

Court No. - 11**Case :-** APPLICATION U/S 482 No. - 11375 of 2023**Applicant :-** Mathura Prasad @ Mathura**Opposite Party :-** State Of U.P Thru. Prin. Secy. Home Civil Sectr. Lko. And Another**Counsel for Applicant :-** Yogeshwar Sharan Srivastava**Counsel for Opposite Party :-** G.A.**Hon'ble Saurabh Lavania,J.**

Heard learned counsel for the applicant and learned AGA for the State and perused the record.

The present petition has been filed for the following main relief:-

"For the facts reasons and circumstances mentioned in the accompanying affidavit, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the order dated 17/10/2023, passed by Learned Additional District and Session Judge Court No. 05/ Special Judge (Gangster Act.) Gonda, (State Vs. Ramesh and Ors.) in Session Trial No. 198 of 2003, in the interest of justice."

Brief facts of the case, as indicated, are to the effect that an FIR was registered by the police on 14.07.1997 at about 13.40, with regard to an incident occurred in the night of 13/14.04.1997. The prosecution story narrated in the FIR, in short, is that the named accused persons including the petitioner came to the house of the informant namely Vasudev Mishra, in the night of 13/14.04.1997 at about 2:30 A.M. and assaulted the sons of the informant with Hathgola and Gun & Katta with the intention to cause death and also demolished the newly constructed wall. Thus, general allegations were leveled in the FIR dated 14.07.1997, against the named accused persons including the petitioner. During the course of trial the statement of the petitioner under Section 313 Cr.P.C. was recorded by the Trial Court on 10.08.2023. In this statement the petitioner stated that at the time of alleged incident the licensed gun of petitioner's father was deposited in the police station and he had gone to his brother's house at Lucknow.

After the aforesaid, the petitioner preferred an application No. 307 Kha dated 24.08.2023, praying therein that head Moharrir P.S.- Tarabganj, Distt.- Gonda, who had deposited the licensed gun of petitioner's father

bearing gun No. 26797, be summoned for examination to prove that the licensed gun and two cartages (Kartoos), were deposited in the police station by the petitioner after demise of his father on 13.03.1996. Another application No. 308 Kha was preferred by the petitioner, wherein he prayed to summon the Prabhari Adhhikari (Ayudh) Office of District Magistrate, Gonda, to prove the fact that the licensed gun was released on 22.02.2001 in favour of legal heirs of late Umashankar, as the petitioner claims that the licensed gun of his father was not available at the time of alleged occurrence and therefore the alleged presence of the petitioner at the place of alleged occurrence would become foul version of the informant. The petitioner had also preferred a list of the witnesses to be summoned.

By means of the impugned order dated 17.10.2023 (Annexure No.1), the trial Court has rejected the above indicated applications of the petitioner.

Assailing the order impugned dated 17.10.2023, learned Counsel for the applicant stated that the Additional District and Sessions Judge, Court No.5/ Special Judge (Gangster Act), Gonda, in Session Trial No. 198 of 2003 vide its order dated 17.10.2023, rejected the application(s) no. 306kha, 307kha, 308kha preferred by the applicant for summoning the witnesses namely Head Moharrir, Police Station Tarabganj, District Gonda, and Prabhari Adhikari (Ayudh), Office of District Magistrate Gonda as also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari, in a utter arbitrary and illegal manner.

He further submitted that allegations against the applicant in the FIR is to the effect that at the time of alleged incident he was holding a gun and as such to support the case setup by the applicant at the stage of 313 Cr.P.C., wherein the applicant specifically indicated that the licensed gun of father of the petitioner was deposited in P.S. Tarabganj, Gonda and on the date of alleged incident the applicant was not present at the place of crime as he had gone to the house of his brother situated at Lucknow, the witnesses indicated in the applications are relevant witnesses and as such they were

required to be summoned and being so by the impugned order dated 17.10.2023 injustice has been done by trial court.

