

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

**CRR-2215-2022 (O&M)
Decided on : 31.01.2023**

Sanjay Sharma

..... Petitioner

Versus

Varuna and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present: Mr. Sangram S.Saron, Advocate
for the petitioner.

HARSH BUNGER J.

Petitioner has filed the present petition assailing order dated 02.06.2022, passed by the Additional Sessions Judge, Chandigarh, whereby an application filed under Section 391 Cr.P.C. for leading additional evidence has been dismissed.

Shorn of unnecessary details, brief facts of the instant case are that respondent No.1-Varuna filed an application under Section 138 of the Negotiable Instruments Act on the ground that the petitioner/accused had asked for a friendly loan of Rs.7,00,000/- (Rupees Seven Lacs Only) from her on account of his friendly relations with her husband, which was given by respondent No.1 to the petitioner/accused, vide Cheque No.945245 dated 27.02.2015, drawn on Vijaya Bank, Manimajra, Chandigarh. It is stated that while advancing the loan amount, the petitioner/accused had assured respondent No.1/complainant that he will repay the same within a short

period of time. It is further stated that in discharge of his legal and financial

liability, the petitioner/accused delivered a Cheque bearing No.289025 dated 06.08.2015 for an amount of Rs.7,00,000/- (Rupees Seven Lacs Only), drawn on IndusInd Bank, SCO No.28, Sector-11, Panchkula, to respondent No.1/complainant but upon presentation, the same was dishonoured vide memo dated 08.08.2015 with the remarks 'funds insufficient'. Thereafter, respondent No.1/complainant apprised the petitioner/accused about the factum of dishonouring of cheque, whereupon the petitioner/accused assured that the cheque can be presented again, however, upon presentation of the said cheque for the second time as well, the same was dishonoured vide memo dated 03.11.2015 with the remarks 'funds insufficient'. It is stated that a legal notice was issued to the petitioner/accused on 30.11.2015 and thereafter, the complaint was filed before the Judicial Magistrate Ist Class, Chandigarh. In the said complaint, petitioner/accused was summoned, whereupon he appeared and was released on bail. Thereafter notice of accusation was served upon the petitioner/accused vide order dated 01.10.2016, passed by the then Judicial Magistrate Ist Class, Chandigarh.

In order to prove her complaint, respondent No.1/complainant examined Vivek Mehta as CW-1 and further led the documentary evidence, which is reproduced as below:-

“ Ex.C1 : Copy of SPA

Ex.C2 : Cheque

*Ex.C3 & C4 : Dishonouring memos dated 8.8.15 &
3.11.15*

Ex.C5 : Legal notice

Ex.C6 & C7 : Postal receipts”

On completion of respondent No.1/complainant's evidence,

whereupon all the incriminating material was put to him for explanation, however, the same was denied by him and he pleaded innocence and false implication. It was the stand of petitioner/accused that he has not taken any friendly loan from respondent No.1/complainant. Rather it was claimed that the petitioner/accused had entered into an agreement with respondent No.1/complainant to sell Ex.D2 for the sale of his Flat No.701, 7th Floor, Royal Estate, Peer Mucchala, Zirakpur, District Mohali, however the said agreement was subsequently cancelled vide Ex.D1 and he had returned the earnest amount to the complainant, i.e. Rs.13,00,000/- (Rupees Thirteen Lacs Only) in cash and Rs.7,00,000/- (Rupees Seven Lacs Only) vide cheque in question on 06.08.2015. It was claimed that the cheque in question was dishonoured and thereafter he paid a sum of Rs.7,00,000/- (Rupees Seven Lacs Only) in cash to respondent No.1/complainant, however the cheque in question was not returned by respondent No.1/complainant, who is stated to have misused the said cheque and filed the complaint under Section 138 of the Negotiable Instruments Act against the petitioner/accused.

In defence, the petitioner/accused examined one Gaurav Sharma s/o Rajesh Kumar as DW-1.

After considering respective stands of the parties and from the evidence/material placed on record of the case, the Judicial Magistrate Ist Class, Chandigarh, vide judgment dated 17.08.2017 (Annexure P-3), held the petitioner/accused as guilty and convicted him for the commission of offence punishable under Section 138 of the Negotiable Instruments Act and vide a separate order of even date, petitioner/accused was sentenced to undergo simple imprisonment for a period of one year. The petitioner was

further ordered to pay an amount of Rs.7,00,000/- (Rupees Seven Lacs Only) to respondent No.1/complainant as compensation under Section 357(3) Cr.P.C. within a period of 30 days.

