

(2003) 02 BOM CK 0159

In the Bombay High Court

Case No : Criminal Application No. 4307 of 2002

Yogendra Bhagatram Sachdev

APPELLANT

Vs

The State of Maharashtra and Shri Shambu Prasad Mishra

RESPONDENT

Date of Decision : 07-02-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Criminal Procedure Code, 1973 (CrPC) — Section 294, 313, 391, 397, 428

Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2003) 2 ALD(Cri) 21 : (2003) 3 BC 158 : (2003) BomCR(Cri) 810

Hon'ble Judges : A.S. Aguiar, J

Bench : Single Bench

Advocate : Amit Desai and N. Seervai, for the Appellant; B.H. Mehta, Assistant Public Prosecutor for Respondent No.1 and Manjula Rao, for the Respondent

Judgement

A.S. Aguiar, J.—By this application, presumably u/s 482 of the Code of Criminal Procedure, 1973, the applicant seeks to invoke the exercise of powers vested in this Court Ex Debito Justitiae to prevent apprehended abuse of the procedural law and miscarriage of justice from taking place. The apprehension arises allegedly on account of the order passed by the Sessions Court, Bombay, rejecting Miscellaneous Application No. 376 of 2000 u/s 391 of the Code of Criminal Procedure, 1973. The appellant sought to examine himself on oath in order to enable him to discharge the burden to rebut the presumption of law under Sections 138 and 139 of the Negotiable Instruments Act. The said Miscellaneous Application No. 376 of 2000 is filed in Criminal Appeal No. 330 of 2001 from the order dated 26.11.2002 passed by the learned Metropolitan Magistrate, 28th Court, Esplanade, in C.C. No. 1173/S/95 convicting the Appellant - accused Yogendra Bhagatram Sachdev u/s 138 of the Negotiable Instruments Act and sentencing him to suffer rigorous Imprisonment for one year and to pay a fine of Rs. 5,000/=, in default to suffer rigorous imprisonment for three months with a further direction to the accused to pay an amount of Rs. 1,00,00,000/= as compensation to the complainant.

2. The appeal was filed and was admitted on 21.12.2001. At the stage when the appeal has become ripe for hearing, the applicant-accused files the said application u/s 391 of the Code of Criminal Procedure, praying that the appellant be allowed to lead cogent evidence which is on record by way of documents, but not by of oral (SIC) and that the said Court, that is to say, the Sessions Court either take his evidence itself or direct it to be taken by the learned Magistrate subject to Chapter XXIII, as if it was an enquiry. The said application, as stated above, has been rejected by judgment and order dated 21.11.2002 passed by the Additional Sessions Judge, Greater Bombay.

3. To appreciate the issues in controversy, it is necessary to give the brief facts of the case.

The applicant and respondent No. 2 were both directors of Reliance Silicon, situated at Navi Mumbai. Differences arose between the complainant and the applicant-accused. An amicable settlement was arrived at between the parties to the effect that the complainant shall transfer his shares to the accused and resigns from the company and, in consideration therefore, he should be paid Rs. 50,00,000/= by the accused. Pursuant to the said understanding, blank share transfer application forms were signed by the complainant and handed over to one Shri. Sanghvi, who acted as intervener, and ten cheques of Rs. 5,00,000/= each were handed over by the accused to Shri. Sanghvi, who handed over the said cheques to the complainant as per the understanding. The complainant, that is, respondent No. 2 deposited the cheques with his bankers. However, the said cheques were dishonoured. After compliance of necessary formalities, namely, serving demand notice, etc., a complaint came to be filed before the Court of the learned Magistrate and numbered as Criminal Case No. 11/0/S/1998.

4. The contention of the applicant-accused is that there was no consideration for the issue of cheques and hence there was no legally enforceable debt or liability entitling respondent No. 2 to encash the cheques.

