

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 18.06.2015

CORAM

THE HON'BLE MR.JUSTICE B.RAJENDRAN

Criminal Revision Case No.1443 of 2008

and

M.P.No.1 of 2008

- | | |
|---|----------------|
| 1. Muthukumar | |
| 2. S.Umabharathi | .. Petitioners |
| vs. | |
| 1. M.Palanisamy | |
| 2. State by SI of Police
Central Crime Branch
Coimbatore. | .. Respondent |

Criminal Revision against the order dated 01.08.2007 made in Crl.M.P.No.10110 of 2006 in C.C.No.288 of 2002 on the file of the learned Judicial Magistrate No.2, Tirupur, and discharge the petitioners from the above said case.

For petitioners : Mr.Raja Senthoo Pandian

For respondent-1 : No appearance

For respondent-2 : Mr.V.Arul
Government Advocate (Crl. Side)

ORDER

The revision is filed by the proposed parties to be included as accused in C.C.No.288 of 2002.

2. According to the revision petitioners neither in the First Information Report nor in the 161 Statement nor in the charge sheet, the name of the petitioners have been included or stated as accused and even thereafter, during the time of trial also, the witnesses had not whisper about the name of the petitioners in their evidence or the alleged overt act against the petitioners. According to the revision petitioners, they have got a registered sale deed dated 26.03.1998 in respect of the disputed property, through one Ramamoorthy, Power Agent of one Sengota Chettiar (A1) and the Power of Attorney has also been executed on the same day.

3. According to A2-Palanisamy/first respondent herein, prior to the said sale, there was an agreement of sale between A1 and

Dr.P.Shanmugam and his wife Gandhimathi, on 29.07.1997. However, after receiving Rs.4,00,000/- from the Doctor as advance, Sengota Chettiar (A1) avoided to complete the sale and he had sold the property to Palanisamy (A2) on 23.02.1998.

4. It is the contention of the learned counsel for the petitioners that the said sale is not mentioned in the encumbrance certificate and without knowing the encumbrance and litigations, the petitioners had purchased the said property. Further this application is filed by the accused (A2) after the evidence is over. In this case, the learned counsel for the petitioners has relied on 2014(3) SCC 92 (Hardeep Singh ..vs.. State of Punjab and others) for the proposition that the power under Section 319 of Cr.P.C. is an extraordinary power which is required to be exercised sparingly and if compelling reasons exist for taking cognizance against persons against whom action has not been taken, the power under Section 319 of Cr.P.C. can be exercised. He also contended that the prosecution has not made out any case at all. Aggrieved against the order passed by the court below in the petition filed under Section 319 Cr.P.C., and that too on the instigation of the second accused, the revision is filed by the revision petitioners.

5. Even though notice has been served and name printed in the cause list, none appeared for the first respondent (A2). As per the judgment of the Hon'ble Apex Court reported in (2013)3 Supreme Court Cases 721, K.S.Panduranga vs. State of Karnataka, the criminal case can only be decided on merits, after hearing other side and also after perusing the materials available on record.

6. The learned Government Advocate (Crl. Side) appearing for the second respondent would also assist the court and state that the court cannot automatically pass an order under Section 319 Cr.P.C., especially when an application is filed by the accused. He would further submit that if the petitioners are aggrieved by the order of the Court below, it is always open to them to subject the prosecution witnesses to cross-examination to prove their innocence. He would also submit that in this case, no clear cut statement has been made at the earliest stage.

7. Heard the learned counsel appearing for the revision petitioners and the learned Government Advocate (Criminal Side) appearing for the second respondent and perused the materials available on record.

8. This is a case under Section 319 Cr.P.C., and the petition has been filed seeking to implead third parties as accused. As rightly pointed out by the learned counsel for the petitioners, the petitioners have purchased the disputed property on 26.03.1998 through a registered sale deed, whereas the alleged agreement of sale is dated 29.07.1997, which is an unregistered document. In fact,

after the completion of the evidence, the lower court has only taken into consideration that there was an earlier agreement of sale. Only on that basis, there cannot be a notice called upon the persons to include them as accused. In a similar case reported in 2014(3) SCC 92 (Hardeep Singh ..vs.. State of Punjab and others), the Supreme Court has categorically held that power under Section 319 Cr.P.C., can be exercised only if the court is satisfied that the accused, if tried, is likely to be convicted and if there is likelihood that the accused, if tried, will be convicted, the court comes to the conclusion that there are evidences to implicate the person based on the cogent evidence available on record. For better understanding, the relevant paragraphs are extracted as under:-

"97. In Palanisamy Gounder & Anr. v. State, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

98. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such

person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?

