

Chitrapandi Vs. Janakaraj,

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Court : Chennai

Decided On : Nov-23-2007

Reported in : 2008CriLJ1087

Judge : S. Palanivelu, J.

Acts : Dowry Prohibition Act - Sections 4 and 6; Indian Penal Code (IPC) - Sections 304B and 406; Code of Criminal Procedure (CrPC) - Sections 307, 386, 389, 390, 391, 391(1), 392, 401 and 401(1)

Appeal No. : Criminal M.P. No. 424 of 2007 in Crl. R.C. No. 1880 of 2004

Appellant : Chitrapandi

Respondent : Janakaraj, ;kamala, ;muthupandi and the Deputy Superintendent of Police

Advocate for Def. : K. Kalyanasundaram, Adv. for Respondents 1 to 3 and ;A. Saravanan, Govt. Adv. (Criminal Side) for Respondent 4

Advocate for Pet/Ap. : C. Deivasigamani, Adv.

Disposition : Petition allowed

Judgement :

ORDER

S. Palanivelu, J.

1. This petition has been filed, praying for a direction to the Court of Sessions, Magalir Neethi Mandram at Coimbatore, to take additional evidence in S.C. No. 311 of 2003.
2. Revision petitioner is father of the deceased Maheswari. The deceased Maheswari was married off to first accused on 26.02.2001 and they were living with second and third accused, who are parents of first accused, as a joint family in Manupatti Village.
3. It is alleged that due to the cruelty perpetrated by all the accused on Maheswari and demand of dowry in question to the tune of Rs. 3.00 lakhs and to get a separate house from her parents, there were some misunderstandings among Maheswari and accused 1 to 3. It is further stated that on 09.01.2003 at about 09.00 a.m., the deceased consumed two packets of chemical poison called 'Sani Powder' with an intent to commit suicide and she was admitted to Government Hospital, Udumalpet, where she breathed her last. Post-mortem examination was conducted and viscera was despatched for toxicological analysis. It was opined that the deceased died due to some poisoning. There were no external injuries on her body.
4. Trial of the case was taken up by the Sessions Court, Magalir Neethi Mandram, Coimbatore, in S.C. No. 311 of 2003. On 12.10.2004, the trial Court found the accused not guilty and acquitted them of all the charges framed against them under Section 304-B and 406 IPC and Sections 4 and 6 of Dowry Prohibition Act.
5. The Government has not preferred any appeal or revision against the acquittal, whereas P.W. 1, revision petitioner herein, has preferred this revision before this Court. Pending revision, the petitioner has come forward with this Criminal Miscellaneous Petition under Section 391 Cr.P.C., for the relief stated supra.
6. In the backdrop of the above circumstances, it is profitable to extract Section 391 Cr.P.C., which 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 Sessions 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.

7. Learned Counsel for the petitioner would strenuously contend that though Ex. P-2, letter, was found in the bag of the deceased, which had been handed over to P.W. 15, who, in turn, gave it to P.W. 1, the said letter was not marked before the trial Court by the prosecution, in spite of the fact that the said document was sent to a handwriting expert and his report was obtained, as to the author of the handwriting. Ex.P-2 was reportedly written by the deceased Maheswari, addressing the Superintendent of Police, in which she appeared to have stated about the cruelty meted out to her by the accused and that her husband was responsible, if she met with death, so also Ex. P-3 series, which too were alleged to have been written by the deceased.

8. A perusal of the judgment of the trial Court would go to show that one Gayathri, P.W. 15, deposed that the deceased handed over one bag to her, when she visited her parents house for Pongal and that the deceased had told her that the bag contained a certificate and if it was kept in her husband's house, he would tear the same and, hence, she gave the bag to her (Gayathri), for safe custody. The observations in the judgment would further go as, on coming to know of the death of Maheswari after some days, P.W. 15 gave the bag of the deceased to P.W. 1 and that she was unaware of the contents of the bag.

9. P.W. 1 stated in his evidence that he found one letter in the bag of the deceased, which was addressed to the police and he handed over the bag to the police.

10. With reference to Ex. P-2, the trial Court observed that the investigating officer stated in his evidence that he had filed a charge sheet against accused 1 to 3 on receipt of report of handwriting expert, but, no such handwriting expert was cited as a prosecution witness before the Court; that being so, it was doubtful whether Ex. P-2 was written by Maheswari; therefore, the prosecution had not proved that Ex. P-2 was written by the deceased to the police officer; hence, the said document could not be considered for convicting the accused 1 to 3 and, accordingly, held that Ex. P-2 was not a true and genuine document and that the claim of the accused that Ex. P-2 was created for the purpose of the case could not be overlooked.

11. There is no convincing explanation on the part of the prosecution for not citing or examining the handwriting expert before the trial Court. When the documents Exs. P-2 and P-3 are presumed to be vital records, the prosecution should have taken possible steps to examine the handwriting expert. Having received the report, it is not known as to what prevented the investigating officer from citing the said expert before the Court as a witness.

