

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.10398 of 2017

ORDER:

This petition is filed under Section 482 Cr.P.C. to quash the order dated 14.07.2017 passed in CrI.M.P.No.89 of 2017 in CrI.A.No.296 of 2014 by the XIV Additional Sessions Judge, Cyberabad, Ranga Reddy District at L.B. Nagar, dismissing the petition filed under Section 391 Cr.P.C. seeking permission to adduce additional evidence i.e., documentary evidence and mark them as exhibits on behalf of the petitioner on the ground that the documents proposed to be filed were already filed in O.S.No.20 of 1997 on the file of the District Munsif, Medchal, and they were marked as Exs.A12, A13 and A11 respectively in the said suit. But the petition was filed on the ground that the documents are just and necessary to receive the same as additional evidence in the above appeal, which are to be marked as Exs.A7 to A9 on behalf of the petitioner for deciding the real controversy.

The present petition is filed reiterating the same ground while contending that the learned Sessions Judge did not consider the contention of the petitioner in proper perspective and committed an error and thereby the impugned order is liable to be set aside and requested to set aside the impugned order allowing the petition filed by the petitioner in CrI.M.P.No.89 of 2017 in CrI.A.No.296 of 2014 and direct to mark the said documents as exhibits.

During hearing, learned counsel for the petitioner reiterated the said contention while stating that there is necessity to mark the said documents as Exs.P7 to P9 to establish the ownership of

the petitioner and dismissal the petition on the ground that the petitioner failed to establish his ownership is erroneous and if the said documents are received as additional evidence, the petitioner will succeed in the appeal and requested to receive the documents as additional evidence.

As seen from the allegations made in the petition filed under Section 391 Cr.P.C., the petitioner filed those documents along with the petition in earlier suit and they were marked as Exs.A12, A13 and A11 respectively, but those documents were not produced before the Magistrate during trial and no reason was assigned by the petitioner for his failure to produce those documents before the Magistrate except contending that he obtained declaration certificates dated 30.04.1992, 02.01.1997 and 02.01.1998 issued by Grampanchayat and the schedule property is in dispute and the said documents are necessary to establish the positive case of the petitioner. The entire petition is silent as to what prevented the petitioner from filing those documents before the Magistrate. The Sessions Judge observed that those documents were already marked in earlier suit and no reason was assigned for his failure to produce those documents or at least certified copies of the documents before the Magistrate during trial, in the absence of any explanation, the Court cannot receive the documents as additional evidence at the appellate stage.

According to Section 391 Cr.P.C., the Appellate Court may take further evidence or direct it to be taken. 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.

In *Mohd. Salauddin v. State and another*, the Delhi High Court dealt with the issue of taking additional evidence at the Appellate stage. The appellant in support of his contention, placed reliance on judgment in case of ***Rambhau and another v. State of Maharashtra***¹, wherein it was observed that very wide discretion is available in the matter of obtaining additional evidence in terms of Section 391 of Cr.P.C., but the additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused.

While observing that Section 386 Cr.P.C. envisages the normal and ordinary manner and method of disposal of an appeal, but it cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 of the Code is an exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Sections 386 and 391 of the Code 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.

In ***Zahira Habibulla H Sheikh and another v. State of Gujarat and others***² while dealing with Section 391 Cr.P.C. held that:

“There is no restriction in the wording of Section 391 Cr.P.C. 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

¹ (2001) 4 SCC 759

² AIR 2004 SC 346

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 reiterated 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.”

Similarly in another decision **Ram Briksh Singh and others v. Ambika Yadav and another**³, it was observed that the revisional court does not function as a court of appeal and, therefore, cannot re-appreciate the evidence. Sections 397 to 401 of the Code are group of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to be exercised sparingly. The jurisdiction can be invoked to correct the wrong appreciation of evidence. Though the High Court is not required to act as a court of appeal but at the same time, it is the duty of the court to correct manifest illegality resulting in gross miscarriage of justice. The High Court is not required to interfere in the concurrent finding of facts.

