

Court No. - 88

Case :- APPLICATION U/S 482 No. - 34261 of 2023

Applicant :- Nadeem

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Sonakshi Arora,Araf Khan

Counsel for Opposite Party :- G.A.

Hon'ble Sanjay Kumar Singh,J.

1-Heard Mr. Araf Khan, learned counsel for the applicant and Mr. Rabindra Kumar Singh, learned Additional Government Advocate, assisted by Mr. Ajay Kumar Singh, learned Brief Holder representing the State of U.P./opposite party no.1.

2-The present application under Section 482 Cr.P.C. has been preferred by the applicant with a prayer to quash the impugned order dated 30.05.2023 passed by learned Additional Sessions Judge, Court No.8, Aligarh in Criminal Case No. 18 of 2019 (arising out of Crime No. 329 of 2018 under Sections 363, 366, 376, I.P.C. and Section 3/4 POSCO Act, Police Station-Gonda, District-Aligarh), whereby the application dated 16.05.2023 under Section 311 Cr.P.C. of the accused-applicant for summoning PW-1-Mahipal Singh (complainant), has been rejected.

3-It is submitted by learned counsel for the applicant that applicant is accused and is facing trial in this case pursuant to F.I.R. dated 16.11.2018. During trial the examination-in-chief of PW-1 Mahipal Singh (father of minor victim) was recorded on 15.02.2021 in absence of accused-applicant and his counsel as due to pandemic Covid-19 it was difficult for them to attend the Court. The accused-applicant was in jail and at that time accused persons were not being produced before the trial court from the jail. On 27.07.2021 the trial court has closed the opportunity of cross examination of the applicant to the P.W-1. It is also submitted that in the year 2018, Mr. Dinesh Kumar Sharma, advocate had filed his vakalatnama on behalf of the applicant along with bail application, but he did not pursue the case of the applicant,

therefore applicant has engaged Mr. Mohd. Zakawat Sultan as his new counsel on 25.05.2022. Lastly placing reliance on the judgment of the Apex Court in the case of **Mohan Lal Shamji Soni Vs. Union of India & Another, AIR 1991 SC 1346**, it is submitted that in view of section 138 of the Indian Evidence Act, the cross examination is most effective tool to elicit the truth but by impugned order dated 30.05.2023, application dated 16.05.2023 under Section 311 Cr.P.C. of the applicant has been illegally rejected by the trial court.

4-Per contra, learned Additional Government Advocate for the State vehemently opposed by contending that the said application dated 16.05.2023 under Section 311 Cr.P.C. has been moved on behalf of the accused-applicant after inordinate delay only with a view to linger on the proceedings of the case, hence, the trial court has committed no illegality in rejecting the said application of the applicant.

5-Having heard learned counsel for the parties and perusing the record, I find that the it is not in dispute that the examination-in-chief of PW-1 was recorded on 15.02.2021 and opportunity of cross-examination of the accused applicant was closed after about five months on 27.07.2021, whereas applicant had ample opportunity to move an application under Section 311 Cr.P.C. within reasonable time but the application under Section 311 Cr.P.C. was moved by the applicant after inordinate delay of one year and nine months on 16.05.2023. Even in the application dated 16.05.2023, no explanation for delay of about one year and nine months has been given. I also find that the trial court while passing the order dated 30.05.2023 has observed that from the order sheet dated 15.02.2021, it is apparent that the presence of accused applicant-Nadeem was registered through video conferencing. The accused were informed about the arrival of witnesses through video conferencing and statements were also being recorded through video conferencing, therefore, it is wrong to say that statement of PW-1 was not recorded in presence of the applicant. Record clearly

reflects that on behalf of accused-applicant vakalatnama of Mr. Dinesh Kumar Sharma, learned advocate was filed in the year 2018. So far as engagement of new counsel Mr. Mohd. Zakawat Sultan on behalf of the applicant on 25.05.2022 is concerned, I find that the applicant in paragraph no.16 of this application has stated that the same is not on record. There is no application on record to indicate that Mr.Dinesh Kumar Sharma, learned advocate was later on disengaged by the applicant. It appears that counsel for the applicant despite having knowledge of the examination-in-chief did not cross-examine P.W.-1. So far as the judgment in the case of Mohan Lal Shamji Soni(supra) is concerned, there is no dispute about the proposition of law laid down by the Apex Court but the same is not helpful to the applicant and is distinguishable on the facts of this case. This Court is of the view that each case turns on its own facts. A little difference between the facts of two cases may make a big difference in the conclusion. The applicant has also not disclosed the present status of the trial of the applicant.

6-The very use of the words in Section 311 Cr.P.C., such as 'any court', 'at any stage' or 'of any inquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of this Court in any way. However, very width requires corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection consistently with the provisions of the Code. The object underlying in Section 311 of Cr.P.C. is that there may not be failure of justice on account of either party in bringing valuable evidence on record of living ambiguity in the statement of witnesses examined from either side. Determinative factor is whether it is essential for the just decision of the case or not. It is also settled that the power under Section 311 Cr.P.C. could not be invoked by the Court to fill up lacuna unless the Court is satisfied that in the interest of justice, it is necessary to invoke to said extraordinary power.

7-Under the facts of the case and in view of the above discussion, this Court is of the view that presumption, observations and findings recorded by the trial Court in rejecting the application under Section 311 Cr.P.C. are fully sustainable. The trial Court has committed no illegality in rejecting the application of the applicant. There appears no abuse of the process of the Court also because no plausible explanation of inordinate delay in moving application under Section 311 Cr.P.C. has been given by the applicant. I do not find manifest error of law or perversity in the impugned order dated 30.05.2023 passed by the trial court.

8-The application lacks merit and is accordingly ***dismissed.***

9-Copy of this order be communicated to the trial Court as well as informant of this case within a week.

Order Date :- 30.10.2023

Kashifa