He further submitted that examination of Head Moharrir and the Prabhari Adhikari (Ayudh) was required to impeach the case of the prosecution.

Learned Counsel for the applicant further says that relevant grounds have already been indicated in paragraph nos. 22 to 25 of the affidavit filed in support the present application, which are as under:-

"22. That in fact the petitioner has been falsely implicated in the instant case and impugned order has been passed by the Court below in a regular routine manner and as such the interference of this Hon'ble Court is required at this stage to secure the justice in favour of the petitioner.

23. That, the Petitioner submits that the allegations against the Petitioner are serious in nature and without affording opportunity to produce their defense Learned trial court has rejected the applications in cursory and mechanical manner. The Petitioners are charged with attempt to murder, causing injuries and in these circumstances the Petitioners ought to have been given ample opportunity to produce their defense.

24. That, Learned trial court failed to consider that during trial prosecution was given ample opportunity to produce its case but the application of the Petitioner to produce defense witnesses and evidence was rejected on the ground of causing delay.

25. That, section 233 (3) Cr.P.C stipulates 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 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."

In support of his contention, learned Counsel for the applicant has placed reliance on the judgment passed by the co-ordinate Bench of this Court dated 21.09.2023 in Application U/s 482 Cr.P.C. No. 9156 of 2023 (Raja Yadav alias Vijay Kumar Yadav and another Versus State of U.P. and Others). The relevant paragraphs, referred by learned Counsel for the applicant, are as under:-

"5. Learned A.G.A., while opposing the prayer of the applicants, submits that police report related to Case Crime No. 296 of 2017 has no relevancy in the present case. It is further submitted that Application Nos. 219 Kha/1, 235 Kha/1 and 239 Kha/1 have already been allowed by the court below by which, F.I.R. of the

aforesaid case, final report, site plan, panchayatnama and post mortem report of Amritlal as well as medico legal report were taken on record along with other documents. It is also submitted that for proving of the said documents, it is obligatory on the part of the accused persons/applicants to produce defense witnesses. However, as all the witnesses, those names are mentioned in the police report in Case Crime No. 296 of 2017 have no relevancy in the present case as they are formal witnesses, including the Head Moharrir, Sub-Inspector and the doctor, who prepared the medico legal report as well as post mortem report of Amritlal. It is lastly submitted that the court below has rightly allowed the aforesaid three applications of the applicants and rejected the rest of the applications.

6. Considering the arguments advanced by the learned counsel for the applicants, learned A.G.A. and going through the contents of application, F.I.R., impugned order as well as other relevant documents, it is evident that 6 applications were moved by the applicants, out of which, 3 applications were allowed by the court below and rest of the 3 applications were rejected vide impugned order.

It is further evident that in the present case, the entire police report of Case Crime No. 296 of 2017 has no relevancy. However, attention of the Court has been drawn towards the statement of Chandrika Prasad, which was recorded in the present case on 09.09.2017, which is entered in CD No. 33 and a request was also made before the court below for calling him as a defense witness, but the same was also rejected. Evidently, the court below rightly rejected the application for summoning the record and police report related to Case Crime No. 296 of 2017, but once the statement of Chandrika Prasad was recorded in the present case and he was not produced as a defense witness, then the defence cannot be stopped from calling him as a defense witness. Therefore, the court below has wrongly rejected the application for summoning the Chandrika Prasad as a defense witness.

7. In such circumstances, present application stands disposed of with the direction that, in case, any such application for summoning of Chandrika Prasad or any other witness is moved, the same shall be considered and decided by the court below expeditiously, in accordance with law. "

Prayer is to interfere in the impugned order dated 17.10.2023 and allow the prayer sought in the present application.