The aforesaid judgment of conviction and order of sentence dated 17.08.2017 (Annexure P-3) was challenged by the petitioner before the Additional Sessions Judge, Chandigarh. During pendency of the appeal, petitioner filed an application under Section 391 Cr.P.C. for leading additional evidence on the plea that he wanted to examine one Karan, who was his Manager. It was stated that in the presence of said Karan, Gaurav (nephew of the petitioner) had returned the amount of Rs.7,00,000/- (Rupees Seven Lacs Only) through cash to Vivek Mehta (husband of respondent No.1/complainant). It was stated that the said fact was brought forthwith by DW-1, however his evidence was not considered by the trial Court. Accordingly, the evidence of said Karan is necessary for proper adjudication of the case. It was claimed that earlier Karan was not traceable as he had left the job of petitioner and neither he was in touch with Karan nor his whereabouts were known to the petitioner.

The application under Section 391 Cr.P.C. for leading additional evidence filed by the petitioner was contested by respondent No.1/complainant by filing her reply *inter alia* on the plea that no such stand was taken by the petitioner while recording of his statement under Section 313 Cr.P.C. that repayment of Rs.7,00,000/- (Rupees Seven Lacs Only) was made through his nephew Gaurav, in the present of the said Karan. Rather, the specific plea of the petitioner was that he had paid back a sum of Rs.7,00,000/- (Rupees Seven Lacs Only) in cash to respondent No.1/complainant.

After considering the pleas/submissions of the parties, the Additional Sessions Judge, Chandigarh, vide order dated 02.06.2022, dismissed the application under Section 391 Cr.P.C. filed by petitioner for leading additional evidence. Relevant extract of the said order is as under:-

“ - x - x -

4. Present complaint under Section 138 of Negotiable Instruments Act has been filed on account of dishonour of the cheque Ex.C2 dated 6.8.2015 for a sum of Rs.7,00,000/- issued by the applicant/convict in favour of respondent-complainant. DW-1 Gorav Sharma has been examined by applicant-convict. He has deposed that at the instance of his uncle applicant-convict Sanjay Sharma he alongwith their Manager Karan went to the house of Vivek Mehta and paid Rs.7 lakh in cash. Thus DW-1 has deposed that in fact the cheque amount has been paid. Date, month and year of payment of cheque amount has not been mentioned in examination-in-chief. Present application has been filed to examine the Manager Karan on the ground that Id. Trial Court has disbelieved testimony of DW-1 terming him to be interested witness being the nephew of the applicant-convict. It has been argued that examination of Mr. Karan will help Convict to prove that cheque amount stands paid in cash. Perusal of the impugned judgment reveals that the testimony of DW-1 has not been believed merely on the ground that DW-1 was an interested witness. Id. Trial Court has disbelieved the testimony of DW-1 on the ground that applicant/convict claimed that he has agreed to sell his Apartment to the complainant for a sum of Rs.45,00,000/- vide an agreement to sell Ex.D2.dated 27.9.2015 and received earnest money. Thereafter Vide writing Ex.D1 it was agreed between the parties

to cancel the impugned agreement Ex.D2 dated 6.8.2015 and applicant paid back earnest money by making payment of Rs.13 lakhs in cash and other sum of Rs.7 lakhs was paid vide impugned cheque Ex.C2. Ld. Trial Court held that applicant/convict has received money under a written agreement. So it is highly improbable that he would have paid back the payment of Rs.7 lakhs in cash to the complainant without taking any written receipt. Ld. Trial Court further disbelieved the testimony of DW-1 on the ground that in statement recorded under Section 313 Cr.P.C applicant-convict stated that he has paid a sum of Rs.7 lakh in cash to the complainant. On other hand DW-1 state that the cheque amount of Rs.7 lakh was paid to the complainant by him without receiving the cheque in question. Ld. Trial Court further held that DW-1 on one hand claimed that he had gone to house of complainant and made the payment of the cheque amount of Rs.7 lakh. But during cross-examination DW-1 was not aware about the locality in which the house of complainant is situated and also failed to disclose as to how many floors were there in the house of the complainant. Thus after discussing these facts in detail the Ld. Trial Court has held that testimony of DW-1 is doubtful and is not worthy of credence for being deposed due to DW-1 being nephew of accused. Thus the contention of the appellant-convict that he intends to examine Manager Karan on the ground that testimony of DW-1 has been disbelieved by the Ld. Trial Court solely on the ground that DW-1 is an interested witness is not correct.

