

Court No. - 84 WWW.LIVELAW.IN

Case :- APPLICATION U/S 482 No. - 8478 of 2021

Applicant :- Adesh Tyagi

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

Counsel for Applicant :- Rahul Kumar Tyagi

Counsel for Opposite Party :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Rahul Kumar Tyagi, learned counsel for the applicant and Sri Pankaj Saxena, learned AGA-I appearing for the State-opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure¹ has been filed to quash the judgment and order dated 27.02.2018 passed by the First Additional Session Judge, Baghpat in Application 28-B in Sessions Trial No. 41 of 2014 (State vs. Jahangir) arising out of Case Crime No. 417 of 2013, under Section 489-B Indian Penal Code², P.S. Khakera, District Baghpat.

3. The proceedings of the case were initiated pursuant to an FIR dated 22.11.2013 registered as Case Crime No. 419 of 2013, under Section 489-B of the Penal Code at P.S. Khakera, District Baghpat. The said FIR was lodged by the Branch Manager, State Bank of India, Khakera, Baghpat. Among the two accused named in the FIR the applicant's name was mentioned as accused No.2. The incident as described in the FIR is that on 22.11.2013 at about 3:00 p.m. the accused no.1 submitted certain currency notes at the cash counter of the Bank which upon being checked by the cashier were found to be counterfeit and upon an inquiry from the said accused

1. the Code

2. the Penal Code

no.1 he stated in writing that the currency notes had been handed over to him by the accused no.2, applicant herein.

4. Upon investigation, a charge sheet dated 10.01.2014 was submitted against the accused no.1, whereupon cognizance was taken on 16.01.2014. During the course of trial, the first informant (Bank Manger) examined himself as PW-1 and reiterated the FIR version by stating that upon the currency notes having been found to be counterfeit, the accused no.1 was questioned and he stated that the said counterfeit currency notes had been handed over to him by the accused no.2.

5. The cashier of the Bank, who appeared as PW-2, during the course of trial also corroborated the FIR version by stating that upon the currency notes having been found to be counterfeit the matter was inquired from the accused no.1 who clearly stated that the currency notes had been handed over to him by the accused no.2.

6. An application dated 31.08.2017 was moved by the prosecution before the trial court stating that despite the two prosecution witnesses having taken the name of the applicant herein in their examination in chief and also the name of the said accused having specifically been mentioned in the FIR, the police report did not mention his name and accordingly on the basis of evidence available on record it was necessary that the said accused be also tried together with the other accused. The aforesaid application came to be allowed by the Additional Sessions Judge First, Baghpat by order dated 27.02.2018, wherein upon noticing the FIR version and also the statements of the two prosecution witnesses and

the necessary legal provisions under Section 319 of the Code the application has been allowed and the applicant herein has been summoned for trial.

7. Learned counsel for the applicant has sought to assail the aforesaid order passed by the trial judge summoning the applicant in exercise of powers under Section 319 of the Code by referring to the statements recorded during the course of investigation to contend that since the Investigating Officer did not find sufficient material against the applicant and no charge sheet was submitted against him, there was no further material on the basis of which the trial court could have summoned the applicant in exercise of powers under Section 319 of the Code. He placed reliance upon the Constitution Bench judgment of the Supreme Court in **Hardeep Singh and others vs. State of Punjab**³, to support his submission.

8. Learned A.G.A.-I has controverted the submissions made by the counsel for the applicant by drawing attention to the fact that the applicant herein was named in the FIR and looking to the facts as narrated in the FIR, the applicant would be the prime accused. It is further pointed out that the testimony of PW-1 and PW-2 during the course of trial made it imperative for the court below to invoke the powers under Section 319 of the Code to summon the applicant for trial. It is also contended that the testimony before the trial judge would be required to be given more weight than the statements recorded by the investigating officer during the course of investigation. Learned A.G.A.-I has also sought to place reliance upon the Constitution Bench judgment in the case of **Hardeep**

3. (2014) 3 SCC 92

Singh (supra).

