

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1048 OF 2017

Dr.Vinit Ramkrishna Mahajan

.. Petitioner

Vs.

The State of Maharashtra & Anr.

.. Respondents

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Mr.Shekhar Jagtap a/w. Sairuchita Choudhary I/b. M/s.J. Shekhar
& Co., Advocate for the Petitioner.

Ms.R.M. Gadhavi, APP for the Respondent No.1-State.

Mr.R.M. Pethe, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.

DATED : AUGUST 16, 2018.

P.C. :

In this petition, the petitioner has challenged the order dated 9th March, 2016, passed by the Sessions Court, rejecting application under Sections 391 and 311 of the Code of Criminal Procedure.

2 The petitioner was prosecuted for the offences under the Prevention of Corruption Act for contravention of the provisions under Section 4(3), 19(4), 23, 25 and 28 of the PC-PNDT Act (hereinafter referred to as “the said Act”, for short) and under Rules 6(2), 9(1), 9(4), 9(6), 9(8), 18(v) and 18(ix) of the PC-PNDT Rules, 1996 (hereinafter referred to as “the said Rules”, for short).

3 Petitioner is a consultant Radiologist. He is delivering his services at Chikitsa Diagnostic Centre at Pune. On 1st April, 2011, the premises were allegedly inspected by respondent no.2 along with panch witness and he had noticed that there is violation of the provisions of the said Act and the Rules therein. The panchanama in that regard was recorded. Thereafter, show-cause notice was issued on 5th April, 2011, under Section 20 of the said Act, calling upon petitioner to submit explanation for contravention of the provisions of the Act and for not maintaining mandatory record in the prescribed format. The complaint was filed by respondent no.2, before the competent Court of which cognizance was taken, and, subsequently, the trial was conducted before the Judicial Magistrate First Class, 9th Court, Pune.

4 By judgment and order dated 30th April, 2014, the petitioner was convicted by the trial Court vide RCC No.1440 of 2011, for the offences punishable under Section 29, 4(3) read with Rule 9, 9(4), 9(6), 9(8) and 19(4) read with Rule 6(2) and Rule 18(v) of the PC-PNDT Act. He was sentenced to suffer six months simple imprisonment and to pay fine of Rs.1,000/- and in default to suffer simple imprisonment for eight days, for contravention of Section 29(1) read with Rule 9(1)(4) of the PC-

PNDT act. He was also sentenced to suffer imprisonment of six months imprisonment for the offence under Section 4(3) read with Rule 9(6), of the PC-PNDT Act. He was also sentenced to suffer simple imprisonment of six months for the contravention of section 19(4) read with rule 9(8) and Section 19(4) read with Rule 6(2) of the said PC-PNDT Act. He was also sentenced to suffer simple imprisonment for three months for contravention of Rule 19(v) of the PC-PNDT Act and all the sentences were directed to run concurrently.

5 The judgment of conviction was challenged by preferring Appeal before the Sessions Court at Pune on 29th March, 2014. The said Appeal is pending before the said Court. Simultaneously, the petitioner also preferred an application before the Appellate Court purportedly under Sections 391 and 311 of the Cr.P.C., for adducing additional evidence and recalling the witnesses. The said application was opposed by the respondents by filing reply. The application was rejected by the learned Additional Sessions Judge, Pune, vide order dated 9th March, 2016. In view of the above, the petitioner has preferred the present petition before this Court.

6 The grievance of the petitioner in the said application is that the amendment to the PC-PNDT Act was carried out in the year 2014, and, whereas, the evidence in the present case is recorded in 2013. As per the amended provisions of the said Act, Form “F” shows that those columns alleged to have been remained blank are for the doctors performing invasive genetic studies to fill up and not for the doctors who conduct sonography i.e. non-evasive genetic studies, as in the present case. The said point could not be raised at the earlier point of time as the amendment came into force after evidence of the witnesses was recorded. It is also contended that the petitioner has reason to believe that evidence of P.W.1 is important to ascertain the criminal liability, if any, against the petitioner, and, thereby recalling the said witness for further cross-examination, is necessary which would not cause any prejudice to the prosecution. It is further contended that the powers vested in the Sessions Court under Section 391 of the Code are required to be exercised in the present case. P.W.1 without applying her mind as to the requirements of law have initiated the proceedings, which is abuse of process of law. It was also stated that in order to bring on record the compliances to be made by doctors performing invasive genetic studies and the doctors who conduct Sonography

i.e. non-invasive genetic studies, it is necessary to adduce further evidence. It would be just and necessary to recall Dr.Sanjay Gupte, as a witness to adduce expert evidence before the Court.

