Biman Chatterjee and anr. Vs. State of West Bengal and anr.

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Court : Kolkata

Decided On : May-09-2008

Reported in : 2008(4)CHN125

Judge : Partha Sakha Datta, J.

Acts : Indian Penal Code (IPC) - Sections 34, 201 and 364; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 173(5), 319 and 319(1)

Appeal No. : C.R.R. No. 1880 of 2007

Appellant : Biman Chatterjee and anr.

Respondent : State of West Bengal and anr.

Advocate for Def. : Subir Ganguly and ;Tapan Dutta Gupta, Advs.

Advocate for Pet/Ap. : Sekhar Basu, ;S. Mitter, ;Somnath Banerjee and ;Rajdip Mazumder, Advs.

Disposition : Application dismissed

Judgement :

Partha Sakha Datta, J.

1. The scope and ambit of Section 319 of the Cr.PC is the subject-matter of this revisional application filed by the two petitioners who have been by the order dated

24.4.2007 passed by the learned Additional Sessions Judge, Barasat, North 24-Parganas summoned in Sessions Case No. 86(6) of 2004 corresponding to S.T. Case No. 1(9) of 2004 to stand trial under Sections 364/201/34 of the Indian Penal Code.

2. One Partha, the victim of the case, had remained untraced since the morning of 5.9.1997. The de facto complainant (P.W.1) started for searching his brother Partha and came to know that on that date police had killed one boy by firing. On the morning of 6.9.1997 P.W.1 rushed to Kaipukur in search of his brother and then came to know that on the previous day in the morning police killed one boy named Suresh Bauri and took away another boy who was seated in a tea stall with injury on his leg due to firing by the police. Then having gone to Habra Police Station, P.W.1 came to know through some inmates of the lock up that at 8.30 a.m. on 5.9.1997 police brought a boy with bullet injury on his left leg and placed him in the lock up. Allegedly the police personnel who were the accused persons before the learned Judge got admitted his brother Partha in the State General Hospital at Habra in the fake name of one Laxman Giri and then transferred him to Barasat Sadar Hospital. But Partha could not be traced out. Before this Court a writ application under Article 226 in the nature of Habeas Corpus was filed and the Writ Court passed an order of initiation of an investigation into the matter by the West Bengal Human Rights Commission which upon investigation directed the State to initiate a criminal proceeding through the CID against the accused persons of the case. The FIR being Habra Police Station Case No. 331 dated 13.8.2000 at the instance of P.W.1 was registered under Sections 364/34 of the Indian Penal Code and chargesheet was submitted upon completion of investigation.

3. After examination and cross-examination of six witnesses the prosecution moved a petition before the learned Trial Court for summoning the two petitioners herein under Section 319 of the Cr.PC in view of the fact that their names, though they had not been chargesheeted, transpired in evidence of the witnesses and accordingly pursuant to Section 319 of the Cr.PC they should be brought to trial to answer the charges. The petition was contested by the present petitioners but the learned Trial Court upon hearing the learned Counsels for the parties allowed the

petition and accordingly issued summons upon them.

4. It is this order dated 24.4.2007 passed by the learned Additional Sessions Judge, Barasat that the two petitioners have assailed in this revisional application contending that the order impugned of the learned Judge in the Court below was illegal and that in absence of complicity of the two petitioners having transpired against them they could not be summoned and while making the impugned order the learned Judge became totally oblivious of the judicial pronouncements of the Supreme Court on the subject and accordingly, simply on the basis of suspicion aired by the witnesses they cannot be summoned to the peril of their liberty.

5. I have heard Mr. Sekhar Kumar Basu, learned Senior Advocate for the petitioners, Mr. Subir Ganguly, learned Advocate appearing for the O.P. No. 2 (de facto complainant) and Mr. Tapan Dutta Gupta, learned Advocate for the State of West Bengal.

