

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO. 415 OF 2022

PETITIONER:
(Ori. Accused) Smita Yashwant Lipte,
Aged about 42 years, Occu: Business,
R/o W.C.L., Quarter No. NM-33,
Duragapur Colliery, WCL, Durgapur, Post:
Durgapur, Tq. & District Chandrapur.

...V E R S U S...

RESPONDENT
(Ori. Complainant) Kavita Suryakant Arade,
Aged about 44 years, Occu: Cultivation &
Business, R/o WCL Quarter No. NM-144,
WCL, Durgapur, Post Duragapur,
Tq. & Dist., Chandrapur. .

Shri M.P. Khajanchi, counsel for the Petitioner.
Shri A.T. Purohit, counsel for the Respondent.

CORAM : ANIL S. KILOR, J.
DATE : 16th November, 2022

ORAL JUDGMENT :

1. Heard.
2. **Rule.** Rule is made returnable forthwith. Heard finally with the consent of both the parties.
3. In this writ petition, a challenge is raised to the rejection of application under Section 391 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for placing

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on record additional evidence, vide order dated 16/02/2022, passed by the Additional Sessions Judge, Chandrapur in Criminal Appeal No. 70/2013.

4. The main ground, on which, the challenge is raised is that the learned Appellate Court while rejecting the application under Section 391 of the Code, failed to consider the wide powers of the learned Appellate Court, which are contained in Section 386 of the Code and the object of powers given under Section 391 of the Code to take additional evidence.

5. It is submitted that, the object is, to appropriately decide the appeal by the Appellate Court to secure ends of justice. Thus, he submits that the learned Lower Appellate Court has committed an error in rejecting the application. For this purpose, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the *Brigadier Sukhjeet Singh (Retired) MVC vs State of Uttar Pradesh and others*¹.

6. He further submits that, if the application Exhibit No.20 filed under Section 391 of the Code is not allowed and the petitioner is not permitted to place on record additional evidence, it will cause great prejudice to the petitioner, and in that case, it will

1 (2019) 16 SCC 712

judgment.odt

amount to failure of justice.

7. On the other hand, Shri A.T.Purohit, learned counsel for the respondent strongly opposed the present application and he submits that the petitioner has suppressed the material facts and unless, in case of failure of justice, such an application for seeking additional evidence should not be allowed.

8. He submits that, the Court has to decide such an application objectively just to cure the irregularity and the said provision should be invoked sparingly. In support of his contention, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Ashok Tshering Bhutia Vs State of Sikkim*².

9. Learned counsel for the respondent has drawn attention of this Court to the pleadings made in the present writ petition and the summary criminal complaint filed by the respondent before the Chief Judicial Magistrate First Class, Chandrapur to point out the suppression of fact and making of incorrect statement. Thus, he submits that the learned Appellate court has rightly rejected the application (Exhibit No.20) of the petitioner.

10. In the backdrop of rival submission, I have perused the

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writ petition, the reply and the impugned order Exhibit No.20.

11. On perusal of the impugned order below Exhibit No.20, it can be seen that the reasoning recorded by the Additional Sessions Judge in para Nos. 7 and 8 are read thus:-

7. Furthermore, so-called statements made by respondent No.1/complainant in Summary Suit No. 9/2009 do not suggest at all that there was a partnership business between the appellant and respondent No.1, or at any point of time there was the business of partnership between them, or the cheque-in-question was given to respondent No.1 for the business of partnership firm or for discharging certain obligations arising out of the business of partnership firm. Therefore, I find absolutely no reason and the scope to allow the appellant to lead additional evidence.

8. It is not that the appellant didn't get the opportunity to bring on record the materials which the appellant now want to bring on record by way of additional evidence. It is not that the learned lower court had prevented the appellant for bringing the alleged materials on record. Therefore, I see no reason to grant the permission to the appellant to lead additional evidence. I find no merits in the application and therefore, the application needs to be rejected and as such, it is hereby rejected."

