

IN THE HIGH COURT OF BOMBAY OF GOA

CRIMINAL WRIT PETITION NO.221 OF 2019

Mrs. Shantal Nayak
w/o. Ramdas Nayak, married
Aged 40 years,
Resident of Kamaxi Prasad,
Tarkar Colony, Behind Hotel Goa International,
Tonca, Carenzalem, Tiswadi, Goa
Presently residing at Flt F-4, B-1,
Poorva Apartments Martins Morod,
Carenzalem, Tiswadi, Goa. Petitioner

V/s.

M/s. Wibro Construction Company
Through its Proprietor, M.K. Abdulla,
Residing at Vishaya Mansion,
Journalist Colony, Porvorim, Bardez, Goa,
Having its office at 1st floor, 'C' Block,
Cardozo Building, Near KTC Bus Stand,
Panaji, Goa. Respondent.

Shri Hrudaynath S. Shirodkar, Advocate for the petitioner.

Shri Nikhil Vaze, Advocate for the respondent.

CORAM : NUTAN D. SARDESSAI,J.

Reserved on:- 22nd January,2020.

Pronounced on :- 30th January,2020.

JUDGMENT:

Heard Shri Hrudaynath S. Shirodkar, learned Advocate for the petitioner and Shri Nikhil Vaze, learned Advocate for the respondent.

2. Rule. Rule is made returnable forthwith with the consent and at the request of the learned Counsel for the parties.

3. The Petitioner has invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India and Sections 391 and 482 of the Code of Criminal Procedure while challenging the validity and legality of the order dated 22/08/2019 passed by the learned Sessions Judge North Goa, Panaji whereby he dismissed the application of the petitioner seeking leave to produce additional evidence on record.

4. Heard Shri H. Shirodkar, learned Advocate on behalf of the petitioner who contended that he had moved an application under Section 391 CrPC before the learned Sessions Judge in the Criminal Appeal filed by the petitioner and as he wanted to produce additional documents being those in a connected criminal complaint between the same parties. Earlier an order was passed by the learned Sessions Judge allowing the application under Section 391 CrPC which was challenged in a Criminal Writ Petition by the respondent. A learned Single Judge of this Court by his order dated 10/04/2019 expressed serious reservation whether evidence recorded in some other case could

form the substantive evidence in the case at large before it and which aspect was not taken into consideration by the learned Sessions Judge while allowing the application and in that view of the matter remitted the matter to the learned Sessions Judge for deciding it afresh on its own merits and in accordance with law. It was the contention of Shri Shirodkar, learned Advocate for the petitioner that a statement was made by the complainant in the connected Criminal Case No.152/NIA/2012/C which had a bearing on this case and therefore that statement was required to be produced on record in this case. He place reliance in **Rajeswar Prasad Misra v/s. The State of W.B. and another** [1965 0 AIR (SC) 1887], **Rambhau and Another v/s. State of Maharashtra** [2001(2) Crimes (SC) 231] and **Kailash S/o. Mannalal Jindal v/s. State of Maharashtra [2016 SCC Online Bom 2609]** in support of his case.

5. Shri Nikhil Vaze, learned Advocate on behalf of the respondent submitted that the learned Single Judge of this Court had rightly observed that there was a serious doubt as to whether the evidence recorded in some other case could form the substantive evidence in the present case. Even otherwise and in

terms of Section 33 of the Indian Evidence Act, an evidence in any case could not be produced in this case. The application moved on behalf of the Petitioner also did not indicate what he sought to produce. On his part, he place reliance in **Mitthulal and Another v/s. The State of Madhya Pradesh** [(1975)3 SCC 529], **Vinubhai Ranchhodbhai Patel v/s. Rajivbhai Dudabhai Patel and others** [(2018) 7 SCC 743], **Balhim Chitte and another v/s. The State of Maharashtra and another** [212 SCC OnLine Bom 1640] and **Rupinder Singh Arora v/s. Kapil Puri** [2016 SCC OnLine Bom 14174] and pressed for the dismissal of the petition.

6. i would consider their submissions, the judgments relied upon, as also the relevant provisions of the Evidence Act and decide the petition accordingly.

7. The petitioner had challenged the judgment of conviction passed by the learned JMFC in an appeal filed before the learned Sessions Judge, Panaji in which she claimed that she had never issued the cheque in dispute to the respondent towards any liability or consideration that could be legally enforced nor was there any transaction between her and the respondent. According

to her, this fact had come up before the Trial Court in another matter where during the course of the deposition, the respondent had admitted the fact that he had advanced huge amounts to various other people and therefore, it was necessary to bring the deposition of the respondent before the Court. The learned Sessions Judge by its original order dated 15/03/2018 had allowed the application precipitating a Writ Petition at the instance of the respondent bearing No.158 of 2018. The learned Single Judge had found that the deposition which was permitted to be allowed by the learned Sessions Judge to be produced could not be said to be between the same parties inasmuch as the accused in that case was a Company while in the present case the respondent no.1 was the accused in person.

