

Court No. - 86

Case :- CRIMINAL REVISION No. - 3729 of 2024

Revisionist :- Subash Yadav

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

Counsel for Revisionist :- Satya Prakash Singh, Shesh Narain Mishra

Counsel for Opposite Party :- G.A., Kamal Kumar Singh

Hon'ble Ram Manohar Narayan Mishra, J.

1. Instant criminal revision has been directed against the impugned order dated 9.7.2024 passed by learned Session Judge, Azamgarh in three connected trial i.e S.T. No. 28 of 2012, S.T. No. 491 of 2014 and S.T. No. 29 of 2012 under sections 302/149, 302/149 and 3/25 Arms Act, respectively. By the impugned order learned trial court dismissed application 193 kha passed under section 233 Cr.P.C. to summon the defence witnesses.

2. Learned counsel for the revisionist submitted that the revisionist is an accused in S.T. No. 491 of 2014 along with co-accused persons at the stage of defence evidence the applicant filed an application 193 kha/4 under section 233 I.P.C. to summon following witnesses:-

i. Senior D.C.M. Officer N.I.R. Varanasi along with travel record registration dated 1.8.2021 related to Train No. 11060/CPR LTT. Express which runs between Azamgarh to LTT, Mumbai.

ii. Dr. Sanket H. Deshmuth Sai Iswar Building near Rana Tower old Velapur road Vulva (west) Mumbai Maharashtra.

iii. S.H.O. Kalwa P.S. Thane Mumbai Maharashtra with visiting register dated 2.8.2011.

iv. Subhash L.Y. the then Up Zila Adhikari Sagari, Azamgarh along with agricultural Accident Insurance description Register dated 16.8.2011 and application filed by Mewati Devi wife of Singhasan Yadav for seeking insurance claim which is in the office of CRO.

v. Vinod Singh Lekhpal then tehsil Sagari, Azamgarh.

vi. Original G.D. Dated 2.8.2021dated 2.8.2011, P.S. Raunapar S.P. Office Azamgarh.

3. Learned trial court allowed the application partly and summoned the record from the office of CRO Azamgarh but rejected the prayer in respect of witnesses and documents mentioned in Serial nos. 1 to 3 of application under section 233 Cr.P.C.

4. It is next submitted that Smt. Mewati Devi informant in the case lodged an F.I.R. on 2.8.2021 at 16:00 hours against the revisionist and three others for offence under section 302/34 I.P.C. with averment that her husband namely, Singhasan Yadav went to sell milk at 2.8.2011 at around 12:00 hours. He was sitting in four wheeler on way to home, his vehicle was hit by accused persons by their own vehicle. Her husband ran away from the spot after stepping down the vehicle the accused persons chased him and he was ran over by the vehicle of the accused persons and he died on the spot. At that time her son Jaikesh reached on the same place after taking medicine and he identified the accused persons.

5. As per post mortem dated 3.8.2011, the cause of death shown as hemorrhage and shock due to anti mortem injury.

6. It is further submitted that learned court below has rejected the prayer for summoning the witnesses and documents mentioned in serial no. 1 to 3 of the accused under section 233 I.P.C. with the observation that the case is listed under the action plan which has been decided on the priority basis. Applicant has not stated anything with regard to plea of alibi under section 233 I.P.C. It appears that section 233 I.P.C. empowered only with view to prolong the proceedings of the trial court of the case and case is fixed for final argument towards disposal of the case.

7. It is next submitted that the informant had received 11 lacs towards death claim insurance and learned trial court was please to summon the records in respect of that from office of CRO in impugned order, however, the documents documents mentioned in serial no. 1 to 3 are sought to produce in defence to fortify the plea of alibi taken by the revisionist. He was employed in Indian Army and he travelled on 1.8.2011 at 10:15 AM by booking an electronic reservation PNR No. 2323647770 at Ajamgarh and reached on 2.8.2011 at 5 P.M. Kalyan Railway station at that time he is named in the F.I.R., therefore, he moved an application before SHO Kalwa P.S. Thane Mumbai to mark his presence in visitors' register and, thereafter, he signed the visitors' register at police concerned.

He was suffering from viral fever and he visited the clinic of Dr. Sanket H. Deshmukh on 2.8.2011 at 6.30 P.M. and obtained a medical certificate from there which has also been annexed in supplementary affidavit.

8. He next submitted that it is wrong to say the applicant/revisionist has taken plea of alibi for the first time under section 233 I.P.C. in as much as in evidence of P.W. 2 Jaikesh a suggestion has been given by the counsel for the accused to the witness to the effect that one day earlier to the incident of this case the accused Subhash yadav travelled from Ajamgarh to Mumbai by train and same has been denied by the witness although the revisionist has taken specific plea under section 311 Cr.P.C. with regard to plea of alibi but when court has asked whether he is interested to produce defence evidence he replied in affirmative, therefore, no suspicion can be raised on bona fides of the revisionist while raising specific plea of alibi in application under section 233 Cr.P.C. In fact a road accident has been given cloak of murder by the informant.

9. Learned counsel for the revisionist placed reliance on the judgement of this Court passed in **Anupam Singh vs. State of U.P. and Another, 2024 SC ALL 29** wherein this court observed in paragraph nos. 5 and 6 as under;

"5. 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 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."