6. The principal submission of Mr. Basu is that unless Court is satisfied...which satisfaction has to be recorded with reasons in the order...that there is evidence prima facie to believe that the two petitioners have committed offence under Sections 364/201/34 of the Indian Penal Code they cannot be summoned to sessions trial and in the instant case simply on the basis of the evidence in examination-in-chief the learned Trial Court passed the order impugned which does not reflect at all the satisfaction of the learned Judge to the effect that if the petitioners were summoned there was likelihood that they could be convicted. It is thus argued that as the learned Trial Court did not record its satisfaction that on the basis of the evidence transpiring on record it could be reasonably held that evidence so adduced would likely to result in conviction of the petitioners the order impugned is wrong. Therefore it is argued that the order impugned having not complied with requirement of the law is had in law and is liable to be interfered with. The second branch of argument of Mr. Basu is that the learned Judge in the Court below relied on and referred to the report of the Human Rights Commission unwisely and illegally because in a criminal trial it is the prosecution papers under Section 173(5) of the Cr.PC that alone can form the materials for prosecution and the report of the Human Rights Commission, howsoever, it is against the

petitioners is quite extraneous to the documents which the prosecution would rely on and thus the order under Section 319 of the Cr.PC taking recourse to the report of the Human Rights Commission is quite unjustified.

7. Mr. Tapan Dutta Gupta, learned Advocate appearing for the State of West Bengal and Mr. Subir Ganguly, learned advocate for the O.P. No. 2 (de facto complainant) supported the order impugned of the learned Judge submitting that it is not that simply on the basis of examination-in-chief of the witnesses and without cross-examination of the witnesses being completed, the two petitioners have been summoned unnecessarily. It is on the strength of the evidence of the witnesses transpiring against the petitioner that the learned Judge exercised his jurisdiction which must not be interfered with in this criminal revision. Unless, of course, the Court is satisfied that any such interference is rightly called for. According to Mr. Dutta Gupta given a plain reading of the order impugned of the learned Judge it does not appear that the jurisdiction exercised by the learned Judge under Section 319 of the Cr.PC has been manifestly illegal one not based on any evidence whatsoever and that the order is the outcome of total perversity legitimately calling for outrage rejection of the same.

8. I have gone through the impugned order and other papers connected with the revisional application and heard the learned Counsels for the parties. It is a trial of certain police personnel in the District of North 24-Parganas for kidnapping a boy Partha Majumdar between 5.9.1997 and 6.9.1997 where charge sheet was submitted against the 11 accused persons and the names of the two petitioners did not transpire in the chargesheet as accused persons. About 85 witnesses including a, good number of police personnel are the witnesses to prove the prosecution case. Though the names of the two petitioners who are also police personnel are not there in the colour of the accused persons, they are not absolutely foreign to the incident of the case. Suresh Barui and the victim Partha Majumdar were known to each other. From the statement of witnesses it could be prima facie case found that Partha @ Bapi had been to the house of Suresh. Police had been looking for Suresh and in the morning of 5.9.1997 while Partha was with Suresh and others, the police chased them. Suresh fell in a pond. Certain police personnel including the Officer-in-Charge of the Habra Police Station were

engaged to trace out Suresh. In the firing Suresh received injury on his left leg while Partha was taken to Habra Police Station lock up on 5.9.1997 at about 8.30 a.m. when Sonai Bhowal and others were in the same lock up, one constable Laxman Giri was a member of the team to apprehend Suresh. However, police took Partha Majumdar to Habra State General Hospital at 8.50 hours and then to Barasat Sadar Hospital in the fake name of Laxman Giri who was in fact a constable and one of the petitioners Arabinda Khusari was in the team when Partha was taken to Barasat Hospital for admission. The other petitioners Biman Chatterjee a constable of Barasat Police Station who was allotted duty to guard the victim got the victim discharged from the hospital and then made over the victim to the other petitioner Arabinda Khusari and since then the victim remained untraced. Therefore the genesis involvement of these two petitioners has been laid in the chargesheet, though they have not been cited as a chargesheeted accused in the requisite column.

