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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: *July 07, 2022*
Decided on: *July 15, 2022*

\+ **CRL.M.C. 4803 of 2019 & CRL.M.A. 9360/2022**

HARKESH CHADHA ..... Petitioner
Through: Mr. Yatharth Rohila Advocates.

V

THE STATE AND ANOTHER ..... Respondents

Through: Mr.Ashok Kumar Garg, Additional Public Prosecutor for respondent no 1/State
Mr. Kanwal Chaudhary, Advocate for respondent no 2.

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CORAM:
HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT

1. This judgment shall decide present petition under section 482 Code of Criminal Procedure, 1973 (hereinafter referred to as **"the Code"**) for setting aside the order dated 02.07.2019 (hereinafter referred to as **"the impugned order"**) passed by the Court of Additional Sessions Judge-05, West, Tis Hazari Courts, Delhi (hereinafter referred to as **"the appellate court"**) in Criminal Appeal bearing no 103/2018 titled as **Harkesh Chadha V State & another** whereby an application under section 391 of the Code filed by the appellant was dismissed.

2. The factual background necessary to mention for disposal of present petition is that the respondent no 2/complainant has filed a complaint under section 138 of the Negotiable Instruments Act, 1881 titled as **Sanjay Dewan V Harkesh Chadha** bearing CC no 969/2016 on allegations that the petitioner hired services of the respondent No. 2 to provide food catering on 14.05.2006 on occasion of birthday of the son of the petitioner and the respondent no 2 raised a bill amounting to Rs.1,07,500/-. The petitioner issued a cheque bearing no 781861 dated 28.07.2006 amounting to Rs. 1,00,000/- drawn on Punjab and Sind Bank, Rajouri Garden to discharge said liability and said cheque was got dishonoured due to "closure of account" on presentation for encashment and the petitioner did not pay cheque amount despite notice dated 07.11.2006.

3. The petitioner vide judgment dated 12.03.2018 passed by the court of MM-01 (NI Act), West, Delhi (hereinafter referred to as **"the trial court"**) was held guilty for committing the offence punishable u/s 138 of the Negotiable Instruments Act, 1888 and was accordingly convicted. The petitioner vide order on sentence dated 20.03.2018 was sentenced till the rising of the court and to pay double amount of the cheque. The petitioner being aggrieved filed appeal bearing Criminal Appeal No 103/2018 titled as **Harkesh Chadha V State & another** which is pending adjudication before the appellate court.

4. The petitioner during the pendency of the said appeal, filed an application under Section 391 of the Code for placing on record there documents as additional evidence which were i) Birth Certificate and the School Identity Card of the son of the petitioner, namely Mohak Chadha, ii) Documents pertaining to catering business of the petitioner and iii) Records pertaining to existence of a chit fund committee by pleading that these crucial documents were left out as evidence inadvertently.

5. The appellate court vide impugned order dismissed the application under section 391 of the Code. The appellate court regarding documents sought to be placed on record held as under:-

> **1. Appellant has moved the present application under Section 391 of the Cr.P.C for leading additional documentary evidence. The documents sought to be produced as additional evidence are - Birth Certificate of the son of the appellant; a Surety Bond furnished by the Complainant (to the Sales Tax Authorities) wherein Appellant stood as a guarantor for the Complainant, to show complainant had previous knowledge about Appellant's catering business; ITR filed by Appellant for the Assessment Year 2004-2005, and certain documents showing existence of a Chit Fund involving the Appellant and Complainant.**
> **2. Before adverting to the merits of the application, brief factual background would be necessary.**
> **3. Complainant Sanjay Dewan filed a complaint against the appellant-accused under Section 138 of the NI Act after dishonour of a cheque of Rs.1lac which was purportedly given by the Accused-appellant to the Complainant in discharge of a catering invoice raised by the Complainant. The invoice, statedly, was in respect of a catering event organized by the Appellant to celebrate the birthday of his son. Before the trial court. Appellant-accused denied holding any such birthday function. It was submitted before the learned trial court by the Appellant-accused that the event is said to have been organized on 14.5.2006**

