

* IN THE HIGH COURT OF DELHI AT NEW DELHI
#14.

+ CrI.M.C.191/2005

Date of Decision: 21.10.2009

SMT. VEENA AHUJA & ANR. Petitioners
! Through: Mr. Naresh K. Daksh, adv.

Versus

\$ GOVT. OF N.C.T. OF DELHI. & ANR. Respondents
^ Through: Mr. G.B. Sewak, Adv. for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

MOOL CHAND GARG, I(Oral)

1. In this case the petitioners were arrayed as respondents no. 3 & 4 in the original complaint filed by the second respondent under Section 138 of the N.I. Act. As no evidence came against them at the stage of pre-summoning they were not summoned by the Magistrate. However, after the conclusion of trial on an application filed on behalf of the second respondent under Section 319 Cr.P.C. alleging that evidence has come against respondents no. 3 & 4 being the Directors and persons responsible for the day-to-day affairs of the company they be also summoned as an accused was filed. However,

the said application was dismissed by the Trial Judge who at that time was an Addl. Sessions Judge vide order dated 05.06.2003. This order was challenged in revision before this Court and vide order passed in criminal revision petition 659/2003 a learned Single Judge of this Court set aside the order passed by the Addl. Sessions Judge and made the following observations.

The perusal of the impugned order shows that the application of the petitioner has been dismissed merely on the ground that the petitioner did not avail any remedy available to him against the summoning order whereby respondents 1 & 2 were summoned and no process ever issued against respondent no. 3 & 4. As is apparent the learned ASJ has not decide the application of the petitioner for summoning respondents 3 & 4 on merits. It was decided on the aforesaid premise. The petition is allowed. Impugned order is set aside with direction to the learned ASJ to decide the application of the petitioner on merits and deal with the contentions raised in the petition and decide the matter afresh. Petition stands disposed of with this direction.

Sd/-
J.D. Kapoor

2. In view of the aforesaid, the application under Section 319 Cr.P.C. was decided afresh by the Addl. Sessions Judge vide his order dated 03.11.2003 whereby the said application was allowed.

3. It is against the aforesaid order the petitioners filed the present petition. According to them once the petitioners who were arrayed as co-accused were not summoned originally by the Trial Judge, they could not have been summoned even by applying provisions

contained under Section 319 Cr.P.C. as they were not the accused persons who were not a party to the proceedings at the time of filing of the complaint. They have relied on the language of Section 319 Cr.P.C. which reads as under:

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 trader arrest or upon a summon, 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 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.

4. They have relied upon the following judgments:

- i. Sohan Lal & Ors. Vs. State of Rajasthan 1990 SC 2150
- ii. Raj Kishore Prasad Vs. State of Bihar & Anr. 1996 SC 1931
- iii. Kishori Singh & Ors. Vs. State of Bihar & Anr. 2000 SC 3725
- iv. Jitender Narottam Das Mehrotra & Ors. Vs. State & Ors. 107 (2003) DLT 152
- v. Charanjit Singh Vs. DB Merchant Bank Services Ltd 2001 (58) DRJ 168
- vi. Kavuluri Vivekananda Reddy and Anr. Vs. State of A.P. & Anr. (2005) 12 SCC 432

5. In the case of Kavuluri Vivekananda Reddy and Anr. Vs. State of A.P. & Anr (supra) it has been held:

5. An application under Section 319 of the Code was filed by the second respondent, who is the wife of the deceased, on 4.3.2003, after seven witnesses, PWs 1 to 7, had been examined by the Sessions Court. By order dated 3.7.2003, the learned Addl. Sessions Judge, by a cryptic order, allowed the said application and directed the appellants herein to be impleaded as accused in exercise of power under Section 319 of the Code. As already stated above, the said order has been affirmed by the High Court in a revision petition. The basis of the application and the order that has been made summoning the appellants as accused are the statements of PWs 1,2 and 3, who are the relations of the deceased; PW2, being the wife of the deceased.

6. We have perused the statements of these witnesses and find that in relation to the alleged instigation by the appellants, only general statements have been made. On the basis of the said general statements qua the appellants, it is evident that the courts below committed serious illegality in proceeding to add the appellants herein as accused in exercise of power under Section 319 of the Code. The manner of exercise of the power under the said provision has been explained by this Court in *Krishnappa V. State of Karnataka* wherein it has been held that it has to be kept in view that the power under Section 319 of the Code is discretionary and has to be exercised only to achieve criminal justice and that the Court should not turn against another whenever it comes across evidence connecting that other person also with the offence. The provisions of Section 319 of the Code are required to be used sparingly. The summoning of the appellants after the expiry of eight years, on the facts and circumstances of the case and having regard to the nature of the depositions of the witnesses which have been examined by us, is not called for. In this view, we set aside the impugned orders and allow the criminal appeal.

