

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRR-386-2018 (O&M)

Date of Decision: 07.02.2023

Nita Ram and another

.....Petitioners

Vs.

State of Punjab and another

.....Respondents

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Abhinav Jain, Advocate for the petitioners.

Mr. J.S. Toor, APP. U.T. Chandigarh.

Mr. Anil Chawla, Advocate for respondent No.2.

DEEPAK GUPTA, J.

By way of this revision petition filed under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973, petitioner has challenged the order dated 07.11.2016, whereby Learned Additional Session Judge, Chandigarh remanded the matter for fresh trial.

2. FIR No.311 dated 02.11.2004 was registered at Police Station Sector-34, Chandigarh under Sections 420, 467, 468, 471 & 120-B of the Indian Penal Code, 1860 with the allegations that petitioners had taken loan of ₹3,00,000/- from respondent No.2 based on fake documents by showing petitioner No.1 to be working as T.G.T. Teacher in Government High School, Thana, Tehsil Chopal, District Shimla and petitioner No.2 as Craft Teacher in same school. When petitioners fail to repay the loan, enquiry was conducted by respondent No.2, which revealed that no such school, in which petitioners had projected to be the employees, existed nor they were employees. Matter was investigated and on trial, the petitioners were

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convicted under Sections 420, 467, 468 and 471 read with Section 120-B of the Indian Penal Code, 1860 vide judgment dated 30.11.2015 passed by Learned Judicial Magistrate First Class, Chandigarh. Vide separate order of even date, the petitioners were sentenced to undergo rigorous imprisonment for a period of 3 years and a fine of ₹1,000/- each for committing offence under Section 420 of the IPC; rigorous imprisonment for a period of 3 years and a fine of ₹500/- each for committing offences under Sections 467 & 468 of the IPC; and for a period of one year each with fine of ₹500/- each for committing offences under Section 471 and 120-B of the IPC.

3. On the appeal filed by the petitioners, Learned Additional Session Judge, Chandigarh vide impugned order dated 07.11.2016 set aside the conviction and order of sentence but remanded the matter back to the Trial Court. It was observed by Learned Session Judge, Chandigarh that without discussing the evidence and without finding as to which offence was made out in what manner, Learned Magistrate had jumped to the conclusion that crime had been committed. It was further observed that in case report of the handwriting expert was found to be not admissible, the Court should have examined the expert and so, without calling the expert witness from the concerned department, reliance had been wrongly placed upon the handwriting expert report while convicting the accused. Learned Additional Session Judge further observed that Learned Trial Court made reference to some inspection report Ex.PW3/5, which was not even on record. Besides Learned Trial Court was not able to appreciate that inspection had been carried out in the subsequent month and the disbursement of the loan had been made earlier but still it was mentioned by the Trial Court that loan was

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disbursed on the basis of inspection report. It was further observed by Learned Additional Session Judge that Trial Court held the accused guilty under Sections 420, 467, 468, 471 & 120-B of the Indian Penal Code, 1860 without giving specific finding as to which documents had been forged nor the evidence in this regard was referred in detail. Holding the judgment passed by the Trial Court to be result of non-application of mind, the matter was remanded.

4. The aforesaid order is challenged by way of this revision. It is contended that recovery suit had been filed by the respondent No.2, which was decreed and in the execution petition, decree was satisfied on 15.09.2015 but still the conviction was recorded by the Trial Court. It is submitted that though Appellate Court rightly set aside the conviction but wrongly remanded the matter for retrial. Contention raised by learned counsel for the appellant is that there is no provision in Criminal Procedure Code governing the process of criminal trial for remanding the matter by the First Appellate Court and so, retrial has been wrongly ordered which is in irregularity. It is also submitted that earlier CRM-M-5387-2017 was filed but the same was dismissed as withdrawn on 19.12.2017.

5. Upon notice of motion, appearance has been made on behalf of the respondent-State as well as by the respondent No.2-complainant, who defended the impugned order of Learned Additional Session Judge.

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

7. Section 386 of the Code of Criminal Procedure defines the powers of the Appellate Courts in dealing with the appeals. It reads as

under:

“386.Powers of the Appellate Court.-

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(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;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, 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, so as to enhance or reduce the same;

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(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided *that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:*

Provided *further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”*

8. The scope of above-said provision was considered by Hon'ble Supreme Court in ***Issac @ Kishor v. Ronald Cheriyan, (SC): Law Finder Doc Id 965883***, wherein it was held as under:

“[Section 386](#) Cr.P.C. defines the powers of the Appellate Court in dealing with the appeals. The powers enumerated thereon are vested in all courts, whether the High Court or subordinate courts, except that Clause (a) of the section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that court, while Clause (b) of the section is not so restricted and embraces all courts. The power to direct the accused to be retried has been conferred on the High Court not only when it deals with an appeal against acquittal but also when it deals with an appeal against conviction.

Under [Section 386\(a\)](#) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of

an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the accused may be retried or may find him guilty and pass sentence on him according to law.

Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

9. It is clear from the legal position as above that although High Court has the power to direct retrial against the judgment of acquittal but the Sessions Court has power to direct retrial only in appeal against conviction. A retrial may be ordered, when the original trial has not been satisfactory for particular reasons like appropriate charge not framed or evidence wrongly rejected, which should have been admitted or the evidence admitted which should have been rejected etc.

10. In the present case, Learned Additional Session Judge was hearing the appeal against conviction and therefore, he has the power to redirect trial as per Section 386(b)(i) Cr.P.C. Learned Additional Session Judge has given detailed reasons, as have been mentioned earlier, for

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directing the retrial.

11. In view of the aforesaid circumstances, the contention of the petitioner that retrial has been wrongly directed or that Ld. Addl. Sessions Judge did not have the power to direct retrial, has no merit

12. Apart from above, it is important to notice that impugned order was passed by Learned Additional Session Judge, setting aside the conviction and ordering retrial on 07.11.2016. Petitioners earlier filed a petition bearing CRM-M-5387 of 2017 on 06.02.2017. Annexure P-1 is the copy of that order which reads as under:

‘Learned counsel for the petitioners prays that he may be permitted to withdraw the instant petition with liberty to the petitioners to raise all the points before the trial Court. Dismissed as withdrawn with aforesaid liberty’.

13. It is thus clear that earlier petition was dismissed as withdrawn with the liberty to the petitioners to raise the points before the Trial Court. However, petitioner re-agitated the matter before this court by filing this petition instead of raising the points before the Trial Court.

14. For all the reasons as discussed above, the present revision petition is held to be devoid of merits and so, same is hereby dismissed.

February 07, 2023

Neetika Tuteja

**(DEEPAK GUPTA)
JUDGE**

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No