

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRR-4079-2017 (O & M)
Date of decision: 26.08.2022

Subhash Chand

..... Petitioner

V/s

Balbir Singh Kanungo and anr.

...Respondents

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Sachin Gupta (Ladwa), Advocate,
for the petitioner.

Mr. Viney Saini, Advocate, for respondent No.1.

Mr. Vikrant Pamboo, DAG, Haryana.

JASJIT SINGH BEDI, J. (Oral)

The present revision petition has been instituted against the judgment dated 10.10.2017 whereby while adjudicating upon an application under Section 391 Cr.P.C., the Additional Sessions Judge, Kurukshetra has allowed the application as well as the appeal against acquittal on the same day i.e. 10.10.2017 without hearing arguments in the appeal.

2. The brief facts of the case are that the respondent No.1-complainant/Balbir Singh filed an FIR No.18 dated 22.02.2009 under Sections 332, 353 and 506 IPC at Police Station Babain against the accused-petitioner/Subhash Chand.

3. The petitioner/original accused Subhash Chand came to be acquitted by the Court of the Judicial Magistrate Ist Class, Kurukshetra vide its judgment/ order dated 05.12.2014.

4. The respondent-complainant filed a criminal appeal against the order/judgment dated 05.12.2014 before the Additional Sessions Judge, Kurukshetra on 03.01.2015. Subsequently, an application was moved under Section 391 Cr.P.C. for additional evidence on 27.09.2017/03.10.2017. The petitioner filed a reply to the said application on 10.10.2017. The Additional Sessions Judge, Kurukshetra allowed the application under Section 391 Cr.P.C. as well as the appeal on the same day i.e. 10.10.2017 and remanded the case back to the Trial Court without hearing the arguments in the appeal. It is this judgment, which is in challenge before this Court.

5. The learned counsel for the petitioner-Subash Chand contends that the application under Section 391 Cr.P.C. had been filed on 03.10.2017 and on 10.10.2017, the case was fixed for the filing of the reply in the application under Section 391 Cr.P.C. and arguments on the same as well as in the main appeal. However, the Additional Sessions Judge, Kurukshetra allowed the appeal without hearing the arguments in the appeal and set aside the judgment dated 05.12.2014 and the case was remanded back to the trial Court to decide the matter afresh while permitting the Trial Court to take the additional evidence. He contends that this course adopted by the Additional Sessions Judge, Kurukshetra was unlawful and contrary to the provisions of Section 391 Cr.P.C. as has been enumerated in “*Charanjeet Gaba versus Arjun Lal Ahuja and another (2012) 5 RCR (Criminal) 820*” and “*Sachdeva Elecrics versus Shyam Sunder Sharma 2013(6) RCR (Criminal) 2983*”. He

contends that if the Court was setting aside the judgment of acquittal then he ought to have considered the arguments of both the sides in detail alongwith the additional evidence before setting aside the same and remanding the case back for reconsideration. However, in the present case, as per the learned counsel for the petitioner, a perusal of the impugned judgment would reveal that there is absolutely no discussion on the merits of the case and the judgment of acquittal has been set aside while allowing the application under Section 391 Cr.P.C. and the case has been remanded back for fresh consideration. He, thus, contends that the judgment ought to be set aside.

6. The learned counsel for the respondent No.1-complainant/Balbir Singh, on the other hand, contends that the judgment dated 10.10.2017 cannot be faulted. The Additional Sessions Judge heard the arguments and felt that it is a case which ought to be sent back for retrial in view of the application having been moved under Section 391 Cr.P.C. He has placed reliance on judgment of Division Bench passed in the case of *“Chamkaur Singh versus Amritbir Singh and another, 2014(3) RCR (Criminal) 777”*.

7. The learned counsel for the State has adopted the arguments of the respondent No.1.

8. I have heard the arguments of learned counsel for the parties in detail.

9. Before proceeding further, it would be apposite to refer to Section 391 Cr.P.C., which is reproduced as under:-

“Section 391 Cr.P.C.:-

391. Appellate Court may take further evidence or direct it to be

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.