8. The learned Judge had also found that there was an erroneous finding of the learned Sessions Judge that both the cases were between the same parties which factually was incorrect. Moreover, there was a clear observation that there was a serious doubt that the evidence recorded in some other case could form the substantive evidence in the present case which aspect had not been taken into consideration by the learned

Sessions Judge and therefore set aside the said order and remanded the matter to the learned Sessions Judge for deciding it afresh on its own merits and in accordance with law. The learned Sessions Judge vide the impugned order dated 22/08/2019 on hearing the learned Advocates came to a clear finding that the deposition which the petitioner sought to produce pertained to another case initiated under Section 138 of the Act and by seeking to produce the said documents, the petitioner wanted to fill up the lacunae of certain questions which were not asked to the witness of the complainant in the cross-examination. Besides, the petitioner had not stated in what manner the said deposition was relevant and dismissed the said application giving rise to the Writ Petition at the instance of the petitioner.

9. Section 391 CrPC deals with the power of the Appellate Court to take further evidence or directed to be taken and reads thus : (1) 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. [\(2\)](#)

When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal. (3) The accused or his pleader shall have the right to be present when the additional evidence is taken. (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry. In other words, the powers of the Appellate Courts are wide enough to take further evidence or directed to be taken **if it thinks** such additional evidence is necessary and records reasons for allowing such application.

10. In **Rajeswar Misra**(supra), the Hon'ble Apex Court held at para 9 in the facts of the case 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 the 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 a 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."

11. In **Rambhau**(supra), another Two Judge Bench of the Hon'ble Apex Court spelt out that the Appellate Court may take further evidence or directed to be taken in terms of Section 391 CrPC. There is a wide discretion in the matter of obtaining additional evidence in terms of Section 391 CrPC. 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 sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order XLI Rule 27 of the C.P.Code.

Both these judgments lay down the general proposition in the matter of admitting additional evidence in appeal and which must be only in case it is necessary for the just decision of the case and for the reasons to be recorded in writing if one understands the predicates of Section 391 CrPC. These judgments do not in any manner buttress the case of the petitioner that such additional evidence can be produced by recourse to Section 391 CrPC to fill up the lacunae and which is otherwise not intended to meet the ends of justice.

12. Section 33 of the Indian Evidence Act 1872 deals with the relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts stated therein. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a

subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: Provided - that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

13. A bare reading of this Section would clearly negate the contention of Shri Shirodkar, learned Advocate for the petitioner that he is entitled to produce the deposition of Shri Abdulla in another proceedings which is apparently not between the same parties in these proceedings which are at large before the learned Sessions Judge Panaji. Therefore from a bare reading of Section 33 of the Act, the application of the petitioner would not stand the test of scrutiny.

14. Besides **Mithhulal**(supra), was an appeal by special leave directed against an order passed by the High Court of Madhya Pradesh confirming the conviction and sentence of the appellants who were prosecuted with four others for offences under Section 326 read with Section 34 and Section 325 read with Section 34 of the Indian Penal Code. The case against the appellants and the other accused was that One Ganpat was in the possession of a field called Buliyawala where arhar crop was standing. On 16th February, 1968 at about 4p.m. Ganpat on reaching his field found that the cattle of the accused were grazing in his field. He rounded up the cattle in order to take them to the cattle pound, whereupon an altercation took place between Ganpat and the accused. The appellant No.2, who was armed with a lohangi, gave a blow causing fracture on the left hand of Ganpat. Baijnath another accused, also gave lathi blows to Ganpat who thereupon fell down semi-unconscious, but at that stage his son Rajdhar came along to the field. He too was attacked by the appellant No.1 with a farsi and an injury was caused to him on his left hand.

15. In **Mithhulal**(supra), the appellant No.2 also gave a below on the right hand of Rajdhar with his lohangi, who ran for safety but he was pursued and ultimately he fell down unconscious. On regaining consciousness Rajdhar went home and found that in the meantime his father Ganpat had also come back. Both thereafter went to the Ashok Nagar Police Station and lodged the first information report in regard to this incident at 8.15p.m. The version of the appellants and the other accused was, however, different. It was their case was that on the same afternoon at about 3.00p.m. the cattle of Ganpat and Laljiram were grazing in the field of the appellant No.2 when appellant No.2 tried to take the cattle to the cattle pound. Ganpat and Lalji objected and took away the cattle from the possession of the appellant No.2 by force. Thereafter, Ganpat, Rajdhar and some others went to the house of the accused Komal and gave him blows with spears, farsi, lohangi and sticks and then belaboured Raghunath & accused Kalloo Ram who met them on the way, and lastly attacked Jagannath Prasad, Baldev Prasad and the appellants with spears, farsis, sticks and lohangi. It appears that in the course of this incident some minor injuries were caused to Ganpat and Rajdhar but that was in exercise of the right of

private defence and no offence, was therefore, committed by the accused.

