

Neutral Citation No. - 2023:AHC:213007

Court No. - 50

A.F.R.

Reserved on: 25.08.2023

Delivered on: 03.11.2023

Case :- CRIMINAL REVISION No. - 3588 of 2017

Revisionist :- Vidya Sagar

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

Counsel for Revisionist :- Lok Nath Shukla

Counsel for Opposite Party :- G.A., Km. Nisha Singh, Prem Chandra

Hon'ble Ram Manohar Narayan Mishra, J.

1. Pleading have already been exchanged between the parties.
2. The instant criminal revision has been preferred by the accused-revisionist against the order dated 05.08.2017 passed by learned Additional Chief Judicial Magistrate-III, Jaunpur, in Criminal Case No. 5690 of 2017 (Jagnarayan Vs. Sher Bahadur) under Sections 379, 427 I.P.C., P.S.- Barsati, District- Jaunpur, whereby discharge application under Section 245(2) Cr.P.C. moved by the accused-revisionist has been dismissed.
3. Heard the submissions of Sri Lok Nath Shukla, learned counsel for the revisionist, Sri Deepak Kapoor, learned A.G.A. for the State, Sri Prem Chandra, learned counsel for opposite party No. 2 and perused the record.
4. The brief facts relevant for present revision are that the complainant filed present complaint against the revisionist and four other accused persons on 02.09.2005 with averment that on 17.05.2005, he was going

towards her village in the evening from District Court, Jaunpur, after disembarking from a train, when he reached near border of his village around 07:00 P.M., he heard some noise from his bamboo cluster situated at Plot No.234/ 1.30. He reached near his bamboo cluster and found that the accused persons were cutting bamboo from said cluster and accused Shravan Kumar was carrying the cut bamboos on his shoulder. He cried and shouted to catch them, whereupon the witnesses Deepak and Ajay Prakash reached the spot, however, the accused persons made their good escape. In the meanwhile, accused persons carried away 10 bamboos which were cut from his cluster amounting to Rs. 500 and left two cut bamboos on the spot, due to which he suffered Rs. 400 more loss. He got a written report prepared next day, when he reached the court and produced the same before Additional S.P. Jaunpur, the complaint was registered before trial court. The complainant examined himself under Section 200 Cr.P.C. and statements of witnesses Deepak and Ajay were recorded under Section 202 Cr.P.C. in support of complainant's version. The learned court below summoned the revisionist under Section 379 and 427 I.P.C. vide order dated 31.03.2006. Feeling aggrieved by the summoning order, the revisionist preferred a Criminal Revision No. 4210 of 2006 (Vidya Sagar Vs. State of U.P. and another) before this Court which was decided vide order dated 07.10.2016. Thereafter, present revisionist moved an application under Section 245(2) Cr.P.C. for discharge before court below on ground that he has been falsely implicated in the case. The complainant did not lodge any F.I.R. deliberately on pretext of being sick at that time. His application under Section 156(3) Cr.P.C moved before court below was dismissed and thereafter he filed present complaint. There is an old enmity between the accused on the one hand and the complainant as well as father of the witness Deepak, namely Balraj on the other hand and due to this enmity many criminal and civil litigations are proceeding between the accused applicant and complainant and father of these witnesses. The complainant

had assaulted accused on 15.07.1996 regarding which a criminal case S.T. 419 of 2010 State Vs Hubanarayan is pending before Special Judge, E.C. Act, Jaunpur and another case was lodged by Tirthraj, the brother of accused applicant against Usardan and others under Section 147, 452, 504, 506 I.P.C. and a criminal revision was also preferred in that case. A civil suit is also proceeding between the accused-applicant and co-accused Sharvan Kumar, Praveen Kumar and Ram Prakash. Apart from that a criminal case is pending in the court against the accused Sher Bahadur. In that case, this is not possible that the accused-applicant would commit theft along with co-accused. The complainant has filed present complaint on creating a false story in collusion with co-accused of this case, no bamboo cluster is existing in the plot No. 234/1.30 of the complainant, he is neither owner nor in possession of said bamboo cluster. In fact, said bamboo cluster was planted by Babu Ram, the grand-son of Bhagwan Das and he is owner, in possession of said bamboo cluster and Civil Suit No. 1049 of 1994 Babu Ram Vs. Usardhan is also pending with regard to said bamboo cluster. No offence of theft is made out in the case against the accused applicant and he is liable to be discharged in this case. Learned court below dismissed discharge application on premise that grounds taken in discharge 245(2) Cr.P.C. are matter of evidence and the evidence of party is yet to be adduced and the court can give its finding after adducing of evidence in the case.

5. The accused applicant has preferred present revision with averment that the application under Section 156(3) Cr.P.C. initially filed by the complainant for lodging an F.I.R. and directing investigation by police with regard to alleged incident was dismissed by court below vide order dated 07.07.2005, however, the complainant filed present complaint by concealing this fact. The accused filed an application under Section 245(2) Cr.P.C. comprising many factual and legal grounds, but same were not properly addressed by learned court below while dismissing his

application. The accused revisionist and co-accused are themselves on enmical terms and no question arises that the revisionist and co-accused will involve in commission of theft and criminal mischief as alleged in the complaint. The charge against the revisionist are groundless and he deserves to be discharged and the impugned order is liable to be set aside.

