

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
JAIPUR BENCH, JAIPUR**

S.B. Criminal Misc. Petition No. 1000/2017

Manoj Chandak son of Shri Ramesh Kumar, resident of 668, Tikkialon Ka Rasta, before Andheri Darwaja, Kishanpole Darwaja, Jaipur.

...Accused-Petitioner

Versus

- 1. State of Rajasthan through P.P. Respondent.**
- 2. Ram Babu Soni son of Late Shri Bansidharji Soni, Shop No. 2553, Jailal Munshi Ka Rasta, IIIrd Choraha, Chandpole Bazar, Jaipur.**

....Complainant-Respondents.

DATE OF ORDER :::: **28th February, 2017**

HON'BLE MR. JUSTICE BANWARI LAL SHARMA

Mr. Sanjay Sharma for the Petitioner.
Mr. Aladdin Khan, PP.

In this present misc. petition, petitioner accused appellant assailed the impugned order dated 19.12.2016 passed by learned Additional Sessions Judge No. 13 Jaipur Metro in Criminal Appeal No. 34/2016 (Manoj Chandak Vs. Rambabu Soni) whereby learned Lower Appellate Court dismissed the application of petitioner appellant accused submitted under Section 391 Cr.P.C. for further sentence at appellate stage.

The brief facts of the case are that in complaint filed by respondent No. 2 complainant Ram Babu Soni for offence punishable under Section 138 N.I. Act, learned Trial Court i.e. Special Additional Chief Judicial Magistrate (PCPNDT Cases), Jaipur Metropolitan vide judgment dated 05.07.2016 convicted

the petitioner appellant accused for offence under Section 138 NI Act and sentenced for one year simple imprisonment and also ordered to pay Rs. 5 lacs as compensation to complainant.

Dissatisfied from the judgment and order of sentence of learned Trial Court, petitioner accused filed appeal which is pending before learned Additional Sessions Judge No. 13, Jaipur Metropolitan. During pendency of appeal, petitioner accused appellant filed an application under Section 391 Cr.P.C. and prayed that application may be allowed and the statements of Babulal Head Constable of Police Station Nahargarh and Jitendra Sharma recorded during inquiry may be taken on record and these two witnesses may be called for evidence and their evidence may be recorded at appellate stage which was dismissed by the learned Appellate Court, therefore, this misc. petition.

Learned counsel for petitioner Shri Sanjay Sharma submits that petitioner accused appellant did not purchase any jewellery from respondent complainant. He was broker only. The cheque in question was given by him for security purposes. Since he went Agra for collection of money but the party failed to pay the due amount. Thereafter, petitioner himself paid Rs. 1,30,000/- to complainant before Jitendra Sharma, therefore, the statement of Jitendra Sharma is important to just decision of the case. Without considering this aspect, learned Lower Appellate Court dismissed the application erroneously, therefore,

this misc. petition may be allowed and the impugned order may be quashed and set aside.

Learned PP. Shri Aladdin Khan supported the impugned order and submitted that cheque was issued in the year 2012 and the aforesaid statements were recorded in the year 2014 during inquiry and no such suggestion was given to complainant during cross-examination. Therefore, the application is baseless and learned Appellate Court rightly dismissed the same.

I have considered the submissions made by learned counsel for the petitioner and learned PP.

Learned Lower Appellate Court, after considering the arguments of petitioner accused observed as follow:-

“प्रकरण में साक्ष्य सफाई की स्टेज पर नीचे गवाहान को तलब करने की अनुमति नहीं मिलने पर निगरानी याचिका के माध्यम से अपीलार्थी ने चार गवाहान पेश किये थे। तब यदि जितेन्द्र की तलबी नहीं हो पा रही थी, तो न्यायालय में दरख्वास्त पेश की जा सकती थी कि इस गवाह को न्यायालय के माध्यम से तलब करवाया जाए व यही दरख्वास्त बाबूलाल एच.सी. के बाबत भी पेश की जा सकती थी कि पुलिस का गवाह न्यायालय के द्वारा ही तलब किया जाना चाहिए और वह खर्चा देने को तैयार है। किन्तु ऐसा कोई प्रयास नहीं किया गया है बल्कि दिनांक 02.05.2016 को डी.डब्ल्यू-4 रामकृष्ण के बयान के बाद साक्ष्य बंद कर दी गई तत्पश्चात कोई दरख्वास्त पेश नहीं की और आलोच्य आदेश

पारित किया गया। इस गवाह का नाम अपीलार्थी ने 315 दं.प्र. सं. के बयानों में भी लिया था। बाबूलाल एच.सी. के बाबत भी अपीलार्थी को पूर्ण जानकारी नीचे ही थी। अतः धारा 391 दं.प्र. सं. के माध्यम से इस गवाह को तलब करवाये जाने का कोई औचित्य नहीं है। अपील की स्टेज पर धारा 391 दं.प्र.सं. में केवल वही गवाह या साक्ष्य अतिरिक्त तौर पर बुलाया जाना सम्भव है, जो पहले से अस्तित्व में न हो या किसी भी युक्तियुक्त प्रयास के बावजूद पक्षकार को उपलब्ध नहीं हो सकती हो। किन्तु वर्तमान प्रकरण में ऐसा नहीं है। राजीनामा के लिए अपील की स्टेज पर कई प्रयास करने के उपरान्त वर्तमान दरखास्त पेश की है। दरखास्त सद्भाविक नहीं है। अतः अपीलार्थी द्वारा प्रस्तुत दरखास्त अन्तर्गत धारा 391 दं.प्र.सं. अस्वीकार की जाकर खारिज की जाती है।”

For which this Court fully agree.

Apart from it, learned counsel for petitioner failed to satisfy this Court that when petitioner has paid the aforesaid amount Rs. 1,30,000/- to complainant than in this regard any suggestion was put to complainant during his cross-examination. Rather from the perusal of impugned judgment, it reveals that complainant denied the fact that petitioner received jewellery as broker. In his cross-examination, he clearly stated that petitioner accused received the jewellery against Approval Memo No. 69 with assurance that either he will return the

jewellery in 4-5 days or shall make payment of the jewellery. Thereafter, he neither returned the jewellery nor made payment. Further, the cheque was issued in the year 2012 and the aforesaid police statements during inquiry were recorded on 10.06.2014 that too after two years. Considering all these facts, learned Lower Appellate Court found that aforesaid evidence is not necessary for deciding the matter which does not require any interference.

This misc. petition devoids merit which is hereby dismissed.

[BANWARI LAL SHARMA], J.

Komal/128.