100. In *Joginder Singh & Anr. v. State of Punjab & Anr.*, AIR 1979 SC 339, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319 (1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

101. In *Anju Chaudhary v. State of U.P. & Anr.*, (2013) 6 SCC 384, a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

102. In *Suman v. State of Rajasthan & Anr.*, AIR 2010 SC 518, a two-Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could

be tried together with the other accused. In *Lal Suraj (supra)*, a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in *Lok Ram (Supra)*, wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

.....

105. In *Sohan Lal & Ors. v. State of Rajasthan*, (1990) 4 SCC 580, a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

106. In *Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors.*, AIR 1983 SC 67, this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

107. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300 (5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged.

108. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face

trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300 (5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 Cr.P.C. can be exercised. We may clarify that the word 'trial' under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

109. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C. ?

110. We accordingly sum up our conclusions as follows:

Question Nos.1 & III Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND Q.III Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In Dharam Pal's case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional

accused. ? Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial."

9. In this case as rightly pointed out by the learned counsel appearing for the petitioners that neither in the First Information Report nor in the 161 Statement nor in the charge sheet, the name of the petitioners have been included or stated as accused and even thereafter, during the time of trial also, the witnesses had not whispered about the name of the petitioners in their evidence or the alleged overt act against the petitioners.

10. In the result, the Criminal Revision Case is allowed. The order dated 01.08.2007 made in CrI.M.P.No.10110 of 2006 in C.C.No.288 of 2002 on the file of the learned Judicial Magistrate No.2, Tirupur, is set aside and the petitioners are discharged from the above case. If the case is still pending before the court below in respect of others, the court below is directed to consider the same without being influenced by any of the observations made in this revision. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS III)

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Sub Asst. Registrar

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To

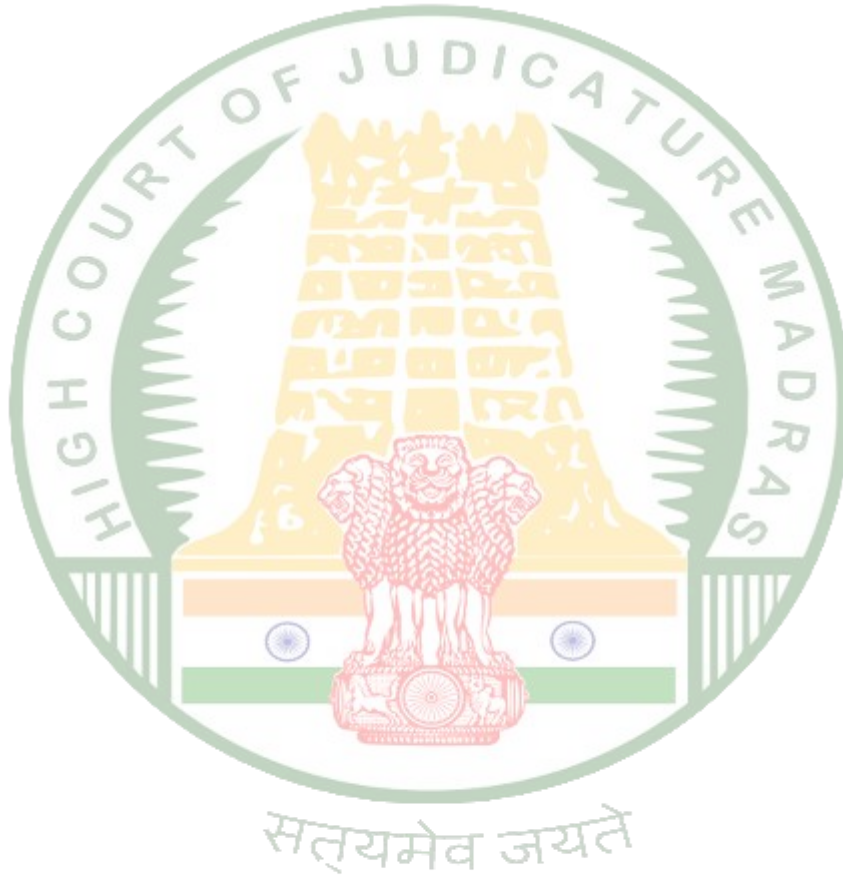
1. The Judicial Magistrate No.2, Tirupur.
2. The Sub Inspector of Police
Central Crime Branch, Coimbatore.

3. The Public Prosecutor
High Court, Chennai.

+1 cc to Mr.N. Raja senthoor pandian, Advocate, SR 30222.

Crl.Revision Case No.1443 of 2008
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