9. Learned Advocate for the petitioners was not correct when he submitted that without allowing the witnesses to be cross-examined, the learned Judge passed the order under challenge. The order reveals examination and cross-examination of six witnesses whereafter the petition under Section 319 of the Cr.PC was moved. The de facto complainant P.W.1 has given a very vivid description of the incident relating to injury of Partha Majumdar and his subsequent disappearance at the instance of the police. He says that he had been to the male surgical ward and found his brother. Partha lying on a bed. Two police personnel were there to guard him. He had no suspicion and so he did not note down the bed number. At 1 p.m., he found a police man to take out Partha and got him boarded in a police jeep of which there were 4 to 5 police people. They brought Partha by jeep. In the evening he came to Barasat Police Station and came to know that Partha was brought to the police station but prior to going to police station he again came back to hospital at 4 p.m. and identified the bed which was bed No. 6 where Partha was admitted but surprisingly he came to know from the Emergency Ward that Bed No. 6 was allotted to one Laxman Giri, a fake name after which Partha was admitted and Laxman Giri was none but a constable who was engaged for apprehending Suresh Barui. From the hospital he came to know that the patient had been discharged on risk bond but when he came to the police station of Barasat he was

told that his brother had not been brought to the police station. On the next day again he went to the hospital and then came to know that Laxman Giri was admitted under the care of SDPO in bed No. 6 and Kusari Babu (petitioner No. 2) herein got him admitted and the other petitioner Biman Chatterjee got him released from the hospital bed. Surprisingly, when he contacted the SDPO and asked him to show Laxman Giri to him, he found Laxman Giri present in the office of the SDPO and SDPO told him that no person Partha by name was arrested. Inspector-in-Charge told him to contact Kusari Babu, one of the petitioners. On 8.9.200 the contacted Superintendent of Police and Additional Superintendent of Police who all denied having any knowledge of Partha. Then from the hospital he came to know that Laxman Giri was a member of the police team. Habra Police Station refused to register the case. Belghoria Police Station refused to accept the FIR. Barasat Police Station pleaded their ignorance about Partha. Then followed the writ petition in the High Court, High Court's order, investigation by the Human Rights Commission and then FIR and then submission of chargesheet against the accused persons, but P.W.1 says police did not make Kusari Babu and Biman Chatterjee accused in the case in spite of having subsequent allegations against them, although their names are in the chargesheet. This is the evidence given by the victim's brother and these witnesses were extensively cross-examined by the defence. Learned Judge in the Court below recorded evidence of the five other witnesses who were all cross-examined and on the basis of the evidence transpiring against the two petitioners process was issued under Section 319 of the Cr.PC. Therefore, it cannot be said that without any evidence process has been issued against two persons.

10. Law in this respect is very clear and learned Advocates for both the parties placed extensive reliance on the decisions. The earliest case law is one in Joginder Singh and Anr. v. State of Punjab : 1979 CriLJ333 , wherein it was observed that the expression 'any person not being the accused' covers the person not being tried already by the Court and the very purpose of the provision is that person dropped by the police during investigation but against whom evidence is there against the person contemplated under Section 319 of the Cr.PC. Then came the decision in Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. : 1983 CriLJ159 , wherein Joginder Singh's case was referred to

and Their Lordships observed as follows:

In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of that the mere fact that the proceedings have been quashed against respondent led before it.

11. The decision in Sohan Lai and Ors. v. State of Rajasthan : 1990 CriLJ2302 , reiterates the same principle holding that the Trial Court can take such a step to add such persons as accused only on the basis of evidence adduced before it. If the power is judiciously exercised by the learned Trial Court it must not be interfered with, unless it be shown that such exercise of power which is really an extraordinay power and can be used very sparingly was not actuated by compelling reasons.

12. In Krishnappa v. State of Karnataka : 2004 CriLJ4185 , it was observed as follows:

It has been repeatedly held that the power to summon an accused is an extraordinary power conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

In the present case, we need not go into the question whether prima facie the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and

circumstances of the case.

13. The decision in Michael Machado and Anr. v. Central Bureau of Investigation and Anr. : 2000 CriLJ1706 , it was observed by Their Lordships of the Hon'ble Supreme Court as follows:

The basic requirements for invoking the above Section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

But even then what is conferred on the Court is only a discretion as could be discerned from the words 'the Court may proceed against such person.' The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons.

14. This decision was followed in subsequent decision of Hon'ble Supreme Court and it was observed that the pre-requisite of exercising the power is the reasonable satisfaction of the Court from the evidence collected to the effect that the person not an accused has committed an offence and that there is evidence against that person not an accused to that effect.

