

Pradeep and Others State of U.P. and Another

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Court : Allahabad

Decided On : Sep-26-2011

Reported in : 2012CrLJ1459

Judge : S.C. Agarwal

Appeal No. : Criminal Misc. Writ Petition No. 21497 of 2010

Judgement :

1. Heard Sri Y.K. Srivastava, learned counsel for the petitioners, earned AGA for the State and Sri Amit Kumar Srivastava, learned ounsel for the complainant.

2. Crime No. 715A of 2006, under Sections 147, 148, 149, 307 PC, P.S. Kotwali City, District- Etah, final report was submitted y the police. Protest petition was filed by the complainant, which as treated as complaint. The complainant was examined under Section 200 Cr.P.C. and two witnesses Sukvendra and Amit were xamined u/s 202 Cr.P.C. Learned C.J.M., Etah vide order dated 10.3.2007, summoned the petitioners to face trial under Sections 147, 148, 149, 307 IPC. Feeling aggrieved, the petitioners referred criminal revision no. 46 of 2010, which was dismissed by A.S.J., Court No. 7, Etah vide judgment and order dated 19.10.2010. Both the aforesaid orders are under challenge in this writ petition.

3. Only ground for challenge in this writ petition is that learned Magistrate has not examined all the prosecution witnesses under ection 202 Cr.P.C. as provided by Proviso to Section 202 (2) Cr.P.C.

4. In Shivjee Singh Vs. Nagendra Tiwary and others, 2010 (70) ACC 07, the Apex Court has held that ;

"The use of the word `shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word `all' appearing in proviso to Section 202(2) is qualified by the word `his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused."

5. From the aforesaid decision of the Apex Court, it is clear that the complainant is not bound to examine all his witnesses under Section 202 Cr.P.C. and only those witnesses are required to be examined whom the complainant considers material to make out prima facie case for issue of process. In the instant case, learned Magistrate has found on the basis of statement of complainant and the witnesses examined u/s 202 Cr.P.C. that there was a prima facie case for trial against the petitioner and consequently summoning order has been passed. The summoning order has been passed on the basis of material available on record. At this stage, only a prima facie case is to be seen. The summoning order as well as order passed by learned Addl. Sessions Judge dismissing the revision do not suffer from

any illegality and do not require any interference by this Court.

6. In this incident, two persons from the side of the petitioners have lost their life and there are cross-cases between the parties. The writ petition is disposed of with a direction that if the petitioners surrender before the Magistrate concerned within three weeks from today and apply for bail, their prayer for bail be considered and disposed of by the courts below expeditiously, if possible, on the same day keeping in view Full Bench decision of this Court in the case of Amrawati and another Vs. State of U.P. 2004 (57) ALR 290 as affirmed by Hon'ble Apex Court in Lal Kamendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).

For a period of three weeks, no coercive steps shall be taken against the petitioners.

7. Interim order stands vacated.

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