

2019 PLRonline 3507

PUNJAB AND HARYANA HIGH COURT

Before:- Arvind Singh Sangwan, J.

CRM-M No. 36367 of 2016 (O&M) and CRM-M No. 36489 of 2016 (O&M). D/d. 31.1.2019.

Balbir Singh and Another – Petitioner

Versus

Kulwant Singh and Another – Respondent

Criminal Procedure Code, 1973 Section 311, 313, 391 - Negotiable Instruments Act, 1881 (26 of 1881) Section 138 - Complaint filed by complainant for dishonour of cheque - Accused sentenced - The petitioner's plea of innocence and false implication in the statement recorded under Section 313 Cr.P.C., 1973 does not affect his right to lead additional defense evidence - The petitioner wants to lead evidence to show that he was under constant treatment with three doctors referred to in the application - The complainant has not produced on record either the agreement to sell or any receipt vide which the money was paid to the petitioner/accused, and even the marginal witness or the scribe was not produced to prove this fact - The petitioner has a right to lead defense evidence that he was mentally not stable when the agreement to sell was executed in the month of August 2013 or the cheques were issued in the month of April 2015 - The amount of Rs. 10 lacs was not paid through the bank and was paid in cash, which raises suspicion about the validity of the agreement to sell - The application of the petitioner to lead additional evidence deserves to be allowed as per the judgment of the Hon'ble Supreme Court in *Sukhjeet Singh's case* - There is no ground to allow the application under Section 311 Cr.P.C., 1973, for recalling the complainant and to put him the medical record, which the petitioner can otherwise produce by way of leading additional defense evidence - **Petition allowed. [Para 13 and 14]**

For the Petitioner :- P.S. Ahluwalia, Advocate (in both the petitions).

For the Respondent :- Deepak Bhardwaj, Advocate (in both the petitions).

JUDGMENT

Arvind Singh Sangwan, J. - Prayer in these petitions is for setting-aside the impugned order dated 17.09.2016 passed by the Lower Appellate Court vide which the application filed by the petitioner/accused under sections 391 and 311 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') praying for leading additional defence evidence and recalling the respondent/complainant for cross-examination was dismissed in complaint No.1150 dated 25.07.2014 and complaint No.1351 dated 25.07.2014.

2. The impugned order passed in criminal complaint No.1150 of 2014 is challenged in CRM-M No.36367 of 2016 whereas the order passed in criminal complaint No.1351 of 2014 is challenged in CRM-M No.36489 of 2016.

3. Brief facts of the case as taken from criminal complaint No.1150 of 2014 are that the respondent/complainant - Balbir Singh filed a complaint under section 138 of the Negotiable Instruments Act (in short 'the NI Act') with the allegations that the complainant was known to him and as per an agreement to sell dated 23.08.2013, the accused agreed to sell 03 shops in village Kheri Gujran, District Patiala and received a sum of L 10 lacs in

presence of marginal witnesses of the agreement to sell. It was agreed that the sale deed will be registered in favour of the complainant upto 30.10.2013. Later on, the complainant express his inability to get the sale deed executed and in the month of April, 2014 in presence of one Davinder Kumar, it was settled that the petitioner/accused will return the amount of L 13.50 lacs and he issued 02 cheques bearing No.579343 dated 16.04.2014 for a sum of L 6.50 lacs (subject-matter of complaint No.1150 of 2014) and No.579344 dated 20.05.2014 for a sum of L 7 lacs (subject-matter of complaint No.1351 of 2014). On presentation, both the cheques were dishonoured by the bank with the remarks 'payment stopped by the drawer's and funds insufficient'. After serving the legal notice, the respondent filed 02 complaint under section 138 of the NI Act, in which the petitioner was summoned and after the respondent/complainant led his evidence by examining himself as CW1 and producing on record the relevant documents and income-tax return, the case was fixed for recording the statement of the petitioner/accused under Section 313 Cr.P.C., 1973 in which he made the following statement:-

"I have been falsely implicated in present complaint by the complainant. The complainant has not capacity to advance any money to me. The complainant being in police department by treating and over owing me had taken blank cheques. The complainant used to threaten me whenever I requested him to return blank cheques as he was working in police department. No notice was received by me. The complaint filed by complainant is false one."

4. Thereafter, the trial Court vide judgment dated 23.07.2015 allowed both the complaints thereby holding the petitioner guilty for offence punishable under section 138 of the NI Act and vide order of sentence of even date, the petitioner was sentenced to undergo rigorous imprisonment for a period of 01 year and to pay a compensation equivalent to half of the cheque amount. The petitioner preferred an appeal before the Lower Appellate Court and during the pendency of the appeal, the petitioner moved separate applications under Section 391 read with Section 311 Cr.P.C., 1973 for allowing the petitioner to lead further additional defence evidence to the following effect:-

(a) That the petitioner remain under treatment of various doctors as he was not mentally stable during the year 2014-15 and in order to prove his medical record, he want to examine 03 witnesses in his defence i.e. (i) Dr. Suman Goel from Goyal Psychiatric Centre, 85, Punjabi Bagh, Patiala along with original treatment record of patient Balbir Singh. (ii) Dr. Anshuman Mittal from Ashadeep Clinic, B-24/129, Kishan Nagar, Lower Mall, Patiala along with complete record of patient Balbir Singh. (iii) Dr. Puneet Phull from Columbia Hospital, Near Phatak No.22, Patiala along with complete record pertaining to patient Balbir Singh. It was stated in the application that in the month of April, 2014 i.e. immediately before issuance of the disputed cheques, the appellant was not medically fit to execute any cheque or a document as he was under the treatment with a Psychiatrist.

