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Court : Allahabad

Decided On : Aug-02-2010

Judge : Rajesh Dayal Khare, J.

Acts : Code of Criminal Procedure (CrPC) - Section 482, 319; Indian Penal Code (IPC) - Sections 143, 147, 353, 341, 427, 504, 506; Criminal Law Amendment Act - Section 7

Appeal No. : APPLICATION U/S 482 No. - 18920 of 2010

Appellant : Subhash Chandra Tiwari, and Others.

Respondent : State of U.P. and Another.

Advocate for Pet/Ap. : Shiva Kant Srivastava, Adv.

Prior history : From the Judgment and Order dated 16.11.2005 of the Hon'ble High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B. Criminal Misc. Petition No. 758/2003

Judgement :

S.B. Sinha, J.

1. Leave granted.

2. Scope and application of Section 319 of the Code of Criminal Procedure, 1973 (for short, 'the Code') is in question in this appeal which arises out of a judgment and order dated 16th November 2005 passed by a learned Single Judge of the High Court of Rajasthan whereby and whereunder the order dated 29th May 2003 passed by the learned Upper District & Sessions Judge (Fast Track), Sikar, refusing to summon the appellants herein as accused, was set aside.

3. A First Information Report (FIR) was lodged by the 1st respondent alleging that his wife was attacked by nine persons including the five appellants herein. His mother was also assaulted. When his father rushed to their rescue, he was also surrounded by them and was assaulted as a result whereof, he expired. Upon investigation, a final form was submitted in favour of the appellants. A charge-sheet was filed only against four persons, viz., Kishori, Jagdish, Sarjit and Sheo.

4. Indisputably, a counter case had been filed.

5. An application was filed on or about 01st April 1998 in terms of Section 319 of the Code for summoning the appellants herein as accused.

Before the learned Upper Distt. & Sessions Judge, a large number of witnesses were examined and cross-examined on behalf of the accused persons. By reason of an order dated 29th May 2003, the learned Upper Distt. & Sessions Judge rejected the said application filed by the 1st respondent herein opining that no case has been made out therefor. A criminal miscellaneous petition filed by the 1st respondent before the High Court against the order of the learned Upper Distt. & Sessions Judge, however, has been allowed by reason of the impugned judgment, stating:

The very ambit of Section 319 Cr.P.C. is to empower the trial court to take cognizance against those persons who are alleged to have been involved in an offence, but who have not been arrayed as accused by the investigating agency while filing the charge sheet. Section 319 Cr.P.C. comes into effect once the evidence comes trickling in during the course of trial against the alleged offender. In case there is prima facie case against the alleged offenders, the Court should take cognizance against them. At the juncture of taking cognizance, the court

should not critically analyze the evidence. For the purpose of taking cognizance, the existence of a prima facie case is sufficient. It is only at a later stage that the trial court is called upon to appreciate the evidence in proper perspective. Moreover, the duty of the court is not only to protect the innocent, but also to punish the guilty. In case the jurisdiction under Section 319 Cr.P.C. is not exercised properly by the trial Court, chances are that those who are alleged in the offence might go scot free. The society cannot be exposed to the dangers created by those who take law in their own hands.

Considering the fact that the large number of witnesses have deposed against the respondents No. 2 to 6, a prima-facie case does not (sic) exist against them for their involvement in the alleged offence. Thus, in our opinion, the learned Magistrate should have exercised the jurisdiction vested in him under Section 319 Cr.P.C.

We allow this petition and direct the learned Addl. Sessions Judge to rehear the arguments of the learned Counsel for the petitioner and the learned Counsel for the State and pass the necessary orders in accordance with Section 319 Cr.P.C. within a period of two weeks from the date of the receipt of the certified copy of this order and to expeditiously complete the trial as the trial has been hanging fire since 1996.

6. Dr. Sushil Balwada, learned Counsel appearing on behalf of the appellants would submit that the involvement of the appellants having not been found by the learned Upper Sessions Judge, the High Court committed a serious error in passing the impugned judgment.

7. Mr. Sushil Kumar Jain, the learned Counsel appearing on behalf of the 1st respondent, on the other hand, urged that although a final form was filed in favour of the appellants, the same would not mean that the application for summoning the accused was impermissible in law.

It was urged that the learned Upper Sessions Judge committed a serious error insofar as he failed to take into consideration that existence of a prima facie case alone would subserve the requirements of the said provision. It was urged that at

that stage, the learned Upper Sessions Judge should not have entered into the arena of appreciation of evidence. In this regard, our attention has been drawn to the statements of various witnesses examined on behalf of the prosecution prior to the passing of the order dated 29th May 2003.

8. Before the learned Upper Sessions Judge, the respondent No. 1 herein was examined as P.W.2 on 23rd February 1998. He alleged involvement of the appellants herein in the incident. He had also attributed certain overt acts on their part, inter alia, contending that they had assaulted his father with the reverse side of an axe (farsi). One Ramesh Kumar, brother of the respondent No. 1 was also examined as P.W. 7 on 22nd January 2003. Similarly, one Kanesh, son of respondent No. 1, examined himself as P.W.8 on 22nd January 2003.

9. Mr. Naveen Kumar Singh, learned Counsel appearing on behalf of the State would submit that it was not permissible in law for the learned Upper Sessions Judge to entertain an application under Section 319 of the Code although they had not been charge-sheeted.

We do not agree.

