

118

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-41498-2023 (O&M)
Date of decision: 23.08.2023**

M/s Manikaran Sales and another

....Petitioners

Versus

Vivek Gupta

....Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present:- Mr. S.S. Behl, Advocate
for the petitioners.

PANKAJ JAIN, J. (ORAL)

Present petition under Section 482 Cr.P.C. impugning order dated 11.08.2023 (Annexure P-9) passed by Ld. Additional Sessions Judge, Ludhiana in appeal No.26/2017 whereby the application filed by petitioners under Section 391 Cr.P.C. has been rejected.

2. Petitioner No.2 earned conviction in a complaint filed against him for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 vide judgment dated 14.12.2016 (Annexure P-5). While leading defense evidence before Ld. Trial Court the petitioners sought to summon certain police officials who as per them have conducted an inquiry on their complaint filed with the police alleging forgery of the cheques. After the police officials failed to appear, the evidence of the petitioners was closed vide order dated 16.03.2016. Against the said order,

the petitioners preferred a revision. Admittedly, the Revisional Court granted three opportunities to the petitioners to lead their defense evidence. It is being claimed by counsel for the petitioners that despite having been served the police officials they failed to appear and thus after expiry of those three opportunities the judgment of conviction was passed. In appeal, the instant application under Section 391 Cr.P.C. was preferred, whereby the petitioners have sought to summon the same official witnesses in their defense evidence. The application now stands rejected by the Appellate Court holding that the evidence being sought to be produced by resorting to Section 391 Cr.P.C. has no effect on merits of the case.

3. Mr. Behl, counsel for the petitioners while assailing order passed by the Appellate Court has contended that the Appellate Court failed to appreciate that petitioners were not granted sufficient opportunities before the Trial Court to lead their defense evidence and thus the present application was moved and the same would fall within the ambit of Section 391 Cr.P.C. which has been interpreted by the Apex Court in the case of ***Brig. Sukhjeet Singh (Retd.), Mvc vs. The State of Uttar Pradesh, (2019) 16 SCC 712*** as under:-

“XXXX XXXX XXXX

20. We have considered the submissions of the parties and have perused the records.

21. In the present appeal, we are concerned only with the rejection of application filed by the appellant under Section 391 CrPC before the Sessions Judge in the criminal appeal filed by him against the conviction order, whether the Sessions Judge committed error in not exercising power under Section 391 CrPC to permit the appellant to lead additional evidence is a question to be answered. Whether the High Court committed

error in not exercising power under Section 482 CrPC so as to secure the ends of justice?

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 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.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.”

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 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 re-tried 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 W.B.* AIR 1965 SC 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 to pronounce judgment but because there would be failure of justice without it. Following was laid down in paras 8 and 9 :

“8. ... Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and 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 the 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, 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.”

25. This Court again in *Rambhau v. State of Maharashtra* [*Rambhau v. State of Maharashtra*, (2001) 4 SCC 759] had noted the power under Section 391 CrPC of the appellate court. Following was stated in paras 1 and 2 :

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same...

*2. A word of caution however, ought to be introduced for guidance, to wit : that this 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. This Court in *Rajeswar Prasad Misra v. State of W.B.* [*Rajeswar Prasad Misra v. State of W.B.*, AIR 1965 SC 1887] in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.”*

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 CrPC of the appellate court. All powers are conferred on the court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.

XXXX XXXX XXXX”

4. The aforesaid judgment has been further relied upon by the Coordinate Bench of this Court in ***Balbir Singh vs. Kulwant Singh, 2019 SCC OnLine P&H 6304***

5. I have heard counsel for the petitioners and have gone through record of the case.

6. In order to appreciate the controversy involved in the present *lis* it will be apposite to peruse the observations made by the Appellate Court while declining application under Section 391 Cr.P.C. which reads as under:-

