

(2023) 07 GUJ CK 0031

In the Gujarat High Court

Case No : R/Special Criminal Application No. 1463 Of 2023

Samirbhai Madhukantbhai Shah

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 06-07-2023

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Criminal Procedure, 1973 — Section 91, 207, 319, 482
Indian Penal Code, 1860 — Section 120B, 212, 302, 342, 365
Evidence Act, 1872 — Section 123, 124

Citation : (2023) 07 GUJ CK 0031

Hon'ble Judges : Sandeep N. Bhatt, J

Bench : Single Bench

Advocate : Nimit Y Shukla, Soaham Joshi

Final Decision : Dismissed

Judgement

Sandeep N. Bhatt, J

1. By way of original accused No.1, of India as well as this petition, the petitioner, who is under Section 227 of the Constitution under Section 482 of the Code of Criminal Procedure, 1973, has preferred this petition before this Court for quashment of the impugned order dated 18.01.2023 passed below Application Exh.387 in Sessions Case No.104 of 2016 with Sessions Case No.11 of 2017 with Sessions Case No.55 of 2019 with Sessions Case No.17 of 2021 by the learned 6th Additional Sessions Judge, Rajkot, whereby the learned Sessions Court has rejected the Application Exh.387 preferred under Section 91 of the Code of Criminal Procedure, 1973, for the purpose of obtaining relevant and important documents, which are not forming a part of the charge- sheet. While rejecting the Application Exh.387, the learned Sessions Court has imposed a penalty of Rs.5,000/- to the petitioner.

2. The short facts of the leading to filing of the present petition are epitomized as under :

2.1 One FIR being C.R.-I No.66 of 2019 came to be registered with the 'B' Division Police Station, Rajkot City for the offences punishable under Sections 302, 365, 342, 120B and 212 of the Indian Penal Code. After investigation, the charge-sheet is also filed. The present petition – Samirbhai Madhukantbhai Shah is shown as accused No.1 in the said charge-sheet.

2.2 The said case is committed to the concerned Sessions Court, Rajkot. There are other connected Sessions Cases and therefore, the trial of all the Sessions Cases i.e. Sessions Case No.104 of 2016, Sessions Case No.11 of 2017, Sessions Case No.55 of 2019 and Sessions Case No.17 of 2021 is going on, together.

2.3 Many prosecution witnesses have been examined by the Sessions Court concerned and many are still pending.

2.4 At this stage, the petitioner has filed an application at Exh.387 seeking copies of the documents under Section 91 of the Code of Criminal Procedure, 1973 before the Sessions Court.

2.5 After hearing the learned advocates for the respective parties as well as considering the averments made in that application Exh.387, the learned Sessions Court has, by reasoned order, rejected the same vide impugned order dated 18.01.2023 with fine of Rs.5,000/-.

2.6 It is this order impugned which is challenged by the present petition – original accused before this Court.

3. Heard learned advocates.

4.1 Learned advocate Mr.Nimit Y. Shukla for the petitioner has submitted that Section 91 of the Code read with Section 207 of the Code compels the prosecution to provide any document for the purpose of free and fair trial proceedings. He has submitted that application under Section 91 of the Code is necessary and desirable for the purpose of conducting trial to bring out the veracity of the truth and also for the purpose of conducting free and fair trial.

4.2 He has further submitted that the trial has commenced and the trial Court has examined around 27 witnesses, which does not involve the present petitioner in the alleged commission of crime. He has submitted that it is evidence on the fact of record that there is direct evidence against the main accused person and not the present petitioner. He has submitted that the only purpose of the prosecution is to arm twist the prosecution case in such a way that the present petitioner is convicted by hook or by crook without any substantial evidence beyond reasonable doubt against the petitioner.

4.3 He has also submitted that in fact, the dilatory tactics of prosecution is delaying the trial as till the deposition of so many important witnesses have turned out to be a no conviction case against the petitioner and therefore, the prosecution is creating a botched-up conspiracy story by using the should of so-called co-accused person (now as accomplice). He has submitted that the

prosecution has also filed a frivolous application under Section 319 of the Code to add other accused person who are not even relevant in the present case.

