

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.295 OF 2023

Ratnakar s/o Sundarrao Sarvadnya

Petitioner

Versus

The State of Maharashtra & another

Respondents

Mr. R. S. Sarvadnya, Advocate for the petitioner.

Mr. V. S. Badakh, APP for the State.

Mr. N. S. Tekale, Advocate for respondent No. 2.

CORAM : R. M. JOSHI, J.

DATE : 27th JULY, 2023.

PER COURT :

1. This petition takes exception to the order dated 9th December, 2022, passed below Exhibit 29 in Criminal Appeal No. 23/2019.

2. Petitioner is convicted for the offence punishable under Section 138 of the Negotiable Instruments Act. He preferred appeal against the said order of conviction. In the appeal, an application Exhibit 29 came to be filed with the contention that the original complainant was working with him as a Manager and that evidence is available in this regard. Petitioner further stated that he is ready to produce the said evidence before the Appellate Court immediately.

It is also claimed that the petitioner is an old aged person and since the document in question is from Government office, it is necessary for the decision of the appeal.

3. Learned counsel for the petitioner states that only on the ground of delay, the learned Appellate Court has refused to entertain the application under Section 391 of the Code of Criminal Procedure. He further submits that for the purpose of just decision, additional evidence ought to have been allowed by the Appellate Court. To support his submission, he placed reliance on the judgment of Hon'ble Apex Court in the case of Brigadier Sukhjeet Singh (retired) MVC vs. State of Uttar Pradesh and others, (2019) 16 Supreme Court Cases 712.

4. No doubt, it is held by the Hon'ble Apex Court that the powers under Section 391 of the Code of Criminal Procedure are wide enough to take care of the situation wherein for the purpose of just cause and to avoid miscarriage of justice, additional evidence needs to be led. As per the above dictum, the power under Section 391 of the Code of Criminal Procedure being exception needs to be exercised sparingly and with circumspection. Thus, it cannot be permitted to

the prosecution/complainant to lead additional evidence as matter of routine course or as a right. A strong case needs to be made out for that purpose with justification to non-production of such evidence during trial. Pertinently, duty is cast upon party to show he was prevented from producing such evidence for the reasons beyond his control.

5. Hon'ble Apex Court in the case of Rambhau vs State of Maharashtra, (2001) 4 SCC 322, has held thus :

“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 powers being an exception shall always be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of powers under Section 391 since the same avoids denovo trial. It is not to fill up lacuna but to sub-serve ends of justice. Needless to record that on an analysis of Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of C. P. Code.”

6. It is therefore just and necessary for the appellant herein to justify non-production of the said evidence during the course of trial. Though it is argued before this Court that the additional evidence has come into the custody of the present petitioner after passing of the order of conviction, however, application Exhibit 29 filed before the Appellate Court is silent on the said aspect. Moreover, there is no further material on record to support such case. In the absence of any such pleading before the Appellate Court, on the basis of oral submission made across the bar, it cannot be held that such evidence was not available with the petitioner during the course of trial.

Perusal of the impugned order shows that the application has not been dismissed solely on the ground of delay. It is specifically observed by the Appellate Court that the contents of the application do not disclose any satisfactory ground for adducing additional evidence. Thus, this is not a case wherein the impugned order is passed without recording any reason. It needs to be considered that the delay mentioned in the order is an additional ground for its rejection and not the sole ground. Having regard to the fact that even petitioner himself does not claim that the evidence was

not available with him during the course of trial, such permission to lead evidence cannot be granted casually. If the applications are allowed in casual manner, then in almost every appeal, such application will have to be allowed irrespective of justification. In the facts and circumstances of the case, no infirmity is seen in the impugned order. Hence, petition is dismissed.

(R. M. JOSHI)
Judge

dyb