

Court No. - 28

Case :- APPLICATION U/S 482 No. - 574 of 2024

Applicant :- Balvinder Singh And Another

Opposite Party :- State Of U.P. Thru. Addl. Chief Secy. Deptt. Home Lko. And Another

Counsel for Applicant :- Sushil Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Rahul Chaturvedi,J.

[1] Heard Sri Sushil learned counsel for the applicants as well as learned A.G.A.

[2] While invoking the extra-ordinary powers of this Court under section 482 Cr.P.C, learned counsel on behalf of the applicants have sought following prayer :-

"To quash and set-aside the impugned order dated 28.11.2023 in S.T. No.2136 of 2023 arising out of case crime no.288 of 1992 under sections 328, 302 IPC Police station-Sitapur, District-Sitapur passed by the Additional Sessions Judge, Court No.8, Sitapur whereby the discharge application no.24Kha preferred by the applicants on 30.10.2023, was set-aside and the matter was remitted back to the court of Chief Judicial Magistrate, Sitapur to comply with the provisions of Section 204 Cr.P.C. so that the matter may be committed to the court of Sessions for framing of the charge,

AND;

In addition to above, it was further prayed to quash the entire criminal proceeding including the summoning order dated 22.07.2023 annexure-2 and 25 respectively to the applicants."

[3] While hearing the matter, the Court has come across to paragraph no.6 of the affidavit in support of the application, which reads thus:-

"6. That it is also submitted that against the summoning order dated 22.07.2023, the 482 Cr.P.C. petition was filed by the petitioners but this Hon'ble Court relegated the matter before the trial Court to consider the discharge application and therefore, the summoning order dated 22.07.2023 has been merged with the discharge rejection order dated

28.11.2023, **however, as a safe side petitioner are also challenging the summoning order and entire criminal proceeding"**

[4] From the aforesaid, it is clear that as an ancillary or as a by product, the applicants are also challenging summoning order as well as entire proceeding. Though, their primary and main focus is upon the orders passed by the Additional Sessions Judge, Court No.8 Sitapur dated 28.11.2023 whereby the discharge application on behalf of the applicants was rejected. Indeed, this is a novel way of drafting the prayer whereby in addition to challenging the Discharge rejection order, the applicants are also challenging the entire proceeding of the case, by way of ancillary prayer.

[5] Thus, when the applicants themselves are reluctant and by way of by-product or tangently challenging the summoning order as well as entire criminal proceeding, is nothing but grossest misuse of power under section 482 Cr.P.C. which cannot be allowed. The 'prayer' of any pleading is its soul, which has to be very precise and focused and not flimsy or vague one.

[6] In fact, this is the second 482 Cr.P.C. application. The earlier 482 Cr.P.C. application no.9660 of 2023 was disposed of by co-ordinate Bench of this Court vide order dated 17.10.2023 where the counsel for the applicants himself have given up their submissions and limited to the extent that the applicants may be permitted to move discharge application before the concerned court and the same may be decided within the stipulated period. The Bench of this Court have granted limited liberty without entering into the merits of the case. The counsel ought to have raised and pressed his prayer for quashing the entire proceeding at that stage, but since he himself has given up to challenge the proceedings at that stage and was satisfied with the discharge order, now he cannot be permitted to raise and press the prayer for challenging the entire proceeding as the same is barred by the principles of '*constructive res judicata*'

[7] However, in the interest of justice, the Court is embarking upon to test the validity and veracity of the impugned discharge application decided by the learned Sessions Judge vide impugned order dated 28.11.2023.

[8] To start with, while venturing into the alleged illegalities of the case, it is imperative to give the factual matrix of the case which reads thus :-

[9] The matter relates to lodging of the FIR in the year 1992 as case crime no.288 of 1992 under section 328, 302 IPC, police station-Kotwali, District-Sitapur. The FIR was got registered against Balwinder Singh, Gauri Sardar and one unknown person on 27.04.1992 at 23:30 hours. The informant was none other than the widow of late Rajesh Khare, who states that on 25.04.1992, around nine in the night, her husband Rajesh Khare was taken away by his three friends Balwinder Singh, Gauri Sardar and one unknown person. They have taken her husband to one beetle shop where they took paan masala and administered some poisonous substance in the said pan masala. Thereafter, her husband started complaining severe stomach ache and started vomiting. These accused persons have also administered two tablets to her husband on the pretext that the same is pain killer. With the help and aid of her land lord, Mr. G.P. Dixit and his son, she took her husband to Sitapur District Hospital. Her husband was constantly accusing his friends that they have mixed some poisonous substance in the said pan masala. Around 9:30 in the night, when the condition of her husband became precarious, then the doctor advised her to take her husband to Lucknow for the specialized treatment. She started her journey at around 4:30 in the morning along with Mr. G.P. Dixit and one Satish Chandra Trivedi, another tenant. Anyhow, she arrived at 7:30 in the morning to the specialized medical institution at Lucknow where her husband was admitted. By the time, her husband was unconscious and he was unable to speak. Eventually, he took his last breath around 8:40 in the morning. After the demise on 27.04.1992, her post mortem was conducted. In the FIR, she has candidly accused Balwinder Singh, Gauri Sardar and one unknown person for this mishap. This FIR was got registered on 27.04.1992.