5. Similarly, in the application under Section 311 Cr.P.C., 1973 the petitioner prayed for recalling of the complainant for further cross-examination and in the application again, giving the similar grounds that the petitioner was not mentally stable during the aforesaid period, he want to cross-examine the complainant by putting the medical record to him from the hospitals to show that he was not medically fit.

6. The respondent/complainant contested the said application. The Lower Appellate Court vide similar order passed in both the appeals dated 17.09.2016, dismissed both the applications under Sections 391 as well as 311 Cr.P.C. The operative part of the order reads as under:-

“....6. This Court has gone through the record and considered the submissions made. There is a fine line of distinction between a person of unsound mind and a person of unstable mind. Whereas unsoundness of mind may be a valid defence, instability of the mind is not defence except to the extent that at the time when the transaction took place, the person could not have understood the facts thereof. There is nothing on record to suggest that at any time during the trial, the applicant/appellant was of unsound mind and he must have instructed his counsel during the trial regarding actual and factual positions of the dealings between the parties and other facts which might be relevant for conducting the case including the cross-examination, but perusal of the record does not put forward any such fact as is claimed in the applications. Further more, it is submitted that the applicant/appellant that no proper opportunity for adducing defence evidence was afforded to him but perusal of the record reveals that the statement of the accused under Section 313 Cr.P.C., 1973 was recorded on 11.06.2015 and the matter was finally decided on 23.07.2015 and during this period, the applicant/appellant had sufficient time to arrange for the witnesses to be examined in defence and especially as the matter was adjourned from 03.07.2015 to 07.07.2015, 07.07.2015 to 16.07.2015, 16.07.2015 to 17.07.2015 and 17.07.2015 to 23.07.2015 on which date the matter was decided. Accordingly, the plea that proper opportunity was not afforded to adduce defence does not hold any ground and accordingly both the applications being devoid of merits are hereby dismissed.”

7. Identical order was passed in the second appeal by the Lower Appellate Court.

8. Counsel for the petitioner has argued that immediately before issuance of the cheque, the petitioner was not medically fit or in a mental state to either issue a cheque or execute any document and, therefore, he want to lead evidence about the treatment undertaken by him since August, 2013 till April, 2014 by way of examining the aforesaid 03 doctors. It is further submitted that the respondent has filed a civil suit and in the written statement of the same, the petitioner has taken a similar plea in para 7 of the reply on merits and, therefore, the petitioner while leading his defence evidence could not lead the aforesaid evidence before the trial Court. Counsel for the petitioner has further submitted that the respondent/complainant while appearing as CW1 could not produce on record any agreement to sell or any marginal witness or scribe of the same to show that the complainant has advanced a huge amount of L 10 lacs in cash when the alleged agreement to sell dated 23.08.2013 was executed. It is further argued that, in fact, the complainant has not even produced on record a photocopy of the same to show that there was any such agreement and since the petitioner was under treatment of a Psychiatrist since August, 2013, he was not in a position to execute any such agreement and there is no evidence to show that the complainant has the paying capacity of giving L 10 lacs as an earnest money in the aforesaid agreement to sell as no receipt has been produced by the complainant. It is also submitted that the complainant is a Head Constable posted in Punjab Police drawing a salary of approximately L 34,000/- in the year 2013 and the petitioner, who was under treatment was facing the withdrawal symptoms of drugs and was, in fact, trapped by the complainant to obtain his signatures on the cheques.

9. Counsel for the petitioner has relied upon a recent judgment passed by the Hon'ble Supreme Court in ***Criminal Appeal No.48 of 2019 (arising out of SLP (Crl.) No.1120 of 2017) titled as "Brig. Sukhjeet Singh (Retd.) MVC v. The State of Uttar Pradesh and others" decided on 24.01.2019***, wherein the Hon'ble Supreme Court has held as under:-

“....11. In the present appeal, we are concerned only with the rejection of application

filed by the appellant under Section 391 Cr.P.C., 1973 before the Session Judge in the criminal appeal filed by him against the conviction order, whether the Session Judge committed error in not exercising power under Section 391 Cr.P.C., 1973 to permit the appellant to lead additional evidence is a question to be answered. Whether the High Court committed error in not exercising power under Section 482 Cr.P.C., 1973 as to secure the ends of justice?

12. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with "Appeals". Section 391 Cr.P.C., 1973 empowers the Appellate Court to take further evidence or direct it to be taken. Section 391 is as follows:-

"391. Appellate court may take further evidence or direct it to be taken.-(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.

(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."

13. The key words in Section 391(1) are "if it thinks additional evidence to be necessary". The word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of Appellate Court are contained in Section 386. In an appeal from a conviction, an Appellate Court can exercise power under Section 386(b), which is to the following effect:-

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

14. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the Appellate Court to secure ends of justice. The scope and ambit of Section 391 Cr.P.C., 1973 has come up for consideration before this Court in **Rajeswar Prasad Misra v. State of West Bengal and Another, AIR 1965 Supreme Court 1887**. Justice Hidayatullah, speaking for the Bench held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. He 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. Following was laid down in Paragraph Nos. 8 and 9:-

"8. Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a

condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said 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. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.....”

15. This Court again in **Rambhau and Another v. State of Maharashtra, 2001(2) RCR (Criminal) 721 : (2001) 4 SCC 759** had noted the power under Section 391 Cr.P.C., 1973 of the Appellate Court. Following was stated in Paragraph Nos. 1 and 2:-

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of section 391 of the Code of Criminal Procedure, 1973. A plain look at the statutory provisions (Section 391) would reveal the same.....”

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of **Rajeswar Prasad Misra v. State of W.B.** in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.”

16. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 Cr.P.C., 1973 of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people....”

10. In the aforesaid judgment, the Hon’ble Supreme Court while discussing two grounds rejecting the application under Section 391 Cr.P.C., 1973 by the Court of Sessions and High Court held that neither the filing of an application for additional evidence at a belated stage is a ground to reject the same nor the delay in decision of the appeal is a ground to dismiss the same if the proposed additional evidence enables the Court to secure the ends of justice in achieving the object of judicial administration.

11. In reply, counsel for the respondent has submitted that in the statement under Section 313 Cr.P.C., 1973 the petitioner has not set up any such defence that he was medically unfit on the day and in the written statement filed before the Civil Court, a plea has been taken that the cheques were issued as a security cheque. It is also argued that as per the averment in the complaint when the settlement arrived at between the complainant and the petitioner/accused, the original agreement to sell was returned and in lieu thereof, he had issued 02 cheques for L 6.50 lacs and L 7 lacs, which were dishonoured and therefore,

the Lower Appellate Court has rightly dismissed both the applications.

12. After hearing the counsel for the parties, I find merit in the present petition qua the application filed under Section 391 Cr.P.C., 1973 however, I find no ground to interfere in the findings recorded by the Lower Appellate Court rejecting the application under Section 311 Cr.P.C., 1973

13. Though in the statement recorded under Section 313 Cr.P.C., 1973 the petitioner has pleaded innocence and false implication, the stage for leading the defence evidence comes later on and it is not necessary that while recording the statement under Section 313 Cr.P.C., 1973 the accused must disclosed what defence evidence he has to lead and therefore, mere not mentioning of the fact that the petitioner was not medically fit in his statement under Section 313 Cr.P.C., 1973 will not affect his right to lead additional defence evidence.

14. The petitioner want to lead the evidence, a photocopy of which is on record to show that he was under constant treatment with 03 doctors referred to in the application and, therefore in the light of the fact that the complainant has examined only himself as CW1 and has not produced on record either the agreement to sell or any receipt vide which the money was paid to the petitioner/accused and even the marginal witness or the scribe were not produced to prove this fact, the petitioner has a right to lead defence evidence that he was mentally not stable when the agreement to sell was executed in the month of August, 2013 or the cheques were issued in the month of April, 2015. It is worth noticing here that the amount of rs. 10 lacs was not paid through bank and was paid in cash, which raises suspicion about the validity of the agreement to sell and, therefore, the application of the petitioner to lead additional evidence deserves to be allowed as in view of the judgment of the Hon'ble Supreme Court in Sukhjeet Singh's case (supra) wherein it is held that the Court exists for rendering justice to the people and to secure the ends of justice. However, I find no ground to allow the application under Section 311 Cr.P.C., 1973 for recalling the complainant and to put him the medical record, which the petitioner can otherwise produce by way of leading additional defence evidence. Even if the said medical record is not put to the complainant in his cross-examination, it will not make any difference as it is for the petitioner to lead his defence evidence and prove the said record by examining the concerned doctors.

15. Accordingly, the present petitions are partly allowed, the impugned orders dated 17.09.2016 passed in both the petitions dismissing the application under Section 391 Cr.P.C., 1973 is set-aside, however, the order dismissing the application under Section 311 Cr.P.C., 1973 is upheld.

16. The Lower Appellate Court will record the statement of the witnesses by granting 03 effective opportunities to the petitioner. It will be the duty of the petitioner to produce the witnesses at his own responsibility, however, the Court may issue dasti summons for effecting service of the aforesaid 03 witnesses mentioned in the application.

17. With the aforesaid modifications, both these petitions are disposed of.