10. Section 319 of the Code reads thus:

319. Power to proceed against other persons appearing to be guilty of offence.-(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

11. An application under the aforementioned provision would be maintainable not only during pendency of an inquiry but also in the course of a trial. In the event, it appears from the evidence that any person, not being an accused, has committed any offence for which he could be tried together with the accused, the court may proceed against him for the offence which he appears to have committed. The provision of Section 319 of the Code confers an extraordinary power upon a court to summon a person who, at the relevant time, was not being tried as an accused, subject, of course, to fulfillment of the condition that it appears to the court that he had committed an offence. A finding to that effect must be premised on the evidence that had been brought on record.

12. Indisputably, the court must satisfy itself about the existence of an extraordinary situation enabling it to exercise an extraordinary jurisdiction. It is true that the court is not denuded of its power to exercise the said jurisdiction only because a person named as an accused in the FIR was not charge-sheeted as a result whereof no cognizance has been taken against him. What is necessary for the said purpose is that the person concerned was not being tried as an accused before the Court at that stage.

13. This Court in the case of *Kailash v. State of Rajasthan* : 2008 CriLJ1914 , has held that a glance of the provision would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. This Court has laid emphasis on the words, 'it appears from the evidence', 'any person', and 'has committed any offence'. It was further held that the power under Section 319 has to be essentially exercised only on the basis of

the evidence brought on record of the case. The discretionary jurisdiction could, therefore, be exercised only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence.

14. In the case of *Raj Kishore Prasad v. State of Bihar and Anr.* : 1996 CriLJ2523 , this Court opined:

14. Learned Counsel differ however on the other question posed in *Kishun Singh* case [*Kishun Singh v. State of Bihar* : 1993 CriLJ1700 . It was whether a Court of Session, to which a case is committed for trial by a Magistrate, could, without itself recording evidence, summon a person not named in the police report presented under Section 173 of the Code of Criminal Procedure, 1973, to stand trial along with those named therein; if not in exercise of power conferred by Section 319 of the Code, then under any other provision? The answer given was in the affirmative, on the basis of Section 193 of the Code, as it presently stands, providing that once the case is committed to the Court of Session by a Magistrate, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of Original Jurisdiction gets lifted, thereby investing the Court of Session unfettered jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the crime can prima facie be gathered from the material available on the record. It is on this reasoning that this Court sustained the order of the Court of Session (though it ostensibly was under Section 319 Cr PC terming material of investigation before it as `evidence') summoning the unnamed accused to stand trial with the named accused. A stage has thus been discovered, before the reaching of the stage for exercise of power under Section 319 Cr PC, on the supposition and premise that it is pre-trial when the question of charge was being examined. Such power of summoning the new accused has been culled out from the power exercisable by the Court of Session under Sections 227 and 228 of the Code, enabling it to discharge under Section 227 or charge under Section 228 the accused persons before it and while so to summon another accused involved in the commission of the crime, prima facie appearing from the material available on record of the case. Thus at a stage posterior to the stage envisaged under Section 319, the Court of Session has been held empowered to summon an accused if a

prima facie case is made out from the material available on the record.

15. In the case of Rakesh and Anr. v. State of Haryana : 2001 CriLJ3511 , it was held:

11. In support of his contention, learned Senior Counsel Mr. Ranjit Kumar referred to the decision of this Court in Joginder Singh v. State of Punjab : 1979 CriLJ333 . In our view, this decision nowhere lays down that before a person is added as accused in a sessions trial case, he should be permitted to cross-examine the witnesses whose evidence is recorded. On the contrary, it lays down that once the Sessions Court is seized of the matter as a result of the committal order against some accused the power under Section 319(1) can come into play and the court can add any person, not an accused before it, as an accused and direct him to be tried along with other accused. The Court has further observed that the very purpose of enacting Section 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court are included in the expression 'any person not being the accused'.

16. We must, however, at this stage also place on record that this Court, in the case of Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. : 1983 CriLJ159 , opined that the power under the said provision must be exercised very sparingly and not as a matter of course. In the case of Joginder Singh and Anr. v. State of Punjab and Anr. : 1979 CriLJ333 , this Court even opined that such a power can be exercised even without there being a committal order passed against a person. [see also Lok Ram v. Nihal Singh and Anr. : 2006 CriLJ2366 ; Shashikant Singh v. Tarkeshwar Singh and Anr. : 2002 CriLJ2806 ; Michael Machado and Anr. v. Central Bureau of Investigation and Anr. : 2000 CriLJ1706 ; Palanisamy Gounder and Anr. v. State represented by Inspector of Police (2005) 12 SCC 327; Kailash Dwivedi v. State of M.P. and Anr. (2005) 11 SCC 182 and Mohd. Shafi v. Mohd. Rafiq and Anr. : 2007 CriLJ3198 .

17. The High Court, in our opinion, however, has committed a serious error in proceeding on the premise that mere existence of a prima facie case would be sufficient to exercise the court's jurisdiction under Section 319 of the Code. We

have noticed hereinbefore the importance of the word 'appears'. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as accused in the case.

18. The High Court furthermore committed a serious error insofar as it failed to take into consideration that when the order dated 29th May 2003 was passed, the learned Judge was in a position to consider the evidence brought on record including the cross-examination of the prosecution witnesses. The High Court did not arrive at any finding that a case has been made out for exercise of such an extraordinary jurisdiction which, in terms of the judgments of this Court, is required to be exercised very sparingly.

19. For the reasons aforementioned, the impugned judgment is set aside. The appeal is allowed.

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