A.F.R.

Neutral Citation No. - 2024:AHC-LKO:4717

Court No. - 34
Case :- CRIMINAL REVISION No. - 794 of 2018
Revisionist :- Anupam Singh
Opposite Party :- State Of U.P. Thru. Prin.Secy. Home And Anr.
Counsel for Revisionist :- Nadeem Murtaza
Counsel for Opposite Party :- Govt. Advocate,Kailash Chandra,Mayank Pandey

Hon'ble Mrs. Jyotsna Sharma,J.

1. Heard Sri Nadeem Murtaza, learned counsel for the revisionist and Ms. Charu Singh, learned AGA for the State.

2. This revision has been filed by the revisionist challenging the order dated 03.08.2018 passed by the Additional District and Sessions Judge, F.T.C.-II, Ambedkar Nagar in Session Trial No. 102 of 2012 (State vs. Anupam Singh) arising out of case crime no. 475 of 2011 under section 302 IPC, whereby the permission to examine 5 defence witnesses, was refused.

3. Relevant facts are as below:-

The revisionist accused is facing trial in S.T. No. 102 of 2012 under section 302 IPC. During the trial an application on his behalf dated 02.06.2018 was moved with the submissions in brief that the inquest was done in presence of 5 public witnesses and they have been named as prosecution witnesses. The aforesaid 5 prosecution witnesses have not been produced by the prosecution, therefore at least one of them may be summoned and examined as court witness. The aforesaid application was rejected by order dated 27.06.2018 by the trial court. After recording all the statements under section 313 Cr.P.C., the accused moved another application with a request that the witnesses namely, Surendra Pratap Singh, Balram Nishad, Ramdhari Yadav, Ram Siromani Upadhyaya and Ram Suresh Nishad may be summoned as defence witnesses. This application to produce them as defence witness was objected to by the prosecution, submitting that all of them were in fact witness of the inquest report and that they have switched side and have come in collusion with defence and further that the previous application moved by the defence for summoning them, has already been rejected, therefore this application may not be allowed. The learned trial court heard both the sides and rejected this application by order dated 03.08.2018. Now this order dated 03.08.2018 is under challenge by the defence.

4. Most vehement and brief contention of the defence is that the first application was moved under section 311 Cr.P.C. and the second one though moved for production of the same witnesses but the prayer has been made under the provisions of section 233 Cr.P.C. There cannot be comparison between the two and that the accused has indefeasible right to produce witness in his defence. Further contention is that if the summons are not issued to call those persons as defence witnesses, the accused shall be highly prejudiced in his defence and his valuable right as regard fair trial shall stand defeated. The revisionist relies on a judgment of the

Supreme Court in ***State of M.P. vs. Badri Yadav and Another; (2006) 9 SCC 549***.

5. Section 311 Cr.P.C. is as below:-

"311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

Under the provisions of section 311 Cr.P.C., the court has a plenary power to summon any person at any stage of the proceedings as a witness. This power includes recall and re-examination of any person who has already been examined. This power is to be exercised when the court finds it necessary to summon/recall any witness for **just decision of the case**. The law puts no fetters on the powers of the courts to call for any witness to attain the highest goal of justice. In my opinion this provision of law gives expression to the inherent power of the courts which is available to them by virtue of being the supreme authority who has been entrusted with responsibility to do justice. The power lies with the Court alone as juxtaposed to rights or powers of parties. The others stake holders whether prosecution or defence, have a limited role of drawing the attention of the court and putting the relevant material before it which may assist it in arriving at a correct inference. On the other hand, section 233 Cr.P.C. works in a different plane altogether. For better understanding of difference between the two sections, I find it appropriate to reproduce section 233 Cr.P.C. as below:-

"233. Entering upon defence. (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

Section 233 Cr.P.C. finds place under Chapter XVIII titled as 'trial before a court of session'. This provision is essential part of session trial and is applicable when the prosecution evidence is complete and the accused is given an opportunity to produce the evidence in its defence. Undoubtedly this right has been given to the defence to produce its witnesses as part of fair trial and as part of legal principle of hearing both the sides. In my opinion, here the right belongs to the accused and not to the court concerned, in the sense that the court concerned shall ordinarily issue process and can decline to summon the witness only for the reason that the request is made for the purpose of vexation or delay or for defeating the ends of justice. The difference between the powers of the court and the right of the accused is too obvious. Under section 311 Cr.P.C., the power lies in the courts only and under section 233 Cr.P.C., the right lies with the accused and the court's interference is limited. The court can only refuse to issue summons where it ought to have refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice only.

6. In my view, if the application is refused on the grounds which are not covered by three excluding clauses, as provided in latter part of section

233(3) Cr.P.C. such approach shall be alien as far as scope of section 233 Cr.P.C. is concerned. This fact is undisputed that the witnesses who are sought to be summoned by the defence under section 233(3) Cr.P.C. were not examined as prosecution witnesses, at any stage. In fact, though they were witnesses of inquest but never produced by the prosecution.

7. The Allahabad High Court in ***Application U/S 482 No. 28214 of 2019 (Ram Charitra Singh vs. State of U.P. and Another)*** dated 30.07.2019, while considering the right of the accused to produce witnesses observed that there is no law or any precedent which prohibited the prosecution witnesses cited in the chargesheet and discharged during the trial for any reason whatsoever, cannot be examined as defence witnesses.

In ***Kalyani Baskar vs. M.S. Sampoornam; (2007) 2 SCC 258***, the Supreme Court while elaborating the meaning of fair trial observed as below:-

"Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

8. I went through the impugned orders. The observation of the learned trial court that summoning the witnesses will tantamount to review is misconceived. The trial court failed to apply the law in right perspective and ignored the difference in scope and implications in which the provisions of section 311 Cr.P.C. and section 233(3) Cr.P.C. are meant to be applied. Hence the order of the trial court suffers from legal flaw and is not sustainable.

9. It is further submitted by the revisionist that though he applied to the court for summoning all the 5 witnesses but it will suffice if any 2 of them are summoned for examination as defence witnesses.

10. In view of the above submission, the revisionist is given liberty to point out to the court concerned which of the 2 witnesses (out of total 5 witnesses), he seeks to produce in this defence.

11. Taking all the facts and circumstances in consideration, this revision is ***disposed of*** as below:-

*(i) The order dated 03.08.2018 is **set-aside**;*

(ii) The revisionist shall, by moving an application, within a week of production of certified copy of this order, give name of 2 persons (out of 5 named)he seeks to summon as defence witness;

(iii) The trial court shall issue summons for their production as defence witnesses.

12. This case pertains to an incident, which occurred in 2012, therefore the court concerned is directed to expedite the matter and would not let any side to deliberately delay the proceedings.

Order Date :- 17.1.2024
Vikram