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9. In order to appreciate the rival contentions the provisions of Section 319 of the Code are required to be referred to. Section 319 of the Code reads as follows :-

“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 sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and 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.”

10. The ambit and scope of the powers of the Magistrate under Section 319 of the Code were considered in the Constitution Bench judgment of the Supreme Court in **Hardeep Singh** (supra). Referring to the object of the provision it was held that the object of the provision is that the real culprit should not get away unpunished and in a situation 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. It was stated thus :-

“8.The constitutional mandate under Articles 20 and 21

of the Constitution of India, 1950 provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 Code of Criminal Procedure. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial.

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12. Section 319 Code of Criminal Procedure springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. 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. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC.

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17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Code of Criminal Procedure or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. 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. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.”

11. As regards the degree of satisfaction required for invoking the powers under Section 319 of the Code, it was held that the test that has to be applied is one which is more than *prima facie* case as exercised at the time of

framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. It was observed as follows :-

“105. Power under Section 319 Code of Criminal Procedure is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Code of Criminal Procedure. In Section 319 Code of Criminal Procedure the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” is clear from the words "for which such person could be tried together with the accused." The words used are not “for which such person could be convicted”. There is, therefore, no scope for the Court acting under Section 319 Code of Criminal Procedure to form any opinion as to the guilt of the accused.

12. The question as to in what situations the power under the section can be exercised in respect of persons not named in the FIR or named in the FIR, but not charge-sheeted or discharged was also considered, and it was held that a person whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the charge-sheet, can still be summoned by the court provided the conditions under the

section stand fulfilled. It was observed as follows :-

“111. Even the Constitution Bench in Dharam Pal (CB) has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Code of Criminal Procedure can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

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117.6 A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Code of Criminal Procedure provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Code of Criminal Procedure has to be complied with before he can be summoned afresh. ”

13. The word 'evidence' as used under Section 319(1) of the Code was also considered and it was held as follows :-

“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 Code of Criminal Procedure. 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 Code of Criminal Procedure. The

“evidence” is thus, limited to the evidence recorded during trial. ”

14. The principles with regard to exercise of power by the court to summon an accused under Section 319 of the Code were reiterated in **S. Mohammed Ispahani Vs. Yogendra Chandak and others**⁴, and it was held that the power under Section 319 to summon even those persons who are not named in the charge-sheet to appear and face trial, is unquestionable. It was observed thus:-

“28.Insofar as power of the Court Under Section 319 of the Code of Criminal Procedure, to summon even those persons who are not named in the charge sheet to appear and face trial is concerned, the same is unquestionable. Section 319 of the Code of Criminal Procedure, is meant to rope in even those persons who were not implicated when the charge sheet was filed but during the trial the Court finds that sufficient evidence has come on record to summon them and face the trial. In Hardeep Singh's case, the Constitution Bench of this Court has settled the law in this behalf with authoritative pronouncement, thereby removing the cobweb which had been created while interpreting this provision earlier. As far as object behind Section 319 of the Code of Criminal Procedure, is concerned, the Court had highlighted the same as under:

19.The court is 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. The desire to avoid trial is so strong that an Accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. '

15. The power to proceed against persons named in FIR with specific allegations against them, but not charge-sheeted, was reiterated in **Rajesh and others Vs. State of**

4. (2017) 16 SCC 226

Haryana,⁵ and it was held that persons named in the FIR but not implicated in charge-sheet can be summoned to face trial, provided during the trial some evidence surfaces against the proposed accused.

