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*Crl.M.P.No.3335 of 2022
in Crl.A.No.90 of 2022*

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D.BHARATHA CHAKRAVARTHY, J.

This is an appeal against an acquittal filed by the petitioner/complainant. The complaint is alleging an offence under Section 138 of the Negotiable Instruments Act, 1881. The case of the petitioner/complainant is that the second respondent/accused, who is also the proprietor of the first respondent/accused firm, was a co-employee and he became friendly with the complainant and borrowed a sum of Rs.13,00,000/- by giving a land document. Later on, the petitioner/complainant realised that the accused had already sold half of the portion of the land in the document to the third parties and upon confrontation, the second respondent/accused issued five post-dated cheques. Upon presentation of those cheques, they were returned and hence the complaint.

2. During the course of the trial, when ***Ex.D-4***, an agreement, dated 26.03.2015, was shown to the petitioner/complainant, during his cross-examination, the petitioner/complainant denied his signature in the said document. However, even after objection on the part of the



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petitioner/complainant, it was marked as a defence document during the defence evidence as **Ex.D-4**. Immediately, thereupon, the petitioner/complainant had filed a petition to refer **Ex.D-4** for forensic analysis so as to compare the signature contained in **Ex.D-4** with the admitted signatures of the petitioner/complainant. The said petition was dismissed on the ground that it is for the accused to prove the said document. The said order was passed in C.M.P.No.2731 of 2018 on 25.07.2018. However, the Trial Court rendered its judgment on 07.09.2018 very much relying upon **Ex.D-4**.

3. This apart, even though at the initial stage of the cross-examination of the petitioner/complainant, the respondent/accused did not deny the signatures in the cheques i.e., **Exs.P-1** to **P-5**, the same is denied belatedly during the course of the defence evidence. Both the said factors are taken into account for acquitting the respondents/accused. Therefore, in the present appeal against acquittal, this petition in Crl.M.P.No.3335 of 2022 is filed to refer **Ex.D-4** and to compare the signature of the petitioner/complainant in **Ex.D-4** with his admitted signature before the Court in the proof affidavit/deposition and similarly to compare the signatures contained in **Exs.P-1** to **P-5** of the respondents/accused and to



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compare the same with the admitted signatures contained in the proof affidavit/deposition.

4. This application is not resisted by the respondents/accused by filing any counter. When the matter came up for hearing on 28.06.2022, the learned Counsel for the respondents/accused was absent and *Mr.R.Sreerangan*, learned Counsel for the appellant made his submissions. Even after pass over, the learned Counsel for the respondents/accused was not present. So as to give one more opportunity, the matter was adjourned to 30.06.2022. On the said date also, the learned Counsel for the respondents/accused was absent and hence orders were reserved in the said application.

5. The law relating to the power of the Appellate Court to order/accept additional evidence under Section 391 of the Code of Criminal Procedure was laid down by the Hon'ble Supreme court of India in ***Zahira Habibulla H. Sheikh Vs. State of Gujarat***¹ and it is useful to extract the paragraph Nos.47 and 59 of the said judgment, which is as follows:-

¹ (2004) 4 SCC 158



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“ 47. Section 391 of the Code is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of a guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person 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



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under Section 391 is desirable.

51. Need for circumspection was dealt with by this Court in **Mohanlal Shamji Soni case** [1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] and **Ram Chander v. State of Haryana** [(1981) 3 SCC 191 : 1981 SCC (Cri) 683] which dealt with the corresponding Section 540 of the Code of Criminal Procedure, 1898 (in short “the old Code”) and also in **Jamatraj case** [AIR 1968 SC 178 : (1967) 3 SCR 415 : 1968 Cri LJ 231] . While dealing with Section 311 this Court in **Rajendra Prasad v. Narcotic Cell** [(1999) 6 SCC 110 : 1999 SCC (Cri) 1062] held as follows: (SCC p. 113, paras 7-8)

“7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not ‘fill the lacuna in the prosecution case’. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage ‘to err is human’ is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna



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which a court cannot fill up.