5. DW-1 Gorav Sharma during examination-in-chief has deposed that cheque amount of Rs.7 lakh was delivered to the complainant in the presence of their Manager Karan. Thus at the time of making testimony

before the Ld. Trial Court accused was in knowledge that the cheque amount has been paid by DW-1 to the complainant in the presence of Karan. DW-1 has not examined Karan before Id. Trial Court. Thus he has not acted diligently. Non examination of Karan is sought to be explained on ground that Karan Manager of the accused has left the job and his whereabouts were not traceable. When Karan was serving as Manager with applicant-Convict then he must be in knowledge of address of his employee. It is not the case of convict/applicant that he had made any application to the Id. Trial Court to summon Karan as a defence witness and any report was received that he is not residing at the given address. So contention of Ld. Counsel for the complainant that impugned application to lead the additional evidence is nothing but an attempt to get delayed the proceedings of the present case carries a lot of force and the present application appears to be an after thought to get further delayed adjudication of the present proceedings.

- x - x -"

The above said order dated 02.06.2022, passed by the Additional Sessions Judge, Chandigarh is being impugned in the present petition.

Learned counsel for the petitioner has submitted that impugned order dated 02.06.2022, passed by the Additional Sessions Judge, Chandigarh is erroneous and illegal and the same has been passed without appreciating the facts and circumstances of the case. It is contended that the true test for the admissibility of additional evidence is whether the Appellate Court is able to pronounce the judgment of the material before it without taking into consideration the additional evidence sought to be adduced. It is

further submitted that the lower Appellate Court, has erred in dismissing the application under Section 391 Cr.P.C. for leading additional evidence as the petitioner, despite making the best efforts, could not get his Manager-Karan examined through the course of trial as he had left the employment of petitioner and it was only during the pendency of appeal that petitioner, through his friend, could trace out the whereabouts of the said Karan. Accordingly, it is prayed that the revision petition be allowed by setting aside impugned order dated 02.06.2022, passed by the Additional Sessions Judge, Chandigarh and permit the petitioner to lead additional evidence under Section 391 Cr.P.C.

I have heard learned counsel for the petitioner and perused the paper book with his able assistance.

Before considering the submissions made by learned counsel for the petitioner, it is apposite to refer to Section 391 Cr.P.C., which reads as under:-

“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.”*

Hon'ble Apex Court in the case of **“Rajeshwar Parsad Misra Vs. The State of W.B. and another”, AIR 1965 Supreme Court 1887**, has laid down the principle that the provisions of Section 391 Cr.P.C. can be exercised only where there is a failure of justice. Moreover, such an exercise would be subject to the conditions namely:

- (i) it should be exercised sparingly and only in suitable cases and more particularly where it is justified;
- (ii) the exercise should not be done in such a way as to cause prejudice to the accused, which would appear as a disguise for a re-trial to change the nature of the case against him;
- (iii) the order may not ordinarily be made if the prosecution or any party had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.

In the case of **Ashok Tshering Bhutia Vs. State of Sikkim, 2011(2) R.C.R. (Criminal) 99**, the Honble Apex Court held as under:-

“15. Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary

object of the provisions of Section 391 Criminal Procedure Code is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. (Vide Rajeswar Prasad Misra v. The State of West Bengal & Anr., AIR 1965 Supreme Court 1887; Ratilal Bhanji Mithani v. The State of Maharashtra & Ors., AIR 1971 Supreme Court 1630; Rambhau & Anr. v. State of Maharashtra, 2001(2) RCR (Criminal) 721; Anil Sharma & Ors. v. State of Jharkhand, 2004(3) RCR (Criminal) 774; 2004(3) Apex Criminal 337; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., 2004(2) RCR (Criminal) 836; 2004(3) Apex Criminal 46; (2004)4 SCC 158; and Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), 2010(2) RCR (Criminal) 692; 2010(3) R.A.J. 1.

