



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on : 03.10.2023

Pronounced on : 29.11.2023

+ **CRL.M.C. 7111/2023**

RAJ SINGH

..... Petitioner

Through: Mr. Vijay Datt Gahtori, Advocate
(through VC)

versus

SATYA PAL SINGH

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

CRL.M.A. 26544/2023

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

CRL.M.C. 7111/2023 AND CRL.M.A. 26545/2023

3. The present petition has been filed by petitioner under section 482 Cr.P.C. for quashing of the order dated 12.09.2023 passed by the learned ASJ whereby the application filed by the petitioner under Section 391 of the Cr.P.C. has been dismissed.
4. In brief the facts of the case are that the respondent/complainant has advanced an amount of Rs 3 lakhs to one Raj Singh (petitioner



herein) on 25.07.2017 and in lieu thereof, the petitioner issued a cheque bearing no 395083 dated 15.04.2018 of Rs.3,00,000/- drawn on Canara Bank, Dwarka Sector 12, to the complainant with an assurance of its encashment. The complainant presented the said cheque but the same was returned with the remarks "Funds Insufficient" vide bank return memos dated 26.04.2018. Thereafter, the complainant served a legal notice dated 09.05.2018 upon the petitioner through his counsel demanding the said amount. However, despite service of aforesaid notice, neither any reply was sent nor was the money repaid by the petitioner. As a result, the complainant filed the complaint under section 138 of negotiable instruments Act on 05.06.2018.

5. Thereafter, vide order dated 16.08.2022, the learned Trial Court convicted the petitioner for the offence under Section 138 NIA and sentenced him to undergo the simple imprisonment for 6 months and further directed to pay compensation for the sum of Rs. 4,50,000/- and in default of which the petitioner was further directed to undergo simple imprisonment for a period of two months.

6. Feeling aggrieved by the said order dated 16.08.2022, the petitioner herein moved an application under Section 391 Cr.P.C., however, the same was dismissed by learned Trial Court vide order dated 12.09.2023.

7. Learned counsel for the petitioner submits that the amount of loan is controversial as the respondent claimed that he had advanced a loan of Rs. 3,00,000/- to the petitioner by withdrawing the same from his bank account and the statement of his bank account is the



best evidence to prove whether the respondent had withdrawn the said amount from the bank on 25.07.2017 or not. He further submits that learned trial court did not appreciate the facts that evidence of above mentioned witnesses is essential for just decision of the present case. In support of his contention, learned counsel for the petitioner relied upon the judgment passed in ***Sukhjeet Singh v. The state of Uttar Pradesh and Ors*** [MANU/SC/0077/2019] wherein the Hon'ble Apex Court held that there are no fetters on power under section 391 Cr.P.C. of the Appellate Court and all powers are conferred on the court to secure the end of justice.

8. Reliance can be placed on ***Sonu Dahiya v. State the Govt. of NCT of Delhi, 2015 SCC OnLine Del 9601*** passed by the Division Bench of this Court wherein it was observed that in exercise of powers under Section 391 of the CrPC, the Court cannot permit production of new documents especially when the aforesaid evidence has not been led before the Trial Court. The relevant portion reads as below:

“10.The law in this regard is well settled. The Court must exercise its jurisdiction with care and caution and only in cases where appellate court is satisfied that some evidence, which ought to have been brought on record, has been left out, the Court must satisfy itself that additional evidence is essential to prevent miscarriage of justice.

11. A reading of the above Section clearly stipulates that the power under Section 391 of the Code of Criminal Procedure needs to be exercised with great care. It is binding upon the Court that where the documents are already on record, the prayer for adducing additional evidence may be inferred as delaying the disposal of the case and in case of production of new documents, the Appellate Court cannot permit such ground as raised by the Appellant.

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13. It is relevant to point out that during the course of trial, accused Sonu Dahiya (appellant herein) did not opt to bring forth any evidence in his defence. He had a full run of trial to adduce evidence in this regard but he has not taken steps for leading additional evidence during the course of trial. An effort is being made to introduce new facts which is an afterthought and has been raised for the first time at the stage of appeal. The only inference which can be drawn is that the application has been made with an intention to delay the proceedings of the case. Moreover the judgments cited by the learned counsel for the appellant are only case specific and cannot be relied in this case.”

9. I have perused the impugned order dated 12.09.2023 passed by learned ASJ. The relevant paragraphs of the order read as follow:

“7. After going through the law on Sec.391 Cr.PC, lets revert to the present application. Complainant has mentioned these two witnesses in his list of witnesses but during his evidence he did not examine them and it can be because they might not be relevant for proving his case. Further, in case these witnesses were relevant to the case, then appellant could have examined them in his defence but he chooses not to do so. One of these witnesses is the Manager / concerned Officer of appellant's bank and through whom he wants to prove that he has made part payments in the account of the respondent / complainant. The appellant could have easily filed his bank statement along-with the application to show that he has made payments from his account to the respondent / complainant to show his bonafide but no such document has been annexed by the appellant. This proves that his application is an after thought which crops in the mind of the appellant during the argument on the appeal.