4.4 In support of his submissions, he has relied upon the following decisions :

(i) Dadhibal P. Jaiswal versus Sunita Jaiswal – Misc. Criminal Application No.5983 of 2014 (Paras : 6 to 8)

(ii) (2009) 3 SCC 153 - Sethuraman versus Rajamanickam (Para : 4)

(iii) (2001) 7 SCC 401 – Bhaskar Industries Ltd., versus Bhiwani Denim & Apparels Ltd. (Paras : 7 & 8)

(iv) (2020) 9 SCC 161 – P. Gopalakrishnan @ Dileep versus State of Kerala (Paras : 32 to 34 & 41)

(v) Sanjiv Rajendra Bhatt – Criminal Revision Application No.301 of 2021

(vi) (2012) 9 SCC 771 – V.K. Sashikala versus State (Paras : 12 to 17)

(vii) (2005) 1 SCC 568 – State of Orissa versus Debendra Nath Padhi (Para : 25)

4.5 He has submitted this application may be allowed.

5. Learned APP Mr.Soaham Joshi for the State has vehemently opposed this petition. He has submitted that the trial Court has rightly rejected the application. There is no error committed by the learned trial Court. He has submitted that it is a discretion of the Court to grant or reject the application under Section 91 of the Code of Criminal Procedure, 1973. He has submitted that the documents which are called for by the accused are not with the Investigating Officer and it is submitted before the learned Human Rights Commission and therefore, the papers which are called for by the accused, are not with the officer in-charge and therefore also, the application is rightly rejected by the learned trial Court. He has submitted that this application may be dismissed.

6.1 I have heard rival submissions made by the learned advocates for the respective parties. I have perused the documents available on record. The group of Sessions Cases are going on before the concerned Sessions Court at Rajkot. There are four Sessions Cases i.e. Sessions Case No.104 of 2016, Sessions Case No.11 of 2017, Sessions Case No.55 of 2019 and Sessions Case No.17 of 2021. The present petition is original accused No.1 in one of the Sessions Case.

6.2 The main controversy involved in the present petition is that the present petitioner has called for certain documents under Section 91 of the Code of Criminal Procedure, 1973, which is rejected by the learned Sessions Court.

6.3 At this juncture, Section 91 of the Code of Criminal Procedure, 1973 is required to be reproduced, which is as under :

“91. Summons to produce document or other thing.—

(1) Whenever any Court or any officer in charge of a police station considers that

the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same. (3) Nothing in this section shall be deemed— (a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or (b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

6.4.1 The above Section itself is very clear that 'Whenever any Court or any officer-in-charge of a police station considers ...'. The powers conferred under Section 91 of the Code of Criminal Procedure, 1973 are enabling in nature, aimed at arming the Court or any officer-in-charge of a police station concerned, to enforce and to ensure the production of any document or other things, 'necessary or desirable', for the purposes of any investigation, inquiry, trial or other proceeding under the Code.

6.4.2 The language of Section 91 of the Code would, no doubt indicate the width of the powers to be unlimited but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object.

6.4.3 Further, Section 91 of the Code does not confer absolute right on accused. Where the document has no relevance on the case in hand, nor it is desirable for the Court to summon, the Court shall reject the application filed under Section 91. Power of Court under Section 91 of the Code of Criminal Procedure, 1973 for summoning and production of documents is one of the absolute discretion. The only condition for exercise of such discretion is that the Court must be of the opinion that the production of document is necessary or desirable. The jurisdiction under Section 91 of the Code when invoked by accused, the necessity and desirability would have to be seen by the Court in the context of the purpose – investigation, inquiry, trial or other proceedings under the Code. The accused cannot summon the records of the police station. Only the Court may call for the records of the police station if it finds necessary for the just decision of the case.

6.5 Keeping the above in mind, the following ingredients are required to be satisfied in the application under Section 91 of the Code of Criminal Procedure, 1973 made by any person/accused.

