

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Neutral Citation No. 2023:PHHC:060201
CRR No.506 of 2022
Date of Decision: April 27, 2023

Kiran Bala
Versus
Rajesh Verma and another

...Petitioner
...Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Lajpat Rai Sharma, Advocate for the petitioner.
Mr. Paramjeet Phor, Advocate for the respondents.

DEEPAK GUPTA, J.

Petitioner is aggrieved by the order dated 28.01.2022 passed by learned Additional Sessions Judge, Panipat in Criminal Appeal bearing No.CRA/137/2017 titled as *“State through Kiran Bala v Rajesh Verma and others”*, relating to FIR No.274 dated 14.04.2013 registered at Police Station Chandni Bagh, Panipat, under Sections 427, 447, 448, 506/34 of IPC, whereby application filed by the petitioner under Section 391 Cr.P.C., seeking permission to examine eye witnesses by way of additional evidence, has been dismissed.

2. FIR in question was lodged on the complaint dated 14.04.2013 of petitioner Kiran Bala, as per which she was a tenant on shop under accused Rajesh Verma (respondent No.1). It was alleged that respondents were putting pressure upon her to vacate the shop and that on 13.04.2013, the respondents came to the tenanted shop threatening to dispossess her forcibly. It was alleged that respondent Rajesh Verma had pressed his hand on her chest, took her to the street and also touched her private parts. It was further stated in the complaint that on the noise raised by her, her husband Shiv Kumar and brother-in-law Brij, besides

other persons of the colony reached there and rescued her from the clutched of the respondents.

3. After necessary investigation, challan was filed. Trial was held and the respondents-accused were acquitted, vide judgment dated 12.05.2017 passed by learned Judicial Magistrate 1st Class, Panipat (copy Annexure P-4). Against the said judgment of acquittal, appeal was filed by the State before the Court of Sessions through the petitioner, during which petitioner moved an application under Section 391 Cr.P.C., stating therein that the Investigating Officer in collusion with the accused had made Ajay Sharma and Raj Pal as eye witnesses, though there is no mention of these PWs in the complaint. On the other hand, Shiv Kumar and Brij besides Medical Officer were the material witnesses, who were not even cited in the challan. Prayer was made to examine them under Section 391 Cr.P.C.

4. After taking reply from the respondents-accused, the application has been dismissed by way of impugned order dated 28.01.2022.

5. It is contended by learned counsel that Shiv Kumar and Brij, besides the Medical Officer are the material witnesses, who were not cited in the final report under Section 173 Cr.P.C. in collusion with the respondents, whereas PW1 and PW2, cited by the prosecution, turned hostile, leading to the acquittal of the respondents-accused. It is further contended that examination of the witnesses proposed to be summoned under Section 391 Cr.P.C. is material and so, impugned order cannot be sustained.

6. Counsel for the respondents has filed written submission, opposing the petition and supporting the impugned order.

7. I have considered submissions of both the sides and perused the record carefully.

8. While dismissing the application by way of impugned order, it has been observed by learned Additional Sessions Judge as under:-

“4. The complainant had moved application Ex.PW5/A before the police on the basis of which the present FIR Ex.PW4/B was lodged. In the said complaint, she had no doubt mentioned the names of Shiv Kumar and Brij as the persons, who had reached at the spot and witnessed the occurrence, and also mentioned that her medical examination was conducted vide MLR no.GH/PNP/4/2013 in Civil Hospital, Panipat but these three persons were not cited as witnesses in the list of witnesses while the final report under section 173 Cr.P.C. was submitted by the police. No doubt, the said persons were material witnesses and should have been included in the list of witnesses but despite having knowledge of this fact that their names are not there in the list of witnesses, the complainant/prosecution had not moved any application under section 311 Cr.P.C. for getting them examined as prosecution witnesses before the trial Court. The other witnesses Ajay Sharma and Raj Pal were cited as witnesses and they were examined by the prosecution and although they have not supported the case of the prosecution but no request was made by learned Assistant Public Prosecutor before the trial Court to get them declared hostile. The complainant had allowed the case to be decided without getting the proposed witnesses examined in the case. Now, when the accused have been acquitted and appeal has been filed by the complainant, the instant application has been moved and that too at very belated stage. The appeal was filed way back on 25.7.2017 whereas the instant application was moved by complainant on 5.3.2021. Thus, the conduct of the complainant is not appreciable and if these witnesses are allowed, at this stage, it will prejudice the rights of the accused, who have already secured a judgment of acquittal in

their favour and it would also reopen the case. No doubt, under section 391 Cr.P.C., this Court has powers to summon the witnesses in additional evidence, but the said powers are not unfettered and it has to be used sparingly and only if grave injustice has been caused to a party. In the present case, the complainant herself had been negligent in not moving the application under section 311 Cr.P.C. at the appropriate stage and had kept on sleeping over the matter for several years and when final arguments in appeal against acquittal were being addressed, she moved the instant application. Hence, finding no merit in the instant application, the same is hereby dismissed. Case is now adjourned to 22.2.2022 for final arguments on the appeal.”

9. It is evident from the above said order that though the appeal against acquittal was filed way back on 25.07.2017, but the application under Section 391 Cr.P.C. was moved on 05.03.2021, when the final arguments against acquittal were being heard. No application under Section 311 Cr.P.C. for summoning the proposed witnesses was moved during trial, despite the fact that petitioner-complainant was represented through her counsel, as is evident from the copy of judgment dated 12.05.2017 (Annexure P-4). Further, two eye witnesses of the occurrence were cited by the Investigating Officer in the challan and during trial, it was never objected to by the petitioner to the effect that they are not the eye witnesses.

10. Learned counsel for the petitioner has relied upon the judgment of ***“Rajeshwar Prasad Misra v. State of W.B. and another”, 1965 AIR (Supreme Court) 1887***, wherein it has been held by the Hon’ble Supreme court that Appellate Court has the power to take additional evidence, if it considers necessary, though the power has to be exercised sparingly and only in the suitable cases.

There can be no dispute to the legal position as above, but the authority does not advance the case of the petitioner, as no case is made out a case to exercise power under Section 391 Cr.P.C., for the reasons as mentioned in the impugned order as reproduced above.

11. In “*State of Gujarat v Galubhai Babubhai Halpati*” 2005(24) R.C.R. (Criminal) 101, relied by the counsel for the petitioner, the victim of crime of an offence under Section 376 of IPC, was not cited as witness in the charge-sheet nor examined by the prosecution during trial and it was in these circumstances that application under Section 391 Cr.P.C., was moved. The order of dismissing the application was challenged and Division Bench of Gujarat High Court held that non-examination of the victim girl by the prosecution would amount to failure of justice, so far as victim is concerned and it was in these circumstances, that applicant was permitted to lead evidence of the victim girl and the Sessions Judge was directed to record the same.

The facts of the above-said case is entirely different, as herein, it is not the case of the petitioner-complainant that her statement has not been recorded.

12. For all the reasons as stated above, I find no illegality or material irregularity in the impugned order. Therefore, the present petition is dismissed.

April 27, 2023
sarita

(DEEPAK GUPTA)
JUDGE

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