

Reserved

Neutral Citation No. - 2023:AHC: 217509

Court No. - 78

Case :- APPLICATION U/S 482 No. - 36474 of 2023

Applicant :- Rizwan Solanki

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

Counsel for Applicant :- Yashaswin Venugopal Bajpai, Aushim Luthra, Sr. Advocate

Counsel for Opposite Party :- G.A., Anuj Kumar Mishra

Hon'ble Raj Beer Singh, J.

1. Heard Sri Manish Tiwary, learned Senior Advocate, assisted by Sri Yashaswin Venugopal Bajpai, learned counsel for the applicant and Sri P. C. Srivastava, learned Additional Advocate General, assisted by learned A. G. A. for the State and Sri Anuj Kumar Mishra, learned counsel for respondent No.2.

2. This application under Section 482 Cr.P.C. has been filed against the order dated 18.09.2023, passed by the learned Additional Session Judge, Court No.11 MP/MLA, Kanpur Nagar in Session Case No. 98 of 2023 (State vs. Irfan Solanki and others), Case Crime No.127 of 2022, under Section 436, 506, 147, 327, 427, 386, 504, 120-B IPC, P.S. Jajmau, District Kanpur Nagar, and to direct the said court to summon call detail records along with location history of applicant / accused, co-accused Irfan Solanki and the witnesses, namely, Akeel Ahmad, Mohd. Naseem and Kaneez Zehra and also to make a direction to the trial court to seek opinion of hand writing expert regarding veracity of the signatures of the first informant on the tahreer.

3. Learned Senior Advocate for applicant submitted that the impugned order, by which the applicant's application 113-Kha, 114-Kha, 115-Kha, 126-Kha and application of co-accused 130-Kha have been rejected, is against facts and law and thus, liable to

be set aside. Referring to facts of the matter, it was submitted that first information report of this case was lodged by the opposite party No.2 against applicant and co-accused Irfan Solanki under Section 436/ 506 IPC, making allegations that they have caused mischief by fire in the property of informant. After submission of charge-sheet, the charges were framed under Section 436, 506, 147, 327, 427, 386, 504, 120B IPC. During trial, applicant has moved an application for summoning of call detail record of applicant and co-accused Irfan Solanki as well as of the witnesses in order to show that the accused were not present at the spot and similarly the witnesses were also present at the spot and they did not witness the incident but the same was rejected by the trial court by the impugned order. Earlier, the applicant and co-accused Irfan Solanki have moved an application bearing No. 7-Kha for preservation of call detail records as well as location of applicant and of co-accused Irfan Solanki and that by order dated 15.02.2023, the trial court has directed for preservation of the said call detail records and thus, the rejection of application for calling the call detail records, is perverse and wholly against law. The trial court has failed to consider that the call detail record of applicant and of the co-accused Irfan Solanki had been preserved by the order of trial court itself and the applicant was granted liberty by the trial court to call the said details at the stage of defence. It was submitted that in fact at the time of alleged incident, applicant was in Lucknow and he was doing shopping at Lulu mall and co-accused Irfan Solanki was also more than 10 KM away from the spot. The call detail records of witness Kaneez Zehra, Mohd. Naseem and Akeel Ahmad were also sought to be summoned by the applicant but the same has also been rejected. It was pointed out that as per Circular / Guidelines dated 21.12.2021, issued by Ministry of Communications, Government of India, the call detail records/logs are preserved for a period of

two years and thus, it cannot be said that the said call details are not available.

4. Referring to provisions of Section 91 Cr.P.C., it was submitted that the rejection of application no.126 Kha by the trial court is bad in eyes of law and thus, deserved to be quashed.

