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Court : Allahabad

Decided On : Jun-14-2011

Judge : Shri Narayan Shukla

Appeal No. : Criminal Misc. Case No. 2221 of 2011

Appellant : Krishna Kumar BhasIn and Others

Respondent : State of U.P. and Another

Judgement :

Shri Narayan Shukla, J.

Heard Mr.Kunwar Mridul Rakesh, learned Senior Advocate assisted by Mr.Vaibhav Kalia, learned counsel for the petitioners and Mr.Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

The petitioners have challenged the order dated 28th of March, 2011, passed by the Special Chief Judicial Magistrate (Custom), Lucknow framing charges against them under Sections 420, 467,468, 120-B IPC, in complaint case No.5260 of 2010.

It is stated that the petitioner Nos.1 and 2 moved an application dated 29th of November, 1998, under Section 245(2) of the Code of Criminal Procedure, which is yet to be disposed of. Similarly the petitioner No.3 also moved an application under Section 245(2) of the Code of Criminal Procedure on 19th of January, 2008,

which was rejected by the learned Magistrate on 23rd of October, 2010 being premature as the evidence under Section 244 of the Code of Criminal Procedure was not adduced till then. Thereafter several opportunities were provided to the opposite party No.2 (complainant) for production of evidence, but he failed to avail the same. Ultimately on 6th of January, 2011 the learned Magistrate closed the opportunity of complainant for production of evidence under Section 244 of the Code of Criminal Procedure. Then he, on 21st of January, 2011 moved another application seeking one more opportunity. Considering which learned Magistrate recalled his order passed on 6th of January, 2011 and on 15th of February, 2011 recorded evidence of the complainant under Section 244 of the Code of Criminal Procedure. On 22nd of February, 2011 one of the co-accused Mr.Gopal Krishna Sinha moved an application seeking permission to cross examine the complainant, whose statement was recorded, but the learned Magistrate without providing opportunity of cross examination, fixed the date for framing of the charges on 3rd of March, 2011. Accordingly ultimately he framed charges on 28th of March, 2011. It is stated that the proceeding at the stage of Section 244 of the Code of Criminal Procedure is still incomplete, as the prosecution witness has yet to be cross examined, there was no occasion for the learned Magistrate to proceed for framing of charges against the petitioners.

Section 244 of the Code of Criminal Procedure is extracted below:-

“244.Evidence for prosecution.-(1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

As is evident from the aforesaid Section the Magistrate is under obligation to take all such evidences as may be produced in support of prosecution.

In light of the aforesaid provisions the question arises as to whether at this stage the accused has a right of cross examination of prosecution witnesses before framing of charge. In identical situation the Hon'ble Supreme Court has dealt with the controversy in the case of Ajoy Kumar Ghose versus State of Jharkhand and another, reported in (2009) 14 SCC 115, in which the Hon'ble Supreme Court held as under:-

“51. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C. The accused can show by way of the cross-examination that there is no justifiable ground against him for facing the trial and for that purpose the prosecution would have to offer some evidence. While interpreting this section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored.”

In the said case trial court straight way proceeded to frame the charge without giving opportunity to the accused to cross examine the witness. The Hon'ble Supreme Court in the light of the aforesaid observations quashed the same and remanded the matter to the trial court to give opportunity to the accused to cross examine the prosecution witness before framing of charges.

Further the Hon'ble Supreme Court in its recent judgment rendered in the case of Harinarayan G.Bajaj versus State of Maharashtra and others, reported in 2010 (70) ACC 955 by referring the aforesaid judgment has held that there would be a complete denial of the accused of an important right of cross examination of the witnesses before framing of charge. It would only then mean that such accused would remain a mute expectator till the framing of charge.

The facts of the present case are very much clear which establish that the learned Magistrate has framed charges without providing opportunity to the petitioners to cross examine the prosecution witnesses, therefore, in light of the aforesaid judgments of the Hon'ble Supreme Court, I am of the view that the order impugned dated 28th of March, 2011, passed in Case No.5260 of 2010, for framing of charges suffers from error and the same is hereby quashed with the direction to

the court below to permit the petitioners to cross examine the prosecution witnesses and only then he shall proceed with the case in accordance with law.

In the aforesaid terms the petition is allowed.

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