10. The judgments relied upon by the learned counsel for the petitioner are as under:-

In the case of Charanjeet Gaba versus Arjun Lal Ahuja and another (2012) 5 RCR (Criminal) 820, the Delhi High Court held as under:-

“2. This petition raises a short, but important question of law relating to powers of the Appellate Court under Section 391 Cr.PC. The respondents herein were convicted under Section 138 of the Act by learned MM vide his judgment dated 17.02.2006. They carried the matter in appeal before the Appellate Court of learned ASJ. Before the Appellate Court, they filed an application under Section 391 Cr.PC for leading additional evidence. The same was allowed by learned ASJ vide the impugned order. While allowing this application, the learned ASJ set aside the conviction and remanded the case back to learned MM to decide the matter afresh after taking into account the additional evidence. It is this part of the impugned order of setting aside the conviction and directing the learned MM to decide the matter afresh after taking into

account the additional evidence that is under challenge by way of instant petition.

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8. *Thus, so far as the powers of the Appellate Court in allowing additional evidence, I do not see any illegality in the impugned order. The question that arises for consideration is as to the course that was to be followed by the Appellate Court while allowing additional evidence. The Appellate Court could take additional evidence itself or direct the trial court to record the same. This section does not authorise the Appellate Court to set aside the conviction and remand the case back to the trial court for recording the evidence. Such additional evidence is taken in the manner prescribed in Chapter XXIII Cr.PC. The Appellate Court cannot order de novo trial while allowing adducing of additional evidence. The section does not envisage retrial. No doubt, the Appellate Court has the power to reverse the judgment of the trial court under Section 386 Cr.P.C, but that could not be done as a matter of routine and certainly not while disposing of an application under Section 391 Cr.PC. For reversing the judgment of trial court under Section 386 Cr.PC, different considerations and reasons need be examined by the Appellate Court and for which imperative reasons are required to be recorded. Ramakant Rai Vs. Madan Rai and others.*

9. *The learned ASJ while allowing the application under Section 391 Cr.PC has set aside the conviction order and ordered for the fresh decision. This is where grave error has been committed by the Appellate Court. The right course for the Appellate Court was to keep the conviction order in abeyance by staying its operation and to either record the evidence itself or to direct it to be recorded by the trial court and then to proceed to dispose of the main appeal in the light of such additional evidence.*

10. In view of foregoing discussion, the impugned order of learned ASJ is untenable and thus set aside. The matter is remanded back to the Appellate Court of ASJ with the directions to proceed to record the additional evidence in the manner indicated above and then dispose of the appeal on merits. The parties are directed to appear before District & Sessions Judge, Delhi on 24.3.2012 at 2.30 p.m.

The Division Bench of the Rajasthan High Court, in the case of Sachdeva Elecrics versus Shyam Sunder Sharma 2013(6) RCR (Criminal) 2983, held as under:-

“1. By way of these criminal misc. petitions filed under Section 482 of Criminal Procedure Code , the complainant petitioner has prayed to quash and set-aside the order dated 23rd August, 2003 rendered by Special Judge, Fake Currency Note Cases, Jaipur City, Jaipur, wherein the learned appellate court while allowing the application made under Section 391 of Criminal Procedure Code , directed the learned trial court to take the reply of notice and receipt, on record, examine the witness Anil Saraswat to be produced by the accused Shyam Sunder Sharma in defence and thereafter decide the case afresh.

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4. Learned counsel for the petitioner canvassed that the accused non petitioner examined himself in defence on 13th August, 2002 and thereafter pleaded before the Court that he did not want to produce any more witness in defence, as a result of which the court closed defence evidence and adjourned the case for final arguments to 29th August, 2002. Once the accused non3 petitioner was given ample opportunity to produce defence evidence, there was no occasion to file an application under Section 391 of Criminal Procedure Code seeking permission to produce Anil Saraswat in defence. The

appellate court, without going through the order sheet dated 14th August, 2002, allowed the application filed under section 391 of Criminal Procedure Code and arbitrarily remitted the case to learned trial court for recording his statements and thereafter decide the case afresh against the provisions of law. Thus, the impugned order passed in appeal by the appellate court being bad in law deserves to be set-aside.

