

Neutral Citation No. - 2024:AHC-LKO:67858

Court No. - 13

Case :- APPLICATION U/S 482 No. - 8790 of 2024

Applicant :- Prabodh Chandra Rastogi (Drug Inspector) And Another

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Civil Sectt.

Lko And Another

Counsel for Applicant :- Mool Chandra, Sanjay Kumar Rao

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania, J.

1. Shri Bipin Kumar Rai, Advocate, has put in appearance for the private opposite party no.2 and has filed his Vakalatnama, which is taken on record.
2. Heard learned counsel for the applicants, learned A.G.A. for the State, learned counsel for opposite party no.2 and perused the material available on record.
3. The present application under Section 528 Bharatiya Nagrik Suraksha Sanhita, 2023 (in short "BNSS") has been filed by the applicants, namely, Prabodh Chandra Rastogi and Manoj Singh seeking the following main relief (s) :-

“The humble petitioners named above most respectfully submit that for the facts, reasons and circumstances stated in the accompanying affidavit, it is most respectfully prayed that this Hon’ble Court may kindly be pleased to quash the order dated 31.07.2024 passed by learned Chief Judicial Magistrate, Ayodhya (Annexure No.1) in case No.12332/2020 (State Vs. Prabodh Chandra Rastogi) pertaining to case crime No.421/2020 u/s 354, 354D, 323, 504 and 506 I.P.C. P.S. Kotwali Nagar, District Faizabad whereby the application u/s 311 Cr.P.C. filed by the applicants has been rejected and also for quashing the revisional court order dated 13.09.2024 (Annexure No.2) passed by the court of Session Judge Faizabad in Criminal Revision No.181/2024 (Prabodh Chandra Rastogi Vs. State of U.P.) and further it is prayed that the Hon’ble Court may kindly allow the

application u/s 311 Cr.P.C. of the applicants for the re-examination of PW.1 (Complainant) and P.W.2 (Victim), in the interest of justice.”

4. The Chief Judicial Magistrate, Ayodhya (in short, ‘Magistrate’) has passed the order dated 31.07.2024, under challenge, in Case No.12332/2020 (State Vs. Prabodh Chandra Rastogi), arising out of Case Crime No.421/2020, under Sections 354, 354D, 323, 504, 506 I.P.C. P.S. Kotwali Nagar, District Faizabad.
5. Vide order dated 31.07.2024, the Magistrate rejected the application, preferred by the applicants under Section 311 Cr.P.C., on 03.04.2024, which was preferred for recalling the P.W.1, the informant/opposite party no.2- Ram Chandra Pal, and P.W.2/victim for further cross-examination.
6. It would be apt to indicate that cross-examination of P.W.1 and P.W.2, after taking note of the specific allegations levelled in the FIR as also the other material/evidence on record, was concluded on 27.07.2022 and 12.04.2023, respectively.
7. The Magistrate rejected the application after taking note of the fact that the witnesses, i.e. P.W.1 and P.W.2 were duly cross-examined on various dates. The reasons recorded in the order dated 31.07.2024 are extracted hereinunder :-

"सुना तथा पत्रावली का अवलोकन किया। पत्रावली के अवलोकन से विदित है कि पत्रावली में माननीय उच्च न्यायालय द्वारा प्रकरण के शीघ्र निस्तारण का आदेश पत्रावलित है। पत्रावली में साक्ष्य की कार्यवाही के दौरान पी०डब्लू०-1 वादी मुकदमा रमेश चन्द्र पाल की मुख्य परीक्षा दिनांक 19.04.2022 को अंकित की गयी है तदुपरान्त बचावपक्ष द्वारा इस साक्षी से दिनांक 19.04.2022, 23.05.2022 व 27.07.2022 को विस्तृत जिरह की गयी है। इसी प्रकार बचावपक्ष द्वारा पी०डब्लू०-2 पीड़िता साक्षी रुबी ओझा की मुख्य परीक्षा दिनांक 21.12.2023 व 11.01.2023 को अंकित की गयी है, तदुपरान्त बचावपक्ष द्वारा इस साक्षी से दिनांक 11.01.2023, व 12.04.2023 को विस्तृत जिरह की गयी है। वर्तमान प्रार्थना-पत्र में अभियुक्त / प्रार्थी द्वारा कोई विशिष्ट तथ्य अंकित नहीं किया गया है जिसके लिए जिरह हेतु साक्षी को पुनः तलब किया जाना