5. In support of his case, the complainant examined himself as P.W. 1 and one bank officer Mr. Manoj Anant Patil as P.W. 2 and the intervener friend Shri. Sanghvi was examined as P.W. 3. The applicant - accused did not adduce any evidence. He, however, produced four documents which were taken on record by consent and marked as Exhibits D-1 to D-4. These documents were produced in order to show that the shares of the company were in the custody of financial institutions which had advanced financial assistance to the company of which accused and the complainant were directors.

6. It is pertinent to note that in his statement recorded u/s 313 of the Code of Criminal Procedure, 1973, the accused had accepted that he had given ten cheques of Rs. 5,00,000/= each to Shri. Sanghvi to be given to the complainant. At the end of recording his statement u/s 313 of the Code of Criminal Procedure, 1973 when he was asked whether he wanted to lead any evidence by entering the witness box, the Applicant declined the offer.

7. The defence of the applicant-accused is that he was obliged to pay Rs. 50,00,000/= to the complainant only on transfer of the shares of the applicant in his name and since that transfer had not taken place, he was not liable to pay the amount stated in the cheques and that, since the shares had not been transferred in his name, he had instructed his banker not to make payment.

8. By judgment and order dated 26.11.2001, the applicant was convicted and sentenced by the trial Court. The same is impugned by the applicant filing Criminal Appeal No. 330 of 2001 which was admitted on 21.12.2001. On 3.9.2002, the Criminal Application No. 376 of 2002 to allow the Applicant to examine himself and leave evidence, came to be rejected by the Sessions Court by the impugned order dated 21.11.2002. It is this order which is the subject-matter of challenge in the present criminal application.

9. Learned Counsel Shri. Desai appearing on behalf of the applicant/accused has pointed out that the learned Additional Sessions Judge has declined to exercise power u/s 391 of the Code of Criminal Procedure, 1973 on two grounds; firstly, that there is no change in the law regarding discharge of burden of proof u/s 139 of the Negotiable Instruments Act after the judgment of conviction, and secondly, that if such application were allowed, it would open the floodgates leading to a spate of applications seeking to avoid conviction by applying to the Appeal Court to allow the accused to lead evidence in the appeal. It is contended that the learned Judge in his order dated 21.11.2002 has not determined the question whether additional evidence was necessary as required u/s 397 of the Code of Criminal Procedure, 1973 for determination of truth and to subserve the ends of justice.

10. It is submitted that the scope and ambit of Section 391 of the Code of Criminal Procedure, 1973 has been enunciated in several decisions of various High Courts as well as the Supreme Court. A Division Bench of the Allahabad High Court in the case of State Vs. Jai Prakash, ; while dealing with the erstwhile provisions of Section 428 of the Code of Criminal Procedure, 1973 has observed as follows:

"2. The section forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court.

Its manifest object is the prevention of a guilty man's escape through same careless or ignorant proceedings of a trial Court or the vindication of an innocent person wrongly accused where the trial Court through some carelessness or ignorance has omitted to record the evidence of the circumstances essential to the elucidation of the truth."

11. A Constitution Bench of the Supreme Court in the case of Ulkha Kolhe v. State, AIR 1963 S.C. 1831; while dealing with the erstwhile provisions observed as follows:

"11. If the Sessions Judge thought that in the interest of justice and for a just

and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceeding, resorted to the procedure prescribed by Section 428(1) of the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellant Court should exercise its power under the said section."

"12. An opportunity to lead this evidence may be given u/s 428, not with a view to fill up lacunae in the evidence but to regularize the trial of the accused and to ensure that the case is establishment against him beyond reasonable doubt, more so when for the purpose of convicting the accused reliance is sought to be placed upon a presumption arising from the report of a Chemical Examiner, who is not examined before the Court, and which substantially raises a presumption of guilt."

