

(2015) 04 GUJ CK 0080

In the Gujarat High Court

Case No : Criminal Revision Application (Against Order Passed by Subordinate Court) No. 606 of 2005

Jayanti Parshottam Machhi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 386, 391
Customs Act, 1962 — Section 124, 135

Citation : (2015) 3 GLR 1978

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Tejas M. Barot, for the Appellant; K.P. Raval, Ld. APP, Advocates for the Respondent

Judgement

N.V. Anjaria, J.—The present Revision Application is directed against order dated 20th July, 2005 passed by learned Sessions Judge, Valsad whereby the learned Judge dismissed application below Exhibit 15 filed by the applicant-accused. The application was under Section 391 of the Code of Criminal Procedure, 1973 whereby the applicant prayed for examine additional witnesses at the appellate stage.

2. Outlining the facts of the case, the applicant pleaded giving the background inter alia that on 25th December, 1990 an unknown vessel had landed on the shores of village Sorathwaad, Near Marol which carried silver slabs. The village people, it was stated, looted the said silver slabs. The Custom Officers, Valsad went there to carry out combing operations and to recover four slabs, for which nobody claimed ownership. The Customs Officers recovered silver and some cash amount. It was stated that on 30th December, 1990 the Customs Department got information that a vessel named "Chanchal Prasad" was anchored at the shores.

2.1 The case of the applicant was that on 26th December, 1990 he had seen the

village people carrying away the silver slabs from the vessel that had landed and anchored a day before. It is the case that at relevant time the petitioner informed in writing the Inspector of Customs one Shri B.D. Nanavati as well as one Shri H.H. Nai who was a Sipoy about landing of unattended vessel and the village people taking away silver slabs. In other words, the applicant claimed that he was informer to the Customs Department with regard to illegal import and landing of silver bars or silver slabs. It was his case that as per the scheme of the Customs Department, he was entitled to a reward having informed about the illegal activity. Applicant has stated that he was not given reward, for which he was constrained to approach this Court by filing Special Criminal Application No. 744 of 1991 seeking a direction against the Department of Customs to give legitimate reward to him. In the said proceedings of writ petition, the above-named two customs employees-Mr. Nanavati and Mr. Nai-had filed their respective affidavits in which they accepted that the applicant was informer and had protected the said silver bars from being looted by the village people.

2.2 It was the further case of the applicant that notwithstanding the above facts, he himself was implicated by the interested quarters. A show cause notice came to be issued to him under Section 124 of the Customs Act, 1962 as well as two other persons, calling upon him to show cause as to why the good seized, that is 46 silver slabs, the vessel and the money in Indian currency, which was about Rs. 01,31,000/- should not be confiscated and penalty should not be imposed; penalty was imposed against the applicant. Against the said Order-In-Original, the applicant filed Appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai. The Tribunal stayed the order of penalty imposed by the Commissioner of Customs and Excise. It is the say of the applicant that the Tribunal considered the fact that the applicant was the informer and the requisite form in respect of informer's details were filled-in by the said named Inspector of Customs Mr. Nanavati and was countersigned by the said Sipoy Mr. Nai.

2.3 The applicant was tried for the offence under Section 135 under the Customs Act in the Customs Case No. 01 of 1992 decided by learned Additional Chief Judicial Magistrate, whereby the learned trial judge convicted the applicant and sentenced him to suffer rigorous imprisonment for three years and to pay fine of Rs. 2,000/- with default clause of further simple imprisonment of three months. Against the said judgment and order passed by the learned Magistrate, the applicant preferred Criminal Appeal No. 134 of 2002 before the Court of learned Sessions Judge, Valsad.

3. It was in the said proceedings of Appeal before the learned Sessions Judge, that the applicant presented the aforesaid application (Exh. 15), in which he inter alia submitted that before the trial court, certain witnesses who ought to have been examined, were not examined. The applicant stated the aforesaid facts that he was informer and the report informing the incident was sent by me on 26th December, 1990 at 03.00 pm and that the said report was countersigned by said Mr. Nanavati and Mr. Nai. Applicant also mentioned about the writ petition filed

before this Court and submitted that even the officers of the Customs had accepted the correct facts. It was in the said context that the applicant prayed seeking to call said Mr. B.D. Nanavai and Mr. H.H. Nai as witnesses. He also prayed that another witness one Mr.Amrutbhai Hirabhai Koli whose statement was exhibited was also required to be called as witness.

