

AFR

Neutral Citation No. - 2024:AHC:28426

Reserved on 06.02.2024

Delivered on 20.02.2024

Court No. - 82

Case :- CRIMINAL MISC. WRIT PETITION No. - 20280 of 2013

Petitioner :- Amit Kumar

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Ali Hasan, Hariom Tiwari

Counsel for Respondent :- Govt. Advocate, Ashok Singh, B.N. Singh

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri Ishtiyak Ahmad, learned Advocate holding brief for Sri Ali Hasan, learned counsel for the petitioner and Sri S.C. Mishra, learned AGA for the State.

2. This writ petition has been filed by the petitioner-Amit Kumar with a prayer to issue a writ, order or direction in the nature of certiorari for quashing the judgment and order dated 21.09.2013 passed by learned Sessions Judge, Jalaun at Orai in Criminal Revision No. 147 of 2013 (Amit Kumar Vs State of U.P. and Another) by which the learned Judge has rejected the revision of the petitioner, which was preferred against the order dated 24.05.2013, passed by learned Chief Judicial Magistrate, Orai in Criminal Case No. 1277 of 2013 (Shatrughan Singh Vs. Ajay Kumar and Others) under Sections 307, 504, 506 IPC, Police Station Kotwali Orai, District Jalaun.

3. Relevant facts are as below:-

- *An FIR case crime no. 1005 of 2002 under sections 307, 504 and 506 IPC, naming three persons including the petitioner-Amit Kumar was lodged by Shatrughan Singh, alleging that three persons lay in wait and attacked his brother Satyabhan Singh when he went to attend call of the nature at about 3:15 am on 28.11.2001; all the three were holding firearms, one of them Ajai Kumar Sharma fired at him which hit on his right side below the shoulder; seriously injured he fell down; on his cries, the first informant and other members of his family*

reached the spot to save him but the accused persons escaped, extending threats to his life.

- *After the investigation, the investigating officer submitted a final report with the opinion that the incident was doubtful and that the accused persons were falsely named.*
- *The first informant moved a protest petition which was treated as complaint; the informant/the complainant was examined under section 200 Cr.P.C.; certain witnesses namely, the injured-Satyabhan as PW-1, Ranbir Singh as PW-2 and Mohit as PW-3, were examined under section 202 Cr.P.C.*
- *The C.J.M. thereafter proceeded to summon Amit Kumar and Arvind Kumar Sharma for offence under Sections 307, 504, 506 IPC by an order dated 24.05.2013.*
- *The accused preferred Criminal Revision No. 147 of 2013, which was decided by the Session Judge, Jalaun at Orai by an order dated 21.09.2013, whereby the order passed by the Court of C.J.M. was affirmed and revision rejected.*
- *Now one of the accused Amit Kumar is before this Court, invoking writ jurisdiction under Article 226 of the Constitution and has challenged both the aforesaid orders.*

4. Very first objection from the opposite side is that the petitioner has filed Misc. Writ Petition under Article 226 of the Constitution, instead he should have filed Misc. Writ Petition under Article 227 of the Constitution. On the above issue, I prefer to place reliance on the judgment of the Supreme Court in ***Radhey Shyam and another vs. Chhabi Nath and others, (2015) 5 SCC 423.*** In the above noted case, the Supreme Court has clearly laid down that order of judicial court could be challenged under Article 227 of the Constitution of India and not under original writ jurisdiction under Article 226 of the Constitution of India. In my opinion, there is no legal hindrance in converting the petition under Article 226 to one under Article 227 of the Constitution. I, therefore, treat this petition as one under Article 227 of the Constitution. ***The registry shall assign appropriate number accordingly.***

5. The contention of the petitioner is that at the time of the incident, he was on duty and therefore the investigating officer submitted a final report on 17.01.2002; the allegation in the FIR

is that at about 3:15 am on 28.11.2001, three persons attacked the injured and only one of them i.e., Ajai Kumar Sharma (who is not the petitioner in the instant petition) actually fired on Satyabhan; Admittedly, Satyabhan sustained a single firearm injury, through and through over his right arm. The forceful contention of the petitioner is that his name has been dragged in the FIR falsely and that no case against him is made out in view of the facts that there was a single injury and the role of fire has been assigned to one Ajai Kumar Sharma only but said Ajai Kumar Sharma, who was named (and was assigned main role) was never summoned and the only other co-accused Arvind Kumar Sharma has died. Further submission is that in fact it is the first informant-Satrughan Singh @ Pappu Singh, who had murdered Arvind Kumar Sharma. And FIR case crime no. 641 of 2006 under sections 364 and 302 IPC has been registered against the first informant; he has also been chargesheeted. Argument is that the learned C.J.M. did not consider the evidence on record and passed an arbitrary order, which is not sustainable in the eyes of law. The learned Court of revision too, did not notice the relevant facts and circumstances and agreed with the view taken by the C.J.M., in a most mechanical way and declined to interfere, hence the petitioner has no remedy except to invoke powers under Article 226/227 of the Constitution.

6. Admittedly, the protest petition has been treated as a complaint. In the protest petition, the first informant named Ranbir Singh and Mohit Singh as the witnesses, who came on the spot and identified the accused persons. It is also alleged in the protest petition that the co-accused-Ajai Kumar Sharma did not pay the price of the articles transferred on his assurance, therefore there has been a dispute between him and the injured on this issue. The Court while treating the protest as complaint, called upon the complainant to produce his witness under section 202 Cr.P.C. The witnesses of fact i.e., PW1-Satyabhan (the

injured), PW2-Ranbir Singh (the alleged eye-witness) and PW3-Mohit Singh (another eye-witness), were examined. The learned trial court took a view that at the stage of summoning only, a prima facie case has to be established and that there is no need to examine rest of the witnesses. And passed summoning order against Arvind Kumar and instant petitioner under sections 307, 504, 506 IPC.