12. Learned Counsel for the respondents would vehemently argue that the trial Court has rendered a finding on the strength of the oral evidence available on record and even if some evidence is found to be missing in the prosecution case, the petitioner cannot now request the Court to order for receiving additional evidence, to fill up the lacuna in the prosecution case.

13. Before entering into the discussion with regard to the import of Section 391 Cr.P.C., it is desirable to depict the scope of the said provision. The substance of the Section does not put any restriction on the power of the Court. The word 'necessary' has not been used in the Section to mean that this power should be exercised when it is impossible to pronounce judgment. The reception of additional evidence may be allowed when there is likelihood of failure of justice without it. It is an exception to the general rule and the power conferred by this provision must be

exercised with great care, so that the reception of additional evidence for the prosecution may not operate in any manner prejudicial to the defence of the accused. Under the garb of the provision of this Section, the prosecution cannot be allowed to fill up the lacuna in the prosecution evidence. The necessity for taking additional evidence under this Section has to be determined on the particular facts of each case. The Section cannot be invoked to fill up laches of the prosecution case nor for allowing it to indulge in fishing of evidence. Additional evidence cannot be refused, when such evidence is necessary to promote justice. While exercising powers under Section 391 Cr.P.C., the Court of appeals cannot allow permission to produce new documents for being used as evidence.

14. At this juncture, learned Counsel for the respondents would assail the contention of the petitioner, stating that Section 391 is meant for taking additional evidence pending appeal before the appellate Court and, these proceedings being a revision, the provision under Section 391 could not be invoked.

15. Section 401 Cr.P.C. contains response to the learned Counsel for the respondents. It empowers the High Court, in its powers of revision, to exercise any of the powers conferred on the Court of appeals by Sections 386,389,390 and 391. The language in Sub-section (1) is plain, by means of which, the powers under Section 391, exercisable by the appellate Court, may very well be exercised by the High Court under Section 401. Section 401 (1) goes thus:

401. High Court's Powers of Revision.- (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

16. The Hon'ble Supreme Court of India, in Janata Dal v. M.S. Chaudhary : 1993 CriLJ600 , has observed that the object of revisional jurisdiction under Section 401 is to confer on superior criminal Court a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law,

irregularity of procedure, neglect of proper precaution or apparent harshness of treatment, which has resulted on the one hand or on the other hand in some undeserved hardship to individuals. The controlling power of the High Court is discretionary and it must be exercised in the interest of justice with regard to all facts and circumstances of each particular case, anxious attention being given to the said facts and circumstances, which vary greatly from case to case.

17. Hence, it is to be held that the High Court, as a Court of Revision, can exercise the powers under Section 391 Cr.P.C. and its jurisdiction is very wide to prevent abuse of process of law and to correct the injustice being caused to any of the parties to the case.

18. Learned Counsel for the petitioner would draw attention of this Court to a decision rendered by the Apex Court in *Zahira Habibulla H. Sheikh v. State of Gujarat* AIR 2004 SC 3114, wherein it is held that it is open to the appellate Court to call for further evidence before the appeal is disposed of. The operative portion of the said decision has been culled out hereunder:

50. 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....

19. Learned Counsel for the petitioner also garnered support from a decision of this Court in *State v. Shanthi*, in which case also, the above said case of Supreme Court was referred and followed and held that in the circumstances of the case, taking additional evidence was essential.

20. The above said decision of the Supreme Court throws much light on the subject. As such, the area of controversy has become narrower. Adverting to the facts of the present case, in the background of the settled legal propositions and judicial pronouncements, it ought to be observed that recording of additional evidence is absolutely necessary for this case, the reason being, the documents, which are sought to be marked as additional evidence, are not new ones, but were already spoken to by the Investigating Officer. It is stated that the Investigating Officer completed his investigation and laid charge sheet, after getting a report from the handwriting expert. If that be so, the list of prosecution witnesses, without containing the name of the said expert, is not tenable. It cannot be stated that the direction for recording of additional evidence is for filling up the lacuna in this case, because, no new material is proposed to be entertained in this case, but the author of the document alone is sought to be examined before the trial Court. Ends of justice will be met by ordering to take additional evidence. Had the State filed the appeal and sought for taking additional evidence, the view of the Court might have been different. But, here, father of the deceased Maheswari has come forward with the revision and sought for taking additional evidence.

21. Considering the materials with reference to Exs. P-2 and P-3 series, I feel, it is just and necessary to direct taking additional evidence in this case and that the request of the petitioner deserves to be entertained. Therefore, the Sessions Court, Magalir Neethi Mandram, Coimbatore, is hereby directed to take additional evidence with regard to Exs. P-2 and P-3 series in S.C. No. 313 of 2003 on its file, by examining the handwriting expert, who has compared the handwriting, and marking the said report. The trial Court shall complete this process and submit the

additional evidence taken by it to this Court, within a period of two months from the date of receipt of a copy of this order. Both the parties shall co-operate with the trial Court, to comply with the direction of this Court. It is needless to mention that both sides would be afforded ample opportunity. If the Registry of this Court had received the case records, they shall be despatched to the trial Court forthwith, along with a copy of this order.

With the above observations, this Criminal Miscellaneous Petition is allowed.

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