



CrI.R.C.No.2076 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.03.2024
PRONOUNCED ON : 04.06.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.R.C.No.2076 of 2023
and
CrI.M.P.No.19022 of 2023

S.Malar Selvam

... Petitioner

Vs.

D.Suddhakar

... Respondent

PRAYER: Criminal Revision Petition filed under Sections 397 and 401 of Criminal Procedure Code, to call for the records, examined the same for the purpose of satisfying itself as to the correctness, legality and set aside the impugned order dated 09.11.2023 in CrI.M.P.No.24708 of 2023 in CrI.A.No.344 of 2023 on the file of the learned V Additional Sessions Judge, City Civil Court, Chennai, consequently to allow the said application in CrI.M.P.No.24708 of 2023, thereby permit the petitioner herein to adduce further evidence by examining Mrs.Kuzhalamani, the respondent's mother under Section 391 Cr.P.C. in the interest of justice.



WEB COPY



Crl.R.C.No.2076 of 2023

For Petitioner : Mr.S.N.Thangaraj
for Mr.P.Premkumar

For Respondent : Mr.P.Sivamani

ORDER

The petitioner/Accused was convicted in STC.No.7235 of 2022. Aggrieved by the said conviction, the petitioner preferred an appeal in Crl.A.No.344 of 2023 in which a petition in Crl MP No.24708 of 2023 under Section 391 of Cr.P.C filed for adducing additional evidence of viz, one D.Kuzhalamani, the mother of PW1. The said miscellaneous petition was dismissed by the V Additional Sessions Judge, City Civil Court, Chennai, Vide order dated 09.11.2023. Aggrieved by the said order, the present criminal revision case filed before this Court.

2.According to the petitioner, the said Mrs.D.Kuzhalamani is due to the petitioner a sum of Rs.20,00,000/- for which she issued a cheque drawn in favour of the petitioner on Punjab National Bank, Kilpauk, Chennai, dated 20.11.2020. Thereafter, the petitioner took steps to proceed against her. On coming to know about the same, the said Mrs.D.Kuzhalamani transferred the



amount to the petitioner through RTGS and this amount of Rs.20,00,000/- has been projected as the amount liable to be paid by the petitioner to the respondent complainant. Though this fact was not elicited during trial, since the petitioner was sick this fact came to the knowledge of the petitioner and hence, he had filed a petition to adduce additional evidence.

3.The Lower Appellate Court failed to consider the same, after notice to the respondent, the respondent is present before this Court, through counsel.

4.The learned counsel for the petitioner referring to the cheque issued by the respondent's mother drawn in Punjab National Bank bearing Cheque No.169684 dated 20.11.2020 for a sum of Rs.20,00,000/- and also referring to Ex.P9/bank statement of the respondent's mother for the period from 21.11.2020 to 30.12.2020, more particularly referring to the transaction on 23.11.2020, submits that this transfer of amount by RTGS of Rs.20,00,000/- is projected as part of the cheque amount in the above case and the balance amount of Rs.5,00,000/- is said to have been paid by the respondent/complainant in cash. In discharge of the said liability, three



subject matter of cheques issued.

WEB COPY

5.The contention of the learned counsel for the petitioner is that the admitted case of the respondent is that his mother paid Rs.20,00,000/- and the respondent paid Rs.5,00,000/-. As per Ex.P9, on 23.11.2020 after payment of Rs.20,00,000/- by RTGS, there is a balance amount of Rs.22,19,973/- hence the respondent's mother can very well paid the balance amount of Rs.5,00,000/- but for what reason the respondent steps into the role of complainant and filed the above case is not known and no explanation is given in this regard. He would further submit that the petitioner retired from Income Tax Department, having sufficient amount and there is no necessary for him to borrow money from the respondent. It is not disputed by the respondent that the cheque drawn in Punjab National Bank for Rs.20,00,000/- is with the petitioner and no explanation how the cheque reached the petitioner's hand. The Trial Court took the complaint on file on 23.08.2022 and disposed the case by judgment dated 16.05.2023 within a period of seven months in a haste not giving sufficient opportunity for the petitioner to cross examine the respondent/complainant. Further, the respondent/complainant by Ex.P9 admits transaction between the



petitioner and the respondent's mother, in view of the same, cross examination of the respondent/complainant and examination of respondent's mother is imperative, more so, in a case under Section 138 NI Act when the statutory presumption is starting against the petitioner and hence, he has to necessarily probabalize his defence. But the reasoning given by the Trial Court that the petitioner failed to cross examine the complainant and not participated in 313 proceedings amounts to admission of offence is not proper. For this reason, the petitioner filed a petition under Section 391 Cr.P.C. to examine the respondent's mother, to bring in evidence and give explanation for his transaction with the respondent's mother and also to cross examine the respondent by invoking Section 311 Cr.P.C. He further submitted that the evidence is complete only when it is tested by way of cross examination.

