Criminal Revision No.277/2016

(Smt. Mamta Sharma v. State of M.P. & Ors.)

04/05/2017

Shri R.K. Sharma, Counsel for the applicant.

Mohd. Irshad, Panel Lawyer for the respondent No.1/State.

Shri S.S. Kushwah, Counsel for the respondents No.2 & 3.

This Criminal Revision under Section 397/401 of CrPC has been filed against the order dated 12.02.2016 passed by Ist Additional Sessions Judge, Dabra, District Gwalior in Criminal Appeal No.499/2012 whereby the judgment and sentence dated 26.09.2012 passed by the Trial Court has been set-aside and the matter has been remanded back for fresh disposal, after partially allowing the application under Section 391 of CrPC.

The necessary facts for the disposal of the present revision in short are that the respondents No.2 & 3 were tried for offence under Section 498-A of IPC. The Trial Court by judgment dated 26.9.2012 convicted the respondents No.2 & 3 for offence punishable under Section 498-A of IPC and sentenced them to undergo rigorous imprisonment for two years and a fine of Rs.1,000/- with default imprisonment as well as the respondent No.1 was also convicted under Section 494 of IPC and has been sentenced to undergo rigorous imprisonment of two years and a fine of Rs.1,000/- with default imprisonment.

The respondent No.2 & 3 being aggrieved by the judgment and sentence dated 26.09.2012 filed a criminal appeal. During the pendency of the criminal appeal, the respondents No.2 & 3 filed an application under Section 391 of CrPC for taking additional evidence. It appears that the said application was allowed and although the Appellate Court did not take all the documents which were sought to be filed as additional documents on record but took the orders of Family Court, Agra and the High Court at Allahabad on record as an additional evidence. The Appellate Court also permitted the respondents No.2 & 3 to further cross-examine the complainant on the allegation of second marriage by respondent No.2 with Smt Madhavi as well as to examine defence evidence.

Challenging the correctness and propriety of the order dated 12.02.2016 passed by the Appellate Court, it is submitted by the counsel for the applicant that the Appellate Court has allowed the application filed under Section 391 of CrPC without considering the merits of the case. The application under Section 391 of CrPC should have been considered at the time of final hearing and only after considering the merits of the case, the lower Appellate Court should have given a finding that whether the application under Section 391 of CrPC could be allowed or not. It is further submitted by the counsel for the applicant that the lower

Appellate Court by allowing the application under Section 391 of CrPC should not have set-aside the judgment of conviction passed by the Trial Court and should have directed the Trial Court to take additional evidence and then to remit the case back to the Appellate Court for its decision on merits.

Per contra, it is submitted by the counsel for the State as well as the counsel for the respondents No.2 & 3 that the order passed by the Appellate Court is in accordance with law. Once the Appellate Court had come to a conclusion that the additional evidence is required to be taken for just decision of the case then the only option available with the Appellate Court was to remand the case back to the Trial Court for decision afresh on merits.

Heard the learned counsel for the parties.

From the impugned order dated 12.02.2016, it is clear that after allowing the application filed by the respondents No.2 & 3 under Section 391 of CrPC, the Appellate Court set aside the judgment dated 26.9.2012 passed by the Trial Court and remanded the case back to the Trial Court with a direction to take additional evidence on record and to further opportunity of cross-examining the complainant as well as a further opportunity to examine Smt. Madhavi as a defence witness.

Section 391 of CrPC reads as under:-

> "**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."

From the plain reading of Section 391 of CrPC, it is clear that if the Appellate Court is of the view that additional evidence is necessary then after recording its reasons, the Court may either take such evidence by itself or direct to be taken by a Magistrate or as the case may be. If the additional evidence is taken by the concerned Court then it shall certify such evidence to the Appellate Court and then the Appellate Court shall thereupon proceed to dispose of the appeal.