15. In Sashi Kanta Singh v. Tarakeshwar Singh and Anr. : 2002 CriLJ2806 , it was observed as follows:

The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the Court from the evidence that any person not being the accused has committed any offence, the Courts may proceed against him for the offence which he appears to have committed. At that stage the Court would consider that such a person could be tried together with the accused who is already before the Court facing the trial.

16. In Kishun Singh v. State of Bihar : 1993 CriLJ1700 , it was observed as follows:

On a plain reading of Sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this-sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the Court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code....

17. The same decision was reached in Rajendra Singh v. State of Uttar Pradesh and Anr. 2008(1) C Cr. LR (SC) 16. This decision referred to the aforesaid earlier decisions of the Hon'ble Supreme Court and reiterates the principle as above.

18. The decision in Guriya v. State of Bihar and Anr. 2007(4) AICLR 635 referred to all the decisions as reproduced above and again reiterates the same principle and it was held that if the Court is satisfied at any stage of the proceedings then it can add any person as accused on evidence adduced.

19. The decision in Lok Ram v. Nihal Singh and Anr. 2006(3) SCC (Cri) 532, can also be referred to here. Herein, it has been observed that the power under Section 319 of the Cr.PC can be exercised by the Court suo motu or on an application by someone including the accused already before it and such person can include a person named in the FIR but not chargesheeted.

20. Then the two decisions of the Hon'ble Supreme Court, namely, Md. Shafi v. Md. Rafiq and Anr. : 2007 CriLJ3198 and the decision in Anil Singh and Anr. v. State of Bihar and Ors. 2006 (8) Supreme 248 may also be referred to and these two decisions are banked upon by Mr. Basu for rejection of the Trial Court's order. In these two decisions, the earlier decisions as have been referred to above have been noted and there is an observation that power should be exercised after evidence and cross-examination of witnesses and on being satisfied that the person being summoned is likely to be convicted. According to Mr. Basu this requirement as have been laid down in the judicial pronouncements in these two decisions has not been complied with by the learned Judge, that is to say, while summoning the two petitioners, the learned Judge did not record that he was satisfied that evidence and cross-examination as adduced would likely to result in conviction.

21. Tuue, the learned Judge in the Court below in the order impugned which is otherwise quite a speaking order did not record that evidence adduced or transpired against the two petitioners would likely to end in conviction of them. All other requirements of the law have been complied with and they met the situation. Mr. Tapan Dutta Gupta submits that when the Trial Court issues process under Section 319 of the Cr.PC and the persons summoned appears, he has to be charged with an offence by framing charge on the basis of the evidence as transpired in evidence of the witnesses and in such a situation when the Court proceeds to frame charge against an accused or an added accused the Court has simply to record that prima facie material in or evidence are there against the accused for framing a charge and the Court cannot record that materials or evidence so available for framing a charge would likely to end in conviction. Mr. Dutta Gupta does not make any distinction between the process of framing charge against a person chargesheeted and process of framing a charge against a person

added under Section 319 of the Cr.PC, the only distinction between two being in the case of chargesheeted accused there are prima facie materials under Section 173(5) of the Cr.PC while in the case of the added person there is prima facie evidence transpired in evidence of the witnesses on oath.

22. The same was the argument of Mr. Ganguly. Now save and except these two decisions, in the earlier decision of the Hon'ble that Supreme Court, this requirement that court has to record its satisfaction that the evidence already on record would likely to end in conviction of the added person has not been expressly insisted upon. What has been insisted upon is the satisfaction of the Court that evidence is there against the added persons, so that they can be brought to trial and having gone through all the decisions of the Hon'ble Supreme Court on the subject, I do not find that the learned Judge has committed any serious default or wrong in exercising the power because as I have been found earlier, evidence is there to the satisfaction of the learned Court below to exercise the power and it cannot be said that the power was exercised capriciously or wrongly calling for interference by this Court. Reference to the report of the Human Rights Commission even if the same is excluded does not alter the situation.

23. Situated thus, I do not think that any interference with the order of the learned Judge is really called for.

24. I dismissed this revisional application and confirm the order of the learned Additional Sessions Judge, Barasat, 1st Court, North 24-Parganas.

25. A copy of the order shall be sent to the learned Trial Court immediately.

26. Urgent xerox certified copy, if applied for, shall be provided.

27. All interim orders are vacated.