Learned A.G.A. has opposed the present application. He says that order impugned is well reasoned and the trial court has taken note of each and every aspect of the case including the fact related to the witnesses namely Head Moharrir, Police Station Tarabganj, District Gonda, Prabhari Adhikari

(Ayudh) and also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari. He further submitted that applicant was failed to indicate the reasons for summoning these witnesses. As such no interference is required in the present matter and the present application is liable to be dismissed with cost, for the reason that the applicant preferred the application(s) just to cause the delay in trial, as the FIR was lodged way back on 14.04.1997 i.e. about 25 years back.

Considered the submissions advanced by learned Counsel for the parties and perused the record.

So far as the provision indicated by learned Counsel for the applicant is concerned i.e. 233(3) Cr.P.C., this Court finds that this provision is not mandatory. Each and every application based upon the frivolous ground, would not be allowed under this provision and accordingly it should be read as directory. It is in view of the law laid down by the Hon'ble Apex Court in the case of *State of Madhya Pradesh Versus Badri Yadav* reported in AIR 2006 SC 1769, the relevant paragraphs reads as under:-

"7. In this matter, the learned Additional Sessions Judge dismissed CrI.R.P. No. 46/2022 relying on a decision reported in AIR 2006 SC 1769 : 2006 KHC 842 : (2006) 3 KLT 205 : (2006) 9 SCC 549], *State of Madhya Pradesh v. Badri Yadav*]. In the said decision, the Apex Court considered the impact of Section 233(3) of Cr.P.C. Section 233 deals with 'entering upon defence'. Sub section 3 of Section 233 provides 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 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*. While interpreting sub section 3 of Section 233 of Cr.P.C, the Apex Court held that *S.233 itself deals with entering upon defence by the accused. The application for recalling and reexamining persons already examined, as provided under S.311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and reexamine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under S.233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-s.(3) of S.233 cannot be understood as compelling the attendance of any prosecution witness examined, cross examined and discharged to be juxtaposed as Dws (Defence Witnesses). In the present case PW8 and PW9 were juxtaposed as DW1 and DW2. This situation is not one what was contemplated by sub-s.3 of S.233 Cr.P.C.*

8. Thus the law is very clear on the point that the provisions of sub section 3 of Section 233 Cr.P.C. could not be understood as one compelling the attendance of any prosecution witness, who was examined in chief already, cross examined and reexamined, to be examined as a defence witness.

9. In the present case, the prayer that has been canvassed after dismissal of the petition filed to recall PW3 is for the said purpose and, therefore, such procedure cannot be permitted. In view of the matter, the orders impugned do not require any interference and, therefore, this petition lacks merit and is accordingly dismissed."

For coming to the conclusion as to whether the impugned order dated 17.10.2023 passed by the trial court is justified or not, this Court is of the view that it would be appropriate to quote the relevant portion of the same, which reads as under:-

