

Court No. - 89

Case :- APPLICATION U/S 482 No. - 32340 of 2023

Applicant :- Ashish Kumar @ Rinku And Another

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

Counsel for Applicant :- Ashwini Kumar Ojha

Counsel for Opposite Party :- G.A.

Hon'ble Deepak Verma,J.

1. Heard Sri Ashwini Kumar Ojha, learned counsel for the applicants, Sri P. P. Pandey learned AGA for the State and perused the record.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 26.06.2023 as well as the entire proceedings of Criminal Case No.6198 of 2007, arising out of Case Crime No.1053 of 2007, under Sections 498A, 304B I.P.C. and Section 3/4 of DP Act, P.S. Prem Nagar, District Jhansi, pending in the court of CJM, Jhansi.

3. Learned counsel for the applicants submits that earlier the applicants had approached this Court by filing an application being Application U/S 482 No. 21346 of 2022 (Ashish Kumar @ Rinku and Another) with the prayer to quash the entire proceeding of the case and cognizance order dated 17.9.2010 as well as order dated 21.10.213. The aforesaid application was allowed vide order dated 29.8.2022 with direction to the court below to pass afresh order, applying its judicial mind. It is further submitted that the learned Magistrate, in pursuance of the order passed dated 29.8.2022 has now passed the order dated 26.6.2023 and summoned the accused- applicants under Sections 498A, 304B IPC and Section 3/4 of D.P. Act. It is next submitted that the learned Magistrate has not applied his judicial mind and without considering the evidence collected during the course of investigation, the summons have been issued. It is also submitted that the learned Magistrate while summoning the applicants has not considered the dying declaration recorded before the Additional City Magistrate, Jhansi. In support of his contention, he has placed reliance over the judgment passed by Hon'ble The Apex Court in the case of Surendran Vs. State of Kerala, 2022 Live Law (SC) 482, the relevant para 9 is quoted herein below:

"9. In this context, it is appropriate to refer to certain provisions of Section 32 of the Evidence Act. Section 32 relates to the admissibility of statements made by a person who cannot be called as witness. The Section itself specifies the circumstances under which such statements become relevant. In the present case, we are concerned with one such circumstance, that is, when the person who made the statement is dead. The learned counsel for the appellant has focused predominantly on Section 32(1) of the Evidence Act in an attempt to exclude the evidence of the deceased by suggesting that it does not fall within the scope of the abovesaid sub-section and

therefore, is inadmissible. The relevant portion of Section 32 of the Evidence Act is extracted below:

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. –

Statements, written or verbal, or relevant facts, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death. When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

4. *Per contra*, learned A.G.A. opposed the submission raised by applicants' counsel and submitted that as per instructions received, the dying declaration is not the part of case diary.

5. Considering the argument raised by applicant's counsel and perused the entire record, as per instructions received by learned AGA that dying declaration is not part of the case diary. It is admitted position of law that before taking cognizance to summon the accused person learned Magistrate has to consider the evidence collected during investigation and on that evidence learned Magistrate has to apply his judicial mind. Learned Magistrate, *prima facie*, found offence under the alleged sections and summoned the accused persons, since, dying declaration was not part of the case diary, therefore, learned Magistrate has not considered the same. On perusal of cognizance order, it is apparent that victim was burnt about 85%. Learned Magistrate's order for summoning the applicants is just and proper and based on evidence collected by Investigating Officer, during investigation, as such, no interference is warranted. The Hon'ble Apex Court's judgement is entirely different from facts and circumstances of the case and the same is not applicable in the present case.

6. In view of the above, *prima facie*, case is made out against the applicants. No interference is warranted, at this stage.

7. The present 482 application is **dismissed** with the aforesaid observation.

Order Date :- 13.10.2023

Nitin Verma