

HIGH COURT OF SIKKIM
Record of Proceedings

Crl.M.C. No. 10 of 2018

ANKIT SARDA

PETITIONER

VERSUS

NUKUL BANSAL

RESPONDENT

Date: 13.06.2019

CORAM:

THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

For Petitioner

Mr. Jorgay Namka, Advocate.
Ms. Panila Theengh, Advocate.

For Respondent

Mr. Rahul Rathi, Advocate.

O R D E R (ORAL)

1. Heard on I.A. No. 1 of 2018.

2. The Petitioner is before this Court assailing the Order dated 25.10.2018 of the Court of the Special Division-I, Sikkim at Gangtok in Criminal Appeal No. 11 of 2017 (Ankit Sarda v. Nakul Bansal). Vide the impugned Order, the learned Appellate Court while considering the petition under Section 391 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') filed by the Petitioner herein *inter alia* allowed the Petitioner to examine one Rabindra Kumar Sarda but rejected his prayer to examine one Ashish Somani. The learned Appellate Court also opined that the evidence of two other witnesses viz. Naresh Kumar Agarwal and Suresh Agarwal would be relevant for a just adjudication of the matter and directed that the said two witnesses also be examined by the Petitioner. The Petitioner contends before this Court that firstly he does not seek to examine witnesses Naresh Kumar Agarwal and Suresh Agarwal in view of the fact that Exhibit 1 where the two persons are witnesses, is an admitted

HIGH COURT OF SIKKIM
Record of Proceedings

document and secondly because these two witnesses were cited as witnesses by the Respondent but were subsequently not examined. That, in view of the fact that the Respondent also admits Exhibit 1, no purpose emanates from their examination. It is prayed that the Order of the learned Appellate Court with regard to examining of these two witnesses be set aside and Ashish Somani be permitted to be examined by the Petitioner.

3. Learned Counsel for the Respondent concedes that he has no objections to the submissions of the Petitioner with regard to the examination of Naresh Kumar Agarwal and Suresh Agarwal not being necessary in view of the fact that Exhibit 1 is an admitted document. However, he submits that the prayer of the Petitioner seeking to examine Rabindra Kumar Sarda and Ashish Somani ought to be rejected as nowhere earlier had the Petitioner cited the requirement of examining these two witnesses. That, allowing the prayer would prejudice the case of the Respondent. Hence the petition be dismissed.

4. I have carefully considered the rival submissions of learned Counsel and perused all relevant documents.

5. Section 311 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') provides as follows;

"311. Power to summon material witness, or examine person present.-Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

HIGH COURT OF SIKKIM
Record of Proceedings

6. In *Shailendra Kumar v. State of Bihar and Others, (2002) 1 SCC 655* while discussing this provision of the Cr.P.C., it was held as follows;

"...**11.** Bare reading of the aforesaid section reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This Court in *Rajendra Prasad v. Narcotic Cell* [(1999) 6 SCC 110] observed: (SCC p. 113, para 8)

"After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."....."

The position of law on this count is no more *res integra* and also requires no further elucidation.

7. Along with the provision *supra* we may also profitably refer to Section 391 of the Cr.P.C. which reads as hereunder;

"**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."

8. In *Zahira Habibulla H. Sheikh and another v. State of Gujarat and others, AIR 2004 SC 3114* while discussing the said provision, the Hon'ble Supreme Court would hold as follows;

HIGH COURT OF SIKKIM
Record of Proceedings

“23. Section 391 of the Code is intended to subserve the ends of justice by arriving at the truth and there is no question of filling of any lacuna in the case on hand. ...

.....
41. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.”

9. Much earlier in time, in *Rajeswar Prasad Misra v. State of West Bengal and Another, AIR 1965 SC 1887* the Hon’ble Supreme Court while considering the same provision would observe as extracted hereinbelow;

“
8. Since a wide discretion is conferred on appellate courts, the limits of that courts’ jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides.

9. Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not

HIGH COURT OF SIKKIM
Record of Proceedings

be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. ..."

10. Further, in ***Brig. Sukhjeet Singh (Retd.) MVC v. The State of Uttar Pradesh & Ors., Criminal Appeal No. 148 of 2019 (arising out of SLP (Crl.) No. 1120/2017)*** it was *inter alia* held as follows;

"As noted above, this Court has laid down that when it becomes necessary to take additional evidence, cannot be enlisted or enumerated in any fixed formula. It depends on facts of each and every case to come to a conclusion as to whether it is necessary to take additional evidence or not."

11. The above propositions categorically expound the parameters of the provisions and the discretion that the Court is clothed with. That having been said, it would be useful to consider that Section 165 of the Indian Evidence Act, 1872 (for short 'Evidence Act') also vests the Court with powers to put questions or order production of witness or document.

12. Considering the aforestated positions of law and the wide discretion afforded to the Courts, I am of the considered opinion that the prayers of the Petitioner ought to be allowed in order to subserve the ends of justice and to give a closure to the issues between the parties. Consequently, the impugned Order of the learned trial Court is modified to the following extent;

- (i) Ashish Somani is also allowed to be examined as the Petitioner's witness along with Rabindra Kumar Sarda.
- (ii) Bearing in mind that Section 58 of the Evidence Act provides that facts admitted need not be

HIGH COURT OF SIKKIM
Record of Proceedings

proved, in view of Exhibit 1 being a document the contents of which are not disputed by both sides, there is no requirement to examine witnesses Naresh Kumar Agarwal and Suresh Agarwal.

- 13.** Let the Petitioner furnish witnesses Rabindra Sarda and Ashish Somani before the learned trial Court on 15.07.2019 and all proceedings before the learned trial Court be completed by 15.08.2019. Thereafter the matter be forwarded to the Court of the Special Division-I, Sikkim at Gangtok.
- 14.** Consequently, I.A. No. 1 of 2018 stands disposed of.
- 15.** In view of the above circumstances, the stay granted by this Court vide order dated 22.11.2018 stands vacated.
- 16.** Crl. M.C. No. 10 of 2018 disposed of accordingly.

Judge
13.06.2019