Thus, it is clear that once the Appellate Court comes to a conclusion that taking an additional evidence is essential then instead of setting-aside the judgment and sentence passed by the Trial Court, it shall either take such evidence itself or it may direct it to be taken by a Magistrate or by a Court of Session, as the case may be. However,

there is nothing under Section 391 of CrPC which empowers the Appellate Court to set-aside the judgment and sentence passed by the Trial Court. The High Court in the cases of **T. Vennila v. Thangavel @ Kumar & Ors.,** reported in **2003 Cri.L.J. 4049** and **Jamuna Singh & Ors., v. State of Bihar** reported in **1975 Cri.L.J. 862** have held that the Appellate Court should not have set-aside the judgment. The High Court in the case of **Jamuna Singh (supra)** has held as under:-

> "7. Under Section 428 of the Code, if the Court of appeal thinks that additional evidence is necessary to be taken, it may either take such evidence itself or direct it to be taken by the Magistrate concerned. The relevant portion of Section 428 of the Code reads as under:
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> > "428 (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."
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> Under this section, if the Court of appeal directs the trial Court to take additional evidence, then the trial Court has to record the evidence as directed by the Appellate Court and then to send such evidence to the Appellate Court which shall proceed to dispose of the appeal taking into consideration such additional evidence. From the order of the learned Additional Sessions Judge it does not

> appear that he has exercised his powers under Section 428, because in that case there was no question of setting aside the judgment passed by the trial Court and directing it to deliver a fresh judgment after examining the witnesses and the accused and after hearing arguments on merits. In my opinion, the learned Additional Sessions Judge has adopted a hybrid procedure which is foreign to the scheme of the Code. I am supported in my view by a Bench decision of this Court in Gajanand Thakur v. Emperor AIR 1916 Pat 219 = (17 Cri LJ 332) where it was held that a direction by the Appellate Court to record a fresh decision on the evidence already on the record, along with the evidence to be taken, was wholly illegal. In circumstances similar to the present case it was held by this Court in Sri Krishna Prasad Sinha v. Emperor AIR 1936 Pat 438 : (37 Cri LJ 906) that whenever a Court of appeal is of the opinion that certain important evidence had not been brought on the records of the case by the trial Court, only two courses are open to it – either to keep the appeal pending and order taking of additional evidence by the trial Court, or to set aside the judgment and order retrial. It was further observed that when a retrial is ordered it would be de novo trial and that the evidence which had been recorded earlier by the trial Court in the trial is wiped off from the records of the case."

It is next contended by the counsel for the applicant that even otherwise the application under Section 391 of CrPC cannot be considered without considering the merits of the case and should not be disposed of in isolation without hearing the appeal on merits.

In order to come to a conclusion that whether the additional evidence is necessary or not, it is essential for the Appellate Court to go through the entire record of the Trial Court. If after hearing the

parties on merits, the Appellate Court comes to a conclusion that for the just decision of the case, it would be in the interest of justice to take the additional evidence without which the appeal cannot be disposed of, only then such additional evidence may be taken on record either by the Appellate Judge himself or by the Trial Court.

My view is fortified by the judgment of the Supreme Court in the case **State of Rajasthan vs. T.N. Sahani** reported in **(2001) 10 SCC 619** and the orders passed by this Court in the case of **Dharmendra s/o Chandan Singh** reported in **2006 (1) MPLJ 436**, **Durgesh Kumar v. J.B. Singh and another** reported in **2016 (1) MPWN 5** and **Khemchand v. Government of M.P. & Others** reported in **1972 JLJ 482**.

This Court in the case of **Dharmendra (supra)** has followed the judgment passed by the Supreme Court in the case of **T.N. Sahani (supra)** and has opined as under:-

> "Therefore, the wording of section 391, Criminal Procedure Code suggests that the application moved under this section should not be considered in isolation but should be considered after hearing the parties on merits. If after hearing parties on merits Court comes to the conclusion that the additional evidence is unnecessary then while deciding the appeal application moved under section 391 Code of Criminal Procedure can be dismissed."
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> (Emphasis Supplied)

If the order under challenge is tested on the

principles of law mentioned above, then it would be clear that the Appellate Court has set-aside the judgment and sentence passed by the Trial Court without considering the merits of the case and without considering the fact that whether the additional evidence is necessary for the just disposal of the appeal or not?

Under these circumstances, the order dated 12.02.2016 passed by the Appellate Court in Criminal Appeal No.499/2012 is hereby set-aside. The matter is remanded back to the Appellate Court to consider the merits of the case along with an application under Section 391 of CrPC for taking the additional evidence on record and to decide the application under 391 of CrPC afresh after hearing the parties on merits.

With the aforesaid observation, the revision succeeds and is hereby **allowed**.

(G.S.Ahluwalia)
Judge

(ra)