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

+ CRL.M.C. 6328/2023& CRL.M.A. 23674/2023, CRL.M.A.
7436/2024

ASHOK KUMARPetitioner

Through: Mr. Prince Mohan Sinha and Mr.
Maneesh Jain, Advs.

versus

SUSHIL KUMAR JAINRespondent

Through: Mr. Arjun Sanjay, Adv. (Through VC)

46 WITH

+ CRL.M.C. 6329/2023& CRL.M.A. 23676/2023, CRL.M.A.
8180/2024

ASHOK KUMARPetitioner

Through: Mr. Prince Mohan Sinha and Mr.
Maneesh Jain, Advs.

versus

SWATI JAINRespondent

Through: Mr. Arjun Sanjay, Adv. (Through VC)

47 WITH

+ CRL.M.C. 6330/2023& CRL.M.A. 23678/2023, CRL.M.A.
7850/2024, CRL.M.A. 7851/2024

ASHOK KUMARPetitioner

Through: Mr. Prince Mohan Sinha and Mr.
Maneesh Jain, Advs.

versus

MADHUBALA JAINRespondent

Through: Mr. Arjun Sanjay, Adv. (Through VC)



48
+ AND
CRL.M.C. 6331/2023& CRL.M.A. 23680/2023, CRL.M.A.
7542/2024

ASHOK KUMARPetitioner

Through: Mr. Prince Mohan Sinha and Mr.
Maneesh Jain, Advs.

versus

RUCHI JAINRespondent

Through: Mr. Arjun Sanjay, Adv. (Through VC)

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

ORDER

30.01.2025

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1. This hearing has been done through hybrid mode.
2. These petitions challenge the order dated 10.07.2023 passed by the learned ASJ-05, Patiala House Courts, New Delhi in Criminal Appeals filed at the instance of the present petitioner whereby, an application under Section 391 of the Cr.P.C. filed in each of the appeals has been dismissed by the learned ASJ before whom the appeals were pending.
3. The details of the CRL.M.C. and the relevant appeals are as under:-
 - i. CRL.M.C. 6328/2023 arising out of Criminal Appeal No.52/2022
 - ii. CRL.M.C. 6329/2023 arising out of Criminal Appeal No.55/2022
 - iii. CRL.M.C. 6330/2023 arising out of Criminal Appeal No.53/2022
 - iv. CRL.M.C. 6331/2023 arising out of Criminal Appeal No.54/2022



4. The petitioner had been convicted by the learned Metropolitan Magistrate for the offence punishable under Section 138 of the Negotiable Instruments Act which had been assailed by him in the aforesaid appeals pending before the learned ASJ. In the aforesaid appeals, the petitioner filed an application under Section 391 of the Cr.P.C. seeking permission to lead additional evidence by summoning the witnesses mentioned in the said application. The said application was dismissed by the learned ASJ in all the aforesaid appeals and consequently the present petitions have been filed challenging the said orders.

5. Learned counsel appearing on behalf of the petitioner submits that additional evidence which is sought to be led is crucial to the defence of the petitioner in order to rebut the presumption *qua* him. It is further submitted that by examining the witnesses mentioned (at Sl. No. 6 to 11 of the application), the petitioner will be able to establish the tranches of payment made to respondent/complainant on different dates which were duly received by respondent, and thus establish that the cheques which were the subject matter of complaint were given as security and the same were misused by the respondent/complainant.

6. It is submitted that the aforesaid witnesses were initially sought to be examined by the petitioner in his defence, however, they were dropped inadvertently before the learned Trial Court and it is stated that these material witnesses will establish the defence of the appellant, and therefore the same should have been permitted to be examined.

7. *Per contra*, learned counsel appearing on behalf of the respondents submits that the various contentions raised in the present petitions have already been dealt with by the learned Trial Court in the judgment dated



17.01.2022. It is submitted that the learned Trial Court has categorically given a finding with regard to the document i.e NCR as well as the complaint filed by the petitioner with regard to stolen cheques. The relevant part of the judgment is reproduced as under:

“26. Further, it is interesting to note that in his examination in chief dated 11.11.2021 Accused Ashok Kumar submitted that he lodged a police complaint and NCR which is Ex. DW-1/A. However, perusal of Ex. DW-1/A shows that it is NCR (and not police complaint) and the lost article is PAN CARD. The accused has failed to prove what is the relevance of missing of the said "Pan Card" with the case in hand. Thus this fact remains uncontroverted that there was no police complaint made or any stop instructions to bank made by accused. Accordingly, this defence of accused that cheque in question was given for security purpose is not proved and therefore, rejected.”

8. Heard the learned counsel for the parties and perused the records. The learned Appellate Court *vide* the impugned order has observed and held as under:-

“6. In the present application, it is stated that during the pendency of the trial, the appellant has filed the list of defence witnesses mentioned at serial no. 1 to 11. Thereafter, DW1 to DWS were examined on 11.11.21. The witnesses mentioned at serial no. 6 to 11 in the list of witnesses were dropped on the statement of appellant I convict recorded by the Ld. Trial Court. It is stated that the witnesses mentioned at serial no.6 to 11 were dropped by the appellant I convict inadvertently and the said witnesses are material witnesses to the defence of the appellant and to rebut the presumption that the said witnesses are the material witnesses, which may fortify the case of the appellant. That dropping the witnesses mentioned at serial no. 6 to 11 were neither intentional nor deliberate but due to inadvertence of counsel for the appellant. It is stated that the



witnesses mentioned at serial no. 6 to 11 are crucial and necessary for just and proper adjudication of the appeal. It is prayed that in view of the grounds mentioned in the present application, the appellant/convict may kindly be allowed to adduce additional /further evidence.