12. It is submitted that the aforesaid observations of the Supreme Court are extremely relevant in the present context since, in this case, reliance is placed on the presumption u/s 139 of the Negotiable Instruments Act. However, since the prosecution is relying on this presumption, the accused is the best person to discharge the burden of proof u/s 139 of the Negotiable Instruments Act to rebut this presumption, since he would have personal knowledge of the transactions with the complainant. It is contended that an opportunity must, therefore, be given to the accused to lead his evidence to ensure that he discharges the burden of proof cast on him specially since reliance is sought to be placed on this presumption for convicting the accused u/s 139 of the Negotiable Instruments Act.

13. Reliance is also placed on the decision of the Supreme court in the case of Rambhau and Another Vs. State of Maharashtra, , which sets out the scope of Section 391 of the Code of Criminal Procedure, 1973, as follows:

"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 as to cause any prejudice to the accused. 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.

3. Be it noted that no set of principles can be set forth for such an exercise of power u/s 391 since the same is dependant upon the fact-situation of the matter and having due regard to the concept of fairplay and justice, well-being of the society.

Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the

Civil Procedure Code, Section 391 is thus akin to Order 41, Rule 27 of the C.P. Code."

14. It is contended that the law as set out in the aforesaid decisions has been settled and Section 391 of the Code of Criminal Procedure, 1973 can be invoked either at the behest of the accused or the prosecution, regard being had to the concept of justice and fairplay. Hence the appellate Court should not hesitate to exercise the powers u/s 391 of the Code of Criminal Procedure, 1973.

15. It is further contended that the impugned order does not address this issue at all and the Sessions Court has rejected the application on the ground that the same would open the floodgates resulting in stalling of all convictions. It is submitted that the accused is ready and willing to subject himself to cross-examination if allowed to lead evidence and no prejudice will, therefore, be caused to the respondent-complainant.

16. The major thrust of the application, however, seems to be the perceived change in the law after the judgment and order of conviction. It is submitted that the Supreme Court in Hiten Dalal's case 2001 Cri L J 4647 and in the case of K.N. Bina v. Muniyappan 2001 Cri. L.J. 4741 has made it obligatory upon the accused to lead evidence if he desires to rebut the presumption that arises u/s 139 of the Negotiable Instruments Act since the effect of the presumption is to place the evidential burden on the accused of proving that the cheque was not received towards discharge of any liability. The said presumption cannot be rebutted by merely relying upon documents or proving the said documents. It is pointed out that the Supreme Court in the case of Hiten P. Dalal Vs. Bratindranath Banerjee, while considering the Constitution Bench decision in the case of D.B. Desai's case observed as under:

"23. The words "unless the contrary is proved" which occur in this provision make it clear that the presumption has to be rebutted by "proof" and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provisions cannot be said to be rebutted.....";

17. It is pointed out that the Supreme Court in that case applied the principle to Section 139 of the Negotiable Instruments Act for the first time and went on to consider whether the accused had supported his defence contained in his 313 statement by any proof sufficient to rebut the presumption. While approaching the evidence, the Supreme Court in para 34 observed that ".....The Appellant alone could have said why he had admittedly executed the said cheque, handed them over to the bank and never asked for their return. He did not chose to do so." It is, therefore, submitted that in view of Hiten P. Dalal Vs. Bratindranath Banerjee, , which was reported in the Criminal Law Journal only after the

judgment of conviction, the accused is required to step into the witness box to prove his defence, namely, that there was no consideration for issue of the cheques as the shares were not transferred to him as they were at the relevant time lying with the financial institutions. The accused states that he is ready to offer the best evidence and corroborate his explanation contained in his statement by proof by stepping into witness box. Not doing so during the trial cannot be ground for not invoking the power u/s 391 Cr.P.C. since that power is to be exercised in the context of the concept of justice and fairplay and with a view to vindicate the innocence of a person wrongly accused. It is pointed out that the accused did apply for examination of defence witnesses and issue of witness summons, but the learned Magistrate did not consider the said application invoking Section 294 of the Code of Criminal Procedure, 1973.

