(2017) 09 BOM CK 0162

In the Bombay High Court

Case No : 351 of 2016

M/s Gandhi Sales (A Partnership Firm now dissolved) through its erstwhile partner Pankaj Gandhi, & Ors.	APPELLANT
Vs	
Prakash M. Khandelwal, Proprietor of M/s Gulabchand Badrinarayan	RESPONDENT

Date of Decision : 26-09-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 311, Section 391 - Power to summon material witness, or examine person present - Appellate Court may take further evidence or direct It to be taken<BR

Citation : (2017) 09 BOM CK 0162

Hon'ble Judges : P.N. Deshmukh

Bench : SINGLE BENCH

Advocate : G.L. Bajaj, A.B. Deshpande, M.D. Samel

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel appearing on behalf of the respective parties.

2. This petition challenges impugned order passed by the learned Additional Sessions Judge, Nagpur in Criminal Appeal No. 08 of 2009 on dated 01st September, 2015, thereby rejecting application filed by the petitioners under Section 391 of the Code of Criminal Procedure praying for directions to the trial Court to record additional evidence.

3. To understand controversy involved in the present petition, following facts in brief are necessary to be stated. The petitioners are original accused in Criminal Complaint Case No. 4800 of 2005 initiated by respondent under Section 138 of Negotiable Instruments Act. By judgment of the learned trial Court, the petitioners came to be convicted and are sentenced to suffer SI for one month and are directed to pay compensation of rupees eight lakhs, jointly and severally

to respondent within one month from the date of order and in default of payment of compensation, are awarded further SI for one month. The petitioners assailed this judgment before the learned Additional Sessions Judge, by filing Criminal Appeal No. 08 of 2009 and during the course of hearing of this appeal, filed an application seeking permission for leading additional evidence or to issue directions to trial Court to allow the petitioners to bring on record additional evidence which came to be rejected under impugned order, as aforesaid.

4. Shri G.L. Bajaj, learned Counsel for the petitioners has submitted that the disputed cheque was drawn on a bank account which was in the name of petitioner No.1 which is a partnership firm which came to be dissolved with effect from 31st March, 2004 by its partners by executing dissolution deed on that date. It is, therefore, submitted that partnership firm having dissolved, as aforesaid, in view of provisions of Section 63 of Indian Partnership Act, 1932 and Rule 4 of Maharashtra Partnership Rules, 1989, the petitioners were under obligation to intimate such dissolution by submitting FormE to the Registrar of Firms which was accordingly submitted on 07.05.2004. It is, therefore, the case of petitioners that as the petitioners were registered partnership firm and as was dissolved with effect from 31st March, 2004 of which intimation of dissolution was submitted as aforesaid on 07.05.2004, the disputed cheque is of no legal consequences and has, therefore, submitted that such cheque cannot attract penal provisions of Section 138 of Negotiable Instruments Act, 1881.

5. It is further submitted that the petitioners are not having any legal knowledge and cannot be said to be fully literate persons though they are carrying out business and as such were totally relying upon the Counsel appointed by them to defend their case before the trial Court but, unfortunately he failed to bring on record said fact of dissolution of firm and of presentation of cheque by respondent after such dissolution and also after presentation of FormE by the petitioners. It is thus contended that even if above stated facts were within the knowledge of petitioners and were brought to the notice their lawyer pending trial, he has failed to bring this material evidence on record by not appreciating its importance and consequences of non production of such evidence. It is thus submitted that, application under Section 391 of Code of Criminal Procedure filed for allowing additional evidence on record needs to be allowed by setting aside impugned order by which it came to be rejected.

6. Learned Counsel for respondent, (original complainant) has contended that as a matter of fact, the petitioners admittedly had a business relations with respondent for purchase of various goods during the period from 25.12.2003 to 24.04.2004 which fact can be established from the bill dated 24.04.2004 valued for Rs.1,60,290/on record. It is further submitted that even according to evidence of petitioner, he has admitted purchase of goods from respondent under delivery memo on 27.04.2004 further admitting signature on delivery memo. It is further submitted that petitioners'' witness in the evidence has admitted of payment made to respondent on 08.04.2004 to the extent of rupees three lakhs

by demand draft and during the entire evidence before the trial Court, had not pleaded nor brought on record fact of dissolution of firm on 31.03.2004. It is, therefore, contended that in view of evidence on record, as aforesaid, there is no substance now to allow the application to establish fact of dissolution of firm on 31st March, 2004 which from the evidence as above on the fact of it, appears to be afterthought and irrelevant and has thus contended that the petition is liable to be dismissed.

7. In view of the facts involved in the petition, as aforesaid, it is material to note that during long pendency of complaint before the learned trial Court, though the petitioners had ample opportunity to plead their case of so called dissolution of firm by leading evidence, no such recourse has been adopted for the period of nine years. Even otherwise neither it is the case of petitioners that they at any time earlier has brought this fact to the notice of public at large by issuing public notice of dissolution of their firm which admittedly is mandatory under the provisions of Indian Partnership Act; while respondent has a specific case establishing business transaction even after 31.03.2004 and has denied that the disputed cheques were issued after dissolution of firm. Moreover, it is further material to note that such an application for leading additional evidence has been filed in an appeal at the stage of its final hearing which is found to be pending for hearing for more than four years. In the light of factual position of the petition, as aforesaid, there appears no substance in it either on merits or on the point of law as the petitioners'' conduct itself demonstrates that there was no such deed of dissolution nor they have acted upon it to dissolve the firm on 31.03.2004 and in fact as aforesaid from the evidence, it is found that business relations and transaction between petitioners and respondent continued even after 31st March, 2004. It is, therefore, found that by filing such application, petitioners wanted top prolong the hearing of appeal without sufficient cause.

