himself as defence witness on 10-11-2014. He was cross examined

in the cross examination. He had stated that, he had not filed any complaint of theft of cheque. The accused had also examined as DW-2 on 13-02-2015 and he was cross examined. Statement was recorded under Section 313 of Cr.P.C. on 21-07-2014. The alleged complaint to the Police was made on 23-12-2010. The statement of account were in existence before completion of the recording of evidence. It appears, RTI application in respect to the complaint of 2010 were made in 2015. Thus, the accused had sufficient opportunity to lead evidence before conclusion of trial. It is true that the additional evidence can be permitted in exercise of powers under Section 391 of Cr.P.C. in the interest of justice. The applicant has been convicted vide judgment and order dated 14-07-2015. The appeal was preferred before the Sessions Court immediately thereafter and the same is pending for final disposal. The application for bringing on record additional documents was preferred before the Sessions Court somewhere on 15-12-2016. The learned Sessions Judge has considered the submissions of both the sides and rejected the application. Although it is not specifically mentioned in the application before the Sessions Court (Exhibit – 37) that it is an application under Section 391 of Cr.P.C., considering the nature and the prayers sought in the said application it was indeed considered as application under Section 391 of Cr.P.C. The learned Sessions Judge while passing the impugned order has observed that, no reason is mentioned by the appellant as to why he did not file those documents in trial Court. He had already taken a defence in the trial Court that the disputed cheque at Exhibit – 81 was missing and complainant misused it. The appellant could have filed those documents during trial. Copy of letter dated 25-08-2015 seeking information in respect of report dated 23-12-2010 is not ground to allow for filing the proposed documents. The Court also took into consideration the decisions relied upon by both the sides. It was further observed that the accused have taken defence of missing of alleged cheque. It is misused by the complainant but he had not filed the documents which were in custody till decision of the trial Court.

9. The appellate Court has power to take further evidence or direct it to be taken by the trial Court. The object of taking additional evidence under Section 391 of Cr.P.C. is to ensure that justice is done between the prosecution and the accused. Additional evidence cannot be permitted at the appellate stage as of right and the appellate Court has to exercise its discretion on sound judicial principle. It is not arbitrary discretion while giving opportunity to

take additional evidence at the appellate stage, the Court is required to record its reasons. The power has to be exercised sparingly and only in suitable cases. No case is made out to set aside the impugned order. Considering the factual aspects, I am not inclined to issue any notice of perjury proceedings or impose costs upon applicant. This submission that two memorandum of understanding which were produced before the Court for the first time be permitted to be adduced in evidence by giving liberty to the applicant to prefer such application before the appellate Court cannot be accepted at this Stage. Although it is contended that, those documents were not in possession of the applicant/accused, permission to adduce documents would amount to filling up lacuna which cannot be allowed. In these circumstances I do not find any infirmity in the order passed by the sessions Court. Hence, the application deserves to be rejected.

ORDER

(i) Criminal Application is rejected and disposed off;

(ii) Hearing of Criminal Appeal pending before Sessions Court, Pune viz Criminal Appeal No.406 of 2015 is expedited;

(iii) The Sessions Court is requested to make an endeavour to dispose off Criminal Appeal No.406 of 2015 within a period of three months from the date of receipt of this order;

(iv) Prayer for seeking permission to file fresh application under Section 391 of Code of Criminal Procedure in respect of two memorandum of understandings dated 25th January 2008 and 29th November 2007, board resolutions dated 21st December 2007 and 31st December 2007 is rejected;

(v) It is clarified that the observations made in this order are for deciding this application and the Appellate Court shall not be influenced by the same and the appeal be decided in accordance with law;

(vi) No order as to costs.

(PRAKASH D. NAIK, J.)