Muhammad Shafi Ganai vs State Through Zeeant Ayour on 21 December, 2021

Author: Sanjay Dhar

Bench: Sanjay Dhar

IN THE HIGH COURT OF JAMMU & KASHMIR AND
AT SRINAGAR

Reserved on: 16.12.2021
Pronounced on:21.12.2021

CRMC No.39/2017

MUHAMMAD SHAFI GANAI ... PETITIONER(S)

Through: - Mr. Z. A. Shah, Sr. Advocate, with
Mr. A. Hanan, Advocate.

Vs.

STATE THROUGH ZEEANT AYOUR ...RESPONDENT(S)
FSO BUDGAM.

Through: - Ms. Asifa Padroo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Petitioner has challenged order dated 08.03.2017 passed by learned Principal Sessions Judge, Budgam, whereby petitioner's application under Section 428 of J&K Cr. P. C seeking permission to lead additional evidence at appellate stage has been dismissed.

2) Before coming to the present petition, it would be apt to narrate the facts that have led to the filing of instant petition.

3) It emerges from the record that respondent herein had filed a complaint against the petitioner alleging commission of certain offences by petitioner under the provisions of Food Safety and Standards Act, 2006 (for short 'the Act of 2006'). The complaint was filed before the Judicial Magistrate 1st Class, Budgam (hereinafter referred to as the trial court). After trial of the case, it seems that the petitioner has been found guilty of offences under Section 51, 52, and 59 the Act of

2006 and has been sentenced to a fine of Rs.5.00 lacs for offence under Section 51, Rs.3.00 lacs for offence under Section 52 and imprisonment of six months with a fine of Rs.1.00 lac for offence under Section 59.

4) The aforesaid judgment of the trial court came to be challenged by the petitioner by way of an appeal before the Principal Sessions Judge, Budgam (hereinafter referred to as the Appellate Court). During pendency of the appeal, petitioner filed an application under Section 428 of the J&K Cr. P. C (which corresponds to Section 391 of the Code of Criminal Procedure, 1973), seeking permission to produce additional evidence. The said application came to be dismissed by the learned Appellate Court vide the impugned order. While dismissing the application, the learned Appellate Court has observed that the documents which the petitioner seeks to place on record and the evidence which he seeks to produce is not relevant and admissible. It has been also observed that petitioner had all the available opportunity to produce this evidence before the trial court which he failed to do and now he cannot be permitted to produce the said evidence.

5) The petitioner has challenged the impugned order on the ground that the conclusions drawn by the learned Appellate Court are not correct as it was not a case where the petitioner wanted to fill up lacunae or gap in the evidence. It has been further contended that the evidence sought to be produced by the petitioner has come to his notice only after the judgment was passed by the trial court and the learned Appellate Court, while rejecting the application, has taken an erroneous view by observing that the evidence which comes to the notice after the passing of judgment by the trial court cannot be produced.

6) I have heard learned counsel for the parties and perused the record of the case.

7) Before coming to the merits of the submissions made by the parties, it is necessary to notice as to what were the allegations made in the complaint against the petitioner and what sort of evidence petitioner is seeking to produce at the appellate stage. The allegations against the petitioner in the complaint are that the sample of milk manufactured by his business concern, upon analysis of the sample take of his product, was found to be sub-standard, unsafe and misbranded by the Referral Food Laboratory, Kolkata. Through the medium of application under Section 428 of Cr. P. C, the petitioner seeks permission to examine one Murtaza Ali, an official of the respondent department, who, according to the petitioner, also accompanied the officials who had collected and sealed the sample of the product of petitioner. According to the petitioner, the said official has made a statement touching the procedure of sampling and its sealing during the departmental enquiry that was held pursuant to the directions of the trial court. The other evidence which petitioner seeks permission to produce is the research paper with regard to effect of Formalin in milk as also changes made in DGHS Manual. As per this research paper, it has been opined by the experts that using of Formalin as a preservative in milk and milk products causes certain effects which can influence the test report of these products.

8) Before proceeding ahead to determine as to whether aforesaid nature of evidence can be allowed to be led at the appellate stage, it is necessary to notice the legal position as regards the scope and interpretation of Section 428 of J&K Cr. P. C (Section 391 of Central Cr. P. C), which reads as under:

> 428. 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 Judicial Magistrate or, when the Appellate Court is the High Court, by a Court of Session or a Judicial 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) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

9) From a perusal of the aforesaid provision, it is clear that it is the discretion of the Appellate Court to take additional evidence at appellate stage. The only requirement is that such additional evidence must be necessary and the court should record its reasons.