7. In this session triable case only three witnesses of fact have been examined at the stage of inquiry before summoning. Admittedly, the doctor who examined the injured has not been summoned and examined under section 202 Cr.P.C. It is relevant to reproduce Section 202(2) Cr.P.C. here which is as below:-

“(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath : Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.”

Section 202(2) Cr.P.C. enjoins the Magistrate to call upon the complainant to produce all of his witnesses and examine them on oath. It appears that the Magistrate did not find necessary to call upon the complainant to examine all his witnesses on a premise that for establishing a prima facie case, there is no need to examine all the witnesses.

8. A moot question is what is a prima facie case and when it can be said to have been made out before a Magistrate proceeds to summon an accused.

9. This Court in its judgment in ***Criminal Appeal No. 9188 of 2022 (Dr. Divya Nand Yadav and Another vs. State of U.P. and Another) decided on 20.04.2023*** observed in para no. 10 as below:-

“10. There cannot be two opinions on the settled legal position that the Magistrate has to decide whether prima facie any case is made out or not, before proceeding to summon the accused persons. The meaning of prima facie case must be understood in the right perspective. There may be cases where the Magistrate finds that in literal sense of

the words occurring in the statements the ingredients of an offence are there but he feels not so satisfied with them. The Hon'ble Supreme Court in para-11 of the judgment passed in Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44, observed as below:-

"At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to "prima facie satisfy" whether there are "sufficient grounds to proceed" against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations made in the complaint."

The Supreme Court has used the phrase arriving at "prima facie satisfaction" whether there are "sufficient grounds to proceed"! Section 204 Cr.P.C. nowhere said that the Magistrate shall take cognizance and summon the accused if prima facie case is made out, instead Section 204 Cr.P.C. says that the Magistrate may take cognizance if there is sufficient ground for proceeding, hence in my view the prima facie case must be construed to mean "prima facie satisfaction" arrived at by the Magistrate. In other words the Magistrate shall proceed only if he finds that there is sufficient ground for the same. This is not to say that the proposed accused shall have any right to be heard at that stage or that any evidence in defence can be considered. It merely means that the Magistrate shall assess all the material before it and apply its mind to find out whether time has come to proceed and take cognizance. In that view of the matter the Supreme Court in the case as aforesaid has instead of using the word "prima facie case" has found fit to use the phrase "prima facie satisfaction" and of course this satisfaction has to be arrived at while acting within the four corners of law i.e., by adopting the procedure as provided under Sections 200 and 202 Cr.P.C. In my view, the Magistrate is not powerless to examine the truth or falsehood of the case made in the complaint. And to fully utilize this power the Magistrate has to play its role of examining himself the complaint and his witnesses under Sections 200 Cr.P.C., and if required to further inquire into by calling more witnesses and examining them or even by ordering investigation. The steering wheel of the inquiry cannot be left at the hands of the complainant. For the reason that at that stage, the accused has no say in the matter and the court has no opportunity to hear the other side, therefore he ought to remain very cautious, circumspect and alert. The broad probabilities or improbabilities of the story of course may be seen at this stage.

The Court further observed in para no. 14 as below:-

"14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other

obstacles before the court below for arriving at the "prima facie satisfaction" a word which can be equated with the word "prima facie case".

10. The purpose of holding inquiry as envisaged under section 202 Cr.P.C. is to look for sufficient ground to proceed. The words "*prima facie satisfaction*" stands in equilibrium with "*sufficient ground to proceed*" and the terms are broadly interchangeable, as far as summoning of the accused persons is concerned.

11. While considering the provisions of law under section 202(2) Cr.P.C., this Court in *Smt. Gudiya vs. State Of U.P. And 5 Others 2023:AHC:238320*, held that ordinarily in a case exclusively triable by the Sessions Court, the complainant has to produce all the witnesses. In case he is unable to produce any of the witnesses on the premise that such witnesses are not under his command or are not his witnesses even then the Magistrate who is conducting the inquiry, may summon those witnesses for the purpose of recording his "*prima facie satisfaction*" with regard to summoning of the accused.

The Court in *Smt. Gudiya case (supra)* observed in para nos. 11 and 12 as below:-

"11. A question may arise that in case the complainant for some reason, whether justifiable or not so justifiable, either cannot produce its witness or deliberately withholds any of them, then what course is available to the Magistrate, who is conducting an 'inquiry'. Can he be left at the mercy of the complainant? There may be instances where a Magistrate may find that something more is required before he can record his 'prima facie satisfaction' with regard to summoning of the accused.

12. Moreover, a situation may arise where in a genuine case put before the court, the complainant is helpless in producing even 'his witness' for some extraneous reason. In such a situation definitely he has an option to apply to the court for summoning those witnesses, which he cannot produce himself."

12. The powers of the inquiry court are not fettered in any manner and it may call the witnesses, if in its view their evidence may prove useful for just decision in the matter for the purpose of summoning the accused persons.

13. In the instant matter, the learned trial court as well as the court of revision, ignored the important provisions of law under section 202(2) Cr.P.C. The approach of the Courts was casual and cavalier. Even the doctor who had examined the injured was not summoned. His examination was, quite important to draw an inference whether prima facie an offence under section 307 IPC is made out against the accused persons. Any summoning order passed ignoring the mandatory provisions of law is vulnerable and is liable to be set-aside.

14. In view of the above, the petition is *allowed*. The impugned orders are *set-aside*. The matter is remanded back to the trial court concerned for passing a fresh order in accordance with law.

Order Date :- 20.2.2024

#Vikram/-