

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

CRR no.3249 of 2016(O&M)

Date of Decision: 02.07.2018

Gulzar Singh and others

....Petitioners

Versus

State of Punjab and another

....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. G.S. Punia, Senior Advocate, with
Mr. Jagrit Kalia, Advocate, for the petitioners.
Ms. Monika Jalota, DAG, Punjab.
Mr. Sandeep S. Majithia, Advocate
for applicant/respondent no.2.

Amol Rattan Singh, J. (Oral)

By this revision petition, the petitioners challenge the judgment of the learned appellate court, (Additional Sessions Judge, Ludhiana), dated July 25, 2016, allowing the appeals of both the respondents herein, thereby setting aside the judgment of the learned trial court (Judicial Magistrate Ist Class), Ludhiana, dated August 12, 2015, acquitting the petitioners of the charges framed against them.

While acquitting the petitioners, however, the learned appellate court remitted the case to the trial court to “proceed with the trial further in accordance with the law”. Thus, the petitioners are aggrieved of their acquittal being set aside and the matter being remitted to the trial court, for the trial to continue.

2. The factual matrix giving rise to criminal proceedings, is that

upon respondent no.2 herein, Rajesh Pal, having made a complaint to the police, FIR no.157 of 08.06.2006 was registered at Police Station Division No.5, Ludhiana, against the petitioners, alleging therein the commission of offences punishable under Section 420, 467, 468, 471, 120B of the IPC.

As per the complainant, he had a shop by the name and style of M/s Pirthi Chand Kaushal, at the Grain Market, Khanna, District Ludhiana, and he had sold rice to M/s Om Parkash Rice Mill, in the same district, with Rs.14,68,466.80 outstanding to be paid by the rice mill to him.

To recover that amount, he had filed a civil suit at Ludhiana, with it being decreed in his favour, after which he had instituted the execution proceedings, in the course of which property belonging to the judgment-debtor was attached and was also auctioned. However, when the Executing Court was to confirm the sale, one Ram Murti filed an objection in the execution petition, stating that the sale could not be confirmed qua 2 kanals and 19 marlas, out of the total property of 14 kanals and 5 marlas of the land attached, (as informed to this Court by learned counsel appearing for the petitioners). The ground taken by Ram Murti was that, as a matter of fact, he had purchased the said land (comprising 2 kanals 19 marlas), from one of the partners of the judgment-debtor rice mill, i.e. from Ramesh Kumar, with the sale having been effected on 07.11.1989, (as per learned counsel for the petitioners).

Upon the aforesaid objection raised, the executing court confirmed the sale of the remaining land, with a mutation also having been

entered in the revenue record, as regards the said order. However, taking advantage of the fact that qua 2 kanals and 19 marlas of land, the executing court had adjourned the matter *sine die*, the allegation of the complainant is that petitioner-accused no.1, Gulzar Singh, forged the revenue record and sold the said property to petitioner no.2, Harbans Singh, who thereafter sold it to petitioners no.3 and 4, Charanjit Singh and Raghbir Singh, all of whom, as per the respondent-complainant, had complete knowledge of the matter having been adjourned *sine die* (qua the said property); the further allegation being that the power of attorney and the sale-deed 'were forged' in connivance with officials from the office of the Sub-Registrar, Ludhiana.

As per the complainant, because Harbans Singh had sold half his share to accused Raghbir Singh, who is his relative, and the remaining half to one Kulwinder Singh on 29.03.1955, Kulwinder Singh filed a suit seeking permanent injunction on 23.12.1995, which was dismissed by the civil court on 19.04.1997, with the appeal filed by Kulwinder Singh also having been dismissed.

The allegation of the petitioners was that if Kulwinder Singh was the owner of 2 Kanals and 19 marlas and the registered sale deed in his favour was 'correct', then there was no cause for him to file a suit seeking permanent injunction. (The inference being that if he was in possession of the property that he owned, he did not need to file a suit seeking permanent injunction; though the complete logic thereof does not stand to reason, because even if a person is owner in possession, a suit seeking permanent

injunction restraining somebody from interfering in his possession could still be filed).

