

A.F.R.
Reserved on : 02.03.2022
Delivered on : 16.03.2022

Court No. - 92

Case :- APPLICATION U/S 482 No. - 3716 of 2022

Applicant :- Bablu @ Vishnu Dhar Dubey

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Mohd. Rashid Siddiqui, Abhinav Gaur, Ankit Shukla

Counsel for Opposite Party :- G.A., Irfanul Huda

Hon'ble Brij Raj Singh, J.

1. Heard Mr. Anoop Trivedi, learned Senior Advocate assisted by Ms. Ballabhi Shukla, learned counsel for the applicant, Mr. O.P. Singh, learned Senior Advocate assisted by Mr. Irfanul Huda, learned counsel for the opposite party No.2 as well as Mr. Aniruddha Sharma, learned A.G.A. for the State opposite party and perused the record.

2. The present 482 Cr.P.C. application has been filed with a prayer to quash the order dated 21.12.2021 passed by Additional District and Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.01, District Gorakhpur, passed in Sessions Trial No.19 of 2015 (State Vs. Govind Yadav & others) arising out of Case Crime No.463 of 2014, under Sections 147, 148, 149, 302, 386, 396 & 504 I.P.C., Police Station Khorabar, District Gorakhpur, pending in the court of Additional Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.01, District Gorakhpur, with a further prayer to stay the further proceedings of the aforesaid case.

3. Brief facts of the case are that the brother of first informant, namely, Raju Yadav was allegedly shot by accused persons, namely, Govind Yadav, Suresh Yadav, Bablu Dubey on 08.08.2014. F.I.R. was lodged on 08.08.2014 in Case Crime No.463 of 2014, under Sections 147, 148, 149, 307, 302, 386, 396 and 504 I.P.C., Police Station Khorabar, Distirct Gorakhpur.

4. Charge sheet was filed against the accused and cognizance was taken. D.G.C. (Criminal), Gorakhpur moved an application under Section 319 Cr.P.C. to summon the applicant as accused, which was allowed on 18.07.2016 by District and Sessions Judge, Gorakhpur. The applicant filed an application under Section 319 (4) (a) Cr.P.C. before the court below on 28.01.2021 which was rejected on 12.02.2021.

5. Being aggrieved against the order dated 12.01.2021, the applicant filed Application U/S 482 No.6670 of 2021 before this Court and the same was allowed on 16.03.2021. This Court directed that opportunity to the accused-applicant will be given for recording the statement of examination-in-chief of P.W.-1 in his presence and further it was observed that full opportunity to cross examine the witness will also be provided.

6. The examination-in-chief of P.W.-1 was recorded afresh before the court below and applicant was allowed to cross-examine P.W.-1 afresh. The applicant preferred two applications bearing Paper No.142 Kha and 143 Kha under Section 311 Cr.P.C. on 02.12.2021 to recall of prosecution witness no.6, namely, Jitendra Pal Singh – the Investigating Officer (I.O.) and prosecution witness no.3 - Dr. Awadhesh, who conducted the post-mortem. The court below rejected the aforesaid applications on 21.12.2021. Being aggrieved against the said order, the applicant has filed the present Application U/S 482 Cr.P.C.

7. The trial court has rejected the application solely on the ground that the trial has been concluded and statement under Section 313 Cr.P.C. has been recorded and the case is going on at final stage. It is further observed that the applicant has not stated what are the questions to be asked in cross-examination and thus rejected the application on 21.12.2021.

8. Mr. Anoop Trivedi, learned Senior counsel has submitted that after examination-in-chief the accused has right under Section 319 (4) (a) Cr.P.C. to cross-examine the witnesses and the proceedings of the trial as afresh. He has further submitted that once examination-in-chief has taken place, the trial is *de*

novvo in respect of the accused applicant and he has all rights open to recall the witnesses. The question in the form of cross examination cannot be disclosed because the accused wants to confront the I.O. and Doctor in the light of the statement made in examination-in-chief. The accused will not open as to what are the questions to be put before the P.W.-1. The trial is *de novo*, therefore, after going through the statement of P.W.-1 he feels in the interest of justice to confront the I.O. and the Doctor. He has also submitted that the fair trial is required under Section 319 (4) (a) Cr.P.C. and it is open for the accused-applicant to confront the witnesses in the light of the statement of examination made by P.W.-1. In case, he is not allowed cross-examination with I.O. and Doctor, it will be denial of fair trial as enshrined Article 21 of the Constitution of India.

9. Pet contra, Sri O.P. Singh, learned Senior Advocate appearing on behalf of opposite party no.2, has submitted that the applicant has not disclosed the material as to why he should be allowed to examine I.O. and Doctor. He has further submitted that statement under Section 313 Cr.P.C. has been recorded and the case is going on in the final hearing, it is not the occasion to allow the application under Section 311 Cr.P.C. and the court below has rightly rejected the applications. He has further submitted that the cross-examination of Doctor as well as I.O. had already taken place during the first statement of examination-in-chief of P.W.-1.