3.1 The learned Sessions Judge who considered application (Exh. 15), had before him a copy of writ of Special Criminal Application No. 744 of 1991, which inter alia mentioned about the affidavit of the said two persons. The applicant wanted to examine the said persons as defence witnesses. Learned Sessions Judge while dismissing the application took the view inter alia that such application could have been filed before the trial court and that even in the statement under Section 313 of the Code of Criminal Procedure, 1973, the applicant has not stated that he wanted to examine additional witnesses. The central reason supplied by learned Sessions Judge for rejecting the application under Section 391, Cr.P.C., was that it was not so that without evidence of the witnesses sought to be examined, it was not possible to deliver the judgment in the Appeal. Learned Sessions Judge in that line considered the examination of additional witnesses, to be not necessary, resultantly, dismissed the prayer of the applicant-accused.

4. Heard learned advocate Mr. Tejas M. Barot for the applicant and learned Additional Public Prosecutor Mr. K.P. Raval for respondent No. 1-State. Though served with Rule, none appeared for respondent No. 2.

4.1 Learned advocate for the applicant submitted that the powers under Section 391, Cr.P.C. are wide and were required to be exercised by learned Sessions Judge in the interest of justice to find out a truth more particularly when the case of the applicant was that he was an informer and the evidence of the witnesses sought to be called for examination to throw light on the said aspect. It was submitted that the prosecution would not be prejudiced in any manner by calling the said two persons as witnesses. According to his submission, their evidence may turn out to be one "going to the root of the matter". Learned advocate for the applicant relied on decision of this Court in Gautambhai Bababhai alias Shantibhai Patel Vs. State of Gujarat being Criminal Miscellaneous Application No. 17123 of 2008 decided on 16th December, 2011 which was a case under the Negotiable Instrument Act where the Court held that additional evidence under Section 391 ought to have been permitted on the ground that where the fact if proved, would go to the root of the matter or it would affect conviction of a person. Another decision, also of this Court in Rameshbhai Jayendrabhai Modi Vs. State of Gujarat being Criminal Revision Application No. 222 of 2012 decided on 10th January, 2013 was also pressed into service.

4.2 Learned Additional Public Prosecutor on the other hand supported the impugned order. He submitted that the applicant had enough opportunity and time to make application to examine persons who are now proposed to be examined at appellate stage. He submitted that even in the statement recorded

under Section 313, Cr.P.C., the appellant could have asked for examining the witnesses but at that juncture also, no such plea was raised. It was submitted that by taking recourse to Section 391, appellant cannot improve upon his case or introduce a new case by leading further evidence. He submitted that all the evidence was before the learned Sessions Judge and the further evidence was not necessary, particularly when it would have effect of unduly protracting the case. He submitted that though the powers under Section 391 are wide, wider the power greater ought to have been the restraint in exercising those powers.

5. Now the prayer of the applicant in the application (Exh. 15) for seeking examination of above-named in particular two persons from the Customs Department, was in the context of his case that he actually worked as an informer of the Customs Department and about landing of the vessel and illegal activity of carrying silver bars was intimated to the Customs Department and in the statement of informer send by him in that capacity, the said two customs officers-Mr. Nanavati and Mr. Nai-had signed and that his role as informer was accepted but subsequently he came to be implicated wrongfully as an accused. Said Inspector of Customs Mr. B.D. Nanavati appears to have affirmed his affidavit dated 17th June, 1991 which formed part of the record of Special Criminal Application No. 744 of 1991 mentioned above. A Xerox copy of the original certified to be true copy is on record of the present Revision Application and upon perusal thereof, it could not be gainsaid that the said Inspector has mentioned about the statement of the applicant given as informer. The said form identified as "DRI" was admitted to have been filled-in and it was admitted that the same was forwarded onwards to the authorities. The applicant has also produced on record copy of order dated 24th February, 1999 of the Customs, Excise and Gold Tribunal and the contents mentioned those factual aspects. It is in this background that the applicant sought to justify his request for calling the said two officers as witnesses by invoking aids of Section 391, Cr.P.C.

