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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-61018-2022 (O&M)
Date of Decision: 18.01.2023

RAVINDER KUMAR ….Petitioner

Versus

SANDEEP KUMAR …Respondent

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present : Mr.Parminder Singh, Advocate
for the petitioner.

HARSH BUNGER, J. (Oral)

The present petition has been filed by petitioner under Section 482 Cr.P.C for seeking quashing/setting aside of order dated 14.12.2022 (Annexure P-7), passed by the Court of Additional Sessions Judge, Karnal vide which an application filed by the petitioner under Section 391 Cr.P.C for leading additional evidence has been dismissed.

Succinctly, the respondent herein Sandeep Kumar filed a complaint under Section 138 of the Negotiable Instruments Act on the plea that Sameer Bhutani, Sudesh Mann and Mukesh Kumar are Directors of Etheric Technology Private Ltd. 587-A, Ist Floor, Sector-21, Panchkula, Haryana; while Surinder Kumar Gupta, Pankaj Madan, Sandeep Malik, Melvyn Nicholas Lambert & Vinod Kumar Goyal are the whole time Director & Directors respectively of Rosmerta Technologies Limited, 137, Udyog Vihar, Phase-1, Gurgaon. The Etheric Technology Private Ltd. Co is the coordinating company of Rosmerta Technologies Ltd. for the purpose of National Population Registrar Data Digitization Work of Haryana.

In the complaint it was stated that previously one Anil Sharma was holding the office of Sr. Manager of Project of Etheric Technology Private Ltd. and he sent an E-mail dated 30.06.2012 vide which the said company namely Etheric Technology Private Ltd. has assigned the petitioner-accused, with Data Digitization Work for Karnal Rural @ 2/- (inclusive of Taxes) and petitioner-accused was directed to arrange all necessary infrastructure with required manpower for completing the said work. It was stated that after receiving the said E-mail from Anil Sharma, the petitioner-accused joined the respondent-complainant as per instructions of the Directors of Etheric Technology Private Ltd. Initially, the respondent-complainant made as many as 443443 Data Digitization entries up to 12th December 2012 and later on he further made Data Digitization entries to the extent of 152825 as provided to him up to 18th February 2013. In this way, the respondent-complainant has made 596268 Data Digitization entries and was entitled to receive the payment of Rs.11,92,536/-(Eleven Lac Ninety Two Thousand Five Hundred Thirty Six only) @ Rs.2 per data digitization entry but the directors of the Etheric Technology Private Ltd. & Rosmerta Technologies Ltd. had paid only an amount of Rs.1,46,850/-(One Lac Forty Six Thousand Eight Hundred Fifty only) and an amount of Rs.10,45,686/- (Ten Lac Forty Five Thousand Six Hundred Eighty Six only) was left outstanding against them. The respondent-complainant repeatedly requested the above named directors as well as petitioner-accused to pay the balance amount but they postponed the matter on one pretext or the other. Ultimately, the respondent-complainant finding no other alternative, issued a legal notice dated 12.5.2014 to the directors of both company as well as petitioner-accused calling upon them to make payment of said amount with interest @ 18% per annum from 18.2.2013 till realization of the amount.

Subsequently, after receiving the legal notice, the petitioner (accused) in discharge of his legal liability, issued a cheque bearing no. 393056 dated 08.08.2014 of Rs.13,01,773/-(Thirteen Lac One Thousand Seven Hundred Seventy Three only) including interest, drawn at Oriental Bank of Commerce, Sector-8, Urban Estate, Karnal from his account no.10211011000645 in favour of the respondent-complainant and assured that the cheque would be honoured when presented for encashment.

Upon presentation of the aforesaid cheque, the same was dishonoured vide memo dated 09.08.2014 with the remarks "Exceed Arrangement". Thereafter a legal notice dated 21.08.2014 was served upon the petitioner-accused. Since the payment was not made within the stipulated period, accordingly the respondent-complainant instituted a complaint under Section 138 of the Negotiable Instruments Act, wherein the present petitioner-accused was summoned and he contested the said complaint.

The respondent-complainant in his evidence examined himself as CW1 and further tendered and proved the following documents:-

Serial No.	Exhibits	Documents
1.	Ex.C1	Original cheque dated 08.08.2014
2.	Ex.C2	Cheque Deposit slip
3.	Ex.C3	Return Memo dated 8.8.2014
4.	Ex.C4	Debit advice receipt
5.	Ex.C6 & Ex.C8	Acknowledgment due
6.	Ex.C9	Legal notice dated 21.8.2014
7.	Ex.C10 & Ex.C11	Postal receipts

During trial, an application for leading additional evidence on behalf of the respondent-complainant was also allowed and one Sh. Ram Kumar was examined as CW2 who tendered the following evidence:-