8. In support of present petition, learned Counsel for the petitioners has relied upon the judgments of Apex Court in the cases of Zahira Habibullah Sheikh (5) and another .v. State of Gujarat and others (reported in 2006(3) SCC, 374); Zahira Habibullah Sheikh (5) and another .v. State of Gujarat and others (reported in 2004(4) SCC, 158); Sudevanand .v. State through Central Bureau of Investigation (reported in 2012 (3) SCC, 387) and Rambhau and another .v. State of Maharashtra (reported in 2001(4) SCC, 749). In the case of Zahira Habibullah Sheikh (5) and another .v. State of Gujarat and others (cited supra), oral evidence was permitted to be led in exceptional case where witnesses are threatened and are forced to make wrong statement before the trial Court. Moreover, both the judgments in the case of Zahira Habibullah Sheikh (5) and another .v. State of Gujarat and others (cited supra) are not relevant in view of the fact that they are not pertaining to filing of documents as sought to be done before the appellate Court by filing application under Section 391 of Code of Criminal Procedure.

9. Similarly, authorities in the case of Sudevanand .v. State through Central

Bureau of Investigation (cited supra), application was under Section 311 read with Section 391 of Code of Criminal Procedure for recalling of approver wherein it was concluded that such statement of approver is beyond legal framework and accused may ask for recalling the approver, which law is thus not relevant in the present petition.

10. Similarly, in the case of Rambhau and another .v. State of Maharashtra (cited supra), the Hon''ble Apex Court in para 4 thereof has observed that Section 391 forms an exception to the general rules and powers thereunder shall have to be exercised with caution and circumspection to meet the ends of justice. It is categorically laid down that this provision is not be invoked to fill up lacuna but to subserve the ends of justice.

11. On the subsequent date of hearing, learned Counsel for the petitioner had cited further bunch of judgments which are listed as below.

(i) Umesh Chandra .v. State of Rajasthan (reported in 1982 (2) SCC, 202);

(ii) Mahant Bhagwan Bhagat .v. G.N. Bhagat and others (reported in 1972 (1) SCC, 486);

(iii) Ramaswamy (dead) by LRs. .v. M. Lobo (dead) by LRs. (reported in 2001 (10) SCC, 176);

(iv) Murarka Properties (P) Ltd .v. Beharilal Murarka and others (reported in 1978 (1) SCC, 109);

(v) Banarsi Dass .v. Brig. Maharaja Sukhjit Singh & another (reported in 1998 (2) SCC, 81);

(vi) Roop Singh (dead) through LRs. .v. Ram Singh (dead) through LRs. (reported in 2000 (3) SCC, 708);

(vii) Sri Bhimeshwara Swami Varu Temple .v. Pedapudi Krishna Murthi and others (reported in 1973 (2) SCC, 261);

(viii) Phiroze Bamanji Desai .v. Chandrakant N. Patel and others (reported in 1974 (1) SCC, 661);

(ix) Gurnam Singh and others .v. Surjit Singh and others (reported in 1975 (4) SCC, 404);

(x) Central Bureau of Investigation .v. Ashok Kumar Aggarwal (reported in 2014 (14) SCC, 295);

(xi) J. Yashoda .v. K. Shobha Rani (reported in 2007 (5) SCC, 730); and

(xii) Kalyan Kumar Gogoi .v. Ashutosh Agnihotri and another (reported in 2011 (2) SCC, 532).

12. I have carefully gone through the judgments relied upon by the learned Counsel for the petitioners, however, found that neither of these judgments can

be used in favour of the petitioners having distinguishing facts on material aspects of the case. Facts involved in these cases are totally divergent against the relief sought in the present petition. In fact it is found that the petitioners are not coming with their case as put forth in the present petition for the period of nine years before the trial Court and thereafter for four years before the appellate Court, as such there is reason to believe that the petitioners are relying upon certain fabricated and forged documents at the appellate stage and by filing such application have made an attempt to bring such evidence on record which cannot be permissible under section 391 of Code of Criminal Procedure. Above findings are supported with the case of petitioners themselves, when from their evidence, it has come on record that the petitioners have received goods from the respondent under bill dated 24.04.2004 for Rs.1,60,290/and have further admitted payment of rupees three lakhs to respondent on 08.04.2004 which goes to show that the petitioner/firm was continuing its business as well as operating its bank account under which disputed cheque is issued even after 31st March, 2004. It is, therefore, necessary to observe that the petitioners cannot be permitted to falsify their own statements on oath by bringing on record fact of dissolution of firm on 31st March, 2004.

13. In view of the facts, reasons in the petition and above and as the citations relied for petitioners, since are found absolutely irrelevant, to the facts involved in the instant petition, the same is liable to be dismissed, as even on otherwise scheme as enumerated in Section 391 of Code of Criminal Procedure does not contemplate production of documentary evidence. Plain reading of sub sections of Section 391 of Code of Criminal Procedure clearly shows that the word "evidence" used in these sub sections is oral evidence.

"Under subsection (1) the Appellate Court is empowered to take evidence itself or direct it to be taken by the Magistrate or by the trial Court. The ''taking of the evidence'' obviously means recording of oral evidence. So also under subsection (2) the evidence is to be certified by the Magistrate or the Court taking such evidence. This further shows that the provision is meant for taking oral evidence only. There is no question of certifying of the documentary evidence by the Court. Subsection (3) also gives the same indication. So also subsection (4)."

Thus the appellate Court cannot permit production of new document in exercise of its powers under Section 391 of Code of Criminal Procedure.

14. In the result, the writ petition is dismissed. Rule is discharged. Criminal Appeal No. 08 of 2009 pending on the file of learned Additional Sessions Judge5, Nagpur is expected to be decided preferably within two months from the date of receipt of this writ.

