"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 24TH DAY OF NOVEMBER 2023 / 3RD AGRAHAYANA, 1945

CRL.REV.PET NO. 36 OF 2018

AGAINST THE JUDGMENT DATED 13.10.2017 IN CRA 191/2016 OF II ADDITIONAL SESSIONS COURT,ERNAKULAM AND THE JUDGMENT DATED 11.06.2016 IN CC 466/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS-III, KOCHI

REVISION PETITIONER/APPELLANT/ACCUSED:

JIMMY GEORGE
AGED 62 YEARS, S/O. GEORGE, 4-C1 TANZEEL EBONY, CHEMBUMUKKU, VAZHAKALA P.O, ERNAKULAM DISTRICT.

BY ADV SRI.T.O.XAVIER

RESPONDENTS/RESPONDENT/COMPLAINANT & STATE:

1 SREEKUMAR
AGED 42 YEARS,S/O. SREEDHARAN, KRISHNA NIVAS, CHUTTUPADUKARA, EDAPPALLY - 24.

2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY SMT.M.S.LETHA
R1 BY SRI.K.R.VINOD
R2 BY SMT.MAYA M.N., PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR FINAL HEARING ON 16.11.2023, THE COURT ON 24.11.2023 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J. "C.R."

Crl.R.P.No.36 of 2018

Dated this the 24th day of November, 2023

O R D E R

The petitioner is the accused. The 1st respondent is the complainant. The Judicial Magistrate of the First Class-III, Kochi after trial in C.C.No.466 of 2013 convicted and sentenced the petitioner for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (N.I.Act). The petitioner preferred an appeal. The Appellate Court as per the judgment dated 13.10.2017 allowed the appeal and remanded the case to the trial court. Aggrieved by the said judgment, petitioner has filed this revision petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (Code).

2. Heard the learned counsel for the petitioner, learned counsel for the 1st respondent and the learned Public Prosecutor.

3. The 1st respondent filed a complaint alleging that the petitioner committed offence punishable under Section 138 of the N.I.Act. The facts stated in the complaint constituting the

offence are that the petitioner issued Ext.P2 cheque for making payment of Rs.7,20,000/- which he owed to the 2nd respondent and the said cheque when presented for encashment was returned unpaid. It was also alleged that despite receiving the demand notice, the petitioner failed to make the payment.

4. Before the trial court, the complainant tendered evidence as PW1. He proved Exts.P1 to P7. No evidence was let in by the petitioner. The petitioner took up the defence that the cheque was issued as a security, that no amount was due from him to the 2nd respondent and the cheque is one drawn by a company, but the company was not made an accused. The trial court considered the evidence let in by the 2nd respondent and on accepting his case, the contentions of the petitioner were held to be untenable. In order to render a finding that M/s.V.J.George Nedungadan and Sons, in whose name Ext.P2 cheque was drawn, is a proprietary concern, the trial court placed reliance on the stop payment instruction letter issued by the petitioner to his banker, which was produced by him along with argument notes filed in connection with C.M.P No.2367 of 2012, which was a petition for condoning the delay of four days

in filing the complaint. The said letter was not duly proved or admitted in evidence.

5. Before the Appellate Court, the petitioner set forth the contentions as raised before the trial court. He further contended that evidence was insufficient to prove that the cheque was returned for insufficiency of funds with his account. The Appellate Court did not deliberate much on the contentions raised by the petitioner concerning lack of proof of execution of Ext.P2 and want of consideration. The Appellate Court observed that the trial court erred in placing reliance on the stop payment instruction letter produced by the petitioner but not admitted in evidence, in order to hold that the petitoner is a proprietory concern. The Appellate Court further found that Ext.P3, cheque returning memo, is one issued from the collecting bank and non-production of the dishonour memo issued from the drawee bank disabled the court to reach a finding about the real reason for return of the cheque. It was observed that the presumption available under Section 146 of the N.I. Act relating to banker's slip or memo is not available to Ext.A3 or helpful to reach a definite finding regarding the reason

for dishonour of the cheque. It was for the said reasons, the Appellate Court ordered to remand the case to the trial court and in order for that purpose the judgment of the trial court was set aside. It is seen that the 2nd respondent filed an application under Section 391 of the Code. The Appellate Court did not entertain that application holding that at such a belated stage, procedure for taking fresh evidence was not feasible. However, the matter was remanded to the trial court ordering as follows:

