

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 25.08.2022
Pronounced on:02.09.2022

CRMC No.236/2015

M/S JK STATIONERS

... PETITIONER(S)

Through: - Mr. Z. A. Shah, Sr. Advocate, with
Ms. Humaira Shafi, Advocate.

Vs.

STATE OF J&K & ORS.

...RESPONDENT(S)

Through: - Ms. Asifa Padroo, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 01.09.2015 passed by learned Special Judge, Anticorruption, Srinagar, whereby the petitioner has been arraigned as an accused in a charge sheet filed by respondent No.1 against respondents No.2 to 4 alleging commission of offences under Section 5(1)(d) read with Section 5(2) of the J&K Prevention of Corruption Act (hereinafter referred to as the J&K PC Act) and Sections 120-B, 201 and 204 RPC.

2) As per the allegations made in the charge sheet, accused/respondents No.2 to 4, in furtherance of a conspiracy, placed supply orders for purchase of agricultural equipments and hybrid seeds on highly exorbitant rates. It was alleged that supply orders for 650

irrigation pump sets were placed with M/S Honda Siel, New Delhi and M/S A. V. Agri-Tech, New Delhi, in the month of February, 2006, on the rate contract that had already expired and the above named accused resorted to manipulation of records thereby predating the supply orders. After investigation of the case, on the basis of oral and documentary evidence prima facie it was established that respondents No.2 to 4, the public servants, have committed offences punishable under Section 5(1)(2) read with 5(2) of J&K PC Act and Sections 120-B, 201 and 204 RPC. Accordingly, the charge sheet was laid before the learned Special Court.

3) On 27.10.2009, learned Special Judge took cognizance of the offences and the copies of charge sheet were furnished to the accused named in the challan whereafter the matter was put up for arguments on the question of charge/discharge. On 01.09.2015, arguments on the question of charge/discharge were heard by the learned Special Judge and while observing that the material on record prima facie establishes that the offences punishable under Section 5(1)(2) read with 5(2) of J&K PC Act and Sections 120-B, 201 and 204 RPC have been committed by the accused named in the charge sheet, it was further observed that the material on record establishes complicity of the supplier i.e. proprietor of M/S J&K Stationers, Srinagar, in the commission of aforesaid offences as, according to the learned Special Judge, the aforesaid supplier i.e. the petitioner herein, was a beneficiary of the conspiracy. On the basis of these observations, the learned

Special Judge exercised his powers under Section 351 of the J&K Cr. P. C, which corresponds to Section 319 of the Central Cr. P. C, and arraigned the petitioner herein as an accused in the case. It is this order which is under challenge before this Court by way of the instant petition.

4) The petitioner has challenged the impugned order on the ground that the reason for arraying him as an accused is patently absurd. It has been submitted that the supply order was not placed with the petitioner but it was placed directly with M/S Honda Siel Power Products Ltd. which has its registered office at Greater Noida, UP, and the petitioner is only a dealer of the aforesaid company. It has been further contended that the reliance placed by the learned Special Judge while passing the impugned order on the ratio laid down by the Supreme Court in the case of **Hardeep Singh and others vs. State of Punjab**, (2014) 3 SCC 92, is misplaced as the learned Special Judge has exercised his powers under Section 351 of the J&K Cr. P. C at a stage when evidence was yet to be recorded. It has been submitted that the learned Special Judge had no jurisdiction to array the petitioner as an accused on the basis of material collected by the investigating agency.

5) Respondent No.1 has contested the petition by filing its reply thereto. In its reply, respondent No.1 has reiterated the facts alleged in the charge sheet and has supported the impugned order passed by the learned Special Judge.

6) I have heard learned counsel for the parties and perused the material on record.

7) The question of law which is required to be determined in this case is as to at which stage of the proceedings a person, who is not named as an accused in the charge sheet, can be impleaded as an accused by taking resort to the provisions contained in Section 351/319 of the Cr. P. C. Another question which is required to be answered is as regards the nature of the material on the basis of which an additional accused can be impleaded in a charge sheet while exercising powers under Section 351/319 of the Cr. P. C.

8) Before considering the legal position laid down by the Supreme Court on these questions in the case of **Hardeep Singh** (supra), it would be apt to notice the provisions contained in Section 351 of the J&K Cr. P. C as also the provisions contained in Section 319 of the Central Cr. P. C, which read as under:

351. Detention of offenders attending Court.—(1) Any person attending a criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place 3 [xxx] after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard.

319. Power to proceed against other persons appearing to be guilty of offence.—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the

accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under subsection (1), then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

9) A bare perusal of the provisions contained in Section 351 of the J&K Cr. P. C, which is applicable to the instant case, reveals that following three conditions must be satisfied before Section 351 is applied to a case:

- i. the person sought to be proceeded against must be attending the court;*
- ii. the court must be competent to take cognizance of the offence for which he is to be tried;*
- iii. there must be evidence before the court that the person is prima facie guilty of the said offence;*

10) Now coming to the provisions contained in Section 319 of the Central Cr. P. C. This provision enables a court to take appropriate steps for proceeding against any person not being an accused, if it appears to the court in the course of any inquiry or trial of an offence from the evidence that such person has committed any offence for

which he can be tried together with the accused, the court has discretion to proceed against such person for the offences which appear to have been committed by him.