Under the provisions of section 311 Cr.P.C., the court has a plenary power to summon any person at any stage of the proceedings as a witness. This power includes recall and re-examination of any person who has already been examined. This power is to be exercised when the court finds it necessary to summon/recall any witness for just decision of the case. The law puts no fetters on the powers of the courts to call for any witness to attain the highest goal of justice. In my opinion this provision of law gives expression to the inherent power of the courts which is available to them by virtue of being the supreme authority who has

been entrusted with responsibility to do justice. The power lies with the Court alone as juxtaposed to rights or powers of parties. The others stake holders whether prosecution or defence, have a limited role of drawing the attention of the court and putting the relevant material before it which may assist it in arriving at a correct inference. On the other hand, section 233 Cr.P.C. works in a different plane altogether. For better understanding of difference between the two sections, I find it appropriate to reproduce section 233 Cr.P.C. as below:-

"233. Entering upon defence.

(1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) 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."

Section 233 Cr.P.C. finds place under Chapter XVIII titled as 'trial before a court of session'. This provision is essential part of session trial and is applicable when the prosecution evidence is complete and the accused is given an opportunity to produce the evidence in its defence. Undoubtedly this right has been given to the defence to produce its witnesses as part of fair trial and as part of legal principle of hearing both the sides. In my opinion, here the right belongs to the accused and not to the court concerned, in the sense that the court concerned shall ordinarily issue process and can decline to summon the witness only for the reason that the request is made for the purpose of vexation or delay or for defeating the ends of justice. The difference between the powers of the court and the right of the accused is too obvious. Under section 311 Cr.P.C., the power lies in the courts only and under section 233 Cr.P.C., the right lies with the accused and the court's interference is limited. The court can only refuse to issue summons where it ought to have refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice only.

6. In my view, if the application is refused on the grounds which are not covered by three excluding clauses, as provided in latter part of section 233(3) Cr.P.C. such approach shall be alien as far as scope of section 233 Cr.P.C. is concerned. This fact is undisputed that the witnesses who are sought to be summoned by the defence under section 233(3) Cr.P.C. were not examined as prosecution witnesses, at any stage. In fact, though they were witnesses of inquest but never produced by the prosecution."

10. Per contra, learned counsel for the respondent no. 2 submitted that revisionist has delayed the trial by taking plea of alibi in a murder case in which he is named in the F.I.R and motive has been attributed to him regarding commission of crime. Learned counsel for the revisionist has filed supplementary affidavit dated 8.8.2024 annexing therein medical certificate issued by the doctor in Mumbai wherein viral fever is shown it appears that on 2.8.2011 at 6:30 P.M. the revisionist has got his medical certificate prepared and marked his presence in visitors register at P.S. Kalwa, Mumbai only to create a false defence in his favour. There is no illegality, irregularity or perversity in the impugned order passed by learned trial court.

11. Learned Sessions Judge has dismissed the application under section 233 Cr.P.C. simultaneously on the ground that the conduct of the accused side has been such as they took always dilatory tactics to delay the conclusion of trial by frequently changing Vakalatnama, filing multiple applications on one and another ground and seeking adjournments. However, learned trial court has not discussed about the relevancy and expediency of documentary and oral evidence sought to be adduced under section 233 of Evidence Act by the accused side described in serial nos. 1 to 3 of application 193 Kha. However, learned trial court has partly allowed the application in respect of evidence sought to be adduced and described at serial Nos. 4 to 6 of application 193 Kha.

12. This court in Anupam Singh vs. State of U.P. and another (Supra) placed reliance in State of **M.P. vs. Badri Yadav and Another 2006 (9)SCC 549** wherein Hon'ble Supreme Court discussed that the application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine 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 Section 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-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as defence witnesses.

13. Having glance at provisions of section 233 Cr.P.C. it can be observed that section 233 Cr.P.C. find in chapter 38 of the Code which deals with trial before the Court of Session. This provision is essential part of sessions trial and is resorted to when the prosecution evidence is complete and accused is an opportunity to produce the evidence in its defence. This is a valuable right available to an accused to produce its witnesses as defence which is an integral part of fair trial and also a part of principle of natural justice which provides "hear the other side also." Section 233 Cr.P.C. confers the right to the accused to enter upon defence if he intends he can put any written statement and that shall be placed on record. If the accused applies for 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, such application should be refused on the ground that it is made for the purpose of vexation of delay or for defeating the ends of justice.

14. In the light of foregoing discussion and judicial precedent cited above, this court is of considered opinion that the impugned order passed by the learned trial court whereby evidence sought to be produced under section 233 Cr.P.C. described in serial nos. 1 and 3 of application under section 193 Kha filed by the revisionist has been declined, cannot be sustained for the reason that learned trial court has not considered significance of the evidence proposed to be adduced by defence under section 233 Cr.P.C. and refused to summon the evidence/ witnesses in cursory manner emphasizing the conduct of the accused while adopting dilatory tactics in the trial. The prayer made in application 193 kha in respect of evidence described at serial Nos. 1 to 3 have to be considered objectively under section 233 Cr.P.C., accused has valuable right to seek issuance of process from the Court to the witness and also to compel their attendance if required. The application has been rejected on extraneous grounds ,therefore, impugned order is vitiated by illegality and deserves to be set aside.

15. The impugned order passed by the learned Sessions Judge is set aside and matter is remitted to the court concerned to hear the application 193 Kha under section 233 Cr.P.C. filed by the accused a fresh in respect of evidence sought to be adduced at serial nos. 1 to 3 of the applicant/revisionist as application is partly being

allowed in the order and the said order has not been assailed for an ex-parte before this court.

16. With the above observations, revision is ***allowed***.

Order Date :- 10.12.2024/SY