

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 18.12.2018
CORAM:
THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH
Crl.O.P.No.7076 of 2018
and Crl.M.P.No.3655 of 2018

K.V.Pownraj

...Petitioner/6th Accused

Vs.

State rep. By
The Inspector of Police,
EOW II Unit, Erode,
Erode District.
Crime No.5/2012.

...Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Cr.P.C., to call for the records pertaining to the order dated 20.02.2018 made in Memo dated 05.10.2017 filed in C.C.No. 20 of 2012 on the file of the learned Special Judge, TNPID ACT cases, Coimbatore set aside the same.

For Petitioner : Mr.N.Manokaran

For Respondent : Mr.M.Mohamed Riyaz

Additional Public Prosecutor

O R D E R

This petition has been filed by the petitioner challenging the order passed by the Court below in dismissing the Memo filed by the petitioner seeking for afresh de-novo trial.

2 The respondent police registered an FIR in Crime No. 5 of 2012 against four accused persons for the offences under Section 120(b), 406, 420 IPC & Section 5 of TNPID Act 1997. After investigation, a Final Report was filed and on further investigation, additional Final Report was also filed by the respondent police. The Court below took cognizance of the Reports and framed charges against the accused persons.

3 The prosecution started examining the witnesses and totally 78 witnesses were examined on the side of the prosecution. At that stage, the prosecution filed a petition under section 319 of Cr.P.C to include the petitioner as one of the accused. For the said purpose, the prosecution relied upon the evidence given by some of the witnesses. The petition was allowed by an order dated 22.12.2015 and this petitioner was arrayed as A6 in the proceedings.

4 The petitioner filed a Memo before the Court below requesting the Court to permit the petitioner to examine all the witnesses on the side of the prosecution by virtue of the procedure contemplated under section 319(4) Cr.P.C. The Court below had rejected the Memo filed by the petitioner and permitted the petitioner only to cross examine the witnesses who deposed against the petitioner. Aggrieved by the same, the present petition has been filed before this Court.

5 The learned counsel for the petitioner would submit that the order of the Court below goes completely contrary to the provisions of section 319(4) of Cr.P.C., and against the Judgements of the Honourable Supreme Court of India.

6 The learned counsel for the petitioner placed reliance on the following judgements:- [1] MICHAEL MACHADO AND ANOTHER Vs. CENTRAL BUREAU OF INVESTIGATION AND ANOTHER reported in (2000)3 Supreme Court Cases 262, [2] Shashikant Singh Vs. Tarkeshwar Singh and Another reported in (2002) 5 Supreme Court Cases 738 and [3] Ajay Kumar Ghoshal Etc. Vs. State of Bihar & Anr. reported in 2017-2-L.W.(CrI.) 921.

7 This Court has carefully considered the submissions made by the learned counsel for the petitioner and also the submissions of the learned Additional Public Prosecutor.

8 It will be more appropriate to extract the provisions of section 319 of Cr.P.C:-

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case

may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

9 A plain reading of Section 319(4) makes it clear that the evidence must be recorded de-novo when a new accused is added. The case shall commence afresh insofar as the newly added accused is concerned and all the evidence must be taken in the presence of the accused person. Merely calling the prosecution witnesses for cross examination will not meet the requirements of Section 319(4) of Cr.P.C.

10 It will be relevant to extract the portion of the Judgements relied upon by the learned counsel for the petitioner

(i) (2000) 3 SCC 262:

14. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action.

(ii) (2002) 5 Supreme Court Cases 738

6. Clearly, the proceedings against the person summoned under sub-section (1) are required to be commenced afresh and the witnesses reheard. The entire proceedings have to recommence from the beginning of the trial. All the witnesses have to be examined afresh. Opportunity has to be granted to such a person to cross examine those witnesses. There has to be a de novo trial.

7. The effect of the conclusion of the trial against the accused who was being proceeded with when the order was passed under Section 319(1) for proceeding against the newly added person, is to be

examined in the light of sub-section (4) of Section 319 which stipulates a de novo trial in respect of the newly added persons and certain well-settled principles of interpretation.

8. When a statute is passed for the purpose of enabling something to be done, and prescribes the way in which it is to be done, it may be either an absolute enactment or a directory enactment. The difference being that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. (Craies on Statute Law, 7th Edn., pp.260-62.)

9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court

when order under section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court.

10. Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. (Craies on Statute Law, 7th Edn., pp. 266-67.)

11. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together with the accused is directory."

11 From the above Judgments, it is very clear that the proceedings against the person added as an accused under sub section (1) must be commenced afresh and the witnesses must be reheard. All the witnesses have to be examined and an opportunity must also be given to the newly added accused to cross examine those witnesses. In short, there has to be a de-novo trial.

12 It was informed to this Court that the prosecution has already examined 277 witnesses in this case. It is therefore clear that a large number of witnesses/victims have been examined on the side of the prosecution. Therefore, this court requested the learned counsel for the petitioner to give a list of witnesses who have to be examined by the prosecution and cross examined by the petitioner, so that unnecessary witnesses could be avoided. The learned counsel for the petitioner submitted a Memo before this court stating that the following witnesses can be examined by the prosecution and they will be cross examined by the counsel for the petitioner.

"12. Those witnesses are Pws. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 47, 77, 78, 115, 116, 119, 143, 146, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 212, 230, 231, 232, 233, 251, 261, 263, 264, 268 and 269."

13

In view of the above, the order passed by

the Court below is not in line with the provisions of Section 319 of Cr.P.C and the judgements of the Honourable Supreme Court referred supra. Therefore, the same needs to be interfered by this Court in exercise of its jurisdiction under Section 482 of Cr.P.C.

14 In the result, the order passed by the court below dated 20.02.2018 is hereby set aside and the Court below is directed to call upon the prosecution to examine the above said witnesses afresh and these witnesses shall be cross examined by the petitioner on the same day they are examined in chief. The Court below shall complete the entire proceedings within a period of six months from the date of receipt of a copy of this order. Accordingly, this Criminal Original Petition is allowed. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar
Dated: 09.01.2019

***Issue a fresh certified copy order
dated 01/02/19 by NAVJ**

Sd/-
Assistant Registrar(CCC)
Dated : 06.02.2019

//True Copy//

Sub Assistant Registrar

mpa/rpl
To

**To be substituted to the
order already
despatched on 31/01/2019.**

1.The Special Judge,
TNPID Court, Coimbatore.

2.The The Inspector of Police,
EOW II Unit, Erode,
Erode District..

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate sr.no.*8891

Cr1.O.P.No.7076 of 2018
and Cr1.M.P.No.3655 of 2018

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nr 10/01/2019
GMY(06/02/2019