6. Learned counsel for the revisionist addressed the grounds taken in discharge application as well as in revision memo while his arguments and submitted that the matter is essentially of civil nature as the ownership of said bamboo cluster is subjudice to civil court and on that account also no case of theft or criminal mischief is made out against the revisionist and therefore, the impugned order is liable to be set aside.

7. *Per contra*, learned A.G.A. for the State and learned counsel appearing for opposite party No. 2 submitted that the learned trial court has applied his judicial mind and rightly passed the impugned order dated 31.03.2006 whereby discharge application moved by the revisionist has been dismissed. The chargesheet is submitted against the complainant in criminal case No. 1286 of 2003 (State Vs Sudeep Narayan and others) which is pending trial. The complainant has rightly filed the complaint case against the revisionist and the summoning order 31.03.2006 is legal and genuine.

8. This is admitted fact that criminal revision filed by the present revisionist against the summoning order passed by learned court below in present case has been dismissed and just thereafter the accused has moved an application under Section 245(2)Cr.P.C. and claiming discharge at pre trial stage. The revisionist is not enlarged on bail as yet as informed by his learned counsel. No further proceedings were taken by court below between summoning order and filing of discharge application by the revisionist. As the summoning order was affirmed in criminal revision against summoning order by this Court on same facts, application for

discharge under Section 245 (2) Cr.P.C. filed by the revisionist could not be allowed by trial court and the trial court has rightly dismissed the discharge application with observation that the grounds taken in the discharge application are matter of fact which can only be adjudicated after adducing of evidence. Disputed questions of facts cannot be adjudicated to hold that the charge levelled against the accused are groundless in facts and circumstances of the present case.

9. In a complainant's case two stages of discharge are provided, first at pre trial stage under Section 245(2) Cr.P.C. and secondly after recording of evidence under Section 244 Cr.P.C. The provision of Section 245 Cr.P.C. are reproduced as under:

“Section 245 in The Code Of Criminal Procedure, 1973

245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless”

10. Thus, from perusal of provisions of Section 245, it is obvious that a Magistrate may discharge an accused at any previous stage of the case before recording evidence under Section 244 Cr.P.C. if, for reasons to be recorded by such Magistrate, he considers charge to be groundless. Whereas under Section 245(1) Cr.P.C. the wide amplitude has been given to the Magistrate, who may discharge the accused if on taking of evidence under Section 244, he considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted would warrant his conviction. As discharge application under Section 245(2) Cr.P.C. has

been filed by the accused before Magistrate on similar grounds which would have been taken by him while challenging summoning order before this Court in Criminal Revision No. 4210 of 2006 (Vidhya Sagar Vs. State of U.P. and Another), the charge cannot be held groundless at this stage.

11. Hon'ble Supreme Court in Ajay Kumar Ghose Vs. State of Jharkhand and others (2009) 14 SCC 115 held that:

“There is difference in Sections 245(1) and 245(2) CrPC. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether, the conviction of the accused would be warranted if the evidence remains unrebutted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) CrPC. The situation under Section 245(2) CrPC is, however, different. There, the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The previous stage would be before the evidence of the prosecution under Section 244(1) CrPC is completed or any stage prior to that. Previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge.”

12. Hon'ble Supreme Court in Harinarayan G. Bajaj v. State of Maharashtra & Ors. (2010) 11 SCC 520 and Ajay Kumar Ghose Vs. State of Jharkhand and others (2009) 14 SCC 115 considered the legal position with regard to difference of procedure in trial of warrant cases on the basis of police report and that instituted otherwise than a

police report, and held that right of an accused to cross-examine the witnesses produced by the prosecution before framing of a charge against him was a valuable right. It was with their cross-examination the accused could show to the Court that there was no need for a trial against him and that the denial of the right of cross-examination under Section 244 would amount to denial of an opportunity to the accused to show to the Magistrate that the allegations made against him were groundless and there was no reason for framing of charge against him.

13. The trial court cannot frame the charge against accused without recording evidence under Section 244(1) Cr.P.C. and even at the stage of Section 244 Cr.P.C., the accused has right to cross-examine the witnesses. This Court has already held that right to cross-examine the witnesses, who are examined before framing of charge is a very precious right, because it is only by cross-examination that the accused can show to the court that there is no need of trial against him. It is to be seen that before framing of the charge under Section 246 Cr.P.C., the Magistrate has to form an opinion about their being grounds for presuming that the accused had committed the offence triable under the Chapter. If, it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope of framing of charge against him.

14. On the basis of foregoing discussions and observations, this Court is of considered opinion that the learned trial court has not committed any illegality, irregularity or perversity while dismissing the discharge application moved by the accused revisionist under Section 245(2) Cr.P.C., however, the accused will have right to cross-examine the prosecution witnesses at the stage of evidence under Section 244 Cr.P.C. and before framing of charge, so that he may be able to show to the court that there is no need of trial against him and he is liable to be discharged under Section 245(1) Cr.P.C. He can confront the witnesses with regard to

documents placed in support of his claim that the matter is essentially of civil nature and no charge as alleged against him is made out in the case.

15. Accordingly, the revision stands **dismissed** with above observations.

16. However, in case the accused-revisionist is not already enlarged on bail in the case, he is at liberty to move a bail application before the court below and the same will be disposed of in the light of guidelines issued by Apex Court in **Satender Kumar Antil Vs. Central Bureau of Investigation and another reported in 2022 SCC Online SC 825.**

Order Date: 03.11.2023

Nitika Sri.