

THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

Date of Decision : January 13th , 2021

1. CRR-3772-2018 (O&M)

Veer Singh Lopoke Ex. MLA PETITIONER

VERSUS

Sukhbinder Singh Sarkaria MLA and another RESPONDENTS

2. CRR-450-2019 (O&M)

Sukhbinder Singh Sarkaria PETITIONER

VERSUS

Veer Singh Lopoke RESPONDENT

CORAM : HON'BLE MR. JUSTICE SANJAY KUMAR

Present: Mr. S.P.S. Sidhu, Advocate, for the petitioner in CRR-3772-2018 and the respondent in CRR-450-2019.
Ms. Ishma Randhawa, Advocate, for the petitioner in CRR-450-2019 and the respondent No.1 in CRR-3772-2018.
Mr. Gaurav Garg Dhuriwala, Senior Deputy A.G.,
Punjab.

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Sanjay Kumar, J.

These two criminal revisions, filed under Section 397 Cr.P.C. read with Section 401 Cr.P.C., are amenable to a conjoined disposal.

The revisions arise out of the common judgment dated 30.10.2018 passed by the learned Sessions Judge, Amritsar, in Criminal Appeal No.24115(New)/18843(Old) of 2013 and Criminal Appeal No. 421 of 2014. The petitioner in CRR-3772-2018 was the appellant in Criminal Appeal No.24115(New)/18843(Old) of 2013 while the petitioner in CRR-450-2019 was the appellant in Criminal Appeal No. 421 of 2014.

These two appeals, in turn, arose out of the judgment dated 18.09.2013 passed by the learned Additional Chief Judicial Magistrate, Amritsar, in Complaint Case No.36 of 2007, registered under Sections 500, 501, 109 and 120-B IPC. Sukhbinder Singh Sarkaria, the petitioner in CRR-450-2019, was the complainant in the said case while Veer Singh Lopoke, the petitioner in CRR-3772-2018, was the accused therein.

By the judgment dated 18.09.2013, the learned Additional Chief Judicial Magistrate, Amritsar, convicted the accused under Section 500 IPC and sentenced him to simple imprisonment for a period of one year and payment of a fine of Rs.5,000/- and in default, to undergo simple imprisonment for a further period of 15 days. Aggrieved thereby, the accused filed Criminal Appeal No.24115(New)/18843(Old) of 2013 while the complainant sought enhancement of the sentence, by way of Criminal Appeal No. 421 of 2014. The complainant also filed an application under Section 391 Cr.P.C. in his appeal seeking to lead additional evidence.

By the common judgment dated 30.10.2018, the appellate Court allowed the appeal of the accused and set aside the trial Court's judgment dated 18.09.2013. At the same time, the application of the complainant under Section 391 Cr.P.C. was also allowed and the case was remanded with a direction to the trial Court to allow the complainant to examine the concerned Clerk of Jagbani Newspaper, along with the summoned record, regarding publication of the offending advertisement in the City Edition of Jagbani dated 13.02.2007, and to dispose of the case

afresh in accordance with law within a time frame. The complainant's appeal for enhancement of the sentence was dismissed as infructuous.

Aggrieved by this judgment to the extent of allowing of the complainant's application under Section 391 Cr.P.C. and the remanding of the case to the trial Court pursuant thereto, the accused filed CRR-3772-2018. Aggrieved by the allowing of the appeal of the accused and the setting aside of the conviction and sentence ordered by the trial Court, the complainant filed CRR-450-2019.

By order dated 16.11.2018 passed in CRR-3772-2018, this Court stayed further proceedings pursuant to the judgment dated 30.10.2018. Separately, by order dated 26.02.2019 passed in CRR-450-2019, pronouncement of the final judgment by the trial Court, pursuant to the remand, was stayed.

The factual matrix relevant to these revisions may be summed up thus: The complainant and the accused were rival candidates in the Assembly elections from Rajasansi Constituency held on 13.02.2007. The complainant was the candidate of Congress Party while the accused was sponsored by the Akali Dal. On the date of the election, viz., 13.02.2007, an advertisement was published in Jagbani Newspaper depicting the complainant in a negative light. The accused was stated to have been responsible for the publication of this advertisement. That apart, he allegedly distributed copies of the said newspaper on that day. Thereupon, on the strength of these allegations, the complainant filed the subject complaint case under Sections 500, 501, 109 and 120-B IPC.

The complainant examined himself and four other witnesses during his preliminary evidence. The four witnesses examined by him were Jasbir Singh, Amandeep Singh, Shadi Lal and Taljit Singh. Shadi Lal was an employee of Jagbani Newspaper and produced the Booking Slip of the offending advertisement. He stated that the same was booked by the accused. The Booking Slip was marked as Exhibit PB/2. However, during the course of the trial, Shadi Lal was not examined as his whereabouts were not known. Apart from the complainant, Jasbir Singh, Amardeep Singh and Gurpreet Singh were however examined.

