

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1877 OF 2022

Hari Om Enterprises
Through Proprietor
Namdev Laxman Hargude
Age : 48 years, Occu. : Business,
R/o. Theur Road, Kesnand,
Tq. Haveli, District – Pune. .. Petitioner

Versus

1. The State of Maharashtra
2. Uttam Shesherao Munde
Age : 66 years, Occu. : Agri. & Pensioner,
R/o. Indapwadi, Tq. Parli-Vajinath,
Dist. Beed .. Respondents

Mr. Sudarshan J. Salunke, Advocate for the Petitioner.
Mr. P. M. Kulkarni, APP for Respondent No. 1.
Mr. Avinash A. Phad, Advocate for Respondent No. 2.

CORAM : KISHORE C. SANT, J.

Date on which reserved for judgment : 11th April, 2023.

Date on which judgment pronounced : 06th June, 2023.

JUDGMENT :-

- . Rule. Rule made returnable forthwith by consent of the parties.
2. This petition is by the original accused whose application under Section 391 of the Code of Criminal Procedure (for short “Cr.P.C.”) came to be rejected by the learned Additional Sessions Judge,

Ambajogai in an appeal.

3. The facts in short are that the respondent No. 2 filed a complaint against the petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act (for short "N.I. Act"). The learned J.M.F.C. after trial held the petitioner guilty of an offence punishable under Section 138 of the N.I. Act by the judgment and order dated 04.01.2019. Being aggrieved by the said judgment and order, the petitioner preferred an appeal in the Court of learned Additional Sessions Judge, Ambajogai bearing Criminal Appeal No. 3/2019. The petitioner in the said appeal filed an application seeking permission to produce on record documents and to cross-examine the complainant.

4. The petitioner submitted in the application that though the petitioner has produced on record documents in the Trial Court that is account extract, however, inadvertently the same was not exhibited. It is submitted that, in view of the same it is necessary to conduct cross-examination of the respondent No. 2/complainant. He submits that, from the account extract it is clear that, from time to time the petitioner has transferred the amount in favour of the respondent No. 2. The said application came to be objected by the respondent No. 2 stating that at this stage no new evidence can be allowed. Even if the documents are not exhibited, it will not cause any hardship as those

documents are admitted.

5. The learned Additional Sessions Judge observed that inadvertently the documents are not exhibited. The documents however can be exhibited during appeal as the said documents are admitted by both the parties. The learned Additional Sessions Judge also relied upon the judgment in the case of Yogendra Bhatatram Sachdevev Vs. State of Maharashtra reported in 2003 (2) Cr.C.89 SC wherein, the Hon'ble Apex Court has held that the power under Section 391 be exercised to meet the ends of justice that is done to the accused on account of some irregularity while conducting trial. It is considered by the learned Additional Sessions Judge that in this case there was proper opportunity given to the petitioner to cross-examine the complainant before the learned Trial Court. Now asking to conduct further cross-examination would be filling up the lacuna in the case of defence of the accused. The learned Additional Sessions Judge thus rejected the application by order dated 09.12.2022.

6. Learned advocate for the petitioner vehemently argued that it is already recorded by the learned Court that the fact about the documents on record is admitted. The said documents are not exhibited that is also accepted by the learned Additional Sessions Judge. He invited attention to the order passed by the learned Trial

Court on application below Exh. 40. The said application was moved by the complainant calling Branch Manager for cross-examination. Though the said application was allowed he did not examine the Branch Manager. In view of the same the Court ought to have exhibited the documents so that those can be read into evidence. He submits that, even if the cross-examination is allowed, no prejudice would be caused to the respondents. He submits that the learned Additional Sessions Court ought to have considered the interest of justice which tilts in favour of the petitioner.

7. Learned advocate for respondent No. 2 submits that, this application is filed when the appeal was posted for hearing. The learned Trial Court had rejected similar application. Now by way of further cross-examination the defence is trying to change its case. In the learned Trial Court, the defence taken was that the cheque was stolen by someone and the same is misused. In the appeal, now he wants to bring on record that the amount of the cheque is already paid by the petitioner. He submits that, thus further cross-examination cannot be allowed to give an opportunity to the petitioner to change his defence and to introduce a new case.

8. Learned advocate for the petitioner relied upon the judgments discussed below :

9. In the case of Bipin Shantilal Panchal Vs. State of Gujarat and another reported in 2001 CRI.L.J. 1254, the Hon'ble Apex Court has held that, when any objection is raised to the admissibility of any material or the document or the evidence, the Court shall record such objections and to decide those at the stage of final judgment.