6.The learned counsel for the petitioner relied upon the decision of the Apex Court in the case of ***Zahira Habibulla H.Sheikh vs. State of Gujarat*** reported in ***(2004) 4 SCC 158***, wherein the import of Sections 391 and 386 Cr.P.C. have been dealt in detail. He further submitted that if proper evidence was not adduced or relevant material not brought on record due to



any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. Further referring to the judgment in the case of ***Brigadier Sukhjeet Singh vs. State of Uttar Pradesh*** reported in (2019) 16 SCC 712, the learned counsel submitted that power to take additional evidence under Section 391 Cr.P.C., is with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice. The Lower Appellate Court in the impugned order admits that the mother of the respondent, namely, Mrs.D.Kuzhalamani by RTGS transferred Rs.20,00,000/- to the petitioner and records the cheque for Rs.20,00,000/- drawn in Punjab National Bank bearing Cheque No.169684 dated 20.11.2020 presented for encashment got dishonoured for the reason, drawers signature differs. On accepting the same, the defence of the petitioner is based on the transaction with the said Mrs.D.Kuzhalamani and reason for the cheque to be considered, that can be done only by examining Mrs.D.Kuzhalamani and by cross examining the respondent, hence the Lower Appellate Court ought to have permitted the petitioner to examine the witnesses. On the other hand, the Lower Appellate Court dismissed the petition for the reason that the petitioner not assigned any reason, for not cross examining the respondent before the Trial Court and the other reasons



given by the Lower Appellate Court in dismissing the petition filed under Section 391 Cr.P.C. are not proper. Hence, he prayed that an opportunity may be given to secure the ends of justice, by examining Mrs.D.Kuzhalamani, mother of the respondent and to recall PW1 to cross examine to probabalize his defence and in the interest of justice.

7.The learned counsel for the respondent submitted that prior to filing of the complaint, the respondent issued statutory notice on 02.08.200 and the same was received by the petitioner on 04.08.2022 but he failed to give any reply and after filing of the complaint, summons were issued for appearance of the petitioner, he appeared but failed to cross examine the witness. Further, during 313 Cr.P.C. questioning, signature in the instrument not disputed and now the petitioner making a claim that he had not received any money from the respondent is not proper. The respondent's mother is of old age with ill-health and unable to sign as per the specimen signature given to the Bank, hence the cheque given by the respondent's mother got dishonoured. The petitioner coming to know about the respondent's mother ill-health, to protract and cause harassment to the respondent and his mother filed the above petition. If the petitioner is sincere in defending his case, the



petitioner ought to have participated in the trial cross examined the respondent at the given opportunity, failing to do so and now filing this petition is only to protract the proceedings. He would further submit that the petitioner has not come up with clean hands and the Lower Appellate Court by giving justifiable reasons dismissed the petition which needs no interference.

8.Considering the submissions made and on perusal of the materials, it is seen that the petitioner's specific claim is that the respondent's mother issued a cheque drawn in Punjab National Bank bearing Cheque No.169684 dated 20.11.2020 for a sum of Rs.20,00,000/- which got dishonoured for variance in signature. In the complaint and in the proof affidavit, the specific case of the respondent is that the petitioner borrowed a loan of Rs.20,00,000/- from the respondent's mother which was transferred by RTGS and Rs.5,00,000/- was paid by the respondent to the petitioner by cash, for which three cheques, namely, two cheques for Rs.10,0000/- and one cheque for Rs.5,00,000/- was given in discharge of the liability. Having said so, in the complaint and in the proof affidavit there is no reference to the cheque drawn in Punjab National Bank bearing Cheque No.169684 dated



CrI.R.C.No.2076 of 2023

20.11.2020 for a sum of Rs.20,00,000/- issued by the respondent's mother and how the cheque, reached the petitioner's hand needs explanation, for which, necessarily the petitioner has to examine the respondent's mother as well as to cross examine the respondent. The petitioner failed to cross examine the respondent before the Trial Court will not be a reason to come to a conclusion that there is no cross examination required and the petitioner had committed the offence. It is to be seen that the evidence includes examination-in-chief, cross examination, re-examination and the evidence would be complete when it is tested by cross examination. In this case, admittedly the respondent/complainant was not cross examined. Further, in a case under Section 138 NI Act, statutory presumption against the accused has to be dislodged by way of materials and cross examination. In the present case, the case is at the appellate stage and hence, Section 391 Cr.P.C. had been invoked by the petitioner. In the case of ***Rambhau vs. State of Maharashtra*** reported in ***(2001) 4 SCC 759***, the power under Section 391 Cr.P.C. had been elaborated and the Apex Court held that there are no fetters on the power under Section 391 Cr.P.C. of the Appellate Court and the ultimate object of judicial administrative is to secure ends of justice, the Court exists for rendering justice to the people. The Apex Court further 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. 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.

9. In view of the guidelines of the Apex Court and also finding that in this case, the respondent/complainant was not cross examined, further in the complaint and in the proof affidavit the transaction between the petitioner and the respondent's mother reiterated and Ex.P9 marked, this Court finds that cross examination of the respondent and examination of respondent's mother Mrs.D.Kuzhalamani as additional witness is necessary. Hence, the impugned order passed by the learned V Additional Sessions Judge, City Civil Court, Chennai in Crl.M.P.No.24708 of 2023 in Crl.A.No.344 of 2023 dated 09.11.2023 is set aside and the petitioner is permitted to recall PW1 for cross examination and to examine the respondent's mother Mrs.D.Kuzhalamani as additional witness. This exercise to be completed within a period of three months from the date of receipt of a copy of this order and thereafter, the appeal to be disposed.



Crl.R.C.No.2076 of 2023

WEB COPY 10. Accordingly, the criminal revision petition stands allowed.

Consequently, connected miscellaneous petition is closed.

04.06.2024

Index : Yes/No

Speaking Order/Non Speaking Order

Neutral Citation: Yes/No

cse



WEB COPY



CrI.R.C.No.2076 of 2023

M.NIRMAL KUMAR, J.

cse

To

- 1.The V Additional Sessions Judge,
City Civil Court,
Chennai,
- 2.The Metropolitan Magistrate,
Fast Track Court-I,
Egmore @ Allikulam,
Chennai – 600 003.

Pre-delivery order made in

CrI.R.C.No.2076 of 2023

04.06.2024