whereas his son was born on 9.2.2001. Consequently, there was no reason for him to have held a function in May i.e. 14.5.2006 for celebrating the birthday of his son when his birthday fell in February. Further, the major defense raised before the Trial Court was that the cheque in question was infact handed over to the Complainant as a security for payment of a chit fund contribution of one lac rupees on behalf of the Accused-appellant since the chit fund was being part managed by the Uncle of the Complainant. It was further asserted by the accused-appellant that though the cheque was handed over in 2004 and subsequently even the cash amount was handed over, the complainant did not return the cheque and instead altered the date on the cheque and thereafter, misused it. Arguments on the present application were addressed only on behalf of the Appellant-applicant. Same have been duly considered and-further, record has also been perused.

4. The Appellant's plea/submission that his son was born in February and consequently, there was no reason for him to have celebrated the birthday in May, was considered by the learned Trial Court. However, the plea was rejected on the ground that Appellant could have filed the birth certificate on record to prove his assertion but he did not do so.

5. Neither in the application at hand nor during the course of submissions, any reason has been put forth for not filing the birth certificate before the learned Trial Court except that it is material for just decision of the case. Reliance has been placed on a judgment delivered by the Hon'ble Supreme Court of India in Crl. A. No. 148 of 2019, cited as 2019 (2) JT 18 to support the argument in favour of allowing the present application for leading additional evidence even when such evidence could have been led before the trial court or that the application for the same was moved at a belated stage,

6. In regard to the relevance of proving birth certificate of son of the Appellant, it needs a highlight that DW2 Shri Ravinder Kumar Lamba admitted in his cross-examination that Complainant had organized the function for the

birthday of accused's son and had provided catering service. This witness further admitted that he had also attended the said function. Once one of the defense witnesses himself had admitted the material factual assertion of the Complainant that he had provided catering services for the birthday function of the accused's son (for which the cheque was issued so as to pay up the invoice), there remains no relevance to prove the birth certificate of the son of the appellant-accused.

7. The second document sought to be proved i.e. Surety Bond would only go to show that Complainant was aware that accused was also in catering business. This document, at best, if allowed to be read in evidence would contradict the Complainant since in his cross-examination, he denied knowledge about appellant-accused having been engaged in catering business. This contradiction does not in any manner affect the merits of the defense raised since appellant-accused did not assert that he never required the services of the complainant because he himself was a caterer.

8. The third document i.e. ITR of the Appellant does not appear to be relevant at all. No argument was addressed to highlight its relevance nor any is mentioned in the application at hand.

9. Lastly, the appellant wants to file contain documents to show that appellant and the complainant had monetary transactions in regard to a chit fund. The documents filed along with the application are not signed by anyone but are hand written notes. Additionally, the documents purport to be accounts of various persons for the year 2001 and 2002. It is not understandable as to how will the Appellant prove his assertion of handing over the cheque in question in the year 2004 to the complainant for the purpose of a claimed chit fund on the Strength of unsigned documents and which pertain to the year

10.The application at hand appears to have been moved only to delay the disposal of the Appeal. For the foregoing

reasons, the application is declined along with cost of Rs.2,000/- to be deposited with DLSA, West District.

6. The petitioner being aggrieved filed the present appeal and challenged the impugned order on grounds that the impugned order dated 02.07.2019 is bad in law and is against the law and fact. The appellate court has erred by not allowing the petitioner to place fresh evidence to rebut the reasons given in the judgment by the trial court and for just adjudication of the appeal filed by the Petitioner. The appellate court misinterpreted statement of DW2. The petitioner himself renders catering services and as such there was no occasion for the petitioner to take catering services from the respondent No. 2 for the celebration of birthday of his son. The documents pertaining to chit-fund business would show that the alleged cheque was never issued for the purposes mentioned by the respondent no 2 in the complaint. The petitioner by these documents could rebut the presumption raised against him by dishonoured cheque. The appellate court failed to appreciate the requirement of documents pertaining to the catering business of the petitioner. The dismissal of application under section 391 of the Code defeated the purpose of the legislature incorporating the section 391 in the Code. The petitioner was to be given opportunity to rebut preponderance of presumption of a liability in a complaint filed under section 138 of the Negotiable Instruments Act, 1888. The respondent no 2 could not prove that any event was held on 14.05.2006. The appellate court did not apply judicial mind while passing impugned order. It was prayed that the impugned order be set aside.