11) While the provisions contained in Section 319 of the Cr. P. C make it clear that the power to array an additional accused can be exercised both during the course of inquiry as well as during the course of trial, Section 351 of the J&K Cr. P. C does not make it clear as to at which stage the power to array an additional accused can be exercised. However, in both these Sections, one thing is common that power to array additional accused has to be exercised on the basis of the evidence.

12) The question as to what constitutes 'evidence' within the meaning of Section 319 of the Cr. P. C came up for consideration before the Supreme Court in the case of **Hardeep Singh** (supra). In the said case, Constitution Bench of the Supreme Court framed as many as five question. Question No.(iii), which relates to interpretation of the word "evidence" is reproduced as under:

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

13) The Supreme Court has, after noticing its earlier judgements on the issue, observed as under:

76. *Ordinarily, it is only after the charges are framed that the stage of recording of evidence is*

reached. A bare perusal of Section 227 CrPC would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word "evidence" as appearing in Section 319 CrPC has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 CrPC, the use of word "evidence" means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 CrPC.

77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench [Ramnarayan Mor v. State of Maharashtra, AIR 1964 SC 949 : (1964) 2 Cri LJ 44] , that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is

the duty of the court to do so and therefore the power to perform this duty is provided under CrPC.

80. *The unveiling of facts other than the material collected during investigation before the Magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the Magistrate or court for the purpose of Section 319 CrPC?*

81. *An inquiry can be conducted by the Magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the Magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 CrPC it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.*

82. *This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been*

submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. *It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence" as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.*

84. *The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.*

85. *In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be*

utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. The "evidence" is thus, limited to the evidence recorded during trial.

14) The ratio laid down by the Supreme Court in **Hardeep Singh's** case has been explained by the said Court in the case **Manjeet Singh vs. State of Haryana and Ors.** (2021) SCC Online SC 632. The Supreme Court after noticing its subsequent judgements on the issue, summarized the scope and ambit of the powers of the Court under Section 319 of the Cr. P. C in the following manner:

(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not have to wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

15) From the foregoing analysis of law made by the Supreme Court, it is clear that it is only the material collected by the court during the course of inquiry or trial and not the material collected by the investigating agency during the investigation of the case which can be used, while arraigning an additional accused. The Supreme Court has made it clear that the word “evidence” appearing in Section 319 of the Cr. P. C means only such evidence as is made before the court in relation to statements and in relation to the documents which can be used by the court for unveiling all facts, other than the material collected during investigation. Of course, the evidence would also include the evidence led during the trial of the case after framing of charges. The Supreme Court has, while answering the aforequoted question framed by it, laid down that besides the evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 of the Cr. P. C.

16) Coming to the facts of the instant case, a perusal of the trial court record reveals that during the inquiry i.e., after taking of cognizance of the offences on 27.10.2009 up till the framing of the charges i.e., 01.09.2015, the learned Special Judge has not collected any material that could be termed as “evidence” within the meaning of Section 351

of the J&K Cr. P. C or Section 319 of the Central Cr.P.C. The learned Special Judge has framed his opinion that the petitioner is also involved in the commission of the alleged offences on the basis of the material collected by the investigating agency during the investigation of the case, which he had considered at the time of taking of cognizance of the offences. The same, in view of the ratio laid down by the Supreme Court in **Hardeep Singh's** case (supra), is impermissible in law.

17) There can be no doubt to the proposition of law that a Magistrate at the time of taking cognizance of the offences or even a Sessions Judge at the time of taking cognizance of the offences upon committal of a case before him, is empowered to implead even those persons who have not been sent up for trial in the charge sheet, if it appears to the Magistrate/Sessions Judge that the material collected by the investigating agency during investigation of the case shows involvement of said person(s) in the offence but in no case a Sessions Judge or a Magistrate can implead an additional accused post cognizance stage of offences without there being evidence on record to show involvement of such person in the alleged offences. The evidence, as already discussed, has to be in the shape of material collected by the court during inquiry or trial and not the material produced by the investigating agency with the charge sheet.

18) As already noted, in the instant case, the learned Special Judge has not collected any additional material during the inquiry proceedings and he has arraigned the petitioner as an accused on the basis of the

material submitted along with the charge sheet. The same, in view of the foregoing discussion, is not in accordance with law. It appears that the learned Special Judge has, while passing the impugned order, not properly appreciated the ratio laid down by the Supreme Court in **Hardeep Singh's** case (supra).

19) For the foregoing reasons, the impugned order, so far it relates to the petitioner, is not sustainable and, as such, the same deserves to be quashed.

20) Accordingly, the petition is allowed and the impugned order, to the extent of arraigning the petitioner as an accused, is set aside. However, it shall be open to the learned Special Judge to consider the matter regarding impleadment of additional accused afresh during the trial of the case, if any evidence in this regard comes before the said Court.

21) A copy of this order be sent to the learned Special Judge for information.

(SANJAY DHAR)
JUDGE

Srinagar,
02.09.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No