आवश्यक हो। माननीय उच्च न्यायालय द्वारा मामले के शीघ्र निस्तारण हेतु निर्देश दिया गया है। यह प्रार्थना-पत्र मामले की कार्यवाही को विलम्बित किये जाने के आशय से दिया जाना परिलक्षित होता है, तदुसार बचावपक्ष की ओर से प्रस्तुत आवेदन अन्तर्गत धारा 311 द०प्र०सं० दिनांकित 03.04.2024 स्वीकार किये जाने का कोई न्यायोचित आधार नहीं है। आवेदन निरस्त किये जाने योग्य है।

आदेश

अभियोजन पक्ष की ओर से प्रस्तुत दोनों आवेदन-पत्र अन्तर्गत धारा 311 द०प्र०सं० दिनांकित 03.04.2024 निरस्त किये जाते हैं। पत्रावली वास्ते बयान अन्तर्गत धारा 313 द०प्र०सं० दिनांक 12.08.2024 को पेश हो।

मुख्य न्यायिक मजिस्ट्रेट
अयोध्या"

8. The order dated 31.07.2024, passed by the Magistrate, was challenged by the accused applicants in Criminal Revision No.181 of 2024 (*Prabodh Chandra Rastogi Vs. State of U.P.*) before the Sessions Judge, Faizabad (in short 'Revisional Court'). The Revisional Court also dismissed the revision vide order dated 13.09.2024. The relevant portion of the same is extracted hereinunder.

“9. आलोच्य आदेश के माध्यम से बचाव पक्ष की तरफ से प्रस्तुत दोनों प्रार्थनापत्र अन्तर्गत धारा 311 द०प्र०सं० निरस्त किया गया है। दण्ड प्रक्रिया संहिता की धारा 311 में उल्लिखित प्राविधान निम्नवत् है-

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.

10. विद्वान अवर न्यायालय द्वारा आलोच्य आदेश में बचाव पक्ष की तरफ से प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा 311 द०प्र०सं० निरस्त करने का यह आधार लिया गया है कि पत्रावली में वादी मुकदमा रमेश चन्द्र पाल की मुख्य परीक्षा

अंकित होने के पश्चात् बचाव पक्ष द्वारा इस साक्षी से दिनांक 19.04.2022, 23.05.2022 व 27.07.2022 को विस्तृत जिरह की गयी है। इसी प्रकार पीड़िता साक्षी रुबी ओझा की मुख्य परीक्षा अंकित होने के पश्चात् बचाव पक्ष द्वारा इस साक्षी से दिनांक 11.01.2023 व 12.04.2023 को विस्तृत जिरह की गयी है। प्रार्थनापत्र में अभियुक्त द्वारा कोई विशिष्ट तथ्य अंकित नहीं किया गया है, जिसके लिये जिरह हेतु साक्षी को पुनः तलब किया जाना आवश्यक हो। माननीय उच्च न्यायालय द्वारा मामले के शीघ्र निस्तारण हेतु निर्देश दिया गया है। प्रार्थनापत्र मामले की कार्यवाही को विलम्बित किये जाने के आशय से दिया जाना परिलक्षित होता है।

11. अवर न्यायालय की पत्रावली के परिशीलन से विदित होता है कि प्रस्तुत मामले की घटना वर्ष 2020 की है। मुकदमें में सभी साक्षीगण का बयान अभिलिखित होने के पश्चात् अभियुक्तगण का बयान अन्तर्गत धारा 313 दं०प्र०सं० अंकित किया जा चुका है एवं पत्रावली वर्तमान में सफाई साक्ष्य हेतु नियत चल रही है। अवर न्यायालय की पत्रावली के परिशीलन से यह भी विदित होता है कि प्रकरण में माननीय उच्च न्यायालय से शीघ्र निस्तारण का निर्देश है। आलोच्य आदेश के परिशीलन से प्रथम दृष्टया यह परिलक्षित हो रहा है कि विद्वान अवर न्यायालय द्वारा अभियोजन साक्षी संख्या 1 व 2 कई तिथियां नियत की गयी, जिसमें बचाव पक्ष की तरफ से विस्तृत जिरह की गयी है। प्रस्तुत मामले के तथ्यों एवं परिस्थितियों में विद्वान अवर न्यायालय द्वारा पारित आलोच्य आदेश में की गयी अवधारणा विधि सम्मत प्रतीत होती है।