It is the discretionary powers of the Court.

There must be satisfaction for the Court to call for the documents.

The Court should feel that the said documents are necessary for a just decision.

The accused cannot compel the Court to summon for the documents.

It is not prerogative of the accused.

The documents, which are called for, should be with the Court / Officer-in-charge.

The documents which are called for, are relevant for the trial.

The documents, which are called for, are the part of the prosecution.

The prosecution has relied on those documents which the accused are asked for.

6.6 Here, in the present case, the accused, who is booked for mainly an offence punishable under Section 302 of the Indian Penal Code, has made an application under Section 91 of the Code of Criminal Procedure, 1973 and called for the documents. The said documents are the documents of the Custodial Death Inquiry papers held by the learned Judicial Magistrate concerned. The entire documents have been sent to the learned Human Rights Commission, for their proceedings and they are the confidential documents. Therefore, such documents are not with the officer-in-charge of the police station and/or with any other Court. The accused has asked for such documents by way of the impugned application under Section 91 of the Code. The trial Court and/or the officer-in-charge of the police station does not want such documents for the trial and/or fair justice or else they would have been called for. From record, it transpires that the applicant has earlier attempted to call for such documents, but it was rejected by the trial Court at that relevant point of time and the accused has not challenged it before the higher Court.

6.7 From bare perusal of the impugned order, it is observed by the learned trial Court that the documents of the custodial death inquiry proceedings, which are asked for by the accused, at present, are not in the custody of the prosecution, as the final report of the said custodial death inquiry proceedings along with all the papers of the inquiry have been submitted to the learned Human Rights Commission and it is confidential and therefore, it cannot be given, as asked for. When the Officer-in-charge and/or the Court has no papers with it, how can they produce such documents and supply to any person ? Further, it is always open for the accused – present petitioner to ask for the said documents from the learned Human Rights Commission, if he is so anxious about it. Further, the arguments / depositions of the prosecution are not based on the said documents. The documents on which the prosecution is relied upon have already been supplied to the accused under Section 207 of the Code of Criminal Procedure, 1973. Further, some of the documents have already been supplied earlier as per the application of the accused – present petitioner i.e. Exh.35, which he has acknowledged for the same. Therefore, there is no error or illegality committed by the learned Sessions Court by rejecting the application at Exh.387. The trial

Court has considered the above mentioned facts into consideration and has used its discretion in just and proper manner.

6.8 It is relevant to refer to the decision of the Hon'ble Apex Court in the case of Assistant Collector of Customs versus L.R. Maheswari reported in AIR 1970 SC 962, more particularly Para : 13 thereof, which reads as under :

" 13. That apart we do not think that the High Court was justified in interfering with the discretion of the learned Magistrate. Whether a particular document should be summoned or not is essentially in the discretion of the trial Court. In that instant case the Special Public Prosecutor had assured the learned Trial Magistrate that he would keep in readiness the statements of witness recorded by the Customs authorities and shall make available to the defence Counsel the statement of the concerned witness as and when he is examined. In view of that assurance, the learned Magistrate observed in his order:"The recording of the prosecution evidence is yet to commence in this case and at present there are no materials before me to decide whether or not the production of any of the statements and documents named by the accused in his application is desirable or necessary for the purpose of the enquiry or trial. As stated at the outset, the learned Special Prosecutor has given an undertaking that he would produce all the relevant statements and documents at the proper time in the course of the hearing of the case. The request made for the issue of the summons under Section 94, Criminal Procedure Code is also omnibus." The reasons given by the learned Magistrate in support of his order are good reasons. The High Court has not come to the conclusion that the documents in question, if not produced in Court are likely to be destroyed or tampered with or the same are not likely to be made available when required. It has proceeded on the erroneous basis that the accused will not have a fair trial unless they are supplied with the copies of those statements even before the enquiry commences. Except for very good reasons, the High Court should not interfere with the discretion conferred on the Trial Courts in the matter of summoning documents. Such interference would unnecessarily impede the progress of cases and result in waste of public money and time as has happened in this case."

