

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 1122 of 2016**

1. Avinash Jadhav S/o Shri Gajanand Jadhav Aged About 67 Years R/o Bandra West Mumbai, Road No. 16, Vergo Heights, Flat No. 301, Police Station Khar, District Mumbai, Maharashtra.
2. Smt. Anjali Jadhav W/o Avinash Jadhav Aged About 56 Years R/o Bandra West Mumbai, Road No. 16, Vergo Heights, Flat No. 301, Police Station Khar, District Mumbai, Maharashtra.
3. Sagar Jadhav S/o Avinash Jadhav Aged About 36 Years R/o Bandra West Mumbai, Road No. 16, Vergo Heights, Flat No. 301, Police Station Khar, District Mumbai, Maharashtra.

---- Petitioners**Versus**

1. State of Chhattisgarh Through District Judge, Raipur, Chhattisgarh.
2. Smt. Apeksha Jadhav w/o. Shri Sagar Jadhav, c/o. Shri Jayant Thorat, A001, Golchaa Residency, Shakar Nagar, Raipur (CG).

---- Respondents

For Applicants	:	Mr. Rahul Tamaskar, Advocate
For Respondent No1/State	:	Mr. Sameer Behar, Panel Lawyer
For objector	:	Mr. Shivendu Pandya, Advocate.

Hon'ble Shri Justice Goutam Bhaduri**Order on Board****3-4-2017**

1) The applicants have preferred this revision petition being aggrieved by the order dated 23-11-2016 passed by learned Additional Sessions Judge (Special Judge of Special Court for trial of CBI cases), Raipur, CG in Criminal Appeal No. 187 of 2016 wherein an application filed under Section 391 of the Code of Criminal Procedure by the applicants for taking additional documents as evidence on record was dismissed. The appeal was preferred after conviction under Section 498-A read with Section 34 of the IPC of the applicants.

2) Perused the impugned order dated 23-11-2016. The reason for dismissal of the application is primary on the ground that no reasons have been

assigned as to why the documents which were sought to be placed and to be adduced were not filed earlier. In a result, it was held that no reasons exist in the order which followed the dismissal.

3) The case of the prosecution is that the applicants are mother-in-law, father-in-law and husband of respondent No.2 i.e., the complainant herein. A report was made by the respondent No.2 that she was married to applicant No.3 in the year 2009 and subsequently she was subjected to cruelty for different reasons and on trivial issues she was insulted. The allegations were also that initially she used to stay at in Mumbai along with others, subsequently she started living with her husband at Goregaon. It was stated that she delivered a male child on 24-5-2010 at Raipur, thereafter also she was subjected to cruelty. The allegations also contained that she was not given any medical support or monetary support and even on demand, money was not being paid to her for her treatment and other necessary deeds.

4) Learned counsel for the applicants would submit that one of the main grounds on which the conviction is based is that applicant No.3/ husband had not financially supported respondent No.2/ wife and she was dependent on her parents which was mentioned at para 10 of the conviction order. It is contended that those facts were negated as would be evident from the documents which were sought to be produced before the court below during the appellate stage that the applicant No.3/ husband was continuously giving financial support by making periodical payments to respondent No.2/wife as the husband was living outside. It is stated that, therefore, on such presumption cruelty on the ground that monetary support was not being extended, was completely based on wrong facts and as such the factual aspect was sought to be clarified before the appellate Court and documents in certain bank account book and medical document were filed showing that respondent No.2/wife was being given adequate financial support. It is stated that, the documents would go to show that all supports were being given to the wife and the documents

were placed but without assigning cogent reason, the application is dismissed which defeats the main statutory object of Section 391 of Cr.P.C. Therefore, prayer was made to set such order and allow the fresh evidence to be adduced.

5) On the other hand, learned State counsel as well as counsel for the objector oppose the petition.

6) I have heard learned counsel for the parties and perused the impugned order and record of the court below.

7) Perused the application filed under Section 391 of the Cr.PC (Annexure P/3). The application would show that certain documents were sought to be placed for evidence. The perusal of the documents would show that certain bank accounts, medical bills and copy of air tickets and legal notice sent to respondent No.2/wife. Eventually, the documents would show that the documents were completely private in nature inter-se between the parties ie., husband and wife which project that medical treatment was provided to respondent No.2/ wife and the bank accounts would show that certain financial supports making payment to the respondent No.2/wife. Further, in this context the order of conviction dated 8-9-2016 would show that the trial Court has relied on the statement of witness respondent No.2/wife heavily to hold cruelty that the wife was not given any financial support during her stay and for such financial constraint during her pregnancy she stayed at Mumbai but she was forced to go to Raipur for her delivery at behest of the applicant No.3 as no financial support or treatment was provided .