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11. In the instant case, an application under Section 391 of Criminal Procedure Code was filed by the accused non petitioner before the appellate court, whereupon the appellate court allowed the application directing the learned trial court to take relevant documents on record and examine Anil Saraswat in defence and thereafter to decide the matter afresh. The impugned order passed by the learned appellate court is found to be totally arbitrary, erroneous and against all the settled principles of law. The appellate court cannot, in exercise of the powers under Section 391, direct the trial court to take evidence and dispose of the case. By parity of reasoning, appellate court, in the exercise of the powers under Section 391, cannot direct the trial court to record a finding on the evidence so taken, which is the special discretion of the appellate court under Section 391 of Criminal Procedure Code. This Section empowers the appellate court merely to take additional evidence or direct it to be taken by a subordinate court and not to call upon the lower court for a finding. When the appellate court passes such an order, there is no option left before the High Court, but to set aside the impugned judgment and direct the appellate court to restore the appeal and dispose it off in accordance with the provisions of law. Section 391 neither authorizes the appellate court to order a fresh trial, nor allows the trial court to re-decide the case on the additional

evidence taken. If such an order is made, it is arbitrary, caprice and illegal.

12. The learned appellate court vide impugned judgment dated 23d August, 2003 while allowing the application filed under Section 391 of Criminal Procedure Code directed the learned trial court to take documents on record, examine Mr. Anil Saraswat in defence and thereafter decide the case afresh, which is found to be totally illegal, improper and unjust”.

11. The learned counsel for respondent No.1 relied upon the judgment passed in the case of Chamkaur Singh versus Amritbir Singh and another, 2014(3) RCR (Criminal) 777”, where it has been held as under:-

“1. By this single judgment, we will dispose of CRA No. D-914-DB of 2012 and CRA No. D-915-DB of 2012, filed by Chamkaur Singh and State of Punjab respectively against the judgment and dated 28.4.2012, passed by learned Additional Sessions Judge, Patiala, vide which accused Amritbir Singh was acquitted of the charges framed against him under Section 302 I.P.C. and Section 25 of the Arms Act. We will also dispose of Crl. Misc. Application No. 46788 of 2012 (in CRA No. D-915-DB of 2012) filed by the State of Punjab under Sections 311 and 391 Cr.P.C. for summoning of witnesses and leading additional evidence in this appeal. Chamkaur Singh, who is the real brother of Jaswinder Kaur (deceased) and maternal uncle of Amritbir Singh (accused) has filed Crl. Misc. Application No. 52009 of 2012 (in CRA No. D-914-DB of 2012) under Section 391 Cr.P.C. for leading additional evidence.

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14. Keeping in view the foregoing discussion, the impugned judgment of acquittal dated 28.4.2012, passed by learned Additional Sessions Judge, Patiala, is set aside. Consequently,

both the appeals stand allowed. The application of the State i.e. CRM No. 46788 of 2012 (in CRA No. D-915-DB of 2012) to produce on file the scientific evidence in the shape of fingerprint report, FSL report, the examination of team of divers, whose names are mentioned above, the production of photographs and video of recovery operation, the examination of Sanjeev Kumar, Photographer, Jasbir Singh, Videographer, re-examination of Harinder Kumar Sharma, Naib Tehsildar-cum-Executive Magistrate and Chamkaur Singh (PWs) is allowed. It is also left open to the trial Court to allow any other additional evidence, if it finds that same is necessary for the ends of justice. CRM No. 52009 of 2012, filed by Chamkaur Singh is also accordingly disposed of.