16. *This Court in State of Gujarat v. Mohanlal Jitmalji Porwal & Anr., AIR 1987 Supreme Court 1321, dealing with the issue held as under:*

...To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool

calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

17. In *Rambhau (supra)*, a larger Bench of this Court held as under:

"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 the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Criminal Procedure Code, Section 391 is thus akin to Order 41, Rule 27 of the C.P. Code."
(Emphasis added)

18. In view of the above, the law on the point can be summarised to the effect that additional evidence can be taken at the appellate stage in exceptional circumstances, to remove an irregularity, where the circumstances so warrant in public interest. Generally, such power is exercised to have formal proof of the documents etc. just to meet the ends of justice. However, the provisions of Section 391 Criminal Procedure Code cannot be pressed into service in order to fill up lacunae in the prosecution's case."

Keeping in view the above stated legal position, when the instant case is examined, it is observed that the petitioner has filed an application under Section 391 Cr.P.C. to examine one Karan, in his additional evidence in the appeal, who is stated to be the previous manager of petitioner (Sanjay Sharma) and in whose presence, it is claimed that the nephew of petitioner, namely Gaurav, had returned the balance amount of Rs.7,00,000/- in cash to the husband of respondent-claimant namely, Vivek Mehta. In the application under Section 391 Cr.P.C., the reason for not examining Karan, as a witness before the trial Court, was stated that he had left the job and the petitioner was neither in touch with him nor he had any contact number or address of said Karan and it was only one month ago that he gained knowledge of the residence of Karan from one of his friends. So far as the examination of Karan in additional evidence is concerned, it is apposite to refer to the statement of petitioner recorded under Section 313 Cr.P.C., which reads as under :-

“On completion of complainant's evidence, statement of accused under Section 313 of Code of Criminal Procedure, 1973 (for short Cr.P.C.) was recorded, wherein, all the incriminating material appearing in complainant's evidence was put to him for explanation, that he denied being incorrect, pleaded innocence and false implication. Accused stated that he has not taken any friendly loan from the complainant. He has entered into an agreement to sell Ex.D2 for the sale of his flat no,701, 7 Floor, Royal Estate, Peer Mucchala, Zirakpur, Distt Mohali with complainant. The said agreement was cancelled vide Ex.D1 and he has returned the earnest money to the complainant i.e. Rs.13 lacs in cash and Rs.7 lacs vide cheque in question on 6.8.2015. The cheque in

question was dishonored on 7.8.2015 and the complainant has informed him regarding the same. He has paid the sum of Rs.7 lacs in cash to the complainant later on and the complainant assured him to hand over the cheque in question later on as the same was not traceable at that time. The complainant has misused the cheque in question in the present complaint by presenting the same again in the month of November, 2015. He has never issued the cheque in question in discharge of any legal liability of friendly loan against the complainant. He has never taken any friendly loan from complainant or his wife.”

A perusal of the said statement would clearly indicate that there is no such plea taken by the petitioner that an amount of Rs.7,00,000/- was paid by his nephew, namely Gaurav, and that too in the presence of Karan, which is sought to be claimed in the application for leading additional evidence. Rather in the statement recorded under Section 313 Cr.P.C., it was the categorical stand of petitioner that he had paid a sum of Rs.7,00,000/- in cash to the complainant later on. It is thus apparent that it was not even the plea of petitioner that the amount of Rs.7,00,000/- was paid to the husband of complainant.

Moreover, learned counsel for the petitioner could not point out any exceptional circumstances so as to warrant any interference by this Court in exercise of its power and neither any irregularity has been pointed out, which necessitated the filing of application under Section 391 Cr.P.C. Apart from the above, had the position been the same as is being sought to be indicated in the application under Section 391 Cr.P.C., even in that eventuality, the petitioner had a fair opportunity to lead this evidence at the stage of his evidence. However, the said opportunity was not availed of by

the petitioner for the reasons best known to him.

Considering the totality of circumstances, it appears that the application under Section 391 Cr.P.C. has been filed only to elongate the appeal proceedings and such tactics cannot be blessed by this Court. Accordingly, no necessity has arisen to interfere with the impugned order dated 02.06.2022, passed by learned Additional Sessions Judge, Chandigarh, wherein an application under Section 391 Cr.P.C. was dismissed. Thus, finding no merit in the present revision petition, the same is dismissed.

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

31.01.2023*Apurva***(HARSH BUNGER)
JUDGE**

1. Whether speaking/reasoned : Yes/No
2. Whether reportable : Yes/No