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

\+ CRL.M.C. 2698/2024

VIVEK KISHORE. ..... Petitioner

Through: Mr. Atul Kumar Sinha, Adv.

versus

NAVEEN KUMAR ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

O R D E R

% **04.04.2024**

CRL.M.A. 10284/2024 *(for exemption)*

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

CRL.M.C. 2698/2024 & CRL.M.A. 10283/2024 *(for stay)*

1. The present petition is filed under Section 482 of the Code of Criminal Procedure, 1973 ('**CrPC**'), challenging the order dated 20.02.2024 (hereafter '**impugned order**'), passed by the learned Additional Sessions Judge ('**ASJ**'), Dwarka Courts, Delhi, in Criminal Appeal No. 230/2023.
2. The learned ASJ, by the impugned order, had dismissed the application filed by the petitioner under Section 391 of the CrPC seeking permission to lead additional evidence.
3. The allegations against the petitioner in the complaint were that the petitioner had approached the complainant/ respondent for a friendly loan of ₹14,50,000/-. Out of the said amount, the complainant had given ₹10,00,000/- to the petitioner by cheque and ₹4,50,000/- by cash. It was alleged that after repeated insistence to repay the loan, the petitioner issued two

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post dated cheques to the respondent. Upon presentation, the cheques got dishonoured with the reason- 'Funds Insufficient'.

4. The petitioner had raised the defence, at the stage of framing of notice under Section 251 of the CrPC, that he had given the cheque in question to the complainant's brother, namely, Ajay, for handing over the same to a builder, as they both used to work together. Thereafter, the petitioner had stated in his statement under Section 313 of the CrPC that Ajay had contacted him to purchase a flat and transferred the amount of ₹10,00,000/- as token money. It was stated that the entre amount had been deposited by the complainant in the account of the petitioner on behalf of his brother Ajay. At the stage of defence evidence, the petitioner had stated that he and Ajay wanted to jointly purchase a flat for the purpose of starting a business. The said amount was returned by the petitioner to Ajay, partly in cash and partly through bank transactions, when the deal did not materialise.

5. The learned Metropolitan Magistrate ('**MM**'), South-West District, Dwarka Courts, by judgment dated 01.03.2023, convicted the petitioner for the offence under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**') and observed that the petitioner had been unable to establish any link between the transactions between him and Ajay and the amount of ₹10,00,000/- deposited by the complainant in his bank account. It was also observed that the petitioner had narrated varying versions at different stages of the trial.

6. The petitioner challenged the said order by filing an appeal, being CA No. 230/23. The petitioner also filed an application under Section 391 of the Code of Criminal Procedure Code, 1973 praying as under:

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"1) Allow this application to bring on record additional evidence;
2) Allow the appellant to summon Ajay Kumar, the brother of the complainant;
3) Allow the appellant to recall the CW1 - the complainant;
4) Allow the appellant to bring on record stamp papers dated 30.5.2016 and another stamp paper dated 8.7.2016 as additional evidences;
5) Allow the appellant to bring on record as additional evidence the cheque book leaf over which remarks is made the appellant for giving cheque to Ajay Kumar in 2016;
6) Allow the appellant to make an application for expert/forensic examination of cheque in question bearing No. 000043 drawn on HDFC Bank, Najafgarh Branch, New Delhi of Rs. 10,00,000 (Rs. Ten Lacs only) to verify the age of signature and its presentation and also for interpolation made over the date as filled by the complaint itself and also to examine the bank official as witness; and/or
7) Pass any such and further order which this Hon'ble Court may deem fit and proper in favour of appellant, in the interest of justice."

7. The learned ASJ, by the impugned order, while dismissing the said application filed by the petitioner under Section 391 of the CrPC noted that the alleged documents sought to be produced did not bear any date or the signature of the complainant's brother, whereby, even if the petitioner was allowed to lead the additional evidence, the same would be futile. It was also observed that the petitioner had admitted that the cheque in question bears his signature at the time of framing of notice under Section 251 of the CrPC, whereby, the presumption under Section 118 (b) of the NI Act would apply. It was observed that in such a case, it was irrelevant whether the petitioner had filled the other contents of the cheque.

8. The learned counsel for the petitioner submits that the petitioner was incapacitated to adduce the evidences that are now sought to be adduced due to his wife having been diagnosed with blood cancer.

9. He submits that the petitioner through the application

under Section 391 of the CrPC wants to place on record certain documents that were executed by Ajay to prove that the petitioner had entered into an agreement to sell and purchase with Ajay. Furthermore, the cheque in question was issued in the year 2016, which the petitioner seeks to prove through the counter slip of his cheque book.

10. He submits that the alleged transaction between the petitioner and Ajay pertaining to purchase of a flat could have easily been proved by the petitioner through documentary evidence to this effect or by summoning either the builder or Ajay to clarify the nature of the transactions between them.

11. He submits that the ends of justice would only be served if the evidence of Ajay is recorded and stamp papers as well as cheque book leaves are allowed to be adduced as evidence.