3. The aforesaid FIR thus having been registered, the report under Section 173 Cr.P.C. was filed after statements under Section 161 of the Cr.P.C. etc. were recorded and the petitioners were charged by the trial court as aforesaid.

After the examination-in-chief of the complainant was recorded partly, the remaining was deferred for want of some relevant documents, those documents being ones on the basis of which the FIR itself was registered (as per the judgment of the trial court), with the complainant having failed to bring the document, despite availing many opportunities. The trial court recorded a finding that he “in a very vague manner” stated that he would produce the same after locating them.

One ASI Avtar Singh was also examined as PW-2, who testified during the course of investigation that ASI Paramjit Singh (investigating officer) had arrested the petitioners-accused (other than Raghbir Singh, petitioner no.4); but with he himself, i.e. PW-2, not having investigated the case personally, and that nothing had been recovered from them in his presence.

At that stage of the trial, the learned trial court held that despite numerous opportunities, the prosecution had failed to examine material witnesses; and as regards the complainant himself (PW-1), his part examination-in-chief could not be read into evidence, and consequently,

after closing evidence by a separate order, it was held that the prosecution having failed to establish the occurrence, the accused were all acquitted of the charges framed against them.

4. The State of Punjab and the complainant having filed separate appeals, they were heard and decided together by the learned Additional Sessions Judge, vide the impugned judgment dated 25.07.2016.

While allowing the appeals, the appellate Court reproduced the order of the trial court justifying the acquittal of the petitioners on the ground of their not having led evidence in the form of material witnesses despite a number of opportunities. However, the appellate court went on to record that a perusal of the case file showed that though the proceedings before the trial Court commenced in the year 2008, thereafter, framing of charges was stayed by this Court, upon a criminal misc. petition for that purpose having been filed by the present petitioners; and though it was not clear when the stay order was vacated, however, an application filed under Section 239 Cr.P.C. before the trial court, was dismissed by that court on 16.01.2014, after which the charge was framed on 02.04.2014. Thereafter, on 01.05.2014 and 26.05.2014, no PWs were found present and on the second date at least, no PW was found to be served with the summons issued. After that, though summons were ordered to be executed through the Commissioner of Police, however, from 11.06.2014 to 30.10.2014, the case file was not before the trial court as a revision petition had been filed by the present petitioners before the learned Additional Sessions Judge,

which was eventually withdrawn on 16.10.2014.

On 18.11.2014 and 05.12.2014, again summons issued to the prosecution witnesses were received back unserved, but with the complainant, Rajesh Pal (PW-1), present thereafter on 12.02.2015, with his examination-in-chief partly recorded.

Summons issued to three PWs for that date were found to have been received back unserved, leading to fresh summons being issued for 19.03.2015, on which date the complainant sought exemption of appearance, which was allowed. Then on 15.04.2015, another witness (a Clerk from the 'DRA branch') had appeared but had not brought the record required.

5. Subsequently it seems that evenailable warrants were issued for production of even the complainant, for 16.05.2015, with such warrants also not received back by the Court, the trial court therefore granting a final opportunity for leading prosecution evidence, but with the summons / warrants still having been received back unserved on 12.06.2015, another date having been granted, i.e. 24.07.2015, on which date a Clerk from the copying branch of the Sub-Registrars' office appeared with the relevant record, and was bound down for the next date of hearing, withailable warrants again issued for the remaining prosecution witnesses to be executed by the next date, i.e. 12.08.2015.

6. In the aforesaid background, the learned appellate court held that though 9 opportunities had been granted to the prosecution for

summoning its witnesses, however, as warrants were not actually served upon the concerned person by the “process server on one account or the other”, proceedings in a criminal trial could not be scuttled.

An argument on behalf of the complainant was also noticed, that in the order closing evidence, the trial court had stated that no prosecution witness was present (on the date that the accused were acquitted), though actually it was also found that the complainant (PW-1) was present, who had sought an adjournment on the ground that he would “locate the documents”.