10) The aforesaid provision has been interpreted and dissected by Supreme Court in a number of judgments. In Zahira Habibullah H. Sheikh & anr. vs. State of Gujarat & Ors., (2004) 4 SCC 158, the Supreme Court has, while considering the scope of Section 391 of Cr. P. C. 1973, observed as under:

> "Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated. In the ultimate analysis whether it is a case covered by Section 386 or Section 391 Cr.P.C 1973, the under lying object which the court must keep in view is the very reason for which the courts exist i.e., to find out the truth and dispense justice impartially and ensure also that the very process of courts is not employed or utilized in a manner which given room to unfairness or lend themselves to be used as instruments of oppression and injustice."

11) In Sudevanand vs. State through CBI, (2012) 3 SCC 387, the Supreme Court, after noticing the provisions contained in Section 391, observed as under:

> "30. It is, thus, to be seen that the provision is not limited to recall of a witness for further cross- examination with reference to his previous statement. The Appellate Court may feel the necessity to take additional evidence for any number of reasons to arrive at the just decision in the case. The law casts a duty upon the court to arrive at the truth by all lawful means. This is another reason why we feel any reliance on Mishrilal that considered the recall of a witness in the context of Section 145 of the Evidence Act is quite misplaced in the facts of this case.

> 31. Mr. Dey contended that Vikram's statement that he is alleged to have made in jail has no legal sanctity and it came to be made and recorded in a manner completely unknown to law. Mr Dey may be right but on that ground alone it would not be correct and proper to deny the application of Section 391 of the Cr.P.C. Take the case where, on the testimony of the Approver, a person is convicted by the trial court under Section 302 and 120-B etc. of the Penal Code and is sentenced to a life term. After the judgment and order passed by the trial court and while the convict's appeal is pending before the High Court, the `Approver' is found blabbering and boasting among his friends that he was able to take the Court for a ride and settled his personal score with the convict by sending him to jail to rot at least for 14 years. Such a statement would also be completely beyond the legal framework but can it be said that in light of such a development the convicted accused may not ask the High Court for recalling the Approver for further examination."

12) Again, in Sukhjeet Singh vs. The state of Uttar Pradesh and Ors., (2019) 16 SCC 712, the Supreme Court, after noticing its earlier decisions on the subject, held that there are no fetters on the power under Section 391 of Cr.P.C. of the Appellate Court. The Court went on to hold that all powers are conferred on the Court to secure ends of justice, the ultimate object of judicial administration is to secure ends of justice and Court exists for rendering justice to the people

13) From the foregoing enunciation of law on the subject, it is clear that it ultimately is the discretion of the Appellate Court as to whether additional evidence can be permitted to be adduced at the appellate stage but such discretion has to be exercised on recognized principles evolved over a period of time by the case law on the subject. The only consideration which has to be kept in mind by the Appellate Court is to secure the ends of justice. However, the additional evidence cannot and ought not to be received in such a manner as to cause prejudice to any of the parties. It cannot be a re-trial and it is only the concept of justice which much prevail. The Appellate Court cannot allow additional evidence to be led just to fill up the lacuna at the appellate stage. The Court has also to see as to whether the evidence proposed to be led is relevant. The test to be applied is as to whether evidence sought to be advanced is essential for just decision of the case.

14) Adverting to the facts of the instant case, as already noted, petitioner proposes to examine witness, namely, Murtaza Ali, who is stated to have deposed about the procedure adopted during the course of sampling and sealing. The said statement has been made by the aforesaid witness in the departmental enquiry that was conducted pursuant to the orders of the trial court in the judgment which is subject matter of appeal before the Appellate Court. The question arises as to whether petitioner can be allowed to do so at the appellate stage.

15) The learned Appellate Court has, while rejecting plea of the petitioner, observed that the petitioner is seeking to bring on record post trial developments. According to learned Appellate Court, the procedure with regard to sampling and sealing was already known to the petitioner during trial of the case and, thus, is not a new thing which has come to the knowledge of the petitioner. Learned Appellate Court has observed that petitioner has availed the opportunity of producing the evidence before the trial court and, therefore, he cannot be allowed to produce

additional evidence on this aspect of the matter. A further observation has been made by the learned Appellate Court while rejecting application of the petitioner that the proceedings conducted in an enquiry are not admissible or relevant in criminal proceedings and that departmental enquiry has not been completed in view of the stay granted by the Appellate Court.

