

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Sr.No.110

Criminal Misc. No.M-37287 of 2015

Reserved on:18.08.2018

Date of Pronouncement:27.08.2018

Raj Kumar and others

....petitioners

Versus

State of Haryana and another

.....respondents

CORAM: HON'BLE MR.JUSTICE ARVIND SINGH SANGWAN

Present: Mr.Devender Punia, Advocate
for the petitioners

Mr.Himmat Singh, DAG Haryana

Mr.Jitender Dhanda, Advocate
for respondent No.2

ARVIND SINGH SANGWAN, J. :

Prayer in this petition is for setting aside the impugned order dated 24th July, 2015 (Annexure P2), vide which the trial Court has summoned the petitioners to face the trial under Sections 323,436,149 IPC, in Criminal Complaint No.564-1, dated 22.11.2012/17.09.2013, titled as 'Om Parkash vs. Raj Kumar and others' (Annexure P1), as well as the order dated 14.10.2015 (Annexure P3), passed by the Additional Sessions Judge, Hisar, vide which the revision filed by petitioner No.1 was dismissed.

Brief facts of the case are that complainant Om Parkash, constructed a boundary wall and a room around the shamlat land,

comprising Khasra Nos.70//18/2 min, 70//19/3 min, 70//22 min, 70//23 min. It is submitted that on 10.07.2012 at about 2.30 PM, nominee of sarpanch Bagla namely Raj Kumar came with Ravi Parkash, Block Development and Panchayat Officer, Adampur, Mainpal Panchayat Officer, Tehsildar Adampur and other police officials to dispossess the complainant from the said plot. The complainant and his brother Hawa Singh showed the copy of the civil litigation pending between the complainant and Raj Kumar but of no use. When the police officials tried to remove the possession of the complainant, the complainant, his brothers Rajender and Hawa Singh, son of complainant Satyaveer and Sonu son of Bir Singh prayed not to dispossess them from the land but the police officials ordered to remove the possession unlawfully and forcefully and the accused Raj Kumar, Sunil Kumar, Jai Singh, Rampat, Manphool, Suresh, Jasbir, Anand and Sandeep, all attacked on the complainant and his family members and as a result the complainant and his family members suffered many injuries. On hearing the noise, people gathered there and saved the complainant and his family members from the accused. They also set ablaze the room. The complainant and his family members were admitted to the hospital, where they got their statements recorded. The police registered the case only against four of the accused and not against all the accused person named in the array of accused. When the complainant inquired about the matter, the police did not respond to his query. Hence the complaint had been filed.

Thereafter, the respondent-complainant led his preliminary evidence and examined himself as PW1 and reiterated the version given in the complaint. The petitioner also examined PW2 Satyawar, PW3 Hawa Singh, PW4 EASI Ram Chander, PW5 Sonu and PW6 Dr.Tarun Sapra. Thereafter, the trial Court summoned the petitioners to face the trial under Sections 323,436 and 149 IPC, vide order dated 24th July, 2015. The petitioners preferred a revision before the Court of Sessions and the same was dismissed vide impugned order dated 14.10.2015.

Learned counsel for the petitioners has argued that on a similar set of allegations FIR No.162 dated 12.07.2012, under Sections 323,325,148,149 IPC, Police Station Adampur, District Hisar, stands registered and the case has been committed to the Court of Sessions and four of the present petitioners namely Raj Kumar, Sunil Kumar, Rampal and Jai Singh are facing the trial whereas accused Jai Singh is stated to have expired. Counsel for the petitioners further argued that the prosecution, in the said FIR, filed an application under Section 319 Cr.P.C.for summoning 13 other accused persons. However, the said application was dismissed by the Additional Sessions Judge, Hisar, vide order dated 06.08.2015 (Annexure P5).

Learned counsel for the petitioners has thus submitted that the Additional Sessions Judge, Hisar, has found no merit to summon all the 13 persons including the petitioners namely Manphool, Suresh, Jasbir, Anand and Sandeep, as additional accused in the aforesaid FIR,

in the application filed under Section 319 Cr.P.C., and while dismissing the same held that prima facie no case is made out for summoning the petitioners No.4 to 8 along with other persons.

Learned counsel for the petitioners has further argued that petitioner No.4 Manphool Singh is a government servant and he was on his place on posting on 10th July, 2018, as per the certificate issued by the Principal of the school. Learned counsel for the petitioner has relied upon **2012(1) RCR (Criminal) 583, Jile Singh vs. State of U.P. and another**, wherein the Hon'ble Supreme Court has held that if a person is named in the FIR, but the police has not filed the charge sheet, such a person cannot be summoned as an accused in a subsequent private complaint filed by the aggrieved person under Section 200 Cr.P.C. As the proper remedy for the aggrieved person is to file an application under Section 319 Cr.P.C., where such an accused person can be summoned by following the procedure. The operative part of the judgment of the Hon'ble Supreme Court is as under:

8. The above legal position has been reiterated by this Court in a subsequent decision in the case of Kishori Singh(supra). The two Judge Bench in Kishori Singh (supra) considered some of the provisions of the Code and earlier decision of this Court in Ranjit Singh (supra) and two other decisions, namely, Raj Kishore Prasad Vs. State of Bihar and India Carat (P) Ltd. Vs. State of Karnataka, and held as under :-

"9. After going through the provisions of the Code of the Criminal Procedure and the aforesaid two judgments and on examining the order dated 10-6-1997 passed by the

Magistrate, we have no hesitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in the FIR as accused persons, but not charge-sheeted in the charge-sheet that was filed by the police under Section 173 CrPC.