5. It is further submitted that the rejection of application No. 114Kha and 115 Kha, by which applicant has prayed for an opinion of a handwriting expert, is also against law. Before filing application bearing No. 114 Kha and 115 Kha, the applicant has moved an earlier application with request for hand-writing examination of informant and it was rejected on the ground that no questions were put to the witness (P.W.4) regarding handwriting of informant. Thereafter, on the application of applicant under Section 311 Cr.P.C, the informant / P.W.-4 was recalled and the questions were put to the P.W.-4 and thus, on that ground also the rejection of application No. 114 Kha and 115 kha is against law. Similarly, the trial court has rejected application 113 kha. By that application under section 91 CrPC, the applicant-accused has prayed for summoning of record pertaining to Dial 112 Event No. P07112212421 PRV dated 07.11.2022. The said record was relevant and necessary for proper disposal of case but the trial court did not consider the matter in accordance with law. It was submitted that impugned orders are against facts and law and thus liable to be set aside.

6. Sri P. C. Srivastava, learned Additional Advocate General, and learned counsel for respondent No.2/ informant have opposed the application and submitted that there is no illegality or perversity in the impugned orders. The location and call detail record of the mobile phone can not be a conclusive evidence to prove that the person, in whose name its SIM is registered, was also present at

the location of the said mobile phone. Thus, there was no justification in calling the alleged mobile call detail record.

7. It is further submitted that as the informant / PW 4 has clearly stated that she has signed the tahreer, on which the first information was registered, thus, there is absolutely no requirement for examination of the signature of informant vis-a-vis the signature shown on tahreer, from handwriting expert. Referring to the facts of the matter, it was submitted that there is no illegality or perversity in the impugned orders calling of any interference.

8. I have considered rival submissions and perused the record.

9. Perusal of record shows by order 18.09.2023, the Trial Court has decided several separate applications moved on behalf of the accused persons. So far the impugned order, by which the application 113 kha was rejected, is concerned, it appears that by that application under section 91 CrPC, the applicant-accused has prayed for summoning of record pertaining to Dial 112 Event No. P07112212421 PRV dated 07.11.2022. Before proceeding further it would be proper to quote the provisions of section 91 CrPC, which read as under:

“91. Summons to produce document or other thing.—

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect, sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

10. It is clear that the provisions under [Section 91](#) of Cr.P.C provide for production of documents or other things if the same is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under Cr.P.C. It does not expressly provide as to who can invoke this provision, however, it implies that it can be invoked by the Court or the officer in-charge of the police station. The satisfaction regarding the necessity or the desirability of the Court or the police is sine qua non for invoking this provision. Therefore, the production of any document or a thing can be directed by the Court after being satisfied such production is necessary and desirable for the purpose of proper lawful conduction of investigation, inquiry, trial or other proceeding. In the instant matter it appears that ground on which the application 113 kha was moved, is quite vague. There is no material to show that production of the said record, sought to be summoned by the applicant, is necessary or desirable for the purpose of trial. The application was quite vague and the relevancy of the material sought to be summoned could not be shown. As observed earlier, the satisfaction regarding the necessity or the desirability of the Court or the police is sine qua non for invoking this provision. In the instant matter, no such case is made out. The trial court has discussed all relevant facts and law and rejected the application 113 kha and 130 kha by a reasoned order. No material illegality or error could be shown in the approach of the trial court, hence, the rejection of said applications does not call for any interference.

11. So far the rejection of application No.126 kha is concerned, by that application the accused-applicant and co-accused have sought summoning of location and call detail record of applicant-accused and co-accused Irfan Solanki, as well as of witnesses in defence evidence, in order to show that at the relevant time the accused

were not present at the spot and that the witnesses were also not present at the spot and they did not witness the incident. It was submitted that earlier the call detail records and location of applicant-accused and of co-accused Irfan Solanki were preserved by the order dated 15.02.2023, passed by the trial court.