8. *Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.” ”*

(Emphasis Supplied)

6. Recently, in **Brigadier Sukhjeet Singh v. State of U.P.**², the Hon'ble Supreme Court of India, in paragraph Nos.23 to 26, held as follows:-

“ 23. The key words in Section 391(1) are “if it thinks additional evidence to be necessary”. The word “necessary” used in Section 391(1) is

² (2019) 16 SCC 712



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to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of the appellate court are contained in Section 386. In an appeal from a conviction, an appellate court can exercise power under Section 386(b), which is to the following effect:

“ 386. (b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;”

*24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in **Rajeswar Prasad Misra v. State of W.B.** [**Rajeswar Prasad Misra v. State of W.B., AIR 1965 SC 1887 : (1965) 2 Cri LJ 817**] Hidayatullah, J., speaking for the Bench held that a wide discretion is*



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conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held 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. Following was laid down in paras 8 and 9 : (AIR p. 1892)

“ 8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if 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,



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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.”

25. This Court again in *Rambhau v. State of Maharashtra* [*Rambhau v. State of Maharashtra*, (2001) 4 SCC 759 : 2001 SCC (Cri) 812] had noted the power under Section 391 CrPC of the appellate court. Following was stated in paras 1 and 2 : (SCC p. 761)

“ 1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same...

2. A word of caution however,



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*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 retrial or to change the nature of the case against the accused. This Court in **Rajeswar Prasad Misra v. State of W.B.** [**Rajeswar Prasad Misra v. State of W.B., AIR 1965 SC 1887 : (1965) 2 Cri LJ 817**] 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.”*

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 CrPC of the 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.”

7. A perusal of the above, it would be clear that additional evidence, if it is necessary to prevent a guilty man's escape through some careless or ignorant



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proceedings before a court or vindication of an innocent person wrongfully accused, then the Appellate Court has the discretion to accept/order taking of additional evidence, if there would be failure of justice without the additional evidence. In this case, to one way or the other arrive at the truth, it is necessary to compare the signatures in **Exs.P-1** to **P-5** cheques to determine whether the respondent/accused had signed the cheques or not as different stands have been taken during the trial. Similarly, when the petitioner/complainant has denied the signature in **Ex.D-4** and when he was diligent enough to file an application under Section 45 of the Evidence Act, it was rejected on the ground that it is for the accused to prove the defence document, but, however, when the document is taken on file as **Ex.D-4** and is relied upon while granting acquittal to the respondents/accused, the proceedings caused injustice both ways to the petitioner/complainant.

8. In that view of the matter, I am of the view that to arrive at the truth, it is necessary to resort to the exercise of additional evidence in this case. Therefore, while keeping Crl.A.No.90 of 2022 pending, this Crl.M.P.No.3335 of 2022 is



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ordered as follows:-

(i) The learned Judicial Magistrate, Fast Track Court (Magisterial Level-II), Poonamallee is directed to forward the proof affidavit filed by the petitioner/complainant and also his signature in the cross-examination/deposition, along with **Ex.D-4** to the hand writing expert so as to compare the signatures of the petitioner/complainant before the Court in the proof affidavit and in the cross-examination/deposition with that of **Ex.D-4** and arrive at a finding whether the signatures are of the same person or not;

(ii) The Trial Court is also directed to forward **Exs.P-1 to P-5** cheques and the proof affidavit filed by the respondents/accused and his cross-examination/deposition containing his signature before the Court to the Forensic Expert so as to compare the signatures in **Exs.P-1 to P-5** with that of the accused in the Proof Affidavit and Cross examination/deposition and find out if the said signatures and the admitted signatures of the second respondent/accused before the Court are signed by one and the same person and submit a report to the Court;

(iii) The Trial Court shall appoint an Advocate Commissioner and send the



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documents to the Forensic Expert of appropriate jurisdiction;

(iv) If the original records of this case are already called for and are before this Court or the Appellate Court, as the case may be, the records may be returned to the said learned Judicial Magistrate, Fast Track Court (Magisterial Level-II), Poonamallee, within a period of one week from today;

(v) The learned Judicial Magistrate may appoint an Advocate Commissioner and carry out the said exercise within a period of four weeks from the date of receipt of a copy of the order and the records to his file;

(vi) The Advocate Commissioner and the appropriate Forensic Expert shall complete the exercise and submit a report within a period of three months there from;

(vii) Upon receipt of the report, the learned Magistrate shall forward the same to this Court accordingly.

9. Call the main appeal after the receipt of the report from the Trial Court.

19.07.2022

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