10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

9. In the present case, if the order passed by the Chief Judicial Magistrate, Mathura, in issuing summons against the appellant on the complaint filed by the respondent No. 2-complainant, which has been confirmed by the High Court, is allowed to stand, it would mean addition of the appellant to the array of the accused in a pending case before the Sessions Judge at a stage prior to collecting any evidence by that court. This course is absolutely impermissible in view of the law laid down by a three Judge Bench of this Court in the case of Ranjit Singh (supra). The stage of Section 209 of the Code having reached in the case, it was not open to the Chief

Judicial Magistrate, Mathura to exercise the power under Section 204(1)(b) of the Code and issue summons to the appellant. The order of the Chief Judicial Magistrate, Mathura is totally without jurisdiction. The High Court was clearly in error in not keeping in view the law laid by this Court in the case of Ranjit Singh (supra) followed by a subsequent decision in the case of Kishori Singh (supra) and in upholding the illegal order of the Chief Judicial Magistrate, Mathura.

10. The two decisions, namely, Hareram Satpathy (supra) and Kishan Lal (supra) relied upon by the learned senior counsel and counsel for the respondents have no application at all to the case in hand.

11. We, accordingly, allow this Appeal and set aside the order of the High Court dated March 10, 2011 impugned in this present Appeal and the order of the Chief Judicial Magistrate, Mathura, dated January 3, 2011.

12. Needless to say that in the course of trial, on the basis of the evidence if it appears to the Sessions Judge that any person not being the accused in the trial has committed the offence and the case is made out for exercise of power under Section 319 of the Code for proceeding against such person, it will be open to the Sessions Judge to proceed accordingly and the present order will not come in the way in exercise of his power under Section 319 of the Code.

In reply, learned State counsel, on the basis of affidavit filed by Deputy Superintendent of Police, Hisar, has submitted that the FIR No.162 dated 12.07.2012, was registered on the complaint of respondent No.2 alleging that he had constructed a boundary wall and

one room in shamlat land at village Bagla comprising in khasra No.70//18/2 min, 70//19/3 min, 70//22 min, 70//23 min. It is further stated that Raj Kumar, nominee for the post of Sarpanch came there along with Ravi Parkash Block Development and Panchayat Officer, Adampur, along with police to dispossess them from the aforesaid land on which respondent No.2 and his brother had shown them the copy of the order passed by the Civil Court, but the official remained adamant by saying that they have no knowledge about the same and when they tried to remove the possession of respondent No.2/complainant, his family members came at the spot. In the meantime, the accused persons also reached the spot and started beating respondent No.2 and his family members upon which the aforesaid FIR was registered. It is further stated that on completion of the investigation, report under Section 173 Cr.P.C.was submitted against the petitioner Raj Kumar, Sunil Kumar, Rampat and Jai Singh. It is also admitted in this affidavit that the application filed by respondent No.2/complainant under Section 319 Cr.P.C. was dismissed by the trial Court.

It is relevant to mention here that on 23.10.2017, the learned State counsel has produced on record the copy of judgment dated 25.05.2017, vide which the petitioner Raj Kumar, Sunil Kumar, Jai Singh and Rampat were acquitted in the aforesaid FIR No.162 dated 12.07.2012. In view of the same, this petition was erroneously rendered as infructuous. However, later on, on the application moved by the petitioners, the said order was recalled vide order dated

15.11.2017 as the aforesaid judgment dated 06.08.2015 (Annexure P5) pertains to FIR No.162 dated 12.07.2012 and not to the present case, arising out of the complaint filed by respondent No.2.

Learned counsel appearing for respondent No.2 has opposed the prayer of the petitioners on the ground that both the Courts below have rightly held that prima facie case is made out against the petitioners for summoning them under Sections 323,436,149 IPC. However, learned counsel for the complainant could not deny the fact that the incident in both the cases pertain to the same date i.e.10.07.2012 and for the same occurrence.

After hearing learned counsel for the parties and on careful perusal of the facts of the case in FIR No.162 dated 12.07.2012, from the judgment dated 25.05.2017 (Annexure P5) and from the impugned summoning order dated 24.07.2015 (Annexure P2), it is apparent that the incident in both the cases is same and the complainant, witnesses and accused persons in both the cases are also same.

