IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.607 OF 2020

Mr. Sanjay Yashwant Kandpile
Age 49 years, Occ : Business,
Residing at 5/10, Plot No.22,
Shree CHSL, Sector no.3E,
Kalboli Taluka Panvel,
New Mumbai 410218. …. Petitioner
(Orig.Accused)

Vs.

1. The State of Maharashtra

2. Mr Vinod S. Shandilya
Age 40 years, Occ: Business,
Plot no.115, RSC no.6,
Gorai-I, Borivali (W),
Mumbai 400 091.
& also at
39, Cijay Bldg,
Andheri Kurla Road,
Andheri (E), Mumbai 72. ….. Respondents.

Ms Divya Parmar, Advocate for petitioner.
Mr AR Kapadnis, APP for State/respondent no.1.
Mr V.S.Tiwari, Advocate a/w Ms Priya Muthupandi i/b Ms Priti V. Tiwari for respondent No.2.

Coram: R.N.Laddha, J.
Date : 19.10.2023.

P.C.:

Rule. The Rule is made returnable forthwith. Heard finally at the request and with the consent of the learned Counsel for the parties.

2. The legality, propriety and correctness of the Order dated 3.12.2019 passed below Exh.8 by the Additional Sessions Judge, Dindoshi, Mumbai, in Criminal Appeal No.64 of 2016, is assailed in this petition. The learned Additional Sessions Judge, by this order, rejected the application Exh.8 filed by the petitioner under Section 391 of the Code of Criminal Procedure, 1973.

3. The petitioner is an accused in a criminal case bearing CC No.4301895/SS/2008 instituted by respondent No.2/ complainant under Section 138 of the Negotiable Instruments Act, 1881. The accused and the complainant/ respondent No.2 were having friendly relations. The accused was having a petrol pump. He approached the complainant for a friendly loan of Rs.10,00,000/- for business purposes. Accordingly, respondent No.2 advanced a loan of Rs.10,00,000/- to the accused.

4. It is the case of the complainant that the accused executed declaration-cum-undertaking on 12.3.2008 in his favour and, to discharge his liability, issued a post-dated cheque bearing No.332204 dated 30.3.2008 for a sum of Rs.10,00,000/-. However, when the cheque was presented for encashment, it was dishonoured. Therefore, after completing the necessary formalities, he filed a complaint. The learned Magistrate, upon consideration of the evidence, found the petitioner/accused guilty and sentenced him to suffer simple imprisonment for one month and to pay compensation of Rs.10,00,000/- to the complainant with default stipulation. He, therefore, preferred an appeal against his conviction before the Court of Sessions. In this appeal, the petitioner/accused filed an application under Section 391 CrPC and sought permission to examine the Life Insurance Agent/officer, Income Tax officer and Handwriting Expert. The Additional Sessions Judge rejected the aforesaid application. Being aggrieved by that order, this petition under Section 482 of CrPC is preferred.

5. Ms Divya Parmar, the learned Counsel appearing on behalf of the petitioner, submitted that the impugned order is non-speaking, arbitrary and unfair. She submitted that

respondent No.2 had not produced any books of account, and no evidence was adduced to show the existence of any transaction between the accused and the complainant. She submitted that the LIC agent/officer is required to be examined as the disputed cheque was given to him as payment towards the LIC policy. She further submitted that the accused had denied his signature as it is in different handwriting and the ink is also different; therefore, the same is required to be sent to a handwriting expert. She submitted that the complainant had not shown this alleged amount in his income tax return. Therefore, it is necessary to examine the Income Tax officer. She submitted that by examining the aforesaid witnesses, no prejudice will be caused to the petitioner at all; on the contrary, the reality would come before the Court, and that would help the Court to do real justice.

6. Mr V.S.Tiwari, the learned Counsel for the complainant/ respondent No.2, submitted that even though the petitioner/ complainant has had enough number of opportunities to make such application before the trial Court, no such application was ever moved. He invited the attention of this court to the impugned order to submit that the learned Appellate Court has dealt with all the contentions of the

petitioner/accused and came to the conclusion that the application filed by the petitioner/accused was devoid of merits.

7. Section 391 of CrPC permits evidence to be taken in appeal, and for the right decision in the matter, the Appellate Court should have allowed the application. Section 391 CrPC says that if the Appellate Court considers such evidence to be necessary, it shall either record it or cause it to be recorded by the Magistrate. The introduction of Section 391 CrPC in the Statute has been for the purpose of making it available to the Court and not to fill up any gap in the prosecution. The parties, as of right cannot seek use of Section 391, but must convince the Court as to why the Court should exercise such power in their favour.

8. It reveals from the record that the accused did not enter into defence after his statement under Section 313 of CrPC was recorded. The accused did not apply before the Magistrate, and even did not apply immediately before the Sessions Court. Although an appeal against the conviction was filed on 15.3.2016, the application under Section 391 CrPC before the Appellate Court was filed only on 27.4.2017.

There is no explanation why the accused did not feel it necessary to apply before the Magistrate and even before the Sessions Judge instantly. The only inference that can be drawn is that the accused was never serious about examining these witnesses. It appears that only when the appeal came up for hearing that this application came to be filed.

9. Furthermore, in the instant case, I do not find that such examination of the witnesses is necessary. This I say because it appears from the judgment of the lower Court that the trial Court itself had compared the signature of the accused with his admitted signatures under Section 73 of the Indian Evidence Act. The learned Appellate Court has also observed in the impugned order that the complainant produced his income tax returns before the learned trial Court wherein he showed the amount of Rs.10,00,000/- outstanding against the accused. The petitioner/accused seeks permission to lead additional evidence to examine LIC agent/officer for the purpose of cheque bearing No.332205. However, it transpires from the records that the complaint was filed in respect of cheque bearing No.332204 and not in respect of cheque No.332205. The decision of this Court in ***H.K. Taneja v. Bipin Ganatra***[1] relied upon by the learned Counsel for the

1 *2008 SCC OnLine Bom 1211*

petitioner has no bearing on the case at hand.

10. Thus, the Appellate Court acting under Section 391 of CrPC has properly exercised its discretion to reject the application of the petitioner/accused to lead evidence.

11. In the circumstances, there is no merit in this petition, and the petition stands dismissed accordingly.

[R.N. Laddha, J.]