5.1 In *Rambhau and Another Vs. State of Maharashtra*, AIR 2001 SC 2120 : (2001) CriLJ 2343 : (2001) 2 Crimes 231 : (2001) 5 JT 121 : (2001) 3 SCALE 539 : (2001) 4 SCC 759 : (2001) 3 SCR 210 : (2001) 2 UJ 1076 : (2001) AIRSCW 1842 : (2001) 3 Supreme 544 , the Supreme Court observed that a very wide discretion is available to the Court in the matter of obtaining additional evidence in terms of Section 391 of the Cr.P.C. It was observed 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. Section 391 was introduced in the statute-book for the purpose of making it available to the court, not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer." (Paras 2 and 6)

5.2 This principle was considered elaborately for its nature, scope, object and underlying legislative intent in *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, AIR 2004 SC 346 : (2004) CriLJ 2050 : (2004) 1 JT 94

Supp : (2004) 4 SCALE 375 : (2004) 4 SCC 158 : (2004) 1 SCR 1050 : (2004) 2 UJ 1041 : (2004) AIRSCW 2325 : (2004) 3 Supreme 210 .

"Section 391 CrPC, 1973 is another salutary provision which clothes the courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered, to enable the appeal to be considered and disposed of in the light of the additional evidence as well. For this purpose it is open to the appellate court to call for further evidence before the appeal is disposed of. The appellate court can direct the taking up for further evidence in support of the prosecution; a fortiori it is open to the court to direct that the accused persons may also be given a chance of adducing further evidence, who may file an application in this regard, in an appropriate case. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, especially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted by arriving at the truth, that is, the prevention of the guilty man's escape through some careless or ignorant proceedings before a court or vindication of an innocent person wrongfully accused: and if the appellate court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391." (Paras 47, 48, 58, 21 and 50)

5.2.1 It was further observed that there is no restriction in Section 391 either as to the nature of evidence or that the said provision is to be invoked only when formal proof for the prosecution is necessary. It was emphasised that while exercising discretion under the said Section, the appellate court has to adopt a pragmatic approach, else the very purpose of enacting the provision by the legislature would be defeated.

5.3 The ultimate consideration for exercise of powers and discretion under the said provision is the object of finding out truth from all factual dimensions of the case. Any aspect of fact which is considered to be expedient to be brought on record by way of permitting additional evidence, even at the stage before the appellate court, Section 391 could be resorted to and additional evidence thereunder could be allowed. Finding of truth without being bound by the procedural shackles is essential for dispensing justice. The provision of Section 391 of the Code helps the Court to find out the truth by allowing at the appellate stage additional evidence. In appreciating a prayer in this regard, sufficiency or otherwise of the evidence already on record is not to be an overridingly decisive

consideration. Nor the admissibility of evidence proposed to be adduced is a consideration. If the evidence sought to be produced bear relevance to the issues, facts or aspects in the case and is likely to throw light on the controversy, then, allowing such evidence at the appellate stage should be guided by pragmatic consideration and the approach purposing to finding out truth.

6. Learned Sessions Judge, while rejecting the application, has reasoned that prayer for additional evidence under Section 391 of the Code could be accepted provided without such additional evidence, deliverance of the judgment in the case was not to be possible, and that in the case on hand such situation was not obtained. It was observed that nothing was shown to suggest that without examining the proposed witnesses, the judgment in the Appeal would not be possible to be given. In other words, learned Sessions Judge took view that it was possible for him to deliver judgment in the Appeal before him on the basis of the evidence on record, therefore, prayer for permitting examination of the two witnesses proposed to be examined was not liable to be entertainable.

6.1 This precisely is not the consideration to be applied while dealing with the prayer under Section 391, Cr.P.C. The entire reasoning of the learned Additional Judge that the evidence already available on record is adequate for pronouncing the verdict and therefore the witnesses proposed by the applicant were not needed to be examined. By bringing additional evidence at that stage was fallacious. The Court is not supposed to weigh sufficiency or adequacy of evidence already on record vis-a-vis prayer for additional evidence when the additional evidence sought to be adduced by invoking aids of Section 391 helps to find out the truth of a fact in issue. If the proposed additional evidence is to throw light on any dimension of the controversy, it could be said to be helpful in searching out truth of the matter which is the aim of trial of the case and for adducing evidence. Nor the admissibility of the additional evidence sought to be adduced is the criteria to judge the merits of the prayer under Section 391.