Gurpreet Singh was the Advertising Billing Head of Jagbani Newspaper but he did not bring the summoned record to the Court. He stated that Dhian Chand, the new Record Keeper, was away at Delhi and that the non-bailable warrants issued against him could not be executed. He further stated that though the new Record Keeper tried to locate the record relating to the offending advertisement, he could not find the same. In effect, Gurpreet Singh had nothing useful to contribute.

However, by its judgment dated 18.09.2013, the trial Court found sufficient evidence to convict the accused and sentence him, leading to cross appeals. Both these appeals were instituted in October, 2013. While so, the complainant filed an application in his appeal under Section 391 Cr.P.C. in March, 2017. Therein, while pointing out that Shadi Lal, who was examined during the preliminary evidence and had produced Exhibit PB/2, was not available during the trial and the Clerk who was sent by Jagbani Newspaper confessed his inability to produce the

record, the complainant asserted that the record could easily be traced and the main Billing Head of the Advertisement Section should be called to adduce additional evidence, by bringing all the records. He further claimed, quite erroneously, that Jasbir Singh, who was examined during the preliminary evidence, had not been examined during the trial due to his not being available and that his examination was also necessary for a just decision of the case.

Ms. Ishma Randhawa, learned counsel for the complainant, would assert that the appellate Court erred in law in setting aside the judgment of the trial Court while allowing the application filed by her client under Section 391 Cr.P.C.

This Court finds merit in this submission.

Section 391 Cr.P.C. authorizes an appellate Court to take further evidence, or direct it to be taken, in fit cases. It provides that, while dealing with any appeal, an appellate Court is empowered, if it thinks that additional evidence is necessary and records reasons therefor, to either take such evidence itself or direct it to be taken by a Magistrate.

As pointed out by the Supreme Court in **Rambhau and another vs. State of Maharashtra [(2001) 4 SCC 759]**, Section 391 Cr.P.C. forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court but such power, being by way of an exception, should be exercised with caution and circumspection so as to meet the ends of justice. It was further observed that the doctrine of finality of judicial proceedings would not stand

annulled or affected in any way by reason of exercise of power under Section 391 Cr.P.C., as the same would avoid a *de novo* trial and it is not meant to fill up lacunae but to sub-serve the ends of justice.

Significantly, this provision does not authorize an appellate Court to set aside the trial Court's judgment at the stage of recording or directing the trial Court to record additional evidence (see **T. Vennila vs. Thangavel @ Kumar and others [2003 Cri LJ 4049 (Madras High Court)]**; **Mithlesh Khaitan vs. State of Rajasthan and another [2013 SCC Online Raj 2102]**; **Charanjeet Gaba vs. Arjunlal Ahuja and another [2012 SCC Online Del 1259]** and **Chandrodaya Vividodesha Trust vs. M/s Swarna Logistics (Karnataka High Court) [Criminal Revision Petition No.1057 of 2015, decided on 16.02.2016]**).

No doubt, the accused had filed an independent appeal against his conviction and sentence but once the appellate Court found sufficient grounds to allow additional evidence to be adduced under Section 391 Cr.P.C. in the complainant's appeal, it could not have decided the appeals at that stage. Both appeals necessarily had to await the adducing of additional evidence so that the appellate Court could take the same into account while deciding them comprehensively. Having found enough grounds to allow the application filed under Section 391 Cr.P.C. in the complainant's appeal, the appellate Court was not justified in dismissing the said appeal as infructuous and in setting aside the judgment dated 18.09.2013 of the learned Additional Chief Judicial Magistrate,

Amritsar, in the appeal of the accused. The interlocutory order allowing the application would not survive independently once the main appeal, in which the said application was filed, was dismissed. The approach of the appellate Court therefore defies law, logic and comprehension.

However, by way of CRR-3772-2018, the accused assails the correctness of the appellate Court's decision in allowing the said application filed under Section 391 Cr.P.C. At this stage, it may be noted that Section 391 Cr.P.C. empowers an appellate Court to call for additional evidence, be it before itself or the Magistrate concerned, once it forms an opinion that such additional evidence is necessary and records reasons therefor. Therefore, the contents of the application filed by the complainant are not conclusive in themselves to determine the validity and correctness of the opinion formed by the appellate Court as to the necessity for such additional evidence. Having examined the matter on merits, the appellate Court found that defamatory material had been published in the offending advertisement against the complainant but opined that sufficient evidence was not placed on record to fasten liability therefor upon the accused. The appellate Court noticed that the trial Court had not used coercive measures to secure the presence of the concerned Clerk of Jagbani Newspaper so as to determine the link between the advertisement and the accused, if any, and that the record maintained by the office of Jagbani Newspaper was also not produced. It was in these circumstances that the appellate Court concluded that the trial Court had closed the evidence in a hasty manner and allowed the complainant's

application under Section 391 Cr.P.C., directing the trial Court to allow the complainant to examine the concerned Clerk from the office of Jagbani Newspaper, along with the summoned record.