6.9 It is further relevant to refer to the decision of the Hon'ble Apex Court in the case of Nitya Dharmananda alias K. Lenin versus Gopal Sheelum Reddy reported in (2018) 2 SCC 93, more particularly Paras : 5 to 9 thereof, which reads as under :

"5. It is settled-law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge.

6. In Debendra Nath Padhi (AIR 2005 SC 359) (supra), it was observed :

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code". The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage.

When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer-in-charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof."

7. In Hardeep Singh Etc. v. State of Punjab and Ors. Etc. (2014) 3 SCC 92 : (AIR 2014 SC 1400, Para 17) a Bench of five-Judges observed:

"19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

8. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the

charge- sheet. It does not mean that the defence has a right to invoke Section 91, Cr.P.C. dehors the satisfaction of the court, at the stage of charge.

9. Accordingly, the view to the contrary in the impugned judgment cannot be sustained and is set aside. ...”

6.10 The Co-ordinate Bench of this Court, in the case of Sanjiv Rajendra Bhatt versus State of Gujarat in Criminal Revision Application No. 301 of 2021, has observed in Para : 26 thereof as under :

“ 26. The applicant accused has claimed the case papers of Human Right inquiry conducted by the then DIG, Bhuj Range, Mr. Dhagal. The reason behind is that, while recording the statement of witness Sumersingh by the IO, he made a reference with regard to his application filed with the Human Rights Commission. This Court is of the considered view that, Investigating Agency has not cited Mr. Dhagal as witness nor any documents with regard to alleged inquiry being collected during the course of investigation. The trial Court while dealing with this issue recorded that the documents of the inquiry are not necessary for adjudication of trial as well as to defend the case. The prosecution's stand is that no such papers are available with the authority and therefore, it cannot be provided as of right to the applicant. This Court is of considered view that, reference subject of Human Right Application and enquiry thereof are not necessary and desirable for the adjudication of trial as well as right to defend the case. However, the trial Court granted liberty to the applicant to revive his claim at appropriate stage if need be arise. This Court is in complete agreement with the view taken by the trial Court and therefore, so far alleged enquiry made by the then DIG Mr. Dhagal is concerned, at this stage, the applicant is not entitled for the documents.”

6.11 There cannot be any dispute with regard to the law enunciated in the decisions of the Hon'ble Apex Court as well as this Court relied upon by the learned advocate for the petitioner, however, it cannot be helpful to the petitioner any further in view of the facts and circumstances of the present case. The present case does not fall within the purview of these decisions with such facts.

7. This Court is conscious about the issue involved in the present petition, as discussed hereinabove. From record, it transpires that the petitioner has also tried to divert the issue by stating many things in this petition, which are, at present, irrelevant for deciding the issue in question and therefore, this Court has not gone into it. Further, the conduct of the petitioner also smacks a lot. The petitioner has tried to shift the burden upon the prosecution for delaying the trial. By way of filing an application Exh.387 before the trial Court, the petitioner has tried to add one more feather in it. Prima facie, it transpires that the petitioner is also equally responsible for the delay in trial. Be that as it may, since it is not an issue on hand before this Court in this petition, this Court has not gone into all these issues while deciding the present petition.

8. Considering the totality of the facts and circumstances of the case, this Court

is of the opinion that the trial Court has rightly rejected the application of the petitioner and denied to issue summons for supplying the documents to the petitioner. The said documents are neither the part of the trial nor the prosecution has relied on it; the entire Custodial Death Inquiry proceeding is concluded in very confidential manner; all the documents are at present neither with the prosecution nor with the Court concerned; the entire proceeding of the Custodial Death Inquiry is confidential and therefore, all its documents are also confidential. Under the circumstances, the trial Court has rightly rejected the application of the petitioner and has not committed any error in rejecting the application of the petitioner. In view of the above discussion, I am of the opinion that, this is not a fit case to exercise the powers under Article 227 of the Constitution of India in favour of the petitioner.

9. Therefore, the present petition needs to be dismissed and is dismissed accordingly.