8. Further, by way of these witnesses, appellant wants to show that respondent / complainant herein did not have financial capacity to lend Rs.3 lacs as loan to the appellant. It is settled law that unless the accused is able to rebut the presumption u/s. 139 of N. I. Act, he cannot question the financial capacity of the complainant. Hon'ble Supreme Court in “**P. Rasiya vs. Abdul Nazer**” dated 12.08.2022, in this respect, has observed “By the impugned common judgment and order the High Court has reversed the concurrent findings recorded by both the courts below and has acquitted the accused on the ground that in the complaint, the complainant has not specifically stated the nature of transaction and the source of fund. However, the High Court has failed to note the presumption under Section 139 of the N. I. Act. As per Sec. 139 of the N. I. Act, it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the



nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. Therefore, once the initial burden is discharged by the complainant that the cheque was issued by the accused and the signature and the issuance of the cheque is not disputed by the accused, in that case, the onus will shift upon the accused to prove the contrary that the cheque was not for any debt or other liability. The presumption under Section 139 of the N. I. Act is a statutory presumption and thereafter, once it is presumed that the cheque is issued in whole or in part of any debt or other liability which is in favour of the complainant /holder of the cheque, in that case, it is for the accused to prove the contrary. The aforesaid has not been dealt with and considered by the High Court. The High Court has also failed to appreciate that the High Court was exercising the revisional jurisdiction and there were concurrent findings of fact recorded by the courts below. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court is not sustainable and the same deserves to be quashed and set aside.”

*9. In the present case, accused has failed to lead any evidence or bring any document to show that he had only received Rs.2 lacs from the respondent / complainant or that he has returned some part of loan through cheques to the respondent / complainant. Further, perusal of cross examination of respondent / complainant as CW-1 shows that accused/appellant has failed to elicit anything from respondent / complainant in his favour and hence has not been able to establish his claim either through his evidence or by impeaching the credit of the respondent / complainant's evidence. As such, the onus remains on the accused/appellant and does not shift to the respondent / complainant and he failed to discharge it. **Consequently, these two witnesses are not necessary for decidning the appeal and there is hardly any requirement for summoning the two witnesses for the appellant.***

10. Both these witnesses were within the reach of the appellant and same could have been summoned by him during the trial by moving appropriate application. So, the present application is moved just to fill lacuna in his case and also to delay the hearings. Also, it is not the case that appellant /accused was not aware about these witnesses or documents and new fact has come to his knowledge. Therefore, court is not inclined to allow the application.

11. The facts of the “Sukhjeet Singh vs State of Uttar Pradesh & Ors.”, Criminal Appeal No. 148 of 2019 (Arising out of SLP (Crl) No.1120/2017) dated 25.01.2019 are different and not applicable to present case as in Sukhjeet case (supra) before the Ld. Trial Court photocopy of trust deed was filed and in absence of the original trust deed, the trust deed could not be proved due to which Ld. Trial Court



did not consider the trust deed and the resolution and convicted the accused for offence u/s. 420 IPC. Later on, in the appeal, the appellant wants to produce the original trust deed after moving application u/s. 391 Cr.PC but same was dismissed by Ld. Sessions Court and then by Hon'ble High Court on the ground that it was moved at belated stage and it is moved with malafide motive. But Hon'ble Supreme Court of India set aside the order dismissing the application u/s. 391 Cr.PC on the ground that certified copy of trust deed is necessary and filing of the application before the High Court to accept the certified copy of the Trust Deed and the Resolution and to permit the appellant to lead evidence can in no manner be said to be malafide motive of the accused.

12. So, order of disallowing the application u/s. 319 Cr.PC on the ground that it was filed on belated stage and with malafide intention was set aside. But the facts of the present case are different and in the present appeal as discussed above, there is hardly any requirement for summoning these two witnesses and the summoning of both these witnesses is not necessary for deciding the appeal. Therefore, present application u/s 391 Cr. PC is hereby dismissed. “

10. The Supreme Court in ***Brig. Sukhjeet Singh (Retd), Mvc V The State of Uttar Pradesh, Criminal Appeal No148 of 2019*** decided on 25th January, 2019 has rejected the findings given by the High Court while upholding decision of the Appellate Court in dismissing application under section 391 of the Code that the present exercise initiated by the applicant for filing additional evidence at such a belated stage appears to be with some ulterior mala fide motive or delaying the decision of the appeal to eternity. It was observed that this court has laid down that when it becomes necessary to take additional evidence, cannot be enlisted or enumerated in any fixed formula and it depends on facts of each and every case to come to a conclusion as to whether it is necessary to take additional evidence or not.

11. The Supreme Court in ***Zahira Habibulla H. Sheikh and another V State of Gujarat and others, AIR 2004 SC 346*** while dealing with



Section 391 of the Code held as under:- There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court.

12. The scope and magnitude of section 391 of the Code is also considered by different High Courts. The Delhi Court in ***Mohd. Salauddin V State & another***, Criminal Revision Petition bearing no 56/2007 decided on 20th March, 2015 while considering primary object of section 391 of the Code observed that the power under section 391 of the Code can be exercised to give correct and proper findings. It was held as under:-

“The primary object of Section 391 Cr.P.C. is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 Cr.P.C. is desirable. Section 391 Cr.P.C. has been enacted for the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391 Cr.P.C.”

13. The counsel for the petitioner cited Sukhjeet Singh V The State of Uttar Pradesh and others, Criminal Appeal No 148 of 2019 decided on



25.01.2019 by the Hon'ble Supreme Court. The Ld. Court has rightly held that the facts of the *“Sukhjeet Singh vs State of Uttar Pradesh & Ors.”*, Criminal Appeal No. 148 of 2019 (Arising out of SLP (Crl) No.1120/2017) dated 25.01.2019 are different and not applicable to present case.

14. In the present case, both the said witnesses were within the reach of the appellant and same could have been summoned by him during the trial by moving appropriate application. The appellate court in the impugned order rightly held that application has been moved only to delay the disposal of the appeal and the appellate court did not commit any infirmity or error in impugned order. The application under section 391 Cr. P.C. is to be considered by the appellate court with great care and caution. The application is liable to be dismissed.

15. In view of the above, the impugned order is well reasoned and suffers from no infirmity. Therefore, no interference is required by this Court and the present petition is dismissed.

16. The petition along with all pending applications if any stands disposed of.

RAJNISH BHATNAGAR, J

NOVEMBER 29, 2023