7. Citing a judgement of the Supreme Court in State of **Rajasthan v. Iqbal Hussien**, (2004) 12 SCC 499, the appellate court eventually held that simply because summons/warrants were not served upon prosecution witnesses, with the accused themselves also having delayed the trial (by first filing a revision petition before this Court and then against another order before the appellate court), it was the duty of the trial court to invoke its jurisdiction under Section 350 Cr.P.C. and adopt summary proceedings for punishing non-attending witnesses, which that court (trial court) did not do. Hence, even while observing that the conduct of the complainant (PW-1) was also not above board, the judgment of acquittal was held to be not sustainable and was consequently set aside.

The principal ground for allowing the appeals of the State and the complainant (respondent no.2 herein), was that the accused themselves had caused a delay of about 6 years, between 2008 to 2014, in not allowing

the trial to proceed, and therefore, they could not be given the advantage of getting away with their own delaying tactics, simply because the prosecutions witnesses were not appearing or were not being served on account of non-service; and the trial court should have therefore adopted procedure under Section 350 Cr.P.C., to ensure production of the witnesses.

8. Before this Court, Mr. Punia, learned Senior Counsel appearing for the petitioners, first of all referred to 'zimini' orders passed by the trial court between 02.04.2014 till 24.07.2015 (copies of which have been annexed as Annexure P-1 collectively), to submit that the trial court was very much justified in closing the evidence and acquitting the petitioners, in view of non-appearance of the prosecution witnesses, including the complainant himself (PW-1). He specifically referred to the orders dated 18.11.2014, 05.12.2014, 15.04.2015, 16.05.2015 and 12.06.2015.

A perusal of first two orders shows that the complainant was not present on account of not having been served of the summons issued for those dates, after which on 15.04.2015, he was not present despite having been bound down for that date and in fact on 16.05.2015 bailable warrants were ordered to be issued to secure his presence, which was also so on 12.06.2015 and 24.07.2015.

It is also seen that though undoubtedly in the order closing evidence on 12.08.2015, it is first shown that no prosecution witness was present, thereafter it was recorded that the complainant had sought an adjournment on the ground that he would locate the documents in

connection, which he did not do.

9. Mr. Punia further submitted that the entire case of the prosecution is not sustainable against the petitioners, as the person who had sold the land to Ram Murti, i.e. Ramesh Kumar, was not made an accused, and therefore, with the original owner not having been arraigned as an accused, the petitioners in any case, who were subsequent purchasers from Ram Murti, cannot be accused of having committed any fraud.

Mr. Punia next submitted that as regards the objections filed by the objectors with regard to the attachment of the property in question, (qua 2 kanals and 19 marlas thereof), on the ground of a bonafide sale by the original owner, i.e. Ramesh Kumar, in favour of Ram Murti, vide a sale deed dated 07.11.1989; such objections having been upheld by the learned Civil Judge (Jr. Divn.), Ludhiana, in execution proceedings, vide his order January 6, 2016, obviously shows that the complainant actually has no legs to stand on, though the said order of the Civil Judge (in execution proceedings) is under appeal by respondent no.2 herein.

Learned senior counsel therefore prayed for setting aside of the impugned order and restoration of the judgment of the trial Court.

10. Mr. Sandeep Majithia, learned counsel appearing for respondent no.2 (complainant), countered the first argument of Mr. Punia by reiterating the reasoning given by the appellate court, to the effect that once the summons/warrants issued to the PWs were not even served upon them, obviously, the complainant or the prosecution could not be penalized for

their non-appearance.

As regards the occasions when they were served but did not come present, Mr. Majithia submitted that with other prosecution witnesses remaining unserved, those 2/3 occasions that the complainant did not appear, would not be fatal to the case of the prosecution, especially as the petitioners themselves delayed the trial for about 6 years by filing revision petitions, as has been found by the appellate court also.

11. As regards the argument of Mr. Punia that the complainant had no locus standi in the matter, he not having arraigned the original owner of the property, i.e. Ramesh Kumar, as an accused, Mr. Majithia countered by submitting that the allegation against the petitioners is that they forged the power of attorney of Ram Murti, on the strength of which the property was shown to have been sold to petitioner no.1, Gulzar Singh, and thereafter in sequence to the other petitioners, and therefore, it is the petitioners who are to be prosecuted for forgery and cheating, and not Ramesh Kumar.