"उभयपक्षों को सुनने तथा पत्रावली के परिशीलन के पश्चात् स्पष्ट होता है कि प्रस्तुत सत्र परीक्षण 198/2003 राज्य बनाम रमेश आदि मुकदमा अपराध संख्या 64/1997 अन्तर्गत धारा 147,148,149,307,324,427, भारतीय दण्ड संहिता, थाना तरबगंज, जिला गोण्डा से सम्बन्धित हैं पत्रावली एक्शन प्लान के अन्तर्गत प्राचीनतम वादों की श्रेणी में आती है आरोप विरचित किये जाने के पश्चात् प्रस्तुत सत्र परीक्षण में दिनांक 15.07.2023 को अभियोजन साक्ष्य समाप्त होने के उपरान्त पत्रावली अभियुक्तगण के बयान अन्तर्गत धारा 313 सीआरपीसी हेतु नियत की गयी। तत्पश्चात् दिनांक 10.08.2023 बयान अन्तर्गत धारा 313 सीआरपीसी अभिलिखित किया गया तथा पत्रावली सफाई साक्ष्य हेतु नियत की गयी, जिसके पश्चात् अभियुक्तगण की ओर से उपरोक्त तीनों ही प्रार्थना पत्र संख्या 306ख, 307ख, 308ख, सफाई साक्ष्य में विभिन्न साक्षियों को प्रस्तुत किये जाने हेतु प्रस्तुत किया गया है। यहाँ यह उल्लेख करना भी समीचीन होगा कि अभियुक्तगण की ओर अपने उपरोक्त तीनों ही प्रार्थना पत्र में जिस विशेष बन्दूक एस0बी0बी0एल0 गन संख्या 26797 का उल्लेख करते हुए उक्त बन्दूक के संदर्भ में सम्बन्धित हेड मोहर्रिर द्वारा जारी की गयी रसीद के आधार पर तत्कालीन हेड मोहर्रिर थाना तरबगंज जिला गोण्डा तथा सम्बन्धि प्रभारी अधिकारी (आयुध) कार्यालय जिला मजिस्ट्रेट गोण्डा को दस्तावेजीय साक्ष्यों के साथ सफाई साक्ष्य में तलब किये जाने हेतु याचना की गयी है उक्त विशेष लाइसेंसी बन्दूक के संदर्भ में वादी मुकदमा द्वारा न तो प्रथम सूचना रिपोर्ट में कोई उल्लेख किया गया है और न ही उक्त विशेष लाइसेंसी बन्दूक को सम्बन्धित विवेचक द्वारा विवेचना में सम्मिलित किया गया है और न ही उक्त के संदर्भ में कोई फर्द बरामदगी ही पत्रावली पर उपलब्ध है। अतः विशेष लाइसेंसी बन्दूक के जमा किये जाने के संदर्भ में जारी रसीद एवं अन्य दस्तावेजी साक्ष्यों के साथ सम्बन्धित तत्कालीन हेड मोहर्रिर व प्रभारी अधिकारी (आयुध) जिला मजिस्ट्रेट गोण्डा को सफाई साक्ष्य में तलब किये जाने का कोई औचित्य नहीं है और न ही प्रस्तुत सत्र परीक्षण के प्रभावी एवं सम्यक् न्याय निर्णयन हेतु उक्त साक्षियों को तलब किया जाना आवश्यक ही है। जहाँ तक अभियुक्तगण द्वारा प्रस्तुत प्रार्थना पत्र 306 ख में अन्य साक्षियों शशि शेखर ओझा, प्रवीण कुमार श्रीवास्तव, राघवराम पाण्डेय, सुरेन्द्र कुमार तिवारी, बब्बन पाण्डेय, हरिशंकर बढई, देवतादीन व चन्द्रमणि तिवारी को तलब किये जाने की याचना का प्रश्न है तो उक्त साक्षियों के संदर्भ में अभियुक्तगण द्वारा यह स्पष्ट नहीं किया गया है कि वे प्रस्तुत सत्र परीक्षण के प्रभावी एवं सम्यक् न्याय निर्णयन हेतु किस प्रकार आवश्यक हैं एवं उक्त व्यक्ति घटना से किस प्रकार जुड़े हुए हैं कि उनके साक्ष्य से अभियुक्तगण लाभ प्राप्त करने के अधिकारी होंगे। यहाँ यह उल्लेख करना भी समीचीन होगा कि अभियोजन पक्ष की ओर से प्रस्तुत साक्षी पी.डब्लू. 07 हेड मोहर्रिर जगदीश पाण्डेय से अभियुक्तगण की ओर प्रतिपरीक्षा में प्रार्थना पत्र में उल्लिखित विशेष लाइसेंसी बन्दूक के संदर्भ में कोई भी प्रश्न नहीं किया गया है और न ही अभियुक्तगण द्वारा विवेचना के दौरान अपने बयान अन्तर्गत धारा 161 सीआरपीसी में ही न तो कोई कथन किया गया है और न ही कोई दस्तावेजीय साक्ष्य प्रस्तुत किया गया है अभियुक्तगण द्वारा उपरोक्त तीनों ही प्रार्थना पत्र मात्र प्रस्तुत सत्र परीक्षण को विलम्बित किये जाने के उद्देश्य से प्रस्तुत किया जाना परिलक्षित होता है।