12. It may be observed that the case is at the stage of defence evidence. Though, technically the application was moved by the accused persons under section 91 CrPC, but the prayer was to summon the said record for defence evidence. A bare reading of sub-section (3) of Section 233 Cr.P.C. would reveal that if the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the trial Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. The provisions of Section 233(3) Cr.P.C. clearly show that except on those grounds the request cannot be turned down on any ground. The Hon'ble Apex Court in the case of *Natasha Singh Versus CBI*, (2013) 5 S.C.C. 74 has held that "fair trial entails the interests of the accused, the victim and of the society and, therefore, includes the grant of fair and proper opportunities to the person concerned and the same must be ensured as this is the Constitutional as well as human right." The accused has a legal right to place on record all evidences in respect of defence to prove his innocence and plea of alibi which he has to establish to the hilt and if he fails to prove this plea of alibi, the court may draw adverse inference in accordance with law but the accused has a right to be provided an opportunity to adduce any evidence in support of his defence. This right of the accused is a very valuable right which cannot be curtailed in any way. Therefore, a heavy duty is cast upon the

Court to see as to whether or not the defence evidence sought to be summoned, is necessary for defending the charge levelled against the accused. In the instant case, the trial court has observed that the details of alleged mobile call detail records are not consistent with the case of accused but mere that fact would not be sufficient to refuse the prayer of summoning of record of location and calls of mobile phones of the applicant-accused and co-accused Rizwan Solanki and co-accused Irfan Solanki, which was earlier preserved by the order of trial court itself. Though, so far the prayer of summoning of call detail record of alleged witnesses is concerned, in view of observations of the trial court, the same has rightly been rejected but the case of summoning of call detail record of applicant-accused and co-accused Irfan Solanki is on different footing, as the same was preserved by the order of trial court to be summoned at the stage of defence evidence. It is all together another matter that what would be evidentiary value of such record, but never the less the said record can not be said irrelevant. An accused has to prove the plea of alibi by standards as required under Section 103 of Indian Evidence Act and if the evidence of alibi is found to be false or fabricated, the court may draw adverse inference as per law.

13. In the light of aforesaid discussion, so far the refusal of prayer to summon the call detail record of applicant-accused and co-accused Irfan Solanki, which was earlier preserved by the order of trial court, does not appear in accordance with law and the same impinges upon the right of accused to led defence evidence. Considering facts of matter and legal position, it appears that the rejection of application 126 kha, so far as it relates to summoning of location and call detail record of the mobile phones of applicant-accused and co-accused Rizwan Solanki, which was earlier preserved by the order of trial court, is not in accordance

with law and thus, to this extent the impugned order is liable to be set aside.

14. So far the rejection of application 114 kha and 115 kha are concerned, by that application it was alleged that the signature of informant / PW 4 shown on the tahreer, were not made by her and thus, the same be examined from a handwriting expert. It was pointed out that before filing application No. 114 Kha and 115 Kha, the applicant has moved an application with request for hand-writing examination of the signature of informant and it was rejected on the ground that no questions were put to the informant / witness (P.W.4) regarding handwriting of informant. Thereafter, the applicant has moved an application under Section 311 Cr.P.C for recalling of informant / P.W.-4 and the questions were put to the informant/ P.W.-4 in that connection and thus, the rejection of application No.114 Kha and 115 kha is against law. In this connection it may be seen from record that the informant / PW 4 Nazir Fatima has clearly stated that she has signed the tahreer and the signature shown on the taheer were made by her and she has proved the tahreer in accordance with law. In view this categorical statement of informant / PW 4, it was wholly undesirable to get examined the veracity of signature of the informant / PW 4 shown on the tahreer, from hand-writing expert. When a witness has clearly stated that he / she has signed the particular document and proved the same in accordance with law, the same is not required to be examined from handwriting expert on mere assertion of accused that said witness did not sign the same, unless there is some material to show that said witness has not signed said document. No such prayer, as sought by the applicant-accused, can be granted on such fanciful grounds. Thus, so far the rejection of application of 114 kha and 115 kha is concerned, there is no illegality or perversity in the impugned order.

15. In view of aforementioned, the impugned order so far it relates to the rejection of application 126 kha for summoning of location and call detail record of the mobile phones of applicant-accused and co-accused Rizwan Solanki, which was earlier preserved by the order of trial court, is set aside and the matter is remanded back to the trial court to decide the application 126 kha afresh in accordance with law. The remaining part of impugned order is upheld. The impugned order stand altered to the above extent.

16. The application under section 482 CrPC is disposed of in above terms.

Order Date :- 16.11.2023

Neeraj