7. The object of judicial administration is to secure ends of justice. The courts exist for rendering justice to the people. Chapter XXIX of the Code deals with **"Appeals"**. Section 391 of the Code empowers the Appellate Court to take further evidence or direct it to be taken. Section 391 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.**
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> **(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.**

8. The relevant words incorporated in section 391(1) are **"if it thinks additional evidence to be necessary"** which implies necessary for deciding the appeal to secure ends of justice and there are no fetters on the power under Section 391 of the Code. The legislative intent in enacting Section 391 is to empower the appellate court to see that justice is done 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 allowing further evidence under Section 391. But such power must be exercised only in suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. The Supreme Court in **Rajeswar Prasad Misra V State of West Bengal and another**, AIR 1965 SC 1887 considered scope of section 391 and observed that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. The additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. It was observed as under:-

> **9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made 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.**

9. The Supreme Court again in **Rambhau and another V State of Maharashtra,** (2001) 4 SCC 759 had noted the power of the Appellate Court under section 391 of the Code and observed that there is available a very wide discretion in the matter of obtaining additional evidence in terms of section 391 of the Code. However 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. The Supreme Court in **Ashok Tshering Bhutia V State of Sikkim,** Criminal Appeal No 945 of 2003 decided on 25.02.2011 observed that additional evidence at appellate stage is permissible in case of a failure of justice but 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 was held as under:-

> **15. 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. 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.**

10. The Supreme Court in **Brig. Sukhjeet Singh (Retd), Mvc V The State of Uttar Pradesh,** Criminal Appeal No148 of 2019decided on

25th January, 2019 has rejected the findings given by the High Court while upholding decision of the Appellate Court in dismissing application under section 391 of the Code that the present exercise initiated by the applicant for filing additional evidence at such a belated stage appears to be with some ulterior *mala fide* motive or delaying the decision of the appeal to eternity. It was observed that this court has laid down that when it becomes necessary to take additional evidence, cannot be enlisted or enumerated in any fixed formula and it depends on facts of each and every case to come to a conclusion as to whether it is necessary to take additional evidence or not.

11. The Supreme Court in **Zahira Habibulla H. Sheikh and another V State of Gujarat and others,** AIR 2004 SC 346 while dealing with Section 391 of the Code held as under:-

> **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.**

12. The scope and magnitude of section 391 of the Code is also considered by different High Courts. The Delhi Court in **Mohd Salauddin V State & another,** Criminal Revision Petition bearing no 56/2007 decided on 20th March, 2015 while considering primary object of section 391 of the Code observed that the power under section 391 of the Code can be exercised to give correct and proper findings. It was held as under:-

> **The primary object of Section 391 Cr.P.C. is the prevention of 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 under Section 391 Cr.P.C. is desirable. Section 391 Cr.P.C. has been enacted for 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 Cr.P.C.**

13. The Madras High Court in **Munusamy V State,** Crl.A.No.723 of 2019 decided on 21st January, 2021 observed that the Court can exercise power under Section 391 of the Code and can allow the additional evidence in interest of justice if any material is available with the defence and not produced or suppose subsequently came to knowledge about the material, in the interest of justice. However court refused to entertain application under section 391 of the Code being after thought by observing that as the documents were available at the time of trial and examination of the witnesses, the documents were not suggested before the witnesses and the appellant not filed the documents at the earliest point of time. It was further observed that the appellant has invoked section 391 of the Code to protract the appeal and fill up lacunae and it cannot be invoked in any extraneous circumstances. It was further observed that even if the said documents are received as evidence and taken into consideration, the decision of the trial Court would not be changed. The Uttarakhand High Court in **Anshu Jain V State of Uttarakhand & another,** Criminal Revision No.80 of 2018decided on 25thFebruary, 2020 while upholding order of the appellate court whereby application under section 391 of the Code was dismissed observed that the revisionist has failed to even plead the necessary ingredients of Section 391 of the Code and there is no averment in the application that the document sought to be relied upon by the revisionist is necessary in the present case and the appeal would lead to failure of justice.