अतः उपरोक्त मामले के तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए अभियुक्तगण की ओर प्रस्तुत प्रार्थना पत्र निरस्त किये जाने योग्य है।

आदेश

आवेदक/अभियुक्तगण मथुरा प्रसाद पाण्डेय आदि द्वारा क्रमशः प्रस्तुत किये गये प्रार्थना पत्र संख्या 306ख, 307ख, व 308ख, निरस्त किये जाते हैं। पत्रावली वास्ते बहस दिनांक 30.10.2023 को पेश हो।"

From the relevant portion of impugned order dated 17.10.2023, quoted above, it appears that for rejecting the prayer to summon Head Moharrir P.S.- Tarabganj, Distt.- Gonda and Prabhari Adhikari (Ayudh), the trial court observed that neither the informant has indicated anything in the FIR with regard to the licensed gun nor the same was made part of the investigation report and as such there is no requirement to summon these witnesses. With regard to Head Moharrir P.S.- Tarabganj, Distt.- Gonda namely, Jagdish Pandey (P.W.:-7), the trial court in the impugned order also observed that in cross-examination, no question was put to this witness in relation to licensed gun nor the accused in his statement made under Section 161 CrPC has indicated the facts related to same nor has produced the documentary evidence in support of his case. With regard to other witnesses indicated in the application No.306 Kha, the observation of the trial court is to the effect that relevancy to summon the witnesses has not been indicated.

It would be apt to refer that while exercising power under Section 233(3) of CrPC, the trial court on three grounds can reject the application under Section 233(3) CrPC. Firstly, the application should have been with vexatious intention; secondly, the application should have been moved with an intention of delaying the trial and third ground for rejection available to the court is that the application has been moved with an intention of defeating the ends of justice.

In the instant case, Head Moharrir P.S.- Tarabganj, Distt.- Gonda was duly examined and cross-examined and during the cross-examination no such question was put as observed in the order impugned and to controvert the same, no document has been placed on record by the applicant and further, that in the FIR it has not been indicated that the present applicant was armed with gun and in fact in the FIR the general allegations have been levelled against all the accused and accordingly, the observations made by the trial court in rejecting the prayer to call the witnesses namely, Head Moharrir and Prabhari Adhikari (Ayudh) to the view of this Court are justified.

So far as the other witnesses, namely Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban

Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari, indicated in the Application No.306 Kha preferred by the petitioner are concerned, it is to be noted that the court has duty to call/summon those witnesses, whose testimony is relevant and therefore, if an accused wants to summon a witness then, he has to explain to the court the reasons for the same. In another words, the relevancy of the witnesses is to be shown, pleaded and proved.

From the application on record, it is apparent that the relevancy to call the witnesses namely Head Moharrir, Police Station Tarabganj, District Gonda, Prabhari Adhikari (Ayudh) and also Sri Shashi Shekhar Ojha, Praveen Kumar Srivastava, Raghav Ram Pandey, Surendra Kumar Tiwari, Babban Pandey, Harishanker Barai, Devdadeen and Chandramani Tiwari has not been indicated. As such, the trial court rightly rejected the Application No.306 Kha.

The trial court while rejecting the applications preferred by the petitioner for summoning the witnesses specifically observed that the applications have been moved with an intention to delay the trial. In the instant case, the FIR was lodged way back on 14.07.1997 and as such, this observation of the trial court appears to be just and proper.

For the reasons aforesaid, this Court affirms the specific findings given by the trial court while rejecting the application(s) preferred by the applicant and accordingly, this Court is of the view that the application(s) have rightly been rejected by the trial court and as such, the present application is liable to be dismissed. It is accordingly **dismissed**. No order as to costs.

Order Date :- 21.11.2023

Jyoti/-