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XXX

XXX

8. The perusal of the record reveals that complaint case for commission of offence u/s 138 N.I.Act was filed on 09.07.2019 and thereafter, on the basis of pre summoning evidence, the appellant I convict

9. The present application is moved on the ground that vide order dated 24.11.2021, statement of the appellant was recorded, whereby witnesses mentioned at serial no. 6 to 11 in the list of witnesses were dropped. It is submitted that witnesses were dropped inadvertently but the said witnesses were material witnesses to defend the case of the appellant and to rebut the presumption. It is also stated that dropping of witnesses was done due to inadvertent act of counsel for the appellant.

10. Ld. Trial court has recorded statement on oath of the accused persons, whereby the defence evidence was closed. Statement was recorded in presence of Ld. Counsel for appellant. Final arguments were also addressed by the Ld. Counsel for appellant but this issue was never raised that the witnesses mentioned at serial no. 6 to 11 are material witnesses and their defence evidence has been closed inadvertently. The present appeal was filed on 03.03.2022 and after expiry of about 2 years at the time of final disposal, the present application U/s 391 Cr.P.C is moved.

11. Section 391 Cr.P.C provides that during the pendency of the appeal, the Appellate Court if thinks necessary may take additional evidence or direct it to be taken by the Ld. Trial Court. The taking of additional evidence may be allowed



when there is likelihood or failure of justice without it. It is an exception to the general rule and the power conferred by this provision should be exercised with great care. The Appellate Court has power to take additional evidence in suitable cases but this power should not be exercised to fill up the gap. The grant of permission to lead additional evidence is the discretionary power of the Court to be used in exception circumstances.

12. The appellant has failed to disclose any justified ground sustainable in the eyes of law for grant of an opportunity to lead further evidence I additional evidence at the appellate stage. The appellant was represented by counsel in the present appeal but the present application was moved in the appeal even at the belated stage. The careful perusal of the material on record reveals that appellant has failed to disclose any justified ground for grant of permission to lead further /additional evidence. The appellant has also failed to disclose any material which justifies the exercise of discretionary power by the court at this appellate stage.”

9. This Court has also perused the bank statements annexed with the present petitions which is sought to be proved on record and it reflects certain payments were made from the account of the petitioner in 2016-17. With regard to this defence the following observations of the learned Trial Court are relevant and are reproduced as under:

“32. Moving further, let us peruse. the Defence evidence of accused. it is apposite to reproduce the relevant extract of examination in chief of accused Ashok Kumar dated 11.11.2021:

I have purchased a property of Rs 1,73,00,000/- from the complainant. I have given four demand drafts and four cheques to the complainant. I have given Rs 95 lakh through demand draft and cheque and remaining amount in cash. In 2017-18 I have



given Rs 12 lakh in cash to the com. plainant at his home against one cheque of Rs 24 lakh approximately.

33. In his cross examination, the accused firstly admitted that for Rs 95 lakh he had issued certain cheques also (which corelate and fortify the case of complainant) and he further submitted that he doesn't remember the date and time when the said abovementioned cash of Rs 12 lakhs was given to the complainant. Further, the payment of huge amount of Rs 12 lakhs in cash is not proved by accused by receipt/written agreement etc. No oral or documentary proof has been led by the accused to prove the same. The accused has placed on record his statement of bank account Ex. DW-1/B from 29.07.2016 to 28.07.2017. But none of the above-mentioned alleged payment by accused to complainant is being reflected in it. Thus,, the accused has failed to prove the factum of making payment of Rs 12 lacs in cash to complaint, as alleged by him.

34. It is apposite to mention that the accused has brought both the property dealers in his defence evidence as DW-4 and DW-5 and both of them admitted in their cross examination that for payment of Rs 95 lakhs certain cheques were also given by the accused which were bounced/dishonored. It is relevant to reproduce the cross examination of DW-4:

Out of the said 95 lakhs certain cheques were also given by the accused which were bounced/dishonored. I have no knowledge whether the payment towards the said dishonored cheque was made by the accused or not. The accused told me that he will pay the amount of dishonored cheques however he didn't pay the same.”

10. The petitioner having once dropped the witnesses before the learned Trial Court cannot now at the appellate stage seek to summon them. The learned appellate court has observed that this application was filed after two



years of filing the appeal at the time of final disposal.

11. This Court has considered the submission made on behalf of the petitioner and respondent and gone through the records and is of the view that the impugned order dated 10.07.2023..deserves no interference.

12. Accordingly, the present petitions are dismissed.

13. Interim order, if any, stands vacated.

14. The petitions are disposed of.

15. Pending application(s), if any, also stands disposed of.

16. The learned Appellate Court is directed to dispose of the appeals as expeditiously as possible within a period of 3 months from receiving the order.

17. Copy of the order be sent to the concerned trial court for necessary information and compliance.

18. Order be uploaded on the website of the Court *forthwith*.

AMIT SHARMA, J

JANUARY 30, 2025/nk

Click here to check corrigendum, if any