

Court No. - 81

Case :- MATTERS UNDER ARTICLE 227 No. - 12091 of 2022

Petitioner :- Smt. Gudiya

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Raghuvansh Misra

Counsel for Respondent :- G.A.,Alok Singh,Deepak Dubey

Hon'ble Mrs. Jyotsna Sharma,J.

1. Heard Raghuvansh Misra, learned counsel for the petitioner, Sri Alok Singh, learned counsel for private respondent nos. 2 to 6 and Sri S.C. Mishra, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed by the petitioner claiming following relief:-

“(i) issue an appropriate order or direction to set aside the order dated 17.10.2022 of Sri Vivek Sangal, Sessions Judge, Agra in Criminal Revision no. 93 of 2020 (Dilip and others versus State of U.P. and another).”

3. Relevant facts are as below:-

- Smt. Gudiya moved an application under section 156(3) Cr.P.C., on the basis whereof case no. 51 of 2019 under sections 147, 148, 149, 323, 325, 452, 504, 506 and 302 IPC was registered. The allegations in nutshell are that the father and brother in-law of the informant were assaulted with ‘lathi-danda’. They managed to escape. 10 minutes later, the accused persons namely, Than Singh, Dilip, Pawan armed with firearms and other accused persons namely, Sunil, Anil, Lalit and Sachin carrying lathi, danda, farsa came to the informant’s house and assaulted her mother in-law Patri Devi. Accused Dilip and Pawan fired at Mahendra and Sachin, which accidentally hit not them, but Anil and Lalit i.e., two of the assailants themselves. Patri Devi died on the spot. Suresh and Hakim Singh suffered fractures.
- The story in the application under section 156(3) Cr.P.C. also mentioned the fact that she tried to lodge an FIR but the same was not registered by the police. Instead an FIR case crime no. 665 of 2018 was registered against husband of the informant and several others.
- After investigation, a final report was submitted by the police.
- The first informant filed a protest petition. The CJM, Agra rejected the final report and treated the protest petition as complaint by order dated 09.09.2019.
- The court proceeded and examined her and her witnesses. The complainant-Gudiya was examined under section 200 Cr.P.C. Her witness-Vijay as CW1, Laxmi Devi as CW2, Phoolwati as CW3,

Dr. C.P. Rawat as CW4, Dr. Sumit Kumar Singh as CW5 and Hakim Singh as CW6 were examined under section 202 Cr.P.C.

- The CJM, by order dated 12.03.2020, summoned accused Than Singh under sections 147, 148, 149, 323, 452, 304, 504 IPC; Dilip and Anil under sections 147, 148, 149, 323, 452, 504 IPC; Sunil and Sachin under sections 147, 148, 149, 323, 452, 307, 504 IPC.
- The aforesaid accused persons preferred a criminal revision no. 93 of 2020 against summoning order. The revisional court by order dated 17.10.2022 directed the Magistrate concerned to pass a fresh order in the light of the observations of the revisional court and set aside the summoning order.

Now the complainant is before this court challenging the order of the revisional court.

4. The submissions of the petitioner are that the revisional court went beyond its jurisdiction. It re-appreciated the evidence on record, which cannot be done by the revisional court. Further, it is argued that the direction of the revisional court to direct the complainant to produce some more witnesses, is wrong as formal witnesses cannot be said to be the witness of the complainant. Contention of the petitioner is based on proviso to sub-section (2) to section 202 Cr.P.C., which is as below:-

“In an inquiry under Sub-Section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath; Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.”

5. On the basis of above provision, it is argued that the formal witnesses like the doctor and the head moharrir, cannot be categorised as his witnesses, therefore he was not obliged to produce them.