12. यहां यह तथ्य भी उल्लेखनीय है कि धारा 311 दं०प्र०सं० के अन्तर्गत प्रस्तुत प्रार्थनापत्र को विचारण न्यायालय द्वारा निरस्त किये जाने के विरुद्ध प्रस्तुत पुनरीक्षण अन्तर्वर्ती आदेश होने के कारण पोषणीय नहीं है और ऐसे आदेश के विरुद्ध पुनरीक्षण वर्जित है। विधि निर्णय "*Sethuraman Vs. Rajamanickam* 2009 (65) ACC 607 (sc)" के मामले में माननीय उच्चतम न्यायालय द्वारा यह उल्लिखित किया गया है कि-

"Secondly, what was not realized was that the order passed by the Trial Court 'refusing to call the documents and rejecting the application U/s 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under section 397(2) Cr.P.C."

इसी प्रकार का मत माननीय उच्च न्यायालय द्वारा विधि निर्णय "*Asif Hussain Vs. State of U.P.*, 2007 (57) ACC 1036 (All-D.B.)" में अवधारित किया गया है

13. आलोच्य आदेश के परिशीलन से स्पष्ट है कि विद्वान अवर न्यायालय ने दण्ड प्रक्रिया संहिता की धारा 311 में प्रदत्त शक्तियों के अधीन पत्रावली पर उपलब्ध साक्ष्य का न्यायोचित विश्लेषण कर आलोच्य आदेश पारित किया है। आलोच्य आदेश में न तो कोई अशुद्धता है, न कोई अनियमितता है और न ही

कोई अवैधानिकता है। विद्वान अवर न्यायालय ने अपने निहित क्षेत्राधिकार का समुचित प्रयोग करते हुये आलोच्य आदेश पारित किया है, जिसमें हस्तक्षेप का कोई औचित्य नहीं है। इस प्रकार प्रस्तुत पुनरीक्षण की पोषणीयता के तथ्य एवं विद्वान अवर न्यायालय द्वारा आलोच्य आदेश में दिये गये निष्कर्ष को दृष्टिगत रखते हुये पुनरीक्षण बलहीन है, जो निरस्त किये जाने योग्य है।"

9. In the aforesaid background of the case, the instant application has been filed.
10. Brief facts of the case, which are relevant for the purposes of disposal of the present application, are to the effect that on 19.06.2022 an FIR was lodged making allegations against the applicants to attract the offences under Sections 354, 294, 323, 504, 506 I.P.C. The said FIR was registered as FIR No.0421 of 2020.
11. According to this FIR, the applicants and two others committed the crime on 24.01.2020 at about 18:30 hours. This FIR was registered against applicants and one unknown person. As per this FIR, in nutshell, the accused named in the FIR on the date of incident, i.e. on 24.01.2020 appeared in Paul Medical Care Centre, Ayodhya (in short 'Nursing Home') and tried to molest a lady staff of the Nursing Home and on being opposed by the informant and other staff of the Nursing Home, the accused assaulted the informant and also threatened the informant that "I would close the Nursing Home and kill you". FIR further says that the applicants sent the obscene messages to the victim. After investigation, charge sheet was filed against the applicants, as named in the FIR.
12. It would be apt to indicate that as per the case set up in the present application, the FIR No.0421 of 2020 was lodged on 19.06.2020 as the informant was not having valid licence for the purposes of running the Nursing Home, which came into the knowledge of applicant no.1/Prabodh Chandra Rastogi

(Drug Inspector) while inspecting the Nursing Home on 24.01.2020 (date of alleged incident).

13. At this stage, on being asked as to whether any complaint was filed/lodged between 24.01.2020 to 19.06.2020, i.e. the date of incident indicated in the FIR and date of lodging of FIR, learned counsel for the applicants failed to point out in this regard.
14. Thus, in absence of any document related to filing a complaint against opposite party no.2 and the specific pleadings in this regard, this Court finds that the case set up by the applicants in relation to lodging of FIR that in retaliation of inspection made by the applicants on 24.01.2020 in which they came to the conclusion that opposite party no.2 is running the Nursing Home without any licence as per law, is not sustainable.
15. Now reverting to the facts of the case, which is pending consideration before the Magistrate as Case No.12332 of 2020 (*State Vs. Prabhodh Chandra Rastogi*). From the contents of the application(s) dated 03.04.2024, preferred by the applicants, for summoning/recalling P.W.1 and P.W.2, respectively, it appears that both the application(s) were preferred on the basis of the statement made by the Investigating Officer (in short 'I.O.')
- before the Magistrate and this statement of the I.O. relates to investigating the matter in relation to the second place of incident indicated in the FIR, i.e. "Kuchery gate" and "whatsapp chat" as also submission of medical documents with report submitted by the I.O. Paragraph Nos.2 and 4 of one of the applications dated 03.04.2024 (Annexure No.6) are reproduced hereinunder.