[10] Thus, the incident which took place in the year 1992, is yet to see the final day even after lapse of 32 years and the defence is taking the advantage of legal pit falls. The poor widow is running from pillar to post and the named accused persons are roaming scott free throwing open challenge to the criminal dispensation system.

[11] After lodging of the FIR, the investigation of the case started rolling and the police has recorded 161 Cr.P.C. statement of opposite party no.2-Ms. Anita Khare, statement of Satish Chandra Trivedi, another tenant of land lord Mr. Ganga Prasad Dixit, Siya Ram, Pan Shop owner, Dr. J.L. Dixit, and Mr. Sandip Kumar Jain, owner of Deepa Enterprises.

[12] The post mortem report (annexure-5) indicates that the cause of death cannot be ascertained and viscera of the deceased was preserved and sent for chemical analysis. The chemical analysis report/F.S.L report which is annexed as Annexure No. 26 indicates that 'Aluminum Phosphide' poison was found in the viscera of the deceased. Even though after evaluating the evidence on record, the concerned I.O. of the case have submitted "a closure report" on 05.08.1992 opining therein that the deceased had never accompanied the accused applicants and went to beetal shop (Paan Shop) near Panjab National Bank, Sitapur.

[13] However, learned Magistrate on 24.05.1994 after perusing the closure report has found that no good ground is being made out to accept the closure report and accordingly the said closure report was rejected and taking into account the material available on case diary, have clearly mentioned that a prima facie case under Section 328, 302 IPC is being made out against Balvinder Singh and Gauri Sardar and therefore the cognizance was taken against the accused applicants under Section 328 and 302 IPC and N.B.W. were issued against them.

[14] Aggrieved by this order of summoning by the concerned Magistrate, one of the accused Gurdeep Singh @ Gauri Sardar has filed Criminal Revision No. 122 of 1994 (Gurdeep Singh @ Gauri Vs. State of U.P.) before the learned District and Sessions Judge, Sitapur. From the perusal of the judgment of learned revisional court which was ultimately allowed by the learned Sessions Judge, purely on the technical ground i.e. Magistrate has rejected the final report without affording an opportunity of being heard to the accused persons and as such the order itself is illegal. As per the opinion of learned Revisional Judge that before rejecting the closure report, the accused should be given an opportunity of being heard so that he may be able to persuade to the Magistrate that final report was justified and no case was made out against him. The then learned Sessions Judge on 30.06.1994 has allowed the revision, so preferred by Gurdeep Singh @ Gauri Sardar while quashing the impugned summoning order/issuance of N.B.W. order dated 24.05.1994 and have directed that Magistrate can pass a fresh order after hearing the revisionist/accused applicants. On 03.05.1999, the first informant Ms. Anita Khare, widow of Rajesh Khare(deceased) moved an application that she wants to file her objection against the final report before the concerned C.J.M, Sitapur.

The matter was kept pending for eleven good years and the then Judicial Magistrate, Sitapur woke up and again issued process to procure the attendance of the contesting parties. At this juncture, it is worth while to point out here that Gandhi

Memorial, an associated hospital at Lucknow has issued a Death summary of late Rajesh Khare in which it is pointedly mentioned that the case relates to “the suspected case of poisoning”. Even after further lapse of 11-12 years, the C.J.M, Sitapur on 22.07.2023 after evaluating the material on case diary and the death certificate of late Rajesh Khare issued by Gandhi Memorial Hospital and referring the report of viscera in which the Aluminum Phosphide was found, on its own wisdom have again taken cognizance for the offence under Section 328, 302 IPC against Balvinder Singh and Gauri Sardar.

[15] This summoning order dated 22.07.2023 was challenged by Balvinder Singh and Gauri Sardar by means of 482 Application No. 9660 of 2023 and this Court vide order dated 17.10.2023 have disposed of the aforesaid 482 Application. In this exercise, 31 years were lapsed and the poor widow was still waiting for her justice, on the other hand the named accused persons Balvinder Singh and Gauri Sardar after throwing the open challenge to the criminal dispensation system were roaming scott free.

[16] The coordinate Bench have taken a judicial note of this fact after recording the submission advanced by learned counsel for the applicants whereby the learned counsel for the applicants have literally given up his submissions before the coordinate Bench and have only prayed, *"that he confined his argument and submits that the applicants may be permitted to move a discharge application before the learned trial court concerned and the same may be decided within stimulated period of time."*

[17] Being an innocuous prayer, learned Co-ordinate Bench granted a liberty to move a discharge application within next 15 days and if such an application is filed, the same may be decided by a speaking and well reasoned order within a period three weeks.