7 It is submitted that the Appellate Court can exercise powers under Section 391 of Cr.P.C. in the interest of justice and since new material has come into existence, it would be beneficial to the defence of the petitioner. Opportunity ought to be given to him by recording further evidence. It is submitted that in accordance with Section 391 of the Code, the Appellate Court or the trial Court, if so directed by the Appellate Court, can record the evidence. The petitioner had pointed out sufficient grounds for exercising powers under Section 391 of the Cr.P.C., but, the Sessions Court has erroneously rejected his application for the reasons which are contrary to law. It is submitted that the Sessions Court ought to have appreciated that the petitioner has received additional information about the eligibility of respondent no.2 only during the Appeal, and, thus, an opportunity should have been given to him by allowing the said application. It is submitted that in the absence of any orders directing the evidence being recorded in exercise of powers under Section 391 of Cr.P.C., serious prejudice would be caused to the petitioner,

who has been convicted for the offences by the trial Court. Reliance is placed on the decision of the Supreme Court in the case of ***Sudevanand Vs. State through Central Bureau of Investigation & Connected Appeals***¹. It is submitted that the Supreme Court has dealt with the issue relating to provisions of Section 391, and, observed that the provision is not limited to recall of a witness for further examination. The Appellate Court may feel the necessity to take additional evidence for any number of reasons to arrive at the just decision in the case. The law casts a duty upon the Court to arrive at the truth by all lawful means. Drawing support from the observations made in the said decision, learned counsel for the petitioner submitted that in the present case also in the interest of justice, the Appellate Court ought to have exercise powers under Section 391 of Cr.P.C. It is submitted that powers under Section 391 of Ccr.P.C. were directed to be exercised in the said decision after long gap of several years as it was just and necessary to do so. It is also submitted that the tenor of impugned order suggest that the Sessions Court has misdirected himself only *qua* the provisions of Section 311 of Cr.P.C. It is, thus, submitted that the impugned order be set aside and the application preferred by the petitioner be allowed.

1 (2012) 3 SCC 387

8 Learned counsel or the respondent-complainant opposed the relief sought in the petition. He supported the orders passed by the Sessions Court, rejecting the application preferred by the petitioner. It is submitted that sufficient opportunity was available to the petitioner during the course of trial to adduce whatever evidence and at the belated stage when the petitioner has been convicted, under the garb of Section 391 of Cr.P.C., petitioner should not be allowed to adduce further evidence. It is further submitted that the incident in the present case had occurred on 1st April, 2011. The complaint was filed on 6th April, 2011. The applicant was convicted on 30th April, 2014. The amendment relating to the Form F, which is highlighted by the counsel for the petitioner came into force on 4th February, 2014. The petitioner cannot take advantage of the said amendment came into force after the commission of offence. It is submitted that the applicant was prosecuted on the basis of the law prevailing at the time of commission of offence and he cannot take advantage of the subsequent amendment. The amendment has no retrospective effect. As far as other issues raised in the application preferred by the petitioner under Section 391 of Cr.P.C., the petitioner had availed off all the remedies available in law. The witnesses were cross-examined with detailed cross by

the petitioner. Hence, the relief prayed in the petition cannot be granted to the petitioner.

9 The Appellate Court while rejecting the application preferred by the petitioner vide order dated 9th March, 2016, has observed that the complaint was lodged for the offences under Section PC-PNDT Act in 2011 by respondent no.2. In order to establish offence, the complainant had examined herself vide Exhibit-32 and besides the same, the prosecution has also examined Smt.Khema Laxman Sonkamble, panch witness vide Exhibit-40. Prosecution has also relied upon various documentary evidence viz., Form A, PC-PNDT Certificate of the Clinic of accused, Government Notification, order of appropriate Authority etc. On the basis of the available evidence, the trial Court has convicted the accused for the said offences. It is further observed that sufficient opportunity was available to the petitioner to cross-examine the witness. Appellant is not supposed to recall the witnesses to fill up the lacuna. The preliminary object of Section 391 of Cr.P.C. is to prevent escape of a guilty man through some careless or ignorant proceedings before the Court or vindication of the innocent person wrongfully made accused. It is further observed that nobody can be allowed to claim as a matter of right

that, such evidence must be taken or accepted as it may allow either of the parties to fill up the lacuna or gap in the evidence recorded by the trial Court. Allowing such application would amount to retrial of the case. The evidence cannot be received as a disguise for retrial, so as to change the nature of the case.

10 It is pertinent to note that the cognizance of the complaint dated 6th April, 2011 was taken by the Court in relation to the incident of 1st April, 2011. It is also noted that the amendment came into force on 4th February, 2014, after the alleged incident, but, before the conviction of the accused. On perusal of the evidence of witness Dr.Vaishali Jadhav, it is apparent that she was also cross-examined in detail, even, on the point of Form F. The Sessions Court came to the conclusion that sufficient opportunity was available to the petitioner. It is also noted that Form F, which was prevailing at the time of the alleged incident was taken into consideration and the petitioner is now trying to rely upon Form F, as per the amended provisions of the PC-PNDT Act. It is true that the Sessions Court has made observations *qua* provisions of Section 311 of the Cr.P.C., however, the relief which was sought by the respondents in the nature of recalling the witnesses for adducing evidence in

exercise of powers under Section 391 of Cr.P.C., and, therefore, the Court was pleased to express observation in respect to provisions 311 of Cr.P.C. The Court, however, also based its conclusion by analyzing the provisions of Section 391, which is apparent from the observations in paragraphs 10 and 11 of the impugned order. In the decision relied upon by the counsel for the petitioner, the Supreme Court has observed that the powers under Section 391 of Cr.P.C. are required to be exercised for the just decision of the case. In the present case, the trial was conducted, witnesses were examined, the accused was represented by the defence counsel. The petitioner was convicted by the trial Court, and, therefore, on the basis of the amended Form F, the application was preferred. I do not find any perversity in the observations of the Sessions Court while rejecting the application under Section 391 of Cr.P.C. For the reasons assigned by the Sessions Court and for the reasons stated hereinabove, the reliefs sought in this petition cannot be granted.

11 Writ Petition stands dismissed.

(PRAKASH D. NAIK, J.)