16. In **Mithhulal**(supra), a first information report in regard to this incident was lodged by one Jwala Prasad with Ashok Nagar Police Station at 8.00p.m. On the basis of these two first information reports cross-cases were filed by the Police. One was a case against the appellants and the other four accused giving rise to the present appeal. The other was a case against Ganpant, Rajdhar and others and both cases were tried separately and each was decided on the basis of the evidence recorded in it. In the former case, with which we are concerned, the other four accused were acquitted but the appellants were found guilty, the appellant No.1 under Section 326 and the appellant No.2 under Sections 325 and 323, and sentenced to suffer rigorous imprisonment for three years for the offence under Section 326, two years for the offence under Section 325 and three months for the offence under Section 323 and the last two sentences against the appellant No.2 being directed to run concurrently.

17. In **Mitthulal**(supra), the appellants, being aggrieved by the order of conviction and sentence passed against them, preferred

an appeal to the High Court of Madhya Pradesh but a Division Bench of the High Court dismissed the appeal and confirmed the conviction and sentence of the appellants which gave rise to an appeal before the Apex Court. Their Lordships found from a bare reading of the judgment of the High Court that it suffered from a serious infirmity and it was impossible to sustain it. The High Court had based its conclusion not only on the evidence recorded in the case against the appellants and the four other accused but also taken into account evidence recorded in the cross case against Ganpat, Rajdhar and others. This was clearly impermissible to the High Court. It is difficult to comprehend as to how the High Court could decide the appeal before it by taking into account evidence recorded in another case, even though it might be what is loosely called a cross case. It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision.

18. In **Vinubhai Patel**(supra), it was observed by the Hon'ble Apex Court at paragraph 47 that in Sessions Case No.58 of 1998 against A-16 and A-17, no evidence was recorded independently.

On the other hand, the evidence recorded in Sessions Case No.118 of 1992 was marked as evidence in Sessions Case No.58 of 1998. The Evidence Act,1872 does not permit such a mode of proof of any fact barring in exceptional situations contemplated in Section 33 of the Evidence Act. There is no material on record to warrant the procedure adopted by the Sessions Court. On that single ground, the entire trial of Sessions Case No.58 of 1998 was vitiated as not in accordance with the procedure established by the law.

19. In **Balhim Chitte and another**(supra), a learned Single Judge of this Court had noted that the Additional Sessions Judge had not only decided two appeals filed in two separate criminal cases together, but the judgment showed that the Additional Sessions Judge had compared the evidence in the two cases to find out as to which side was aggressor and as to which side committed offence. In that context, the advocate of the petitioners submitted that the prejudice was certainly caused to the accused and it needed to be inferred that there had been a miscarriage of justice. It considered the judgment in **Mitthulal**(supra) where it was made clear that each criminal case

must be decided on the evidence recorded in it and evidence recorded in another case though it may be a cross-case cannot be taken into account in arriving at the decision. It can be said that the Sessions Judge had committed an error in reading the evidence of counter case in the appeal filed by the present petitioners. Thus, there was certainly an irregularity in the procedure adopted by the Sessions Court.

20. In **Rupinder Arora**(supra), the learned Counsel also relied upon the cross-examination of the plaintiff in the proceedings filed by the plaintiff under Section 138 of the Negotiable Instruments Act to submit that the plaintiff had admitted that he was told to sell the shares pledged and read out certain portions of the cross-examination. The learned Single Judge was not willing to accept this submission. First of all as the matter was subjudice. Moreover, it was elementary that each case must be decided on the evidence available in that matter and evidence recorded in another case cannot be taken into account in arriving at the decision and again relied in **Mitthulal**(supra) where the Apex Court had held that it was clearly impermissible to decide

the matter or base its conclusion by looking into the evidence recorded in another matter.

21. At the cost of repetition, the records which the petitioner sought to produce before the learned Sessions Judge were not between the same parties and were primarily intended to fill up the lacunae in the case of the petitioner. This Court while passing its order dated 10/04/2019 had observed so that the proceedings were not between the same parties and moreover there was a serious doubt as to whether evidence recorded in some other case could form the substantive evidence in the present case. No case whatsoever has been made out for interference with the order under challenge. In view thereof, i pass the following:

O R D E R

Rule is discharged. The petition is dismissed. The parties to appear before the learned Sessions Judge on the pre-scheduled date of hearing.

NUTAN D. SARDESSAI,J.