

THE HIGH COURT OF MADHYA PRADESH, JABALPUR

Misc. Criminal Case No. : 21577 of 2021
Parties Name : Harihar Mishra vs. Vinay Kumar Bhavsar & another
Bench Constituted : Hon'ble Shri Justice Rajendra Kumar (Verma)
Whether approved for reporting : Yes
Name of counsel for parties : Shri Pradeep Kumar Naveria, Advocate for the petitioner.
None for the respondent No.1 though served.
Shri Rahul Tripathi, Panel Lawyer for the respondent No.2/State.
Law Laid Down : When evidence has not been led before the trial court, the question of leading additional evidence under section 391 of Code does not arise.
Significant Paragraphs : 7, 8, 9, 10, 11, 12, 13, 14

Jabalpur, Dated: 24.09.2021

The petitioner has filed this Misc. Criminal Case under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') being aggrieved with the order dated 09.03.2021 passed in Criminal Appeal (Regular) No.58/2019 by the Second Additional Judge to the Court of First Additional Sessions Judge, Betul; whereby the learned Additional Sessions Judge has rejected the application filed by the petitioner under Section 91 of the Code.

2. According to the petitioner, the complainant has filed a private

complaint under section 200 of the Code against the petitioner/accused for the offence punishable under section 138 of Negotiable Instruments Act (hereinafter referred to as “the Act”) contending that there was an agreement to sale of land between the parties and in this regard as an advance payment the petitioner/accused has issued a cheque of Rs.20,00,000/- dated 5.10.2013 of State Bank of India, Raipur in favour of respondent no.1/complainant, which was dishonoured on presentation. In proceeding, petitioner/accused has preferred an application under section 91 of the Code, which was dismissed by the trial court and after completing the trial petitioner/accused has been convicted for the offence under section 138 of the Act and sentenced simple imprisonment for one year and compensation of Rs.31,74,500/- (including interest of Rs.11,74,500/- and suit cost of Rs.66,000/-) has also been imposed, in default of payment of compensation, to undergo 2 years additional simple imprisonment.

3. The petitioner/accused preferred a criminal appeal under Section 374 of the Code and in appeal, the petitioner filed an application under Section 91 of the Code (annexure A-3); whereby he prayed to call the income tax return of the complainant. That application was rejected by the appellate Court vide impugned order passed in Criminal Appeal (Regular) No.58/2019.

4. Learned counsel for the petitioner submits that impugned order passed by the learned appellate Court is bad in law as well as in facts. The learned appellate Court erred in rejecting the application only on the ground that the same application was rejected by the learned trial court. The learned Appellate Court erred in not giving the proper emphasis to the contents of application, Annexure A-3, and passed the impugned order, which is not in consonance in the eyes of law. It is also submitted that though he had filed the application under Section 91 of the Code before the appellate Court, however, the same ought to have been treated to be filed under Section 391 of the Code by the appellate Court and dealt accordingly. It is also submitted that even

otherwise under the facts and circumstances of the case, impugned order is liable to be set aside and the application, Annexure A-3, is liable to be allowed.

5. Heard learned counsel for the parties at length and perused the record.

6. The petitioner/accused preferred an application under section 91 of the Code before the trial court with the prayer that as the complainant has stated that he has given the aforesaid amount to the petitioner/accused, thus, it is necessary to call the income tax return to find out income of complainant. But that application was rejected by the trial court.

7. In appeal same application under section 91 of the Code was filed by the petitioner/accused before the learned appellate Court and after due consideration, that application was rejected by the appellate Court and appellate Court came to the conclusion that the trial court has decided the case on merits and trial is over, therefore, complainant cannot be compelled to produce the income tax returns. The learned Appellate Court has relied on the judgments of this Court in the cases of *Prem Babu Jayant Vs. Devendra Kumar Chaudhary, 2018 (2) MPWN 120 and Madhusudan Flour Mill Pvt.Ltd.& another Vs. Sanjay Mane, 2018 (2) MPWN 45*; whereby it has been held that in cases under section 138 of Negotiable Instruments Act complainant could not be directed to act in specific manner and complainant cannot be compelled to produce the income tax returns and non-payment of income tax is the matter between the revenue and assessee.

8. The provisions of section 91 of the Code is reproduced as under:-

“91. Summons to produce document or other thing.

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession

or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

The provisions of Section 391 of the Code is also reproduced below :-

“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.”

9. Section 91 of Cr.P.C deals with the power of the Court or any officer in-charge of police station regarding production of any document or other things necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer.

10. Section 391 of the Code empowers the appellate Court to take further evidence or direct it to be taken. The key words under section 391 of the Code is that, the appellate Court, 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 power to take additional evidence under section 391 of the Code is an object to properly decide the appeal by the appellate Court to secure the ends of justice.

11. The scope and ambit of section 391 of the Code before the Apex Court dealt in *Rajeshwar Prasad Mishra Vs.State of West Bengal, AIR 1965 SC 1887* and it was held that wide discretion is conferred on appellate Courts and the additional evidence may be necessary for a variety of reasons. In *Ram Babu and another Vs. State of Maharashtra, 2001 (4) SCC 759* it was held that there is a very wide discretion in the matter of additional evidence in terms of section 391 of the Code. Therefore, under section 391 of the Code appellate Court may permit for additional evidence.

12. On a perusal of Annexure A-3 (application under section 91 of the Code) filed by the petitioner before the lower appellate Court it reveals that petitioner/accused prayed for production of the documents/ITR form by the complainant. At this juncture, it is relevant to quote the decision of Orissa High Court in the case of *Gave Dei Vs. Subasini Dei and another, 1998 CrLJ 3071 (Orissa)*, wherein the Hon'ble High Court has held that :-

“Where no evidence was adduced by the accused, when they were called upon to adduce the evidence, the appellate Court was not justified in permitting the accused/appellant to adduce additional evidence in appeal preferred by them against their conviction and sentence recorded by the Magistrate.”

13. In the case in hand, there is nothing to show that the petitioner/accused had adduced any evidence before the trial court. In view of the said decision, the question of leading additional evidence under section 391 of the Code would arise only when some evidence is adduced by the parties seeking evidence. From the perusal of section 391 of the Code also, it is clear that it provides the leading of additional evidence only. **When evidence has not been led before the trial court, the question of leading additional evidence under**

section 391 of Code does not arise.

14. Admittedly, the petitioner did not move before the appellate Court for producing the additional evidence, on the contrary, he moved an application under Section 91 of the Code for summoning of the document mentioned therein. In my view, the appellate Court was justified in dismissing the application when the petitioner himself did not request for producing additional evidence and in absence of such request, summoning of a document is a futile exercise.

15. Apart from that, in the present case, there is a dispute with regard to the cheque amount of Rs.20,00,000/-, which was dishonoured. In short, it can be said that the petitioner wants to call the aforesaid income tax returns of complainant to determine the source of income of complainant. It is also necessary to this Court to think about this fact that if the complainant shall not file the proof of his source of income or income tax return, then what would be its effects on the case of complainant and what can be presumed by the Court in this regard. It is held by a Gwalior Bench of this Court in *Criminal Revision No.5263/2018 (Smt. Ragini Gupta Vs. Piyush Dutt Sharma)* that mere non-filing of income tax return, would not automatically dislodge the source of income of the complainant. Non-payment of income tax is a matter between the revenue and assessee. No adverse inference can be drawn in this regard only because of absence of income tax return.

16. In view of the above discussion, no case for interference is made out. This petition is, accordingly, **dismissed**.

**(Rajendra Kumar (Verma))
Judge**