[18] In the same breath, the learned coordinate Bench has granted further concession and liberty to the accused applicants to move a discharge application through their counsel. Though such type of concession is no where in the code of criminal procedure.

[19] Armed with aforesaid order dated 17.10.2023 passed by the coordinate Bench of this Court, on 30.10.2023 a detailed discharge application was moved by one Chandra Kishore Mishra, Advocate, which was ultimately declined by the Additional Sessions Judge, Court No.8. Sitapur vide order dated 28.11.2023, which is under challenge before this Court.

[20] The Court has occasion to perused the entire judgment which is for the judicial scrutiny by means of the present 482 Application. In the discharge application the grounds taken are :-

- (1) That the name of the applicants has been falsely dragged in the FIR just to harass the accused applicants.
- (2) It is urged that the first informant was not present at the place of occurrence where the alleged poison was administered by the accused applicants. She has never divulged the source of her information.
- (3) In her 161 Cr.P.C. statement, she has failed to give any clue as to what was the animosity between the accused applicants and the deceased.

[21] From the FIR, it is clear that when her husband came back to home around 10.00 in the night, he was complaining about severe stomach ache and then the accused applicants had administered two tablets. Besides this, number of alleged contradictions and defense were narrated so as to give the dent to the prosecution story.

[22] In the impugned judgment, learned trial judge after relying upon the catena of decision of Hon'ble Apex Court in which it has been categorically pointed out and which is almost a settled principle of law that while deciding the discharge application, the court shall not look into the defence or the alleged contradiction in the 161 Cr.P.C. statement of the witnesses or go by an imaginary hypothesis so created by the defense. The court concerned is not holding a "mini trial" while deciding the discharge application. The court has to see the limited aspect of the issue, that a prima facie offence is made out or not. In the present case the accused applicants have taken away the deceased with them to the beetel shop (paan shop) and administered him paan masala and soon thereafter he started complaining about stomach ache and on the very next day, he died. The doctor opined that this is a case of suspected case of poisoning which was ultimately found to be true and Aluminium Phosphide has been found from the viscera. The deceased was found in the company of the present accused applicants. The accused applicants remained in the company of the deceased, has administered two tablets on the false pretext that they are pain killers. Putting all these aspect in a linear way, clearly and prima facie indicts the involvement of the present applicants in the commission of the present offence. The accused persons are in front of niddle of suspicion.

[23] Learned counsel for the applicants have tried to tailor a parallel story that deceased was under the heavy debt as his services were terminated by his master Sandeep Jain about eight months back and he has taken money from the purchaser to provide television sets to those purchasers and when they started demanding their money back, he himself consumed some poisonous substance. Secondly, the accused applicants were not present near the place of occurrence as they were in Punjab since 8-9 months back and therefore, their involvement in the offence is highly bleak and and untrustworthy. The theory of heavy debt is neither here or there. It is the imagination of the defence, who vainly created a story in air, without any legs to stand. Since the deceased was found with the accused applicants last time and soon thereafter he died during treatment on the very next date, then the burden to prove their innocence is on the shoulders of accused applicants.

[24] The learned trial judge while dismissing the discharge application no. 24 Kha remanded the matter back for committal of the case as prescribed under Section 209 Cr.P.C.. As the discharge application was decided without committal of the case to the court of Sessions pursuant to the order of coordinate Bench of this Court and also directed to provide all the documents to the accused applicants pursuant to the provision under Section 204 Cr.P.C.

[25] We are in the year 2024 and the FIR was registered on 27.04.1992 a more than quarter century has been lapsed and the accused applicants are yet to be tried for the offence.

[26] This condition is literally abhorring and horrifying. The poor widow is still in search of justice for her husband. Under these circumstances, we find that there is no merit in the present 482 Cr.P.C. application, accordingly liable to be dismissed with the direction to the court below:-

(i) That order of committal would be pass by the Magistrate on or before 10.02.2024 and by 29.02.2024, the learned trial judge would frame the charge after ensuring the physical presence of accused applicants and thereafter the trial should proceed on day to day basis and the trial court should make a necessary endeavour to conclude the same by 31.12. 2024 positively.

(ii) It goes without saying that the trial judge has got an ample power in the code of criminal procedure to procure the attendance of witnesses. It is made clear that

(8)

the present case shall be heard and decided on the top most priority of the list and no laxity or accommodation shall be shown to any of the parties.

[27] With the aforesaid directions, the present 482 application stand **REJECTED**.

[28] The Senior Registrar, Lucknow Bench is directed to communicate this order to the concerned District Judge as well as concerned trial court for the necessary steps and compliance. In addition to this, the concerned learned Session Judge shall also keep a close vigil regarding the progress of the trial.

Order Date :- 23.1.2024

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