“xxxx xxxx xxxx xxxx

8. *In cross-examination the complainant has categorically stated that his firm is registered firm and he has not brought registration certificate in the court, but he can produce the same. Accused/appellant examined DW.1 Harshdeep Singh official of Axis Bank, DW.2 Amit Aneja official of ICICI Bank, DW.3 Aditya Kumar Shukla official of income tax department and Rajan Assistant Manager of Union Bank of India as DW.4. Accused/appellant/applicant himself did not appear to depose as witness u/s 315 Cr.P.C. There is no evidence on record produced by the accused that there was an oral partnership of accused with complainant. There is no evidence on record produced that cheques were given as security. The case was pending before the Court for adjudication and accused/appellant/applicant had already appeared in the Court and he should have lead his defence in the Court, instead of filing complaints before Commissioner of Police. It was the Court to adjudicate the matter and the statements recorded by the police during inquiry has no bearing or effect on merits of the case. Accused had opportunity to summon the record from concerned department and to cross-examine the complainant on all aspects, if he wanted to prove that invoices or bills as forged and fabricated. Any compromise effected before police cannot be taken into consideration. It is not explained by accused that how and when video clips were recorded and how the same are admissible in evidence, which are recorded by ACP. Moreover this practice is totally against the spirit of law that parallel inquiry or proceedings are going on before the police, when case is pending before the competent court of jurisdiction. Accused/appellant had already availed sufficient opportunities to adduce the evidence in his defence. But no such evidence has come on record from which any inference can be drawn that*

inquiry conducted in parallel to court proceedings in any way relevant. In the application Id. counsel for the appellant mentioned case laws titled as “ Shailender Kumar Vs. State of Bihar” (2002) 1 SCC 655, “ Zahira Habibulla H. Sheikh Vs. State of Gujrat” (2004) 4 SCC 158, “ Sudevanand Vs. State” (2012) 3 SCC 387, “ Brigadier Sukhjeet Singh Vs. State of Uttar Pradesh” (2019) 16 SCC 712 & “ Balbir Singh Vs. Kulwant Singh” 2019 SCC Online P&H 6304.

9. No doubt there is provision enshrined u/s 391 Cr.P.C. for affording an opportunity to the applicant to lead additional evidence, but as per section 391 Cr.P.C. the application can be allowed if Appellate Court thinks that additional evidence is necessary for proper adjudication of the matter, but in the present case, complainant wants to adduce the evidence, which cannot effect the merits of the case or which is not necessary for proper adjudication of the matter in dispute. As already discussed after filing the complaint u/s 138 N.I. Act by the complainant, accused appeared in the proceedings and thereafter moved an application before Commissioner of Police. It is very strange that the police officials started parallel inquiry to the trial pending before the Trial Court. The police official conducted inquiry should have restrained himself and should have advised the appellant/applicant to put his case before the Court in his defence. So, I do not find any reason or merit to allow this application, which is only filed to linger on the matter.

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7. Law with respect to Section 391 Cr.P.C. stands authoritatively laid down by the Apex Court in the case of ***Rajeswar Prasad Misra vs. State of West Bengal and another, AIR 1965 SC 1887*** which has been followed in ***Brig. Sukhjeet Singh (Retd.)'s case (supra)*** as well. The relevant part of the judgment passed in ***Rajeswar Prasad Misra's case (supra)*** is as under:-

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10. 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. Commentaries upon the Code are full of cases in which the powers under Section 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised.

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8. Coming to the present case, after appreciating the averments raised by petitioners the Appellate Court has come to the conclusion that not only the evidence sought to be produced by the applicants has no bearing on the merits of the case but even the *modus operandi* of the petitioners of getting parallel inquiry done from the police and to tender the same in defense in trial under Section 138 of the Negotiable Instruments Act, 1881 is deplorable.

9. Counsel for the petitioners also can not deny the fact that though defense evidence was closed by the Trial Court but the Revisional Court granted three opportunities to the petitioners to lead his defense evidence and despite availing those opportunities, petitioners failed to lead

the evidence and no effort was made by the petitioners to get the Revisional Court orders modified or challenged.

10. Thus, in view of observations made by the Apex Court in *Rajeswar Prasad Misra’s case (supra)* to the extent that “order under Section 391 Cr.P.C. should not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it”, present petition is found to be without merit. Consequently, the same is dismissed.

11. Pending application(s), if any, shall also stand disposed of.

(PANKAJ JAIN)
JUDGE

August 23, 2023
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Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No