

Court No. - 84

Case :- APPLICATION U/S 482 No. - 8420 of 2021

Applicant :- Ramdas Tureha

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Ravindra Pal Singh Kashyap, Akshay Kumar Shukla

Counsel for Opposite Party :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava, J.

1. Heard Sri Ravindra Pal Singh Kashyap, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

2. The present application under section 482 of the Code of Criminal Procedure, 1973¹ has been filed seeking to quash the order dated 03.02.2021 passed by Additional District and Sessions Judge, Court No.4, District Hathras in Criminal Appeal No.17/2015 (Ramdas vs. State of U.P. and Others), whereby the application dated 18.01.2021 under section 391 of the Code filed by the applicant for summoning certain persons as witnesses, has been rejected.

3. Pleadings of the case indicate that by means of an order dated 28.05.2015, passed by the Additional Civil Judge (Junior Division)-Judicial Magistrate, Sadabad, District Hathras, the applicant was convicted and sentenced under sections 419 and 420 of the Indian Penal Code² pursuant to a criminal trial. The trial court while considering the question as

1 The Code

2 IPC

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to whether the applicant-accused could be held guilty of concealing his original caste while contesting the panchayat elections, has held that though the applicant had misrepresented his caste in the nomination form but he had neither utilized the caste certificate nor had he appended the same alongwith the nomination form. Accordingly, it was held that the charges against the applicant under sections 419 and 420 IPC were fully proved but since the applicant did not utilize the caste certificate the charges under sections 467, 468 and 471 IPC were not proved and he was acquitted of the said charges.

4. Aggrieved against the aforesaid order the applicant preferred an appeal being appeal no.17 of 2015 and during the pendency of the aforesaid appeal an application dated 18.01.2021 was moved by the applicant seeking invocation of the provisions under section 391 of the Code for summoning certain persons as witnesses and recording of additional evidence by the appellate court.

5. The Additional District and Sessions Judge in terms of order dated 03.02.2021, has rejected the aforementioned application after taking into consideration the relevant facts and particularly taking note of the fact that the appeal had been filed against the judgment of the trial court dated 28.05.2015, by means of which the applicant-accused had been convicted and sentenced under sections 419 and 420 IPC and despite the lapse of more than five years the appeal was not being argued and the application seeking summoning of

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witnesses had been filed only with a view to delay the proceedings. The order also records that the applicant had not moved any application for summoning of the aforesaid persons as witnesses during the course of the trial and there was no justification for their summoning at the stage of appeal.

6. Learned counsel for the applicant, apart from referring to the factual aspects of the case, has not been able to point out any material error or illegality in the order passed by the court below refusing to entertain the application for summoning of witnesses at the stage of appeal.

7. Learned Additional Government Advocate-I submits that the powers under section 391 of the Code for taking further evidence are to be exercised sparingly and it is not open to the applicant to seek invocation of the same as a matter of right.

8. In order to appreciate the rival contentions the provisions with regard to taking additional evidence by the appellate court under section 391 of the Code may be adverted to. Section 391 reads as follows:

“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.”

9. Section 391 of the Code empowers the court to admit additional evidence at the appellate stage, if it considers that such additional evidence is necessary. The power to be exercised is of a discretionary nature and cannot be utilized to fill up gaps and lacunae in the evidence.

10. The appellate court's power to receive additional evidence under section 391 of the Code fell for consideration in **Rambhau and Another Vs. State of Maharashtra**³ and it was held that the powers under the section being in the nature of an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. It was stated thus:

“3. Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependent upon the fact situation of the matter and having due regard to the concept of fair play and justice, well-being of the society.

4. Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a *de novo* trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code.”

3 (2001) 4 SCC 759

11. The nature, scope and object of the powers to be exercised under section 391 of the Code was also examined in **Zahira Habibulla H. Sheikh & Anr vs State Of Gujarat & Ors**⁴ and it was held that though under the provision a wide discretion has been conferred, the powers could not be exercised for filling up any lacunae and the appellate court while directing taking of additional evidence was required to record reasons for the same. The powers under section 391 of the Code were held to be in the nature of exception to the general rule and it was stated that the same must be exercised with great care. It was observed as follows:

“47. Section 391 of the Code 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 also 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 of 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. 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, specially 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 primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court

4 (2004) 4 SCC 158

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through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. 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 and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As re-iterated supra, the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions.”

12. It is therefore seen that the powers under section 391 of the Code to take additional evidence by the appellate court are of a discretionary nature and are to be exercised sparingly and only in suitable cases. The powers under the section have been held akin to those under Order XLI Rule 27 of the Code of Civil Procedure, 1908 and in view thereof additional evidence cannot be tendered at the appellate stage as a matter of right and the power to be exercised by the appellate court is to be based on discretion, sound judicial principles and in the interest of justice. The discretion is to be exercised in suitable cases and not to fill up gaps and lacunae in the evidence. The recording of reasons by the appellate court for taking the

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additional evidence has been made mandatory with the salutary objective of operating as a check against a too easy reception of evidence at a later stage of the litigation. The test to be applied is as to whether the evidence sought to advanced is essential for a just decision of the case.

13. In the case at hand the appellate court apart from taking note of the fact that more than five years had elapsed from the date of institution of the appeal and the case had not been argued, has also considered the material on record to arrive at a conclusion that there was no justification to summon the persons as witnesses, as sought by the applicant, in the facts of the case.

14. Even otherwise, the trial court having acquitted the applicant of the charges under sections 467, 468 and 471 IPC after recording a finding that though the applicant had misrepresented his caste while contesting the panchayat elections but he had not utilized the caste certificate since the same had not been appended alongwith the nomination form, the application filed under section 391 seeking to summon the persons who are stated to have issued the caste certificate, as witnesses, may not have any material bearing on the outcome of the pending appeal.

15. No material error or infirmity could be pointed out by the counsel for the applicant in the order dated 03.02.2021 passed by the appellate court, so as to warrant interference.

16. For all the aforestated reasons, this Court is not inclined

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to exercise its inherent jurisdiction under section 482 of the Code in the facts of the present case.

17. The application therefore stands **dismissed**.

Order Date :- 17.8.2021

Nitendra

(Dr. Y.K. Srivastava, J.)