12. He submits that the present application is not a disguise for retrial or to change the nature of the case.

13. I have heard the learned counsel for the petitioner and perused the record.

14. The relevant portion of the impugned order reads as under:

> "***6.*** *In this case also, the appellant seeks permission to lead additional evidence in appeal u/s 391 Cr.P.C. to prove the document, allegedly executed by brother of respondent in the year 2016 and the counter slip of his cheque book to prove that cheques in question were issued in the year 2016.*
> ***7.*** *The alleged documents placed on record neither bear date nor the signatures of Ajay Kumar.* ***Even, if the appellant is allowed to lead additional evidence to prove these documents, it would be futile exercise because these documents do not bear the signatures of executing party and have been prepared unilaterally by the appellant to serve his interest.***
> ***8.*** *At the time of framing of notice u/s 251 Cr.P.C., appellant has admitted that the cheque in question bears his signatures only and it was issued to complainant.*

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9. Clause (b) of section 118 of Negotiable Instruments Act 1881 provides that' court shall presume that every negotiable instrument bearing a date was made or drawn on such date. ***Once appellant has admitted that he had issued the cheque in question to the complainant and it bears his signatures then it is irrelevant whether he has filled the other contents of the said cheque or not…***

10. *Moreover, appellant was granted sufficient opportunities by the Ld. Trial Court to lead evidence in his defence. Appellant has examined himself as a witness u/s 315 Cr.P.C. but failed to produce the abovementioned documents which were in his possession at that time also. It is not the case that appellant came to know about these documents after judgment passed by the Ld. Trial Court.”*

(emphasis supplied)

15. Section 391 of the CrPC empowers the Appellate Court to take further evidence or direct it to be taken in case it deems the same to be necessary. The applicant seeking permission to adduce further evidence under Section 391 of the CrPC has to specifically show and give tangible reasons as to how the same is necessary.

16. Another factor to be considered is whether the party which moves the application under Section 391 of the CrPC had exercised due diligence and was prevented from presenting the evidence sought to be adduced. The Hon'ble Apex Court in the case of ***Ajitsinh Chehuji Rathore v. State of Gujarat & Anr.*** **: 2024 SCC Online SC 77** had observed as under:

"***9.*** *At the outset, we may note that the law is well-settled by a catena of judgments rendered by this Court that power to record additional evidence under Section 391 CrPC should only be exercised when the party making such request was prevented from presenting the evidence in the trial despite due diligence being exercised or that the facts giving rise to such prayer came to light at a later stage during pendency of the appeal and that non-recording of such evidence may lead to failure of justice.*"

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17. The petitioner has sought to distinguish the facts in the present case from those in the case of ***Ajitsinh Chehuji Rathore v. State of Gujarat & Anr.* : 2024 SCC Online SC 77**. However, while the facts of the present case differ from those in the aforesaid judgment, the settled law in regard to Section 391 of the CrPC would still apply.

18. As discussed above, the power under Section 391 of the CrPC is to be exercised when the concerned evidence is necessary and if the party could not have adduced the same despite diligence. While the petitioner has argued that he was incapacitated to adduce the concerned evidence due to the health of his wife, who has since expired, it is not the case of the petitioner that he was not granted an adequate opportunity to lead the evidence he seeks to put forth at this stage.

19. The Hon'ble Supreme Court in ***RE: Expeditious Trial of Cases Under Section 138 of N.I. Act:* 2021 SCC OnLine SC 325**, noting the huge pendency of complaints under Section 138 of the Negotiable Instruments Act, 1881 ('**NI Act**') and their adverse effect in disposal of other criminal cases, directed the High Courts to issue practice directions to the Magistrate. It was noted that Section 143 of the Act was introduced as step in aid for quick disposal of the complaints under Section 138 of the N. I. Act. It was held that it is sufficient for the Magistrate to record the substance of the evidence and deliver a judgment containing a brief statement of reasons for his findings and the Magistrate must give reasons for converting the trial from summary trial to summons trial.

20. Moreover, it is relevant to note that Section 148 of the NI Act was amended to include a mandate of a minimum deposit of

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20% of the fine or compensation by the convicted appellant to curb the issue of undue delay in final resolution of cheque dishonour cases and discourage frivolous delay tactics of unscrupulous drawers of dishonoured cheques. Thus, when the object of the NI Act is to ensure speedy disposal of cases, a tardy and prolonged appellate remedy would be in teeth with the very object of the NI Act.

21. In such a case, if applications under Section 391 of the CrPC are allowed in a routine manner, especially, in proceedings in relation to the NI Act, the spirit of the NI Act would be defeated. The petitioner has not sought to dispute the finding of the learned ASJ that the documents sought to be brought on record do not bear the signature of Ajay or that the petitioner had admitted his signatures on the cheque in question.

22. In such circumstances, this Court is of the opinion that given the nature of the evidence sought to be adduced, the learned ASJ has correctly observed that even if the same is brought on record, it would serve no purpose in view of the presumption under Section 118(b) of the NI Act and because the documents don't bear the signature of Ajay. The concerned evidence is thus not necessary and allowing the application would only cause undue delay in the proceedings.

23. In view of the above, this Court finds no infirmity with the impugned order. The present petition is, accordingly, dismissed.

AMIT MAHAJAN, J

APRIL 4, 2024
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