> "In the result, the Criminal Appeal is allowed. The findings entered in Paragraph No.13 of this judgment shall be operative. All findings recorded as affirmed shall also hold good for the purpose of remand. Both sides shall adduce evidence on the points mentioned for remand and the learned Magistrate shall record his findings on this point. Based on those findings, he shall pronounce his judgment as per the procedure established by law. The judgment and sentence impugned is therefore set aside. Both parties shall appear before the learned Magistrate as and when called for by him. The learned Magistrate shall conclude the trial without unnecessary delay. Ordered accordingly."

6. The learned counsel for the petitioner submits that having gone through such an ordeal of trial and the proceedings in the appeal, it is quite unjust to drive the petitioner again for a

trial. It is submitted that the Appellate Court, although ordered retrial, imposed restrictions, which are unjustified in the circumstances of the case. The purpose for the remand stated by the Appellate Court casts doubt about the possibility of a fair trial before the learned Magistrate. It is also urged that the reasons stated for remanding the case are absolutely insufficient. The learned counsel for the petitioner also raised contentions on the merits of the case. The contentions are that allegation of issuance of Ext.P2 cheque for the discharge of a legally enforceable liability is quite improbable and also that the evidence let in by the prosecution was insufficient to prove its execution.

7. The powers of revision under Section 397 of the Code is limited to examine correctness, legality and propriety of a finding, sentence or order recorded or passed by an inferior court. Besides, it is possible also to consider the regularity of any proceedings of such an inferior court. The order under challenge being one rendered by the Appellate Court remanding the case to the trial court, whether this revision is allowed or dismissed, consequence is the revival of the proceedings; either

the appeal or the trial. If the revision is allowed, the Appellate Court has to decide the appeal afresh. If the revision is dismissed, the matter has to go back to the trial court for a retrial. In such circumstances, I proceed to consider as to what shall be the legal and appropriate course to be followed.

8. The scope and ambit of Section 391 of the Code was considered by the Apex Court in **Rajeswar Prosad Misra v. State of West Bengal and another [AIR 1965 SC 1887]**. It was held that a wide discretion is conferred on the Appellate Courts and the additional evidence may be necessary for a variety of reasons. The Apex Court held:

> "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....."

9. The Apex Court in **Rambhau and another v. State of Maharashtra [2001 (4) SCC 759]** explained when the power under Section 391 of the Code can be exercised by the Appellate Court. It was held:

> "1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of S.391 of the Code of Criminal Procedure. A plain look at the statutory

provisions (S.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."

10. In **Brig. Sukhjeet Singh (Retd), MVC v. State of Uttar Pradesh and others [2019 (16) SCC 712]** the Apex Court dilated further the powers of the Appellate Court to take additional evidence under Section 391 of the Code. It was observed that the provision is added with an object. That the Appellate Court should be able to appropriately decide the appeal and secure the ends of justice. The Apex Court held that the keywords in Section 391(1) are "if it thinks additional evidence to be necessary" and the word "necessary" used in Section 391(1) is to mean necessary for deciding the appeal.

This has to be understood vis-a-vis the powers of the Appellate Court to order retrial where also there will be often obligation to record additional evidence.

11. The powers of the Appellate Court are contained in Section 386 of the Code. In an appeal from a conviction, an Appellate Court can exercise power to order retrial 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."

12. In **Nasib Singh and others v. State of Punjab and another [(2022) 2 SCC 89]** the Apex Court emphasized that a retrial would not be ordered unless the Appellate Court is satisfied that:

> (i) The Court trying the proceeding had no jurisdiction;
>
> (ii) The trial was vitiated by serious illegalities and irregularities or on account of a misconception of the

nature of the proceedings as a result of which no real trial was conducted; or

(iii) The prosecutor or an accused was for reasons beyond their control prevented from leading or tendering evidence material to the charge and that in the interest of justice, the Appellate Court considers it appropriate to order a retrial.