"2. यह कि विवेचक मनोज कुमार ने अपने साक्ष्य के दौरान इस मुकदमें में दो घटना स्थल बताया है पहले छेड़खानी की घटना पाल मेडिकल दवा खाना पर व दूसरी घटना मार पीट की कचेहरी गेट पर हुई थी परन्तु विवेचक ने दूसरी

घटना के सम्बन्ध में न तो कोई नक्शा नजरी बनाया है और न घटना स्थल का निरीक्षण ही किया है और न घटना की दिनांक को ही बता सके हैं जबकि प्रथम सूचना रिपोर्ट में व वादी के बयान में कहीं भी कचेहरी के गेट पर मार पीट की घटना का उल्लेख नहीं है जिस कारण उक्त सम्बन्ध में वादी से पुनः जिरह कराया जाना न्यायहित में आवश्यक है।

3. यह कि प्रथम सूचना रिपोर्ट के अनुसार मार पीट की घटना दिनांक- 24/01/2020 की बतायी गयी है और प्रथम सूचना रिपोर्ट 6 माह बाद दिनांक- 19/06/2020 को दर्ज हुई है जी०डी० के अनुसार प्रथम सूचना रिपोर्ट नकलचिक नकल रपट व मेडिकल रिपोर्ट विवेचक को दिये जाने का उल्लेख है परन्तु विवेचक ने उक्त मेडिकल रिपोर्ट को विवेचना का पार्ट नहीं बनाया गया है और न उक्त मेडिकल रिपोर्ट पत्रावली में शामिल किया गया है और जो पत्रावली मेडिकल रिपोर्ट शामिल है व दिनांक- 21/06/2020 की है जिसमें डाक्टर द्वारा चोटे की अवधि दो चार दिन की बतायी गयी है विवेचक से उक्त बिन्दु पर जब सवाल पूछा गया तो विवेचक ने कहा कि उक्त सम्बन्ध में वादी मुकदमा/चोटहिल, चिकित्सक बता सकते हैं। वादी मुकदमा ने शेष गवाहों के साथ चिकित्सक को भी गवाही से डिस्चार्ज करवा दिया । ऐसी दशा में वादी मुकदमा से उक्त बिन्दु पर जिरह किया जा आवश्यक है ताकि न्यायालय के समक्ष सही बात आ सके।

4. यह कि वादी मुकदमा व पीड़िता द्वारा वाट्सएप के चैट की फोटो कापी दोनों लोगों के संयुक्त हस्ताक्षर से विवेचक को दिया गया जिसमें कई चैट को डिलिट किया गया है जिस बिन्दु के सम्बन्ध विवेचक से प्रश्न किया गया तो विवेचक ने बताया कि उक्त सम्बन्ध में मैंने कोई विवेचना नहीं की है इसके सम्बन्ध में वादी मुकदमा पीड़िता ही बता सकती है। ऐसी दशा में वादी मुकदमा को तलब करके उक्त बिन्दु पर जिरह किया जाना आवश्यक है।"

16. Thus, in nutshell, the application(s) dated 03.04.2024 were preferred on the basis of illegalities/irregularities/defects committed by the I.O. during investigation.
17. In the aforesaid background, impeaching the order, under challenge, learned counsel for the applicant has placed reliance upon the judgment of Hon'ble Apex Court in the case of **Satbir Singh v. State of Haryana, AIR ONLINE 2023 SC 882** and submitted that as per settled principle of law the application ought to have been allowed by the trial Court and the order impugned is against the principle settled in this regard as also the observations made by the Hon'ble Apex Court in regard to expression 'Fair Trial'. As such, interference of this Court is required in the matter.