10. Sri Anoop Trivedi, learned Senior Advocate has relied several judgments:-

- (i) **Tahir & another Vs. State of U.P. 2000 (1) JIC 588 (All)**
- (ii) **Shashikant Singh Vs. Tarkeshwar Singh and others reported in (2002) 5 SCC 738.**
- (iii) **Nayeem Vs. State of U.P. reported in 2002 (2) JIC 389 (All)**
- (iv) **Jokhan Patel Vs. State of U.P. reported in 2001 (2) JIC 459 (All)**

(v) **Dharmveer Singh & others Vs. State of U.P. & others** reported in 2011 (2) JIC 496 (All)

11. Relevant paragraph no.10 of the judgment passed in the case of **Shashikant Singh** (*supra*) is quoted below:-

“10. 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 court 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. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatory to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court.”

12. Sri O.P. Singh, learned Senior Advocate has relied upon the judgment and order passed in the case of **Chand Patrakar and another Vs. State of U.P. and another** decided on 06.12.2021 in **Criminal Revision No.3280 of 2021**. Relevant paragraph nos.28 and 30 of the aforesaid judgment are quoted below:-

“28. This Court finds that the aforesaid grounds so taken in the application under Section 311 of the Cr.P.C. or not only vague but they do not disclose any of the conditions which are necessary for recalling the witness. Merely on asking the application under

Section 311 of the Cr.P.C. cannot be allowed as there has to be sufficient reasons behind it.

30. The application so preferred by the revisionist also does not give any specific details as to what are the questions which are to be raised in the cross-examination of PW-1 as only bald and vague assertion has been made that certain questions relating to the occurrence of the incident were left to be asked. In the absence of any pleadings set-forth by the revisionist before the court below seeking re-examination / recall of the witness as well as canvassing of any argument to show that the order under challenge is illegal, perverse and palpably unjust, this Court cannot interfere.”

13. The judgments cited by Sri O.P. Singh, learned counsel for opposite party no.2 have got different footings because the present case is arising out of *de novo* trial under Section 319(4)(a) Cr.P.C. The trial in respect of present accused-applicant is fresh and he has right to confront the Doctor and I.O. in pursuance of his application. All of the aforesaid cases cited by learned counsel for opposite party indicate that application for cross-examination has been allowed under Section 311 Cr.P.C. in pursuance of regular trial, whereas, in the present case under Section 319(1) Cr.P.C. *de novo* trial is going on in respect of accused-applicant; thus, once the trial is fresh, the accused-applicant has legal right to confront any of the witness who has to be examined by him.

14. The provision under Section 319 (1) Cr.P.C. is enabling provision by which the trial court has power to summon the accused on the basis of the evidence relating to commission of offence. The accused has been saved in a way that the proceedings under Section 319 (4) (a) Cr.P.C. right from the beginning is mandatory to be commenced afresh and the witnesses are to be reheard. It is thus clear that the trial has to be a *de novo* trial against the accused. The provision of *de novo* trial is mandatory for the accused summoned under Section 319 Cr.P.C. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross examination of such a person rather they have to be examined afresh. The words ‘could be tried together with the accused’ in Section 319(1), appear to be only directory. ‘Could be’ cannot under these circumstances be held to be ‘must be’. The provision cannot be interpreted to mean that since the

trial in respect of a person who was before the court below has concluded with the result that the newly added person cannot be tried together with the accused who was before the court below when order under Section 319(1) was passed. The earlier proceeding will become ineffective and inoperative because the accused brought under Section 319(1) Cr.P.C. has to be given fair trial in view of Section 319 (4) (a) Cr.P.C.

15. Since, the trial is *de novo* in respect of applicant accused, he cannot be denied the right to cross examine two witnesses. This finding of the court below is not sustainable in the eyes of law, wherein, it has been observed that the applicant has not disclosed the material for cross-examination. The accused has right to confront the witnesses. The question of cross-examination is *sanctum sanctorum* for accused which will not be opened by him in the application. The accused will put the question on the basis of examination-in-chief of P.W.-1 at the time of cross-examination but the court below has taken contrary view.

16. In view of the aforesaid factual and legal aspect of the matter the order dated 21.12.2021 passed by Additional District and Sessions Judge/Special Judge (Prevention of Corruption Act), Court No.1, District Gorakhpur, in the aforesaid case Sessions Trial No.19 of 2015 (State Vs. Govind Yadav & others) arising out of Case Crime No.463 of 2014, under Sections 147, 148, 149, 302, 386, 396 & 504 I.P.C., Police Station Khorabar, District Gorakhpur, is set aside and the matter is remitted to the court below to take fresh decision in pursuance of both applications bearing Paper No.142 Kha and 143 Kha, under Section 311 Cr.P.C. in the light of the observations made above, within a period of three weeks from the date of production of certified copy of this order.

17. The application stands **allowed**.

18. It is further observed that in the peculiar facts and circumstances of the case, the trial is pending since more than seven years, it is necessary to issue direction to expedite the trial, therefore, I direct the court below to complete

the trial within a period of eight months from today. In case, day to day hearing is required, the dates will be fixed accordingly and no unnecessary adjournment will be granted to either of the parties.

Order Date :- 16.3.2022

Atul