It was further held that an order of retrial wipes out from the record the earlier proceeding and exposes the accused to another trial. It is for that reason that the Court has affirmed the principle that a retrial cannot be ordered merely on the ground that the prosecution did not produce proper evidence and did not know how to prove their case.

13. From the above, it is explicit that there are no fetters on the powers of the Appellate Court to record additional evidence under Section 391 of the Code. But the powers are conferred on the Court to secure ends of justice.

14. What emerges is that retrial may be ordered when the trial was illegal, irregular or defective. A retrial can also be ordered where there is no proper or fair trial and for the ends of justice a retrial is required. Going by the provisions of Section 386(b) where the Appellate Court remands the matter for

retrial, it may not be within the powers of that court to restrict the evidence to be taken. In a case of retrial, it is required to allow both sides to adduce further evidence which they want to. If the Appellate Court is of the view that what is required is calling for additional evidence alone, the recourse shall be to Section 391 of the Code and this provision does not contemplate any retrial. Whether it is retrial in terms of Section 386(b) or collection of additional evidence in terms of Section 391 of the Code, it is mandatory that the accused is examined under Section 313(1)(b) of the Code with reference to the incriminating circumstances appearing in such additional evidence.

15. In the impugned judgment, the Appellate Court remanded the matter to the trial court. It is mentioned that it might be inappropriate at that stage to direct adduction of further evidence, inferably, before the Appellate Court. But, the court remanded the matter with a specific direction that the trial court shall permit both sides to adduce evidence with respect to two points alone. Without any further direction as to the right of the accused to bring in any further evidence and also his

examination under Section 313(1)(b) of the Code. When a retrial is held and additional evidence is collected, it shall be the obligation of the trial court to examine the accused under Section 313(1)(b) of the Code, even in the absence of a direction by the Appellate Court in that behalf. If a case is ordered to be retried, ordinarily it is a *denovo* trial. The Appellate Court is, however, not debarred from directing to use the evidence already recorded and to proceed to record additional evidence. In such a case, the trial court is obliged to give opportunity to both parties to adduce further evidence, if they propose to adduce and to examine the accused under Section 313(1)(b) of the Code before rendering its judgment. If it is a direction to take additional evidence, the Appellate Court shall state in its order the facts regarding which additional evidence is to be taken and to examine the accused under Section 313(1)(b) of the Code with respect to such additional evidence. There shall be a further direction for certification and submission of such evidence to the Appellate Court.

16. From a reading of the impugned judgment, what can be understood is that the case was remanded for a retrial. The

direction was to allow the parties to adduce evidence concerning two facts alone, namely, whether the accused is a company or a proprietory concern and the reason for return of the cheque. I do not find any reason to say that the said view is illegal, since the documents relevant to those facts are already placed on record. But that does not make the case a fit one for ordering a retrial. This case does not fall in any of the categories enumerated in **Nasib Singh [(2022) 2 SCC 89]**. Taking that into account the order sought to have been passed by the Appellate Court is a direction to take additional evidence in terms of Section 391 of the Code.

17. Accordingly, I allow this revision petition. The Appellate Court shall restore the appeal on file. In order to avoid delay, I direct the petitioner and the 1st respondent to appear before the Judicial Magistrate of the First Class-III, Kochi on 14.12.2023. The said court shall record further evidence as held hereinbefore, examine the accused under Section 313(1)(b) of the Code and submit the records along with such additional evidence and certificate to the Appellate Court within a period of three months. Thereupon, the Appellate Court will proceed to

dispose of the appeal. Registry shall forward records to the Judicial Magistrate of the First Class-III, Kochi and a copy of this order to the Appellate Court. The Appellate Court shall restore the appeal on file and proceed to dispose of the appeal immediately on receipt of records as aforesaid from the trial court.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr