IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.
...

CRIMINAL APPLICATION (APPP) NO. 325/2018
IN
CRIMINAL APPEAL NO. 146/2018

Kuldip s/o Babarao Taral .. Applicant
versus
The State of Maharashtra & another ..Respondents
....
Ms.Apurva Kolhe, Advocate for the applicant
Mr. N.R.Rode, APP for Respondent No.1
Mr. S.O. Tapadia, Advocate for Respondent No.2
....

CORAM: ANIL L. PANSARE, J.
DATED : 3rd March, 2023.

PC:

Heard learned counsel for both the sides, at length.

2. By the present Application, the applicant/appellant is seeking permission to adduce additional evidence under section 391 of the Code of Criminal Procedure, 1973 (in short "the Code"). The applicant/ appellant has filed an Appeal against the judgment and order dated 13.12.2016 passed by the learned Judicial Magistrate, First Class, Court No.1, Daryapur in Summary Case No.187/2016 acquitting the Respondent No.2/accused for the offence punishable under Section 138 of the Negotiable Instruments Act (in short, the "N.I. Act").

3. It is the case of the applicant that the applicant-firm is a regular sales tax payee. The applicant is the original complainant. According to the applicant, there occurred transaction on 02.01.2016 for purchase of 50 bales of cotton between the applicant-firm and the respondent No.2-Proprietory concern M/s Baba Sai Corporation.

4. The learned counsel for the applicant submits that the contractual relation has been sufficiently proved by the applicant through the tax invoice receipts. The learned trial Court has, however, failed to appreciate the said fact and majorly on the basis of doubt created by the absence of signature on transport receipt, acquitted the Respondent No.2/accused. She further submits that the transaction under question has been sufficiently proved but to further substantiate and support the tax invoice and to leave no room of doubt regarding the transaction, it is extremely crucial to adduce additional evidence in the form of sales tax returns paid by the applicant on 29.02.2016. The applicant also intends to place on record, in the form of additional evidence, the ledger account maintained by the applicant to show the details of transaction dated 02.01.2016 and to conclusively bring forward the truth as to happening of transaction between the applicant and the accused/ respondent no.2.

5. I have gone through the application. The applicant has not pleaded in the entire application as to what prevented it from filing these documents before the trial Court. Hence, a query was made with the learned counsel for the applicant as to what prevented the applicant from adducing evidence before the trial Court. She spontaneously responded that the answer finds place in the judgment of the Hon'ble Apex Court in the case of *Brigadier Surjeet Singh vs. State of UP and others* reported in *(2019) Vol. 16 SCC 712*. My attention is particularly invited to paragraph nos. 22,23 and 24 which read thus:

"22. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with “Appeals”. Section 391 CrPC empowers the appellate court to take further evidence or direct it to be taken. Section 391 is as follows:

> *“391. Appellate Court 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 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.*
>
> *(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were enquiry.”*

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 to 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 retried 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 .B. AIR 1965 SAC 1887. Hidayatullah, J. speaking for the Bench held that a wide discretion is 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 into pronounce the judgment but because there would be failure of jsutice without it. Following was laid down in paras 8 and 9 : (AIR p.1892).

> *"8. ...Since a wide direction is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play ad 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 are 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, however he 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 be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence, 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 or justice dictate otherwise. "

6. As could be seen, the Apex Court, referred to another judgment in the case of *Rajeswar Mishra vs. State of W.B. reported in AIR 1965 SC 1887,* which held that the wide discretion is conferred on appellate court and the additional evidence may be necessary for variety of reasons. It further held that for additional evidence must be necessary not because it would be impossible to pronounce the judgment but because there is failure of justice without it. The Apex Court has also held that power must be exercised sparingly and only in suitable cases. It is then held that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless requirements of justice dictate otherwise.

7. The learned counsel for the applicant, by ignoring all other findings of the Apex Court has harped upon the expression, "unless the requirements of justice dictate otherwise" to contend that in the present case there is requirement of leading additional evidence to render the justice.

8. Ms.S.O.Tapadia, the learned counsel for the respondent No.2 has correctly countered the submission by contending that the argument is misplaced. The applicant has neither pleaded in the application nor made an attempt to even answer the query made by the court as to what prevented the applicant from filing documents and leading evidence before the trial Court. The judgment of the Apex Court is taken aid of to argue that as of right and whenever the applicant desires, it can lead additional evidence.

9. In my considered view, this is not the scope and ambit of Section 391 of the Code. The applicant is/ was duty bound to firstly plead in the application as to what prevented her from filing the documents and leading evidence which the applicant intends to lead as additional evidence and secondly, when a specific query was made by the Court, the applicant ought to have answered the same. Having failed to do so, the application is liable to be rejected on this count itself. It is so because even the Hon'bl Apex Court has held that the power must be exercised sparingly and that order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it.

10. Nonetheless, it would be appropriate to understand as to what the applicant intends to place on record in the form of additional evidence and the reasons for doing so.

11. Ms. Kolhe, learned counsel for the applicant has contended that to prove contractual relations between the applicant and the respondent no.2, the documents under question i.e. Books of Accounts and Ledger Book are required to be placed on record. She has further argued that there is as such no need to submit aforesaid documents inasmuch as issuance of cheque by the non-applicant in favour of the applicant itself is sufficient to prove the contractual relations. It is also the case of the applicant that the tax invoices placed before the trial Court were sufficient to establish the transaction. According to her, the additional evidence is required to leave no room for doubt regarding the transaction.

12. Thus, in a way, it has been argued that though the evidence has been led, the trial court has committed error in not appreciating the same as required under the law. It is then suggested that the additional evidence is being led by way of abundant precaution.

13. This submission, to my mind, is contrary to the law laid down by the Apex Court in Brigadier's case *(supra)*. The learned counsel for the applicant has not even argued as to how would there occur failure of justice if the applicant is not allowed to lead additional evidence. In fact, the argument is suggestive of the fact that there is ample evidence on record but the Court below failed to appreciate the same. If that be so, according to the applicant itself there is no need to lead additional evidence.

14. Thus, the applicant has failed to make out a case. Nonetheless, if it is found, even at the stage of final hearing that additional evidence would be necessary, this Court can permit the applicant to lead evidence at that sage.

15. With the above observations, the application is rejected.

[ANIL L. PANSARE, J.]

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