

(2013) 07 MP CK 0241

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 493 of 2013

Sharif Kha

APPELLANT

Vs

Gajanand and State of Madhya Pradesh

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319(1), 391, 397, 401
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 07 MP CK 0241

Hon'ble Judges : Brij Kishore Dube, J

Bench : Single Bench

Advocate : Shishir Saxena, for the Appellant; Ravi Gupta, Advocate for the Respondent No. 1 and Shri Kuldeep Singh, Panel Lawyer for the Respondent No. 2/State, for the Respondent

Final Decision : Dismissed

Judgement

1. This Criminal Revision under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short the "Code") is preferred against the order dated 07/06/2013 passed by III Additional Sessions Judge, Guna in Criminal Appeal No. 390/11 whereby allowed an application u/s 391 of the Code submitted by the petitioner herein/appellant and remanded the matter back to the Trial Court for recording the additional evidence. Short facts of the case are that on the basis of a private complaint filed by the respondent herein/complainant, the Trial Court had taken cognizance u/s 138 of the Negotiable Instruments Act (for short the "Act") against the petitioner herein/accused and the case was proceeded. Vide the judgment dated 02/09/2011 passed in Criminal Case No. 914/2009 by the Judicial Magistrate, First Class, Guna, convicted the accused u/s 138 of the Act and sentenced to suffer 06 months rigorous imprisonment with fine of Rs. 2,50,000/-. Being aggrieved thereof, the petitioner herein/accused preferred an appeal against the judgment of conviction and order of sentence which was numbered as Cr. Appeal No. 390/2011. During pendency of the appeal, an application u/s 391 of the Code was preferred by the petitioner herein for taking

two documents as additional evidence. The application was allowed and by keeping the appeal pending for decision, by the impugned order the matter was remanded back to the Trial Court for recording the additional evidence of the parties by passing the following order:

2. Against the aforesaid remanded order, the present revision is preferred by the petitioner herein/accused.

3. Learned counsel for the petitioner submits that the impugned order is illegal, incorrect and deserves to be set aside as the Appellate Court remanded the matter only for a limited purpose. Looking to the nature of the documents, the Appellate Court should have remanded the whole matter for deciding it afresh after setting aside the judgment of conviction and order of sentence passed against the petitioner herein/accused. According to him, the learned Appellate Court erred in law by remanding the matter for a limited purpose. Learned counsel prays for setting aside the impugned order and to remand the whole matter to the Trial Court for fresh decision. In support of his contention, he has placed reliance on the decision of Shobharam and others Vs. State of M.P., 2010 Cr. L.R. (MP) 647.

4. In response, learned counsel for the respondent No. 1 argued in support of the impugned order, however, he submitted that looking to the nature of the documents submitted by the accused, the Appellate Court should itself decide the case and should have not remanded the matter back to the Trial Court for recording the additional evidence. In support of his contention, he placed reliance on the decision of this Court in the case of Babulal and Others Vs. State of Madhya Pradesh,

5. Considered the rival contentions of the learned counsel for the parties.

6. Section 391 of the Code reads as under:

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.

7. From a bare perusal of sub-section (1) of Section 391 of the Code, it is clear

that in dealing with an appeal, 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.

8. Section 391 of the Code forms an exception to the general rule that an appeal must be decided on the evidence which was before the Trial Court. The Section does not contemplate retrial but only taking of the additional evidence Appellate Court may itself take further evidence or direct Magistrate to take fresh evidence on a particular point where it feels that it is necessary in the interest of justice and for a proper decision.

9. In Shobharam & others (supra), this Court held as under:

Keeping in view the fact that in the incident, which took place for which the case was registered at Crime No. 219/2004 the appellants also sustained injuries and upon the complaint of the appellants party case was registered at Crime No. 218/2004 and also keeping in view the aforesaid position of law the application filed by the appellants is allowed and the impugned judgment passed by the learned Sessions Court is set aside and the case is remanded back to the Sessions Court to give an opportunity to the appellants to adduce the evidence in defence and pass a fresh judgment. It is also made clear that while passing the judgment learned Sessions Judge shall also take into consideration the final outcome of criminal case registered at Crime No. 219/2004. Parties are directed to remain present before the learned Court below on 14.05.2010.

10. In Babulal S/o Mukund Shah Gupta and others (supra), this Court held that it is well settled that though an Appellate Court has power to take additional evidence in a suitable case, but the discretion should not be exercised to fill up gaps or lacunae in the prosecution case though Section 391 of Cr. P.C., is akin to Order XLI Rule 27 of C.P.C., but avoids de novo trial.

11. Thus, the case cited by the learned counsel for the petitioner in the case of Shobharam and others (supra) is distinguishable and not applicable to the case in hand.

12. So far as the case cited by the learned counsel for the respondent in the case of Babulal S/o Mukund Shah Gupta and others (supra) is concerned, since the discretion as available u/s 319(1) of the Code has been properly exercised by the Appellate Court in the case in hand, no error of jurisdiction has been committed in remanding the case to the Trial Court for recording the additional evidence. Resultantly, in the facts and circumstances of the case, the settled legal position and for the reasons given hereinabove, I do not find any infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction under Sections 397 read with 401 of Cr. P.C., This revision petition is devoid of merit and is therefore, dismissed.