The fact that the petitioners were sought to be summoned as additional accused during the pendency of the trial arising out of the FIR No.162 dated 12.07.2012, was dismissed by the Additional Sessions Judge, Hisar, and that order had attained finality. It is also not disputed that petitioner No.1 and 2 along with one Jai Singh (since deceased) and Rampat, after facing the full length trial were acquitted by the Court. The operative part of the judgment dated 25.05.2017 is reproduced as under:

25. *Coming to the facts of present case, as discussed above, the prosecution has failed to explain the injuries sustained by the accused and has also failed to prove that which of the party was aggressor, therefore, benefit of doubt must be given to the accused. Further, in view of above discussed facts and circumstances of the present case, the investigation conducted in the present case also appears to be not proper and faulty and thus seriously prejudiced the defence of the accused and benefit of the same must be given to the accused. In this regard, I am also fortified with the view taken by Hon'ble Supreme Court in Kashiram and others vs. State of M.P. 2001 (4) RCR (Criminal) 556, wherein has been observed as follows:-*

“The Investigating Officer, having found one of the accused having sustained injuries in the course of the same incident in which those belonging to the prosecution party sustained injuries, should have at least made an effort at investigating the cause of, and the circumstances resulting in, injuries on the person of the accused. If only this would have been done, the defence version of the incident would have been before the investigating officer and the investigation would not have been one sided. Investigating Officer having failed to do so the investigation suffers from a serious infirmity which has prejudiced the accused in their defence.”

26. *Now the question arises whether the Investigating Officer was aware about the injuries of accused party sustained in the occurrence. Admittedly, cross case is pending before this Court for today itself, in which the same Investigating Officer i.e. ASI Bhanwar Lal had recorded the statement of accused party*

regarding the present occurrence and about the sustaining of injuries by the accused party and further, he had also collected the medical record of injured from accused side from the concerned hospital, thus, there was no reason to believe that Investigating Officer was not aware about the injuries sustained by accused party in the present occurrence. Thus, in view of the above facts and circumstances of the case, the investigation conducted in the present case was faulty or can be said to be biased and benefit of doubt must be given to the accused. In this way, prosecution has failed to prove its case by leading cogent, convincing and trustworthy evidence and further failed to complete the chain of circumstances which could help the prosecution to prove its case against the accused.

27. *In view of above reasoning, it is proved on record that though a fight had taken place on 10.07.2012 in village Bagla in which both the parties had received simple as well as grievous injuries but it was a free fight and the prosecution has failed to prove on record that which of the party was aggressor. Further, in the present case, as discussed above, and as held in cross case tilted as State versus Akhe Ram and others, the origin of fight also doubtful, the investigation is faulty and in such situation, it is the safer course that benefit of doubt be given to both the parties and acquit them. Moreover, in State of U.P. Vs. Gambir Singh & Ors. 2005(2) CCC 835 (SC), it has been held that if on the same evidence two views are reasonably possible, one in favour of the accused must be preferred.*

28. *Per discussion, it is held that the prosecution has not been able to prove its case beyond shadow of*

reasonable doubts against the accused. So, it is a fit case, where benefit of doubt deserves to be given to the accused and by giving them the same, I acquit accused Raj Kumar, Rampat and Sunil from the charges framed against them. Their bail bonds and surety bonds stand discharged. Case property, if any, be disposed of as per rules, after the period of appeal/revision, if any. File be consigned to record room after due compliance.

In view of the judgment of the Hon'ble Supreme Court in Jile Singh's case (supra), respondent No.2/complainant has already availed his remedy under Section 319 Cr.P.C, therefore, after dismissal of the said application, the present complaint is not maintainable.

A perusal of the impugned orders dated 24.07.2015 and 14.10.2015 (Annexures P2 and P3), passed by the courts below, would show that the Courts below have not recorded any specific finding in this regard. Though the order dismissing the application under Section 319 Cr.P.C. was passed on 06.08.2018, i.e.after the impugned summoning order was passed by the trial Court on 24.07.2015 and the Lower Appellate Court has not taken into consideration the same.

The finding recorded by the revisional Court that the facts in both the cases i.e.the FIR case and the present complaint are entirely different is erroneous as the only reason given to come to this conclusion is that in the FIR, the case was registered for commission of offence under Sections 323, 325 IPC, whereas the complaint has been filed under Sections 323,325,380,436,506,148 and 149 IPC. The revisional Court has ignored the fact that the summoning order was

passed under Sections 323,436,149 IPC only and as per the judgment of the Additional Sessions Judge, discharging petitioners No.1 and 2, the charges were framed under Sections 323,325 read with Section 34 IPC and the complainant even did not avail his remedy to challenge the aforesaid order framing the charges before the Court of Sessions.

However, the complainant never moved any application under Section 210 Cr.P.C for a joint trial of the complaint case along with the aforesaid FIR case and therefore, after petitioner No.2 and 3 and two other persons stand acquitted in the said FIR, I find that the impugned summoning order passed by the trial Court as upheld by the revisional Court, is not sustainable in the eyes of law.

Accordingly, this petition is allowed and the impugned summoning order as well as the order passed by the revisional Court is set aside.

[Arvind Singh Sangwan]
Judge

27.08.2018

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Whether speaking/reasoned	Yes
Whether reportable-	Yes