8) One of the main ground for conviction by the trial Court shows that since no financial support was provided as such it leads to cruelty. Reading the document which has been placed before this Court would show that the documents prima facie proposed to be filed are copy of bank accounts, certain medical treatment papers, air tickets etc. Prima facie, the documents sought to

be produced do not appear to be fabricated. The nature of documents shows that it is all nature of private documents. The order of conviction shows that the trial Court was greatly influenced by fact that the husband had not looked after the wife and in absence of financial support, the father had to send money to his daughter, the complainant. The court has also recorded the finding that for medical need also no financial support whereas the documents sought to be produced for evidence by husband would prima facie show that financial support was provided to wife along with medical treatments. Therefore, without going into merits of the documents and the implication thereof, the same could not have been shelved at the threshold by the appellate Court, specially considering the analogy and reasons for conviction by the trial Court.

9) The Hon'ble Supreme Court in a law laid down in case of **Rambhau and Another Vs. State of Maharashtra**, reported in (2001) 4 SCC 759, has laid an analogy of Section 391 of the Code as under :

“4. 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. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code.”

The Hon'ble Supreme Court has laid down the principle that the provision of Section 391 of the Cr.P.C. are akin to Order 41 Rule 27 of the Civil Procedure Code, which empowers the appellate Court to invoke the power u/s. 391 of

Cr.P.C. to adduce evidence in a given circumstances of the case to sub-serve the ends of justice.

10) Furthermore, the Hon'ble Supreme Court in a law laid down in case of **Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and others**, reported in (2004) 4 SCC 158 has held as under :

“47. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances

essential to elucidation of truth, the exercise of powers under Section 391 is desirable. 48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. 50. In *Rambhau and Anr. v. State of Maharashtra* (2001 (4) SCC 759) it was held that the object of Section 391 is not to fill in lacuna, but to subserve the ends of justice. The Court has to keep these salutary principle in view. Though wide discretion is conferred on the Court, the same has to be exercised judicially and the Legislature had put the safety valve by requiring recording of reasons.”

The reading of law laid down by the Hon'ble Supreme Court clearly leads to form an opinion that the legislative intent in enacting Section 391 appears to be the

empowerment of the appellate court to see that justice is done between the parties and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in allowing further evidence under Section 391 of the Cr.P.C.

11) In view of the law laid down, if the facts of the present case are tested, it lead to believe that the appellate Court completely swayed away by the fact of reopening of evidence and in mechanical manner has dismissed the application without evaluating the same. Therefore, the appellate Court failed to exercise the true intent and object of Section 391 of the Cr.P.C., which is premised order on the doctrine to do substantial justice between the parties.

12) Considering all the documents and the nature of it, qua the cruelty as observed by the trial Court, the same cannot be mechanically thrown away as prima facie It appears that the documents so filed have relevancy to the Issue. In facts of the case, since the conviction was already made, the applicants were only left with an option to seek a prayer to adduce evidence u/s 391 of Cr.P.C. before the appellate Court and having moved the application, it was rejected without considering the same on merits.

13) Therefore, without going into admissibility of the documents, I am of the considered opinion that the appellate Court has failed to exercise its jurisdiction by dismissing the application under Section 391 of the Code only on the simple ground that reasons have not been assigned. Therefore, if such order is sustained, it would then defeat the very purpose & intent of the legislature as envisaged under Section 391 of the Cr.P.C.

14) Accordingly, the revision is allowed and the impugned order passed by the court below is set aside and it is directed that the documents be sent back to the Court of Magistrate in terms of sub-section (ii) of Section 391 of the Cr.P.C. The Court of learned Magistrate thereafter after giving opportunity to the parties to

examination and cross examination shall send it back to the appellate Court. Thereafter, the appellate Court shall proceed to dispose of the appeal by evaluating the entire evidence of the witnesses, Till such evidence is recorded, the appellate court shall not adjudicate the case on merits.

15) The parties shall appear before Court of Magistrate on 4-5-2017.

With the aforesaid observation and direction, the revision stands disposed of.

Sd/-
(Goutam Bhaduri)
Judge

Raju