12. The Hon'ble Supreme Court of India in the case of ***Brigadier Sukhjeet Singh (Retired) MVC*** (supra) had an occasion to examine the powers of learned Appellate Court under Section 391 of the Code to take additional evidence. The Hon'ble Supreme Court of India, after examining the provisions namely Sections 391

and 386 of the Code has held thus:-

“22. Chapter XXIX of the Code of Criminal Procedure, 1973 deals with “Appeals”. Section 391 Cr.P.C. empowers the appellate court to take further evidence or direct it to be taken. Section 391 is as follows:-

“391. Appellate court may take further evidence or direct it to be taken.—(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.”

23. The key words in Section 391(1) are “if it thinks additional evidence to be necessary”. The word “necessary” used in Section 391(1) is to mean necessary for deciding the appeal. The appeal has been filed by the accused, who have been convicted. The powers of appellate court are contained in Section 386. In an appeal from a conviction, an appellate court can exercise power under Section 386(b), which is to the following effect:-

“386.(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;”

24. Power to take additional evidence under Section 391 is, thus, with an object to appropriately decide the appeal by the appellate court to secure ends of justice. The scope and ambit of Section 391 CrPC has come up for consideration before this Court in Rajeswar Prasad Misra Vs. State of W.B Hidayatullah, J., speaking for the Bench held that a wide discretion is conferred on the appellate courts and the additional evidence may be necessary for a variety of reasons. He held 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. Following was laid down in Paragraph Nos. 8 and 9: (AIR p.1892)

“8....Since a wide discretion is conferred on appellate courts, the limits of that courts’ jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of

observations made by this Court in the interpretation of the other section.

9. Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if 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. 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.”

25. This Court again in Rambhau v. State of Maharashtra had noted the power under Section 391 CrPC of the appellate court. Following was stated in Paras 1 and 2:- (SCC p.761)

“1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same...”

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a

way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in Rajeswar Prasad Misra v. State of W.B. in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.”

26. From the law laid down by this Court as noted above, it is clear that there are no fetters on the power under Section 391 CrPC of the Appellate Court. All powers are conferred on the Court to secure ends of justice. The ultimate object of judicial administration is to secure ends of justice. Court exists for rendering justice to the people.”

13. Earlier, the Supreme Court of India in the case of **Ashok Tshering Bhutia** (supra) has held thus:-

Additional Evidence:

28. Additional evidence at appellate stage is permissible, in case of a failure of justice. However, such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society. Such an application for taking additional

evidence must be decided objectively, just to cure the irregularity.

29. The primary object of the provisions of Section 391 CrPC is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary. (Vide *Rajeswar Prasad Misra v. The State of W.B.*, *Ratilal Bhanji Mithani v. The State of Maharashtra*, *Rambhau v. State of Maharashtra*, *Anil Sharma . v. State of Jharkhand*, *Zahira Habibulla H. Sheikh .v. State of Gujarat*, and *Manu Sharma v. State (NCT of Delhi)*.)

14. In the light of the above referred discussions of the Hon'ble Supreme Court of India, as regards powers under Section 391 of the Code, I revert back to the facts of the present case.

15. The learned Additional Sessions Judge while rejecting the application Exhibit No.20 and exercising the discretion conferred upon him under Section 391 of the Code, wherein the keywords "if it thinks additional evidence to be necessary" are used, has not observed and recorded any reasons in this regard.

16. Moreover, nothing has been observed about the powers under Section 391 of the Code and Law in this regard. In the circumstances, I have arrived at the conclusion that, the learned Additional Sessions Judge has not exercised its discretion, after

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examining the powers under Section 391 of the Code.

17. Accordingly, I am of the opinion, that the matter needs to be remanded back to the learned Additional Sessions Judge, Chandrapur to decide the application afresh. Accordingly, I pass the following order:

- (i) The writ petition is partly **allowed**.
- (ii) The order dated 16/02/2022, order below Exhibit No.20 is hereby quashed and set aside.
- (iii) The learned Additional Sessions Judge, Chandrapur is directed to decide the application (Exh.20) on or before 30/12/2022.
- (iv) It is made clear that, this Court has not observed or has not given findings on merits of the matter and the learned Additional Sessions Judge, shall not influence by any of the observations made in the order.

[ANIL S. KILOR, J.]

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