6. Arguments have also been addressed on behalf of the respondent. According to them, in the present case even though the

petitioners were arrayed as respondents in the complaint filed by them and were not summoned despite leading pre-summoning evidence, the Court passed the impugned order once evidence came on record in the form of cross-examination of the Managing Director, Mr. Arjun Lal Ahuja, of the firm M/s Cosmoflex Pvt. Ltd. The relevant portion of the statement made by the Managing Director has been re-produced in the summoning order which reads as under:

“It is the contention of ld. counsel for the complainant that the accused No.2 being Managing Director of accused No.1 has himself admitted in his deposition as DW4 on 15.09.2001 in his examination in chief that accused No.3 Smt. Veena Ahuja is a promoter/director of the accused No.1 whereas, accused No.4 is an active Director of accused No.1-company. Ld. counsel for the complainant has also drawn attention to Ex.DW1/CB on record which is a return filed by accused NO.1 company with the Registrar of Companies, Delhi and Haryana on record, wherein the names of accused No.3 Veena Ahuja and accused No.4 Arvind Ahuja have been shown as Directors of accused NO.1 company as on 30.09.1998. Ld. counsel for the complainant has further drawn attention of this Court to the deposition of accused No.2 vide his cross examination dated 5.1.2002 and 16.3.2002 wherein the accused No.2 has admitted in no uncertain terms that accused No.3 and 4 were and still are the Directors of accused No.1 company to be submitted to the Registrar of Companies as also taking part in its day to day affairs. In this context attention has been drawn to Ex.DW1/CC on record which is Directors Report dated 29.8.1998 filed on behalf of the accused No.1 company with the concerned Registrar of Companies admittedly by the accused Nos. 2,3 and 4 as Directors of the accused No.1 company. It is the further contention of Ld. Counsel for the complainant that in view of the said evidence on record, the deeming provisions of Section 141 of the Negotiable Instruments Act, 1881 (as amended upto date), are attracted to the accused No.3 and 4 in the instant complaint and accordingly they be summoned as accused in the instant complaint.”

7. On the basis of the aforesaid observations, the impugned order was passed for issuing summons to the petitioners as accused

persons in the case initiated on the basis of the complaint filed by the respondent under Section 138 of the N.I. Act.

8. It is a matter of record that the original complaint filed against the company and the Managing Directors has already been disposed of and an appeal against the conviction of the Company, the Managing Directors is pending disposal before the a learned ASJ.

9. Learned counsel for the petitioners has submitted that in this case in the complaint filed by the respondent No.2, the present petitioners had been arrayed as a parties. Pre-summoning evidence was also led by him. Since no evidence came on record to substantiate the role of the present petitioners, they were not summoned by the M.M. which amounted to discharge of the petitioner from the case.

10. It is, thus, submitted that even if some evidence have come on record in the form of cross-examination of one of the Directors of the Company which would be in the nature of confession of a co-accused it cannot be used against the present petitioners because of the bar of Section 30 of the Evidence Act, as it will not be possible for the petitioners to cross-examine the co-accused. Moreover, issuing summons also tantamounted to reviewing its own order by the trial Court. As stated above they have relied upon a number of judgments cited above which supports aforesaid view.

11. On the other hand, the learned counsel for the respondents rely upon the judgment delivered by the Hon'ble Supreme Court in the case of M/s. Swil Ltd. Vs. State of Delhi. & Anr. JT 2001 (6) SC 405 and submits that in the light of the said judgment the order of the trial Court in summoning the petitioners is justified. Reference has been made to paragraphs 6 and 7 which are re-produced hereunder:

6. In our view, from the facts stated above it is clear that at the stage of taking cognizance of the offence, provisions of Section [190](#) Cr.P.C. would be applicable. Section [190](#) inter alia provides that 'the Magistrate may take cognizance of any offence upon a police report of such facts which constitute an offence.' As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section [204](#) Cr.P.C. is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charged sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the police officer and other documents tendered along with charge sheet. Further, upon receipt of police report under Section [173\(2\)](#) Cr.P.C., the magistrate is entitled to take cognizance of an offence under Section [190\(1\)\(b\)](#) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the investigating office and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the police. At this stage, there is no question of application of Section [319](#) Cr.P.C. Similar contention was negated by this Court in *Raghuband Dubey vs. State of Bihar* : 1967 (2) SCR 423 by holding thus:

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are

involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

7. Further, in the present case there is no question of referring to the provisions of section [319](#) Cr.P.C. That provision would come into operation in the course of any inquiry into or trial of an offence. In the present case, neither the Magistrate was holding inquiry as contemplated under section [2\(g\)](#) Cr.P.C. nor the trial had started. He was exercising his jurisdiction under section [190](#) of taking cognizance of an offence and issuing process. There is no bar under section [190](#) Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet.

12. Having perused the judgment, I am of the considered view that in view of the provisions contained under Section 319 Cr.P.C. and the peculiar facts of this case, the said judgment has no application to the facts in issue for the reasons that the name of the accused persons, who were summoned in that case was not included in the chargesheet which was filed earlier and it is on the basis of the evidence which was led during the course of trial the power under Section 319 Cr.P.C. was exercised which is not the case in hand. In the present case, the accused/petitioners were very much before the Court and evidence was led on behalf of the respondent/complainant for the purpose of showing that they were guilty of the offences alleged but the Court at the time of passing the summoning order did not find it appropriate to summon the

petitioners at the relevant time thereby holding that there was no evidence against them. Merely because in the defence evidence some statement has been made by one of the co-accused, it cannot be said that it becomes a fit case under Section 319 Cr.P.C. which is quoted in my earlier order dated 27.05.2009 makes it very clear that such powers can be exercised only against a person who was not an accused at the earlier occasion.

13. As such the order passed by the learned Trial Court directing issuance of summons against the petitioners dated 03.11.2003 in the N.I.A. No. No.156/03 cannot be sustained. Accordingly, the same is set aside. Consequently, the proceedings arising therefrom against the petitioners are also set aside. Their bail bonds are discharged.

14. The Petition is disposed of accordingly.

15. A copy of the order be sent to the trial Court.

MOOL CHAND GARG,J

OCTOBER 21, 2009
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