The petitioner refers to the judgment of the Allahabad High Court given in ***Kallu Pal and Others vs. State of U.P. and Another; 2008 (3) ADJ 254***. The High Court observed in para nos. 3 and 4 as below:-

“3. The word "his witness" occurring in the proviso to Sub-section 2 of Section 202 Cr.P.C. is of material significance. The formal witnesses, such as doctor, Investigation Officer, Executive Magistrate, Police constable etc are not under the command of the complainant. They are not the witnesses of the complainants confidence. Hence they are not "his witnesses". Thus the formal witnesses are not covered by the proviso to Section 202(2) Cr.P.C.

4. The complainant is bound to produce only those witnesses of facts whom he intends to produce in the court of Sessions. The witnesses of fact who are not produced under Section 200 or 202 Cr.P.C, cannot be produced by him, in the court of Sessions. The complainant is not bound to produce those witnesses of fact, whose names are, though mentioned in the complaint but who are not intended to be produced by him in the Court of Sessions.”

6. The State and the private respondent have not countered the above proposition of law by bringing into this court's notice any contrary law laid down by the High Court or the Supreme Court in this respect.

7. I do not propose to defer from the interpretation of the word “his witness” as mentioned in the judgment of ***Kallu Pal and Others (supra)***.

In my view, the purpose of proviso to section (2) of section 202 Cr.P.C. shall fail if the Court/Magistrate do not play their own role.

8. In a matter before the Supreme Court in *Shivjee Singh vs. Nagendra Tiwary and others*, (2010) 7 SCC 578, the issue was whether proviso to section 202(2) Cr.P.C. was mandatory and whether the Chief Judicial Magistrate committed a serious error in taking cognizance against the respondents without insisting on the examination of remaining two witnesses. The Supreme Court in para no. 7 of the judgment held as below:-

“7. We have considered the respective submissions. By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word ‘shall’.”

After observing as above, the Supreme Court further elaborated the law as to enquiry in section 202 Cr.P.C. and then in para nos. 11, 12 and 13 touched upon ‘satisfaction of the Magistrate’ before he could proceed to summon the accused.

Para nos. 11, 12 and 13 of the Supreme Court’s judgment are as below:-

“11. Section 202(1) empowers the Magistrate to postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No.25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200.

12. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath.

13. Section 203 empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then

he may issue summons for attendance of the accused in a summons-case. If it is a warrant-case, then the Magistrate can issue warrant for causing attendance of accused.”

A thing which is relevant to point out is that after referring to the procedure which could be adopted under section 202(1) and 202(2) Cr.P.C., the Supreme Court spoke of sufficient ground to proceed and the Magistrate’s satisfaction thereon.

Further in concluding paras of the judgment, the court held that non-examination of all the witnesses by the complainant as per the provisions of proviso to section 202(2) Cr.P.C. would not vitiate the proceeding and it will not preclude the Magistrate from taking cognizance and issue process or passing a committal order **if he is satisfied that there existed sufficient ground for doing so.**

9. In my view, the Supreme Court found it desirable that the complainant is directed to examine all his witnesses, however in case the complainant failed to produce any one or one more of his witnesses for some reason that cannot be a ground to assail the summoning order or the committal order. The Supreme Court, in my opinion, did not put any bar on the powers of the Magistrate or the court concerned to summon any of the witnesses, whether from the list of witnesses furnished by the complainant or any other person not from the list, for the purpose of arriving at requisite satisfaction.

This aspect of the matter shall be clearer by going through the view as taken by Allahabad High Court given in ***Criminal Appeal No. 9188 of 2022 (Dr. Divya Nand Yadav and Another vs. State of U.P. and Another) decided on 20.04.2023.*** It may be noted that the proceedings before a Magistrate under section 202 Cr.P.C. fall under the head of ‘inquiry’ as juxtaposed to trial or investigation as defined in section 2(g) and 2(h) Cr.P.C. Further Section 202 Cr.P.C. speaks of ‘inquiry’ into the case by the Magistrate himself. The law casts burden on the Magistrate to conduct an inquiry himself. The manner in which the provision is worded gives an impression that Magistrate is expected to play an active role and that he cannot afford to be a passive spectator. This point of view has been dealt with in the judgment of ***Dr. Divya Nand Yadav and Another (supra).***

