A.F.R.

Reserved on 05.05.2022

Delivered on 30.05.2022

Court No. - 93

Case :- CRIMINAL REVISION No. - 2341 of 2001

Revisionist :- Prabhakar Pandey

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

Counsel for Revisionist :- Shashank Shekhar Singh,Anil Bhushan

Counsel for Opposite Party :- Govt. Advocate

Hon'ble Shamim Ahmed,J.

1. Heard Sri Anil Bhushan, learned senior counsel assisted by Sri Siddharth kumar Mishra, learned counsel for the revisionist and Sri Suresh Bahadur Singh, learned A.G.A. for the State-opposite party No.1. Even in the revised list none appeared on behalf of the opposite party nos.2 to 4 nor any counter affidavit has been filed on their behalf, this court proceed to hear the matter finally.

2. This revision is directed against the order dated 26.07.2001 passed by learned District and Sessions Judge, Kannauj by which he has accepted the final report submitted by the Investigating Officer and set aside the order dated 25.04.2001 passed by the Judicial Magistrate, Chhibramau by which he has summoned the opposite party no.2 under Section 379 I.P.C.

3. The brief facts of the present case is that the revisionist has constructed a house in the property in dispute and also there are 32 trees of Mango and one tree of Neem. On 06.09.2000 respondent No.2 along with some unsocial elements has broken the lock of the house of the revisionist and took possession on the same and also take away the goods of Rs. 8000/-. The revisionist tried to lodge F.I.R. by approaching the concerned Police Station and by sending Fax

message to the Superintendent of Police, but no F.I.R. has not been lodged. Thereafter, revisionist filed an application under Section 156 (3) Cr.P.C. before the Judicial Magistrate on 02.12.2000 and on the application of the revisionist on the same day the Judicial Magistrate, First Class has passed an order directing the Police Station of concerned Police to lodge an F.I.R. and inform the Court. Pursuant to the order passed by the Judicial Magistrate an F.I.R. has been lodged by the police on 07.12.2000, under Sections 147, 504, 506, 427, 448, 379 I.P.C. and the same was registered as Case Crime No. 454 of 2000 and after investigation the Investigating Officer in a mechanical manner submitted final report in favour of the opposite party no.2 without considering the evidence on record.

The revisionist has again approached to the Police Authority for again re-investigation and also filed protest petition before the Judicial Magistrate and on the protest petition of the revisionist the learned Magistrate vide order dated 25.04.2001 have issued summons to the opposite party no.2 under Section 379 I.P.C.

4. Feeling aggrieved by the order dated 25.04.2001 the opposite party no.2 filed a criminal revision before the learned District and Sessions Judge, Kannauj and the revisional court vide impugned order dated 26.07.2021 set aside the summoning order dated 25.04.2001 and also accepted the final report without considering the evidence on record.

5. After hearing the learned counsel for the revisionist and learned A.G.A. for the State and on perusal of the record it reveals that the F.I.R. was registered by the revisionist against opposite party no. 2 under Sections 147, 504, 506, 427, 448, 379 I.P.C. and after investigating final report was submitted by the Investigating Officer in a mechanical manner. Thereafter, the learned Magistrate after considering the protest petition and perusing the record summoned

the accused under Section 379 Cr.P.C. vide order dated 25.04.2001, expressing his judicial power.

6. In **Gangadhar Janardan Mhatre vs. State of Maharashtra and others 2004 (7) SCC 768**, the Court reiterating above view said as under:

> "The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 109(1)(b) and direct the issue of process to the accused."
>
> (emphasis added)"

7. In **Pakhando and others Vs. State of U.P. reported in 2001 SCC Online All 967** a Division Bench of this Court after considering Section 190 Cr.P.C. has held that if upon investigation Police comes to conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify forwarding of accused for trial and submits final report for dropping proceedings, Magistrate shall have following four courses and may adopt any one of them:

> (I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;
>
> (II) He may take cognizance under Section 190(I)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(I)(b) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

8. In **Mohammad Yusuf Vs. State of U.P. 2007 (9) ADJ 29**4, Police submitted final report which was not accepted by Magistrate, not on the basis of material collected by Police, but, relying on Protest Petition and accompanying affidavit Magistrate issued process. Court disapproved the aforesaid procedure adopted by Magistrate and said:

"Where the magistrate decides to take cognizance under section 190 (1) (b) ignoring the conclusions reached at by the investigating officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the

> complainant and the witnesses who had filed affidavits under Section 200 and 202 Cr.P.C. The Magistrate could not take cognizance under section 190 (1) (b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taking into account extraneous material i.e. protest petition and affidavits while taking cognizance under section 190 (1) (b) Cr.P.C. the impugned order is vitiated." (emphasis added).

9. In the instant case, after submission of final report under Section 173 Cr.P.C. against opposite party no. 2, the learned Magistrate after considering the protest petition rejected the final report and arrived at conclusion that case is made out against opposite party under Sections 379 I.P.C. and cognizance order was also passed on 25.04.2001 and summoned the accused/opposite party. Contention of the counsel for the revisionist is perfectly correct that the Magistrate has power straightway disagreeing with the conclusion arrived at by the Investigating Officer. Being aggrieved with the order dated 25.04.2001, opposite party No.2 filed revision in the court of District and Sessions Judge, Kannau. Sessions Court considered the plea of alibi of the accused only on the basis of affidavit submitted by opposite party and quash the order of cognizance passed by Magistrate against the opposite party under Sections 379 I.P.C. vide order dated 26.07.2001 and accepted the final report submitted by investigating officer. Revisional Sessions Court has allowed the revision of opposite party no.2 on the basis of plea of alibi filed on affidavit of witness. But it is a settled principal of law that plea of alibi must not be looked at the stage of investigation and inquiry. Plea of alibi of accused shall be examined only during the trial at the stage of defence. Order of learned Revisional Sessions Court is totally based

on plea of alibi of accused-oppposite parties on the basis of affidavit submitted by witness before the Sessions Court. So the order of the lower revisional court is not sustainable in the eyes of law. **On exercising the revisional power, learned Sessions Court cannot quash the cognizance and summoning order passed by the Magistrate, in exercising its revisional power, jurisdiction of Sessions Court is very limited and the Sessions Court can only examine the illegality, irregularity and impropriety of the order passed by the Magistrate. If the Sessions Court find any illegality, irregularity or jurisdictional error then Sessions Court cannot quash the proceedings but the revisional court have only power to issue direction by pointing out the error regarding the order passed by the Magistrate. Therefore, order of learned Sessions Court, is wholly erroneous and against the set principles of law.**

10. In view of the aforesaid discussion this Court is of the view the present revision of revisionist is liable to be allowed and the order dated 26.07.2001 passed by learned District and Session Judge, Kannauj is hereby quashed.

11. The District and Session Judge, Kannauj is directed to pass a fresh order in accordance with law in view of the observation of this Court after hearing the aggrieved parties.

12. Accordingly, the revision is **allowed.**

13. The office is directed to transmit back the lower court record, if any, with a copy of the judgment and order of this Court before the court below for its compliance.

Order Date :- 30.05.2022

Arvind