6.2 In *Zahira Habibulla H. Sheikh (supra)*, the Court observed that it cannot be laid down as a rule of universal application that the Court has to first find out whether evidence already on record is sufficient. The question of admission of evidence either at the initial stage or as additional evidence under Section 391, Cr.P.C. is required to be treated as a distinct aspect from adequacy of the evidence on record or the admissibility of the proposed evidence to be further led as well as its acceptance for consideration of claims in the appeal on merits. In *Zahira Habibulla H. Sheikh (supra)* the Court persistently observed thus,

".... as a matter of routine, additional evidence should not be permitted. But when the circumstances, as in this case, clearly indicate that there is some truth or prima facie substance in the grievance made, having regard to background of events that happened, the appropriate course for the courts would be to admit additional evidence for final adjudication, so that the acceptability or otherwise of evidence tendered by way of additional evidence can be tested properly, and legally tested in the context of the probative value of the two versions. There

cannot be a straitjacket formula or rule of universal application when alone it can be done and when, not."

6.3 In *Rameshbhai Jayendrabhai Modi* (supra) this Court in the context of facts of that case observed and held,

"....It is an important aspect in the proceedings, which the applicant wants to prove and for that, he wants to lead further evidence. The ultimate criteria for invoking provision of Section 391 of the Code is to accord fair opportunity to the accused in a trial and to see that hands of justice are properly served. Therefore, in the facts and circumstances of the case, application ought not to have been dismissed by the Court below. It is also trite that application under Section 391 of the Code for additional evidence can be considered at a later stage where the facts sought to be proved have their bearing on the ultimate result. In *Rambhau and Another Vs. State of Maharashtra*, AIR 2001 SC 2120 : (2001) CriLJ 2343 : (2001) 2 Crimes 231 : (2001) 5 JT 121 : (2001) 3 SCALE 539 : (2001) 4 SCC 759 : (2001) 3 SCR 210 : (2001) 2 UJ 1076 : (2001) AIRSCW 1842 : (2001) 3 Supreme 544 , it is said by the Apex Court that it is the concept of justice which ought to prevail and in the ultimate analysis, the same would dictate the exercise of powers under Section 391 of the Code. The reasons supplied by the trial Court in rejecting the application that the accused had opportunity during the trial or that application is filed to delay the proceedings do not hold good in light of the facts of the case...." (para 6)

7. Reverting again to the facts of the present case, the following factor which is sought to be pleaded in support of examination of witnesses, in particular two customs persons, was that the applicant acted as informer and he acted for the Customs Department in the incident in question; that he himself did not play any role as an offender. The facts and materials indicate that the said aspect was a related aspect for the facts in issue which could be permitted to be brought on record by means of examining the said two officers of the Customs Department. Given the principle underlying, exercise of discretion under Section 391 and the object and purpose of the provision, the prayer could not be brushed aside. The facts pleaded for the said prayer could not be said to be an unimportant or non-bearing fact, rather it could be seen as a relevant and important aspect in the total facts, the truth about which has to be searched out and for that, examination of said two witnesses ought to have been allowed. It could also be said that it was a material aspect decisive in deciding the allegation against the applicant and may ultimately affect the question of conviction itself of the applicant. The learned Sessions Judge failed to take into account all these dimensions and contours in respect of the prayer made under Section 391.

8. In light of the above principles, the prayer of the applicant for seeking examination of the witnesses more particularly the two customs persons Mr. B.D. Nanavati and Mr. H.H. Nai could not be discarded as meritless. Though the application (Exh. 15) prayed for examination of one more witness on the ground that his statement was recorded, the prayer qua him was not contested and even

otherwise, the said witness is not required to be called in the facts of the case. The prayer in respect of said third witness was rightly note granted and the same is rejected herein as well. The evidence of two other witnesses could be said to be necessary to aid the discovery of facts in issue. Learned Sessions Judge ought to have allowed application in respect of said two witnesses named being Inspector of Customs Mr. B.D. Nanavati and Sipoy Mr. H.H. Nai.

9. For the forgoing reasons and discussion, impugned order dated 20th July, 2005 passed below Application Exhibit 15 by learned Sessions Judge, Valsad in Criminal Appeal No. 134 of 2002 is hereby set aside. Applicant's application at Exhibit 15 stands allowed. The first appellate court shall proceed to permit examination of the said named two witnesses prayed to be examined by the applicant, and looking to the age of the case, complete the exercise within two months from the date of receipt of this order.

10. Rule is made absolute in the aforesaid terms.

Record and Proceedings shall be sent back by the Registry.