18. It is further pointed out that the documents Exhibits D-1 to D-4 suggest that some of the shares which are the subject-matter of the transaction are in the custody of financial institutions, namely, Central Bank of India and Maharashtra State Financial Corporation and, therefore, the shares were never in possession of the accused as falsely stated by the complainant. The applicant-accused now wants to lead evidence to prove that the balance shares were also not with him. It is further submitted that in the instant case, it is the bare word of the complainant in cross-examination that the physical custody of the shares, which were the subject-matter of the transaction, were always with the accused. Therefore, the accused should be given an opportunity by stepping into the witness-box to prove that the bare word of the complainant is not true.

19. It is submitted that the balance of convenience is also in favour of the accused since no prejudice would be caused to the complainant if the accused is allowed to examine himself and present the aforesaid facts and he would be open to cross-examination by the complainant. On the other hand, irreparable harm will be caused to the accused if he is deprived of this opportunity as he would be sent to jail on a mere technicality.

20. After having given anxious consideration to the submissions of the learned advocate for the Applicant/Accused, I am afraid no case has been made out for interfering with the impugned order of the learned Additional Sessions Judge by granting the relief prayed for. Dealing with the contention that the Hiten Dalal's case and Bina's case (supra) set out a different, if not new, proposition in law which was not in existence prior to the date of conviction of the accused, the learned Additional Sessions Judge has rightly rejected the said contention since there is nothing new in what the Supreme Court has said in the said two decisions. The Apex Court has in the aforesaid decisions only reiterated the position by reference to the earlier authorities which set out the same principle as to the standard of proof required. The Supreme Court has in Hiten Dalal's case referred to its decisions in the earlier cases of (i) Dhanvantrai Balwantrai Desai Vs. State of Maharashtra, , (ii) V.D. Jhangan Vs. State of Uttar Pradesh, ; (iii) Sailendranath Bose v. State of Bihar AIR 1968 S.C. 1292; and (iv) in the

case of Ram Krishna Bedu Rane Vs. State of Maharashtra, .

21. Regarding the observations of the learned Additional Sessions Judge that granting of such applications would open the floodgates resulting in a spate of such applications filed purely with a view to delay and or subvert the judgments of conviction passed by trial Courts, it seems to me that the said observations are not without merit and the apprehension is justified. However, mere probability or possibility of the floodgates being opened would not necessarily prevent the Court from entertaining the application u/s 391 of the Code of Criminal Procedure, 1973 allowing the accused to lead evidence in appeal from conviction, if it was absolutely necessary in the "fact situation" for the purpose of doing justice between the parties.

22. All the decisions cited by the learned advocate for the applicant are agreed that the exercise of power by the Judge u/s 391 of the Code of Criminal Procedure must be to meet the ends of justice so that injustice is not done to the accused on account of some irregularity in the conduct of trial or where the trial Court through ignorance has omitted to record the evidence of circumstances essential to elucidate the truth, with a caveat, that exercise of such power should not be with a view to fill up the lacunae in the evidence. Thus the Court acting u/s 391 of the Code of Criminal Procedure, 1973 is required to exercise its discretion to allow the applicant-accused to lead evidence by examining himself at the appeal stage with circumspection and caution and only with the object of doing justice between the parties in the facts and circumstances of the case. However, if the purpose of the prosecution or the accused to adduce evidence at the appeal stage is for the purpose of filling in lacunae, then such an application must be rejected.

23. In the present case it is seen that the applicant-accused had not disclosed any defence prior to the trial. The applicant-accused, for reason best known to him, has not sent any reply to the statutory notice of demand u/s 138 of the Negotiable Instruments Act. The failure to reply to this 138 notice not being explained would raise a presumption that the Accused had, in fact, no defence whatsoever. After the prosecution was launched and the evidence on behalf of the complainant concluded and the Section 313 statement of the Accused recorded, the Applicant-accused was offered the opportunity to lead evidence by examining himself or examination of witnesses in his defence. However, he declined to do so. No doubt, he had filed an application dated 19.5.2001 for issue of witness summons, but that application was not pressed and notice was given by the Accused to the complainant u/s 294 Code of Criminal Procedure in August 2001 and the documents marked Exhibits D-1 to D-4 were taken on record by consent of the parties. Thus, at the stage of trial, the applicant-accused sought to rebut the presumption only on the basis of these four documents, which the Applicant/Accused produced at the time of recording his statement u/s 313 of the Code of Criminal Procedure. In his 313 statement, the accused made it explicit that except for the production of the documents, he did not want to examine