In **Rajeswar Prasad Misra v. The State of West Bengal and another**⁴, the Apex Court considered the scope of Section 391 of Cr.P.C. holding that:

“Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose 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. One 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

³ (2004)7 SCC 665

⁴ AIR 1965 SC 1887

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.”

From the law declared by the Apex Court in various judgments referred supra, the Court has got wide discretion to receive additional evidence, but in the later judgment of the Apex Court in ***Ravinder Singh v. State of Haryana***⁵, the Apex Court while dealing with an appeal in identical situation held that the Court can consider the question of receiving addition evidence in para 11 of the judgment, wherein it is held that:

“At the outset, we must deal with submissions as regards application for leading additional evidence at the appellate stage. It has been the consistent defence of the Appellant that the dead body found in agricultural fields in District Muzaffar Nagar was that of Pushpa Verma and he went to the extent of producing photograph of the dead body in the present trial. He also examined Brahm Pal Singh, Sub-Inspector and other witnesses. It was certainly possible to examine Forensic Expert at the trial Court stage itself and the High Court was right and justified in rejecting the prayer to lead additional evidence at the appellate stage. Nonetheless, we have gone through the report of said Forensic Expert engaged by the Appellant. The exercise undertaken by that expert is to start with the admitted photograph of Pushpa Verma on a computer, then remove the “bindi” by some process on the computer, then by same process remove her spectacles and by computer imaging change the image as it would have looked if the lady was lying down in an injured condition. The computer image so changed was then compared with the photograph of the dead body. We have seen both the images and we are not convinced at all about any element of similarity. We do not therefore see any reason to differ from the view taken by the High Court.”

In para 11 of the judgment, it was observed that the evidence is not necessary but no law is declared by the Court but based on facts of the case, the Court decided to receive additional evidence by exercising power under Section 391 Cr.P.C.

⁵ (2016)14 SCC 671

In any view of the matter, it is clear from the above decisions, that vide discretion is conferred on the Court to receive or reject the additional evidence. Here, the petitioner filed three documents to mark them as Exs.P7 to P9 on his behalf, but receiving the documents as additional evidence without examining any witness is impermissible as per the rules of evidence and they cannot be marked straight away without examining any witnesses. Moreover, the petitioner did not assign any reason for his failure to produce the said documents before the Magistrate during the trial, though the documents were of the years 1992 to 1997 and were available with them and were also marked as Exs.A11 to A13 in the earlier suit O.S.No.20 of 1997. In the absence of any reason for his failure to mark the said documents before the Magistrate, it is difficult to exercise discretion by the appellate Court to receive those documents. The Court must also record its satisfaction that those documents are necessary for deciding the real controversy. The offences allegedly committed by respondents 2 to 4 are of Sections 448 and 506 IPC. At best, to establish the guilt of respondents 2 to 4 for the offences punishable under Sections 448 and 506 IPC, these documents are relevant. In para 10 of the judgment in C.C.No.192 of 2013, the Magistrate concluded that the prosecution failed to establish that PW1 was the legal heir of late Laxmamma and he was in possession of the disputed house at Nizampet. The prosecution also failed to prove that the accused trespassed into the disputed house on 04.03.2017. The evidence of PWs.2 and 5 did not disclose the date of incident. Therefore, the Magistrate found the respondent not guilty for the said offence.

Even if these documents are produced and marked as Exs.A7 to A9, it is difficult to establish that the petitioner was the legal heir of late Laxmamma and he was in possession of the disputed property as on the date of the alleged offence i.e., on 04.03.2017. Therefore, the Sessions Judge rightly recorded its satisfaction and declined to receive additional evidence. In view of the same, the order passed by the Sessions Judge exercising discretionary power that conferred on it cannot be interfered while exercising power under Section 418 Cr.P.C. Therefore, I find no ground to quash the orders passed by the trial Court and the appellate Court.

In the result, the Criminal Petition is dismissed at the stage of admission.

Consequently, miscellaneous petitions pending, if any, shall stand closed.



JUSTICE M.SATYANARAYANA MURTHY

10th November 2017
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