16) All the aforesaid reasoning given by the learned Appellate Court appears to be misplaced and misconceived. Firstly, the Appellate Court has stayed the conviction of the petitioner and no direction with regard to holding of departmental proceedings has been passed. The departmental proceedings have been completed and the copies thereof have been placed on record by petitioner after obtaining the same through RTI. It is correct that proceedings conducted in a departmental enquiry do not have a bearing upon criminal proceedings but then what the petitioner is seeking to achieve by examining the witness, namely, Murtaza Ali is to bring to the fore the manner in which sampling and sealing has taken place in the instant case. Murtaza Ali, admittedly, has not been examined as witness before the trial court and he, during the departmental proceedings, has made certain observations and statements as regards the manner in which the sample was collected and sealed. His statement, therefore, is relevant to the case at hand. Admittedly, departmental enquiry was conducted after the decision of the trial court, as such, it would not have been in the knowledge of the petitioner that Murtaza Ali was in know of the facts relevant to the case. Therefore, there was no occasion for the petitioner to produce the said witness in defence during trial of the case. The observations of the Appellate Court that petitioner had enough opportunity to produce the said person as a witness during trial is certainly off the mark.

17) Regarding petitioner's request for permission to place on record the research paper published in the magazine "INDIAN DAIRY MAN"

> in June 2016 issue, the learned Appellate Court, after noticing Regulation No.2.3.1(4) of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2017, has observed that these provisions permit use of Formalin as preservative in samples of milk and, as such, objection with regard to its effect on test results pales into insignificance. The learned Appellate Court has further observed that no amount of evidence in opposition shall be enough to dispute the statutory provisions of law. It has also been observed by learned Appellate Court that the aforesaid evidence sought to be produced by petitioner is neither relevant nor admissible in evidence as the same does not pertain to this case or to the said Court. The learned Appellate Court goes on to observe that opinion does not become relevant to a case which is already concluded.
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> 18) So far as the opinion of the experts is concerned, the same is a relevant fact in terms of Section 45 of the Evidence Act. What the petitioner seeks to produce on record is opinion of an expert who has published a research paper on effects of Formalin on the test results of samples of milk. An expert is not a witness of fact and his evidence is really of an advisory character and his duty is to furnish court with scientific test criteria to test accuracy of conclusions. Based on such expert opinion and upon appreciation of the facts of a case, the court has to give its independent

judgment. The court has not to subjugate its own judgment to that of expert. Nonetheless, opinion of an expert is a relevant fact.

19) What petitioner seeks to produce before the Appellate Court is opinion of an expert and it is for the Appellate Court either to rely upon the same or to take a different view. It is not in dispute that Formalin is a permissible preservative for sampling of milk but then what petitioner wants to establish before the Appellate Court is that this preservative does effect the test report. Such an evidence cannot be shut out merely because it is a permitted preservative. The view of the learned Appellate Court in this regard is patently erroneous. The observation of the Appellate Court that an opinion rendered after conclusion of the trial cannot be taken into consider is also erroneous because any research which throws light on a relevant fact and has bearing upon a case can always be taken into account, more particularly when the judgment of the trial court has not attained finality as yet, inasmuch as appeal is a continuation of the trial.

20) The foregoing discussion clearly leads to the conclusion that the petitioner is seeking permission to produce evidence which is relevant to the issue pending before the Appellate Court and there was no occasion for the petitioner to produce this evidence during trial of the case as the same has come to his notice only after conclusion of the trial. The evidence sought to be introduced by the petitioner is not only necessary for the just decision of the appeal but shutting out the same would result in failure of justice. It is not a case where petitioner is trying to fill up the lacunae left during the trial of the case but it is a case where petitioner is trying to place on record the evidence which has come to his notice after the conclusion of trial and which has a definite bearing upon decision of the case.

21) In view of the foregoing analysis and discussion, allowing the impugned order passed by the learned Appellate Court to stand would amount to failure of justice and, such, the same deserves to be set aside.

Accordingly, the petition is allowed and the impugned order passed by the Appellate Court is set aside. The petitioner is permitted to lead additional evidence, as has been sought to be led by him by way of the application filed before the Appellate Court.

22) Copy of this order be sent to the learned Appellate Court for information and compliance.

(Sanjay Dhar) Judge Srinagar 21.12.2021 "Bhat Altaf, PS"

Whether the order is speaking: Yes
Whether the order is reportable: Yes