It was held in para nos. 8 and 9 as below:-

“8. It is clear that the examination of witnesses under Section 202 Cr.P.C., as is popularly known, is in fact part of inquiry which a Magistrate may conduct in cases he does not find enough of grounds to immediately proceed to summon the accused. Though not always, this part of procedure too has become a routine matter. In almost all the cases based on complaint, the witnesses are examined without realizing the fact that such a step shall be unnecessary if the Magistrate/the court concerned is satisfied that prima facie case is made out, on the basis of the examination of the complainant and his witnesses at previous stage of the case i.e. section 200 Cr.P.C. Where the Magistrate finds himself short of requisite level of ‘satisfaction’ then only he may decide to further probe into by ordering for examination of more witnesses. The reasons behind jumping to the next step of Section 202 Cr.P.C. have

gone in to oblivion in the rush of work and almost routinization of things.

9. The phrase occurring in Section 202 Cr.P.C. "inquire into the case himself" enjoins the Magistrate that he actually plays its part by examining the witnesses himself, rather than depending upon the statements which might be clouded, cryptic, obscure or ambiguous and sometime very direct and bald. The experience in courts strengthens the impression that more often than not unsupervised, one sided statement may have more to conceal than to reveal. It is said that law is a living being. It grows and develops according to the exigencies of the times. It will not be out of context to mention that the superior courts have observed in a number of cases that the trial courts ought to be quite alert when they decide to take cognizance or summon the accused persons, may be at the stage of Section 204 Cr.P.C. or otherwise. The superior courts have consistently kept on cautioning the courts to be quite circumspect, careful, alert and wakeful while putting the legal machinery in motion. The vicissitudes of cases, peculiar facts and situations do impact the interpretations of law and contribute towards the developments and progress of legal arena."

10. The court in *Dr. Divya Nand Yadav and Another (supra)* equated the word 'prima facie satisfaction' with the sufficient ground to proceed on the basis of the judgment of the Supreme Court passed in *Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44*. The relative scope of Sections 203 and 204 Cr.P.C. were noted and considered by the Supreme Court in **Pepsi Food Limited and another vs. Special Judicial Magistrate and others; (1998) 5 SCC 749**, is as below:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The Supreme Court emphasized the need that the Magistrate should not sit like a silent spectator.

In para no. 14 of the judgment of *Dr. Divya Nand Yadav and Another (supra)*, this court has held as below:-

“14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other obstacles before the court below for arriving at the "prima facie satisfaction" a word which can be equated with the word "prima facie case".

11. A question may arise that in case the complainant for some reason, whether justifiable or not so justifiable, either cannot produce its witness or deliberately withholds any of them, then what course is available to the Magistrate, who is conducting an 'inquiry'. Can he be left at the mercy of the complainant? There may be instances where a Magistrate may find that something more is required before he can record his 'prima facie satisfaction' with regard to summoning of the accused.

12. Moreover, a situation may arise where in a genuine case put before the court, the complainant is helpless in producing even 'his witness' for some extraneous reason. In such a situation definitely he has an option to apply to the court for summoning those witnesses, which he cannot produce himself.

13. In my opinion, section 311 Cr.P.C. is framed to rescue situations, particularly in cases where the Magistrate is of the view that certain person/witness must be examined before he can record his 'satisfaction' to proceed against certain persons. Such person may or may not be from the list. In case name of such witness finds place in the list, the complainant may not be willing to produce him for some reason. Same applies where name of an important witness is deliberately left out of the list.

Section 311 Cr.P.C. is as below:-

“311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

14. From bare perusal, it is evident that the provisions of section 311 Cr.P.C. shall apply even at the stage of inquiry. The trial court or the inquiry court may summon any material witness/witnesses which, in its opinion, are necessary to be examined for just decision. It will be rather unwise to put fetters on a court whether it is trial court, inquiry court, the court of appeal or a revisional court, where it seeks to exercise its powers for production of some important witness for just decision in the matter. It is not at all necessary that when a court chooses to exercise its powers, it should specifically mention under which provision of law such powers are being exercised.

15. In the instant case, the learned revisional court, after hearing both the sides found a number of facts and circumstances relating to the matter,

which needed attention. It may be noted that respondent's main contention is that Patri Devi did not die of any injury and that she died a natural death. Further that after investigation, the investigating officer did not find adequate material to chargesheet the accused persons and closed the case by filing a final report; The court was attentive to the fact that there was a criminal case already registered against the complainant's husband and number of others, (case crime no. 665 of 2018) under sections 147, 148, 149, 302, 307, 504 IPC. The revisionist had before the revisional court, argued that a false FIR against them was lodged by the complainant to create a defence in their favour and to exert pressure on them to settle scores in the wake of pending criminal case against the other side. This fact was also brought into notice of the revisional court that the medical officer/doctor, who prepared medical report of Hakim Singh was not produced by the complainant and there were certain other relevant papers in respect of which witness were not produced. Besides above material facts, brought into notice of revisional court, some other submissions were made with regard to summoning order by the revisionist.

I perused the order passed by the revisional court. The revisional court has given cogent reasons for setting aside the order of the trial court. The revisional court further found that some of the material witness were not produced, which ought to have been examined in a case exclusively triable by the session court.

16. In my view, the powers conferred upon the court under the provisions of section 311 Cr.P.C. have a real purpose. When a court properly exercises such powers in interest of justice, the court exercising supervisory powers should be slow to interfere. Moreover, though the doctor and any other formal witness may not be 'his witness' but definitely, the court's power to summon them remains unaffected. The complainant-petitioner cannot take shelter of the judgment pronounced by the High Court in ***Kallu Pal and Others (supra)*** to circumvent the powers of the inquiry court or the court of revision, which have been provided by statutory law. In my view, even if certain witnesses are not or cannot be produced by the complainant, on the premise that those witnesses were not 'her witnesses' and not under his command, the court is perfectly within its powers to summon and examine them.

17. The respondent has raised an objection against the maintainability of this petition and places reliance on the judgment of the Bench of this Court passed in ***Criminal Revision no. 2078 of 2000 (Ram Kishore Singh vs. State of U.P. and Others)***. In the aforesaid case before the High Court, a common judgment and order passed by the Sessions Judge, Varanasi in two criminal revisions, whereby both the criminal revisions were allowed, was challenged. The revisional court had held that when a specific task was given to the Magistrate, he ought to have performed in true spirit of order of the court. The revisional court had set aside the order of the C.J.M. concerned, expressing surprise that the main appellant, the circle officer was absolved of the charge, while public persons who were said to be merely standing there, were made accused under section 34 IPC. The revisional court had sent back all the record directing the C.J.M., Varanasi for passing a fresh order, after considering all material facts and circumstances. The order of the revisional court was challenged before the Allahabad High Court. In para no. 17 of the judgment, the Allahabad High Court observed that the Sessions Judge

had only set aside the order of the learned Magistrate and to pass an order a fresh and therefore the parties would have another opportunity to address the Magistrate's court. Hence, there was no need to rush to High Court. The court expressed a view that such an order falls within the order of interlocutory order.

18. This may be noted at this juncture that the present petition has been filed under Article 227 of the Constitution of India and the principles, if any, laid down in the above noted judgment cited by the respondents, definitely do not apply here. The issue here is quite different. In the instant case, the revisional court made certain cogent observations in the backdrop of certain facts and circumstances. It was of the view that in the light of the contention that the deceased-Patri Devi died a natural death, the evidence of the doctor and another witness ought to have been recorded, before the Magistrate could have decided the matter of summoning. When the allegations are of serious nature, the courts have to be extra cautious and careful. And this view finds support from the judgment of the Supreme Court in *Pepsi Food Limited and another (supra)*.

19. In my view, there is no good ground to interfere in the impugned order. Hence, the petition is **dismissed**.

Order Date:- 16.12.2023

#Vikram/-