14. The counsel for the petitioner submitted written submissions and advanced oral arguments. The counsel for the petitioner argued that the birth certificate of son of the petitioner would prove that the birthday of son of the petitioner falls on 9th February and not on 14.05.2006 and as such there was no occasion for the petitioner to take catering services from the respondent no 2 and the petitioner himself is a caterer. The said defence taken by the petitioner was rejected by the trial court on ground that birth certificate of son of the petitioner was not produced during trial. The testimony of DW2 did not favour the respondent no 2.The application under section 391 of the Code filed by the petitioner should be allowed by the appellate court. The counsel for the petitioner argued that the impugned order be set aside. The counsel for the petitioner cited **Sukhjeet Singh V The State of Uttar Pradesh and others,** Criminal Appeal No 148 of 2019 decided on 25..01.2019 by the Supreme Court; **Ashok Tshering Bhutia V State of Sikkim,** Criminal Appeal No 945 of 2003 decided on 25.02.2011 by the Supreme Court; **Asharam and others V State,** Manu/RH/0418/2022 decided by the High Court of Rajasthan at Jodhppur; **Shushruti Souharda Sahakara Bank Niyamitha V S. Manjunatha,** Criminal Appeal No 544/2017 decided on 02.03.2022 by the High Court of Karnataka at Bengaluru; **Muhammad Shafi Ganai V State,** CRMC No 39/2017 decided on 21.12.2021 by the High Court of Jammu & Kashmir at Srinagar; and **Rangaraj Urs V J.T. Muniraju,** 2014 SCC Online Kar 12877.

15. The counsel for the respondent no 2 also submitted written submissions and advanced oral arguments. The counsel for the respondent no 2 argued that the present petition is wholly misconceived and is neither maintainable in law and facts. The petitioner after concluding of defence evidence in March, 2017 filed an application under section 91 of the Code read with section 45 of the Evidence Act which was dismissed vide order dated 09.08.2017 and Criminal Revision Petition was also dismissed vide order dated 09.01.2018.The appellate court in the impugned order rightly held that application has been moved only to delay the disposal of the appeal and the appellate court did not commit any infirmity or error in impugned order. The application under section 391 Cr. P.C. is to be considered by the appellate court with great care and caution. The application is liable to be dismissed.

16. The respondent no 2 in complaint filed under section 138 of the Negotiable Instruments Act, 1888 titled as **Sanjay Diwan V Harkesh Chaddha** bearing no 969/2016 as appearing from the judgment dated 12.03.2018 passed by the trial court alleged that the respondent no 2 being an event manager-cum-catering consultant was engaged by the petitioner to provide catering for 300 persons on 14.05.2006 and for said catering service, the respondent no 2 raised bill dated14.05.2006 amounting to Rs. 1,07,500 and the said bill after deliberations was settled for Rs. 1,00,000. The petitioner issued cheque bearing No. 781861 dated 28.07.2006 drawn on Punjab and Sind Bank, Rajouri Garden, New Delhi 110027 for Rs.1,00,000 which on presentation returned dishonoured on two occasions with remarks "account closed" vide returning memos dated 01.11.2006 and 01.11.2006. The petitioner did not pay cheque amount despite demand notice dated 07.11.2006. The respondent led evidence. The petitioner in statement recorded under section 313 read with section 281 of the Code on 02.02.2013 denied providing of catering services by the respondent no 2 and stated that the cheque in question was given to the maternal uncle of the respondent no 2 in respect of a committee/chit fund which was to be returned back after receipt of amount but the respondent no 2 did not return said cheque despite receipt of amount and was misused after alteration of date. The petitioner led defence evidence and examined himself as DW1 and

Ravinder Kumar Lamba as DW2.The trial court observed that the petitioner did not dispute presentation of the cheque for encashment and its dishonour due to "account closed" and service of demand notice. The trial court also observed that question which needs determination that whether a legally valid and enforceable debt existed qua the respondent no 2 and the cheque in question was issued in discharge of said liability/debt and referred section 139 of the Negotiable Instruments Act, 1888 which deals with statutory presumption that the cheque was handed over in respect of a debt or other liability and section 118 which provides that every negotiable instrument is presumed to have been drawn and accepted for consideration. The trial court also considered defence of the petitioner that cheque in question was handed over as security for payment owed to the uncle of the respondent no 2 in a chit fund transaction and subsequently said payment was made. The trial court did not accept said defense of the petitioner by giving detailed reasons in final judgment.