Mr. S.P.S. Sidhu, learned counsel for the accused, would contend that sufficient opportunities were given by the trial Court to the complainant to adduce his evidence but he failed to do so. Pointing out that the complainant himself stated before the trial Court that he had no objection to the closure of the evidence, the learned counsel would assert that the application filed under Section 391 Cr.P.C. was practically an application under Section 311 Cr.P.C. and that it amounted to an abuse of process of the Court.

However, perusal of the orders passed by the trial Court reflects that coercive measures were adopted only to procure the presence of Gurpreet Singh, whose evidence was of no assistance. Dhian Chand, the new Record Keeper, was not even examined though non-bailable warrants were issued against him but the trial Court allowed him to go free, on the ground that the case was a targeted case for early disposal.

In such circumstances, the consent of the complainant cannot be held against him. In any event, irrespective of his willingness or otherwise, the appellate Court was always at liberty to exercise power independently under Section 391 Cr.P.C., once it felt that such evidence was necessary and recorded reasons therefor.

The argument of Mr. S.P.S. Sidhu, learned counsel, that the application was liable to be dismissed on the ground of delay does not

merit consideration. No doubt, the said application was filed in the year 2017, long after the institution of the appeal in the year 2013. However, as pointed out by the Supreme Court in **Brigadier Sukhjeet Singh (Retired) MVC vs. State of Uttar Pradesh and others [(2019) 16 SCC 712]**, when the statute grants a right of appeal, the appellant has every right to take all steps and take the benefit of all the powers of the appellate Court to secure the ends of justice. It was further pointed out that the endeavour of all Courts is to reach the truth and in a criminal case, an appellate Court has to consider as to whether conviction of the accused is sustainable or a case is made out for acquittal. Earlier, in **Sudevanand vs. State through Central Bureau of Investigation [(2012) 3 SCC 387]**, the Supreme Court held that mere delay is no ground for rejecting an application under Section 391 Cr.P.C., particularly when the applicant was not responsible for the inordinate delay in the disposal of the appeal. Therefore, the delay in the filing of the application by the complainant cannot be held to be fatal. Further, as pointed out *supra*, the appellate Court had *suo motu* power to exercise discretion under Section 391 Cr.P.C. and call for additional evidence after recording reasons therefor. Therefore, the delay in the filing of the application does not vitiate the opinion formed by the appellate Court.

As the appellate Court only permitted the complainant to examine the concerned Clerk of Jagbani Newspaper and the summoned record to prove the link, if any, between the advertisement and the

accused, the contention that the application was liable to be rejected as it also referred to Jasbir Singh, who was already examined, does not merit acceptance. As the appellate Court did not permit his re-examination, the accused can have no complaint, though the complainant's prayer in that regard was erroneous and misconceived.

This Court therefore finds no grounds to interfere with the opinion formed by the appellate Court as to the necessity of additional evidence to prove the complainant's case against the accused. To that extent, the judgment dated 30.10.2018 of the appellate Court is justified.

On the above analysis, CRR-450-2019 is allowed to the extent of setting aside the judgment dated 30.10.2018 insofar as it allowed the appeal of the accused and set aside the judgment dated 18.09.2013 of the learned Additional Chief Judicial Magistrate, Amritsar, in Complaint Case No.36 of 2007. In consequence, the dismissal of the complainant's appeal, on the ground that it had become infructuous, is also set aside. As a sequel, both appeals are restored to the file and the appellate Court shall consider the same after receiving the report of additional evidence from the trial Court and decide both appeals on merits and in accordance with law. CRR-3772-2018 is dismissed, confirming the judgment dated 30.10.2018 of the appellate Court, insofar as it pertains to allowing of the complainant's application under Section 391 Cr.P.C.

Interim orders shall stand vacated. The trial Court shall send the additional evidence to the appellate Court under due certification as per Section 391(2) Cr.P.C. within two months from the date of receipt of a

certified copy of this order. Thereupon, the appellate Court shall dispose of both the appeals on merits and as per law, duly taking into consideration the additional evidence placed before it.

The revisions are disposed of accordingly.

January 13th, 2021
Kang

(Sanjay Kumar)
Judge

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No