18. Learned counsel for opposite party no.2 as well as learned A.G.A. opposed the present application which relates to recall of witnesses in exercise of power conferred under Section 311 Cr.P.C.. It is stated that as per settled principle of law, for filling lacunas a witness cannot be recalled or permitted to be recalled. Prayer is to affirm the impugned order and dismiss the application.
19. Considered the aforesaid facts and the observations made by the trial Court in the order dated 22.08.2024 and the principles related to recall of witness under Section 311 Cr.P.C. settled by the Hon'ble Apex Court in the case(s) of **Mohd. Khalid Versus State of West Bengal (2002) 7 SCC 334; Natasha Singh vs. CBI, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828 : 2013 SCC OnLine SC 444; Mannan S.K. and Ors. V State of West Bengal and Anr., AIR 2014. SC 2950. State of Haryana vs. Ram Mehar and others (2016) 8 SCC 762; Swapan Kumar Chatterjee vs. Central Bureau of Investigation, (2019) 14 SCC 328; Varsha Garg vs. State of Madhya Pradesh and Others 2022 SCC OnLine SC 986 and as also by this Court in Application under Section 482 Cr.P.C. No. 274 of 2022 (Ram Nayak Singh vs. State of U.P. & Another).**
20. It is well settled by catena of decisions by the Hon'ble Apex Court that the power under Section 311 Cr.P.C. must be exercised with the care, caution and circumspection and only for strong and valid reasons. The recall of a witness already examined should not be a matter of course and discretion given to the court in this regard has to be exercised judicially to prevent failure of justice. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society.

21. The Court is fully conscious of the position that after all the trial is basically for the prisoners/accused and the Court should afford an opportunity to them in the fairest manner possible. At the same time, the Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. Recalling of witnesses has to be applied on the basis of judicially established and accepted principles.
22. In the facts of the case it would be apt to refer the observations made in the judgment(s) passed in the case of **Mohd. Khalid (Supra) and Ram Mehar (Supra)**.
23. In the case of **Mohd. Khalid (Supra)**, the Hon'ble Apex Court observed as under:-

"Before parting with the case, we may point out that the Designated Court deferred the cross-examination of the witnesses for a long time. That is a feature which is being noticed in many cases. Unnecessary adjournments give a scope for a grievance that the accused persons get a time to get over the witnesses. Whatever be the truth in this allegation, the fact remains that such adjournments lack the spirit of Section 309 of the Code. When a witness is available and his examination-in- chief is over, unless compelling reasons are there, the Trial Court should not adjourn the matter on the mere asking. These aspects were highlighted by this Court in State of U.P. v. Shambhu Nath Singh and others (2001) 4 SCC 667 and N.G. Dastane v. Shrikant Shivde (2001) 6 SCC 135. In the case of State of U.P. v. Shambhu Nath Singh and others (2001) 4 SCC 667, this Court deprecated the practice of Courts adjourning cases without examination of witnesses when they are in attendance with the following observations:-

"9. We make it abundantly clear that if a witness is present in Court he must be examined on that day. The Court must know that most of the witnesses could attend the Court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta

(allowance) which a witness may be paid by the Court is generally a poor solace for the financial loss incurred by him. It is a said plight in the Trial Courts that witnesses who are called through summons or other processes stand at a doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by every one provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are standard on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner."

24. In the case of **Ram Mehar (Supra)**, the Hon'ble Apex Court observed as under:-

"23. In Bablu Kumar and others v. State of Bihar and another, (2015) 8 SCC 787 the Court referred to the authorities in Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC, Rattiram and others v. State of Madhya Pradesh (2012) 4 SCC 516, J. Jayalalithaa and others v. State of Karnataka and others (2014) 2 SCC 401, State of Karnataka v. K. Yarappa Reddy (1999) 8 SCC 715 and other decisions and came to hold that keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. We may note with profit though the context was different, yet the message is writ large. The message is - all kinds of individual notions of fair trial have no room".

"38. At this juncture, we think it apt to state that the exercise of power under Section 311 Cr.P.C. can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of

magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance".

25. Considering the aforesaid as also the submissions advanced by the learned counsel for the parties and the proposition of law on the issue, this Court finds no force in the instant application.
26. Aforesaid is for the reason that it is trite law that defective or illegal or irregular investigation would itself not vitiate the trial. In the instant case, the application(s) dated 03.04.2024 seeking prayer to recall P.W.1 and P.W.2 were preferred on the basis of illegality/irregularity committed by I.O. during investigation, which is evident from paragraph 15 and 16 of this judgment, and to the view of this Court, on this aspect of the case, even if it is taken to be true that I.O. committed illegality/irregularity during investigation, the P.W.1 and P.W.2 cannot be recalled for further cross-examination.
27. For the reasons aforesaid, the instant application is **dismissed**.
No order as to costs.

Order Date :- 30.09.2024

Anand/-