17. The petitioner wanted to place on record birth certificate of his son to establish that the date of birth of his son is 09.02.2001 and as such birthday of his son falls in month of February and there was no occasion for the petitioner to host a party on 14.05.2006. However DW2 Ravinder Kumar Lamba in cross examination admitted that the petitioner provided catering services for the birthday function of the son of the petitioner. The appellate court in impugned judgment also observed that the petitioner neither in the application nor during the course of submissions submitted any reason for not filing the birth certificate before the trial court and observed that such evidence could have been led before the trial court and the application under section 391 of the Code was moved at a belated stage. The appellate court also discussed relevance of proving birth certificate of son of the appellant in light of cross examination of DW2 who admitted that the respondent no 2 had organized the function for the birthday of son of the petitioner and provided catering service and held that there remains no relevance to prove the birth certificate of the son of the petitioner. The appellate court gave justified and logical reasoning while rejecting prayer of the petitioner for filing birth certificate of son of the petitioner.

18. The petitioner wants to file contain documents to establish monetary transactions in regard to a chit fund between him and the respondent no 2. The trial court in final judgment did not believe the defence of the petitioner that cheque was given to the uncle of the respondent no 2 by giving detailed reasons. The appellate court in impugned judgment also observed that the documents are hand written notes and not signed by anyone and the appellant would not be able to prove handing over the cheque in question in the year 2004 to the respondent no 2 on the strength of these unsigned documents. The appellate court by giving appropriate reasoning rightly disallowed prayer of the petitioner to place these documents as additional evidence.

19. The petitioner also did not put forward cogent reasons for placing documents pertaining to his catering business. The nature of business being carried by the appellant does not have any relevance in context of present dispute between the respondent no 2 and the petitioner. The appellate court rightly observed that surety bond sought to be proved would only show that the respondent no 2 was aware about catering business of the petitioner and ITR of the petitioner does not appear to be relevant.

20. The arguments advanced by the counsel of the petitioner are considered in right perspective and are without any legal force. The decisions of the Supreme Court and different High Courts reiterated legal position regarding section 391 of the Code and do not provide any support to pleas and arguments advanced on behalf of the petitioner.

21. The documents sought to be produced on record as additional evidence are not necessary to pronounce judgment and there would not be failure of justice if these documents are not allowed as additional documents. If the application under section 391 of the Code is allowed it would result in retrial of the case. The petitioner initiated legal proceedings for filing additional evidence at much belated stage with intention to delay final disposal of appeal. The appellant has not filed these documents at the earliest point of time. The petitioner was aware of these documents and in possession of these documents when the respondent no 2 filed the complaint under section 138 of the Negotiable Instruments Act, 1888. The documents were available at the time of trial and examination of the witnesses and even not suggested before the witnesses. The petitioner did not assign any reason of filing these documents at stage of consideration of appeal. The petitioner only mentioned that due to inadvertence documents could not be place on record which is not enough good and justified to allow application under section 391 of the Code. The application under section 391 of the Code is after thought and is filed to protract the appeal and fill up lacunae and for extraneous circumstances. The decision of the trial court would not be changed even if the these documents are received as additional evidence and taken into consideration as the trial considered the defence of the petitioner in detail and not accepted by giving detailed and cogent reasons.

22. The appellate court rightly dismissed the application under section 391 of the Code by considering every legal and factual position and appropriately observed that application have been moved only to delay the disposal of the appeal. There is no legal or factual infirmity in the impugned order which cannot be interfered. The present petition is without any merit, hence dismissed. The pending applications, if any, stands dispose of.

SUDHIR KUMAR JAIN,J.

JULY 15, 2022/*'j/kg'*