16. The exercise of powers under Section 319 of the Code for summoning an additional accused again came up for consideration in **Saeeda Khatoon Arshi Vs. State of Uttar Pradesh and another**⁶ and it was held that it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. In the case at hand the FIR was registered with regard to an offence under Section 489-B of the Penal Code which relates to using forged or counterfeit currency notes, and the applicant herein was named as an accused. The FIR version shows complicity of the applicant inasmuch as the currency notes, which were presented at the cash counter of the bank, are stated to have been handed over to the accused no. 1 by the applicant herein, named as accused no. 2 in the FIR. The accused no. 1, who is stated to have brought the currency notes to the bank, in fact submitted a statement in writing to the bank cashier stating therein that the currency notes had been handed over to him by the applicant. Upon investigation the police submitted a charge-sheet against accused no. 1

5. (2019) 6 SCC 368

6. (2020) 2 SCC 323

under Section 489-B of the Penal Code. During the course of trial, the Bank Manager and the cashier appeared as witnesses, PW-1 and PW-2 respectively, and in their testimony corroborated the FIR version by stating that upon the currency notes having been found to be counterfeit, when the accused no. 1 was questioned, he stated that the said currency notes had been handed over to him by the accused no. 2.

18. The charge in respect of which trial is proceeding is an offence under Section 489-B of the Penal Code, which relates to using forged or counterfeit currency notes and in view thereof the source of the currency notes or the person from whom the said notes had been received would be relevant. The FIR version as well as the testimony of two witnesses having indicated that the accused no. 1 i.e. the person who had presented the currency notes at the cash counter of the bank had specifically stated that currency notes had been handed over to him by the accused no. 2, the complicity of the said accused could not be ruled out. The evidence before the trial judge being indicative of the complicity of the applicant, though not arraigned as an accused in the charge-sheet, it was open to the trial court to form a view that the applicant be tried together with the accused, and for the said purpose summon the applicant in exercise of powers under Section 319 of the Code.

19. The broad principles which have been laid down for exercise of powers under Section 319 of the Code underline the object of the enactment that the real perpetrator of the offence should not get away unpunished and in a situation where the investigating

agency for any reason does not array the real culprit as an accused the court would not be powerless in calling the accused to face trial; rather it would be duty of the court to do justice by punishing the real culprit.

20. The test which has been laid down with regard to the degree of satisfaction required for invoking the powers under Section 319 is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction.

21. The power to proceed under Section 319 has also been held to be exerciseable in respect of persons though named in the FIR but not charge-sheeted provided the court is satisfied that the conditions provided under the section stand fulfilled.

22. The only ground which has been canvassed on behalf of the applicant to raise a challenge to the order of summoning under Section 319 of the Code, is that the statements recorded by the investigating officer during the course of investigation did not indicate any material against the applicant and that no charge-sheet was submitted against the applicant.

23. Section 319 (1) of the Code envisages that 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.

24. The word evidence used under Section 319 (1) of

the Code has been held to be understood to refer to the evidence recorded during trial, and also any material that has been received by the court after cognizance is taken and before the trial commences, to be utilized for corroboration and to support the evidence recorded by the court.

25. The evidence recorded by the court during trial is thus to be accorded primacy and for the purpose of exercise of power under Section 319 of the Code would have to be given weight over the material which was collected during the course of investigation. The contention which has been sought to be raised placing reliance upon the material collected by the investigating officer during the course of investigation, for the purpose of exercise of powers under Section 319 of the Code, thus cannot be accepted.

26. The power under Section 319 of the Code to summon even those persons who are not named in the charge-sheet to appear and face trial, being unquestionable and the object of the provision being not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity which can be gathered from the evidence during the course of trial, the order passed under Section 319 of the Code summoning the applicant does not contain any material error so as to warrant inference.

27. Counsel for the applicant at this stage submits that he does not dispute the aforementioned legal position with regard to the exercise of powers under Section 319 of the Code and states that the applicant would submit to the jurisdiction of the court below and seek bail.

28. It goes without saying that in case any such application is moved, the court below would be expected to dispose it of in accordance with the settled principles of law.

29. Subject to the aforesaid observation, the application stands dismissed.

Order Date :- 4.8.2021

Imroz/Pratima

(Dr.Y.K.Srivastava,J.)