Serial No.	Exhibits	Documents
1.	Ex.CW2/A	Affidavit
2.	Ex.C12	Other affidavit dated 15.07.2015
3.	Ex.C14	Acknowledgment of Registration of firm
4.	Ex.C15	Certified copy of judgment dated 04.08.2010 passed in civil suit titled as SBOP Vs. Ravinder Kumar
5.	Ex.C16	Decree-sheet
	Ex.C17	Certified copy of judgment dated 21.04.2015 passed in complaint u/s 138 of the Act titled as Nitu Kumar Vs. Ravinder
6.	Ex.C18 to C22	Mails
7.	Mark-A	Rent deed

In defence evidence, the petitioner-accused himself stepped into the witness box as DW1 and tendered the following evidence/documents:-

Serial No.	Exhibits	Documents
1.	Ex.D1 to Ex.D22	Attendance register
2.	Ex. D23 to Ex. D34	Vouchers
3.	Mark DA to Mark DG	Certified copy of statement of account of Insight Solution
4.	Mark-DH	Copy of self certificate
5.	Mark DI & Mark P	Letter regarding Digitization of Rural National Population Data dated 13.8.2012

Thereafter, the petitioner-accused examined one Sukesh Kumar as DW2, who tendered the following evidence:-

Serial No.	Exhibits	Documents
1.	Ex D35 & Ex. D36	Salary receipt for the month of December 2011 & January 2012
2.	Ex.D37	Copy of data entry operator Admit Card
3.	Ex.D38	Joining report
4.	Ex.D39 & 40	Monthly report for the month of August & September 2012
5.	Ex. DX	Rent deed

After considering the entire evidence on record, the Court of Judicial Magistrate First Class, Karnal convicted the petitioner-accused vide judgment dated 20.07.2016 and vide order dated 21.07.2016, sentenced the petitioner as under:-

Offene u/s	Sentence
138 of Negotiable Instruments Act	To undergo rigorous imprisonment for a period of two years and to pay cheque amount of Rs.11,92,536/- to the complainant as compensation within three months and in default of payment of compensation, to further undergo rigorous imprisonment for a period of three months.

Against the said judgment of conviction and order of sentence; the petitioner herein filed an appeal before the Court of Additional Sessions Judge Karnal, which came to be registered as CRA-462-2016.

During the pendency of the said appeal, the petitioner herein filed an application under Section 391 Cr.P.C (Annexure P-3), wherein the following averments were made:-

> *2. That while preparing of argument in the present appeal, it revealed that the previous counsel did not produce the documents i.e. Operetor wise records count from 12.8.2012 to 12.2.2013 of NPR (Ministry or Home affairs Govt of India), NPR Rural manuals for NPR project, Email conduct of online examination by insight solution from NIELIT Chandigarh, Gmail regarding payment of Rs. 2 lacs received Sandeep, forward Gmail from Ethric Sunaina by Sandeep Kamboj, Gmail from Ethiric brother regarding salary sheet voucher formate forwarded by Sandeep Kamboj, Certificate issued by Gram Panchayat village Kunjpura Distt Karnal and Gmail from Ethirc groups regarding List of total operaters and their IDs who work for NPR Rular, and requisition form, of Cheque no. 869151 to 869200 issued date 31.8.2013, original cheque no. 395991 dt. 10.11.2012 and now the applicant appellant wants to tender the aforesaid documents in the aforesaid case and further the applicant wants to examine the concerned officials from the concerned department relating to Operetor wise records count from 12.8.2012*

to 12.2.2013 of NPR (Ministry of Home affairs Govt of India), which will be helpful for proper adjudication of the case.

3. That further the applicant wants to compare the handwriting of EX C-1, with EX C-3 and EX D-38 from the handwriting expert which will be helpful for proper adjudication of the case.

4. That the aforesaid witnesses as well as the aforesaid documents are very much necessary so the applicant wants to lead his evidence in the aforesaid case which is very much necessary for proper adjudication of the case and same will be helpful in order to meet the justice.

The application filed under Section 391 Cr.P.C was contested by the respondent-complainant by filing its reply (Annexure P-4).

The above said application under Section 391 Cr.P.C has been dismissed vide order dated 14.12.2022 passed by the Court of learned Additional Sessions Judge, Karnal by observing as under:-