10. In the case of Rajendra Prasad Vs. Narcotic Cell Through its Officer-In-Charge, Delhi reported in AIR 1999 SC 2292, the Hon'ble Apex Court has observed that in the Criminal Court the defence would be entitled to recall witness under Section 311 of the Cr.PC. It is held that, the lacuna in prosecution is not to be equated with the fallout or an oversight committed by a public prosecutor during trial. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. It is thus held that the power to cross-examine any witness is plenary power and that can be exercised at any stage of the trial if Court finds the same to be necessary for a just decision of the case.

11. In the judgment of Eastern Equipment and Sales Limited Vs. Ing. Yash Kumar Khanna reported in (2008) 12 SCC 739, it was a case of

civil appeal wherein, the Hon'ble Apex Court has considered the provisions of Order 41 Rule 27 of the Code of Civil Procedure by holding that such applications are to be considered at the stage of final hearing.

12. In the case of **Ashok Tshering Bhutia Vs. State of Sikkim** reported in **2011 CRI.L.J. 1770**, the Hon'ble Apex Court has held that, to give additional evidence at appellate stage is permissible in case of failure of justice, however, such power must be exercised sparingly and only in exceptional suitable cases where the Court is satisfied that additional evidence would serve the interest of justice. The discretion would depend upon the facts and circumstances of individual case. The Hon'ble Apex Court has also considered the primary object of provisions of Section 391 of the Cr.P.C.

13. In the case of **Maria Margarida Sequeria Fernandes and ors. Vs. Erasmo Jack de Sequeria (Dead) through L.Rs.** reported in **AIR 2012 SC 1727**, the Hon'ble Apex Court has held that, in the trial it is against the case when the suit was filed for possession and the matter went to the Hon'ble Apex Court. It is held in the said case that truth must be foundation of justice and the judges should not sit merely as umpire during trial, but play active role to find out truth. It was case arising out of civil suit.

14. Learned advocate for respondent No. 2 relied upon the judgment in the case of Yogendra Bhagatram Sachdev Vs. State of Maharashtra and another reported in 2003 Bom. C.R. (Cri.) 810. It was a case under Section 138 of the N.I. Act. In the said case, the accused had filed an application under Section 391 to allow him to examine himself. The said application was rejected. This Court has held that at the stage of appeal the accused was trying to set up a new case. In view of that, it was held that it was clearly an attempt to improve on the defence, if not to set up a new defence altogether. The discretion is required to be exercised with circumspection and caution and such application be disallowed. It is held that, the power under Section 391 of the Cr.P.C. sought to be misused or abused and had rejected the application under Section 391.

15. By considering the above judgments this Court finds that, the application under Section 391 of the Cr.P.C. needs to be considered in the facts of the case. The principle underlying under Section 41 Rule 27 need not be considered while considering the application under Section 391 of the Cr.P.C. It also requires a consideration as to what is the nature of the evidence that is sought to be produced in the appeal. It is not a case of the petitioner in this case that he discovered some new fact or the document or material only after filing of the appeal. It

is also not a case that in spite of due diligence he could not get the material during the course of trial. In this petition there are two prayers (i) to allow to exhibit the documents which are already produced on record and (ii) to allow him to cross-examine the complainant on the aspect of payment of amount.

16. While considering both these aspects this Court finds that, so far as exhibiting the documents is concerned even the respondent has accepted that the documents are admitted by both the parties and those can be read into evidence. So far as the second aspect that is the cross-examination of the complainant, it is the case of the complainant that by way of cross-examination now the petitioner wants to set up altogether a new defence. The defence in the trial court is that the cheques were stolen whereas, from the application now it appears that the petitioner wants to make out a defence that the amount of the cheque is already paid and on that aspect he wants to examine the respondent No. 2. This is also recorded by the learned Sessions Judge. Looking at the judgment of the learned Trial Court it is seen that, in the learned Trial Court a defence was that the accused i.e. petitioner had never issued disputed cheque. It is again suggested that, the complainant had free access to the house of the accused and to the business place and thus, the complainant has stolen 3-4 blank cheques

signed by the accused. Thus, the defence was clearly of misuse of cheque or stealing of the cheques. Certainly, now from the application it appears that the petitioner wants to cross-examine the witness to show that he has already made the payment. The application therefore is not mere application for correcting the inadvertent mistake. So far as exhibiting of the document is concerned, the Court has already observed that the said documents would be considered. This Court thus finds that no case is made out to exercise the jurisdiction by allowing the petition.

17. This Court finds that, there is no merit in the petition and the same deserves to be dismissed.

18. The rule stands discharged.

(KISHORE C. SANT, J.)

P.S.B.