himself or any defence witness. It is not the case of the applicant accused that at the trial when he declined the offer to lead evidence in his defence, he did not have the benefit of legal advice. He was represented by an advocate. It, therefore, cannot be argued that he gave up a valuable legal right of examining witnesses. in his defence out of ignorance of the law. The applicant-accused has with full knowledge of the facts and the law applicable deliberately restricted his defence to the said four documents Exhibits D-1 to D-4 to prove that the shares were not given to him by the complainant and were not in his possession as the same were in possession of financial institutions.

24. By this application u/s 391 of the Code of Criminal Procedure, 1973, the applicant-accused seeks to rebut the presumption u/s 139 of the Negotiable Instruments Act by leading evidence in his defence to prove that all the shares were not in his possession but in possession of financial institutions. This clearly is an improvement in the defence as the four documents Exhibits D-1 to D-4 are in respect of some 10-12 shares only while the consideration for issue of the cheques admittedly is for surrender of all 12% shares in Reliance Silicon India Ltd. by the complainant to the accused. It is clear that a new case is sought to be put up in appeal by the applicant-accused stepping into the witness box and examining himself. The applicant-accused chose not to reply to the said notice u/s 138 of the Negotiable Instruments Act, he chose not to examine himself or lead any evidence in defence at the trial; he chose not to press his application for issue of witness summons; and chose to restrict his defence to the four documents only, namely, Exhibits D-1 and D-4 which pertained only to some 10-12 shares and not all shares of Reliance Silicon India Ltd. The application for witness summons which the accused claims to have filed in the trial Court is to be before this Court today. It is not clear whether the case of the applicant-accused is that these witnesses whom he proposed to examine would prove that all shares were not in his custody but in custody of financial institutions. If that was, in fact, his defence, then the applicant-accused will be deemed to have given up this defence by waiving his right to lead evidence and restricting his defence to only the four documents which admittedly cover only some and not all the shares. It is the case of the Applicant/Accused that since there was no consideration, the accused was entitled to stop the payment of the cheques. If this was, in fact, the defence of the accused, he would have replied to the notice filed u/s 138 of the Negotiable Instruments Act; he would have insisted on summoning the witnesses whom he proposed to examine by issuing witness summons and he would not have declined the offer of examining himself and lead evidence after his statement u/s 313 of the Code of Criminal Procedure was recorded.

25. It is clear that the accused at the stage of appeal is now trying to set up a new case. The affidavit of respondent No. 2 dated 23.1.2003 makes reference to the declaration of the Accused Yogendra Bhagatram Sachdev dated 23rd August 1994 filed in Suit No. 3978 of 2002 stating that the entire shareholding of Reliance Silicon India Ltd. Is in the name of the applicant. This indicates that the

shares which belonged to respondent No. 2 have been duly transferred to the name of the applicant-accused. Thus no case has been made out by the applicant-accused to allow him to examine himself or lead evidence in his defence at the stage of Appeal. It is clearly an attempt to improve on the defence, if not to set up a anew defence altogether. This Court in exercise of the jurisdiction u/s 391 of the Code of Criminal Procedure, 1973, as clearly laid down in various decisions of the Apex Court, is required to exercise its discretion with circumspection and caution and must disallow any such application if the power u/s 391 of the Code of Criminal Procedure, 1973 is sought to be misused or abused. In the circumstances, the application must fail. The application is rejected and disposed of accordingly. The learned Judge hearing the appeal will not be influenced by any of the observations made above.

26. Parties to act on an ordinary copy of this order duly authenticated by the Sheristedar of this Court.