12. A perusal of the aforementioned judgments in the cases of *Charanjeet Gaba (supra)* and *Sachdeva Elecrics (supra)* would show that the Lower Appellate Court while setting aside the judgment under challenge while allowing the application under Section 391 Cr.P.C. cannot ask the Magistrate's Court to decide the matter afresh. That option would be open to the Lower Appellate Court only in a case where arguments have been heard in the appeal on merits after examining the additional evidence and the Lower Appellate Court finds it to be a case wherein the judgment of the Trial Court ought to be set aside. In such a scenario, of course, the Lower Appellate Court has the power to set aside the judgment and order rehearing. However, in the present case, the facts are slightly different. The appeal against the judgment of acquittal had been filed on 03.01.2015. On 29.09.2017 when the arguments were to be advanced in the main appeal, an adjournment was sought and the matter stood adjourned to 03.10.2017. On

Section 391 Cr.P.C. on behalf of the appellant (respondent No.1 herein). The case was adjourned to 10.10.2017 for filing of a reply and consideration on the application as well as on the main appeal. However, surprisingly on 10.10.2017, absolutely no arguments on the merits of the appeal were advanced. In fact, a bare reading of Para 01 of the order would show that the Court was in the midst of deciding an application for permission to lead additional evidence. It is only in Para 07 when abruptly after stating that the application under Section 391 Cr.P.C. ought to be allowed did the Lower Appellate Court set aside the judgment of acquittal and remand the case back to decide the matter afresh after permitting the additional evidence to be taken by the Trial Court. Para 07 of the impugned judgment is reproduced hereinbelow:-

“7. As far as question of disproving these documents is concerned, opportunity has to be granted to the respondent No.1-accused to rebut the same. Therefore, in view of these circumstances, I am of this considered view that at this stage, these documents seem to be relevant for the purpose of deciding the controversy in question. As such, present application is hereby allowed and the appellant-applicant is allowed to produce and prove the above said documents by way of additional evidence. Consequently, the impugned judgment dated 05.12.2014, against which the present appeal was filed, is hereby set aside. The case is remanded back to the learned trial court to decide the matter afresh after affording two opportunities to each of the parties i.e. two opportunities to appellant-applicant to produce and prove the above said documents and two opportunities to respondent No.1-accused to rebut the same. Parties are directed to appear before the learned Illaqa Magistrate of Police Babain on 13.10.2017.

LCR along with a copy of this order be sent to learned Illaqa Magistrate of Police Station Babain”.

13. So far as the judgment of this Court in the case of *Chamkaur Singh (supra)* is concerned, the facts therein are entirely different. In that case, the accused were acquitted by the Trial Court and an appeal was preferred before this Court. During the pendency of the appeal, an application under Section 391 Cr.P.C. had been moved. This Court, after hearing the detailed arguments in the main appeal against acquittal, set aside the judgment of acquittal and remanded the case back for a fresh decision while allowing the application under Section 391 Cr.P.C.

14. In the present case, as has already been stated hereinabove, there were absolutely no arguments advanced on merits and the Additional Sessions Judge, has simply allowed the application and set aside the judgment of acquittal and remanded the case back.

15. In view of the above discussion, I find merit in the present petition. Therefore, the impugned order dated 10.10.2017 is hereby set aside and the case is remanded back to the Additional Sessions Judge, Kurukshetra for a fresh decision on merits. He shall proceed to decide the appeal on merits subject to any party moving an application under Section 391 Cr.P.C. If an application, in that regard is moved, the same shall be considered on its merits by the Additional Sessions Judge, Kurukshetra, who shall pass an appropriate order on the application pursuant thereto if the application under Section 391 Cr.P.C. is allowed, he shall either record the evidence himself or send it to the Magistrate from the same. The proceedings in the main appeal shall be kept in abeyance till then. Pursuant to the additional evidence being

recorded or a report regarding the same being recorded from the Magistrate, he (Sessions Court) shall proceed to decide the appeal on merits after considering the said additional evidence.

16. Disposed of.

(JASJIT SINGH BEDI)
JUDGE

August 26, 2022
sukhpreet

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No