6. Appellant-applicant seeks to adduce additional oral and documentary evidence in the present appeal, to which a reference has already been made in the earlier part of the order. Apart from the fact that some such documents/ record has already been tendered in evidence i.e. the operator wise records for the months of August and September, 2012 as Ex.D39 and Ex.D40 and the relevant e-mails as Ex.C18 to Ex.C22, it deserves to be noticed that all such documents/ record were well within the knowledge of appellant-applicant from the very beginning, however, no plausible explanation has been put forth either in the application or at the time of arguments as to why such documents/ record were not tendered at the stage of leading evidence. So much so, more than 6 years after the conviction of appellant-applicant and filing of present appeal, the present application has been moved for additional evidence without disclosing any cogent reason for non-adducing such evidence earlier. Moreover, in the entire application as also during the course of arguments, nothing is forthcoming as to how such documents/ record are material for just adjudication *of the case. Merely by stating in the application and then reiterating during the course of arguments that such documents would be helpful for adjudication of the matter does not suffice, when the basis thereof is not forthcoming. In so far as the comparison of the handwriting on the body of cheque Ex.C1 with the admitting handwriting of complainant-respondent on the deposit slip Ex.C3 and the joining report Ex.D38, suffice it to say that the appellant-applicant while appearing as DW1 has admitted in his cross-examination his signatures on the cheque Ex.C1. In the face of such admission, the question as to who filled the cheque is not material. In the case of Sudhir Kumar Vs. Padam Singh, supra our own Hon'ble High Court has held that there is no provision of law as per which the handwriting on cheque must necessarily be that of the signatory or that the filling of cheque in different handwriting itself be a sufficient ground to rule against a cheque having been issued in due course.*

7. Consequently and in view of the aforesaid discussion, the application filed by the applicant-appellant for additional evidence is wholly devoid of merits and the same is hereby dismissed. For arguments in the appeal, to come up now on 04.01.2023.

Accordingly, the present petition has been filed before this Court assailing the order dated 14.12.2022 passed by the Additional Sessions Judge, Karnal (Annexure P-7).

I have heard learned counsel for the petitioner and perused the paperbook as well as the impugned order (Annexure P-7).

Learned counsel for the petitioner has submitted that the learned Court below has erred in law and facts in dismissing the application under Section 391 Cr.P.C for leading additional evidence. It is submitted the documents/evidence sought to be produced by way of additional evidence was necessary for the just decision of the case. It is further submitted that merely admitting signatures on the cheque will not dispense with proof by complainant by leading affirmative evidence that there was a pre-existing liability. Accordingly, it is prayed that the instant petition be allowed by setting aside the impugned order and the application under Section 391 Cr.P.C for leading additional evidence be allowed.

Before considering the submission of 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.
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> *(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.*
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> *(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 v. The State of W.B. and another, AIR 1965 Supreme Court 1887 lays down the principle that the provisions of Section 391 Criminal Procedure Code 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.

Recently, in the case of Ashok Tshering Bhutia v. State of Sikkim 2011(2) RCR (Criminal) 99, Hon'ble 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 facts 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) RAJ. 1.

16. This Court in State of Gujarat v. Mohanlal Jitamalji 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 CP. Code" (Emphasis added)*
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> *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..."*

Considering the submissions of the counsel for the petitioner in the light of the settled law on the issue; I am of the considered view that neither in the application for leading additional evidence nor before the Lower Appellate Court or before this Court, the learned counsel for the petitioner has given any plausible ground/explanation as to why the documents/record which is sought to be tendered by way of additional evidence are material for the just decision of the case and how the said documents/record would be helpful for the adjudication of the matter in hand. Moreover, there is no explanation as to why the said evidence which is now sought to be tendered in additional evidence, was not led in evidence before the trial Court as it has been fairly conceded by the learned counsel appearing for the petitioner that the said record was within the knowledge of petitioner during trial. Learned Lower Appellate Court has observed that a part of the record namely operator wise record for the month of August and September 2012 already stands exhibited as Ex.D39 and Ex.D40 along with the e-mails as Ex.C18 to Ex.C22. Thus, there is no manner of doubt that all the documents/record which is now sought to be tendered by way of additional evidence before the Lower Appellate Court was well within the knowledge of the petitioner from the very beginning and petitioner had a fair opportunity to produce them at the stage of its evidence, however, petitioner did not avail of the said opportunity.

It is well settled law that application under Section 391 is not to be allowed on the mere asking of a party and that too without showing the necessity for filing such application in terms of Section 391 Cr.P.C. The counsel for the petitioner has not brought forth any exceptional circumstances warranting interference by this Court and neither any irregularity has been pointed out for which application under Section 391 Cr.P.C. was filed.

So far as the prayer regarding comparison of the handwriting on the body of the cheque Ex.C1 with the admitting handwriting of the complainant-respondent on the deposit slip Ex.C3 and joining report Ex.D38 is concerned, the lower Appellate Court has observed that the petitioner had admitted the signatures on the cheque Ex.C1 and during his cross-examination and the said fact is not disputed by the counsel for the petitioner, thus there was presumption in favour of the respondent-complainant and against the petitioner-accused, which was not rebutted by petitioner-accused.

It appears that filing of application under Section 391 Cr.P.C. is an attempt on the part of the Petitioner to elongate the appeal proceedings and no necessity has arisen to interfere with the decision arrived at by the Appellate Court, in the instant petition. The present petition being devoid of merits is liable to be dismissed.

In view of the aforementioned facts and circumstances, the present petition is dismissed.

All pending applications (if any) shall stand disposed of.

18.01.2023 **(HARSH BUNGER)**
Amandeep **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No