12. As regards the last argument of Mr. Punia, Mr. Majithia submitted that the order of the learned executing court, upholding the objections of the objectors (petitioners and their predecessor-in-interest, Ram Murti), still being under consideration of the appellate court in civil proceedings, no mileage can be taken on that count by the petitioners; and further, though the sale deed is stated to be dated 01.09.1989, the decree-holder had sent a notice on 09.05.1989 to the judgment-debtor, i.e. M/s Om Parkash Rice Mills, with regard to the recovery to be made from them, even

though the suit for recovery was instituted on 11.05.1990.

He therefore submitted that the sale of the property was wholly mala fide, with 'no success' even in a suit filed by Ram Murti on 24.01.1991, seeking partition of the said property on the basis of the sale, by which he also sought a nullity of the judgment in the civil suit in which the present complainant/respondent no.2 is the decree-holder.

Mr. Majithia contended that in said the suit filed by Ram Murti, his application under Order 39 Rules 1 and 2 of the CPC was also dismissed, as was the appeal against that order, with the suit eventually also having been dismissed-in-default on 03.10.1996, which may have been because of the death of Ram Murti.

13. Learned counsel next submitted that even as per the case of the petitioners, petitioner no.2 Harbans Singh became owner of the property only in the year 1993, with him having raised no objection before the executing court, but with petitioner no.1 Gulzar Singh having deliberately sold the property despite being fully aware of the factum of its attachment and the pending litigation in execution proceedings, with warrants of attachment having been issued on 09.11.1990 and the property attached actually auctioned off on 12.12.1990, and only the confirmation of the auction having been stayed qua the property in dispute (because of Ram Murtis' objections having been filed).

He submitted that, therefore, the petitioners in connivance with each other forged Ram Murtis' power of attorney, on the basis of which the

property was sold, despite complete knowledge that it was subject matter of execution proceedings.

Hence, Mr. Majithia submitted that the revision petition is without any merit and deserves to be dismissed.

14. Having considered the judgment/order of the learned Courts below, as also the arguments of learned counsel for the parties before this Court, as regards the finding of the learned appellate court that the prosecution witnesses not appearing on account of their not being served of the summons/warrants issued to secure their presence, no fault can be found with that finding, in view of the fact that the prosecution witnesses are shown to be mostly police or government officials and as such, though it is not a case instituted on a criminal complaint filed under Section 190(a) of the Code of Criminal Procedure, but even so, the complainant cannot be solely held responsible for non-appearance of such witnesses, and therefore the trial court should very much have resorted to the procedure provided under Section 350 of the said Code to try and ensure that the witnesses summoned actually did appear before it.

However, as regards non-appearance of the complainant himself as PW-1 even after he was bound down to appear after being present on 19.03.2015, with bailable warrants issued to secure his presence thereafter on 15.04.2015 and 16.05.2015, 12.06.2015 and 24.07.2015 and he even on the date that eventually the petitioners were acquitted, i.e. 12.08.2015, having sought an adjournment for production of relevant

documents which it would seem that he had also sought to do when his examination-in-chief was initially recorded on 12.02.2015, that would be something inexcusable; and from that point of view, the order of the learned trial court would not otherwise seem to be unsustainable.

15. Still, in view of the fact that the trial initially dragged on for about 6 years on account of revision petitions filed by the present petitioners-accused (though of course they were otherwise within their right to do so), and the allegations against the petitioners being rather serious of alleged forgery and cheating qua a piece of land, I would not interfere in the order of the learned appellate court, setting aside the judgment of acquittal passed by the trial court, especially in view of the fact that the appellate court has directed vide the impugned judgment, that no further adjournment shall be granted to the complainant (respondent no.2 herein, Rajesh Pal), as regards his testimony before the trial court.

16. This petition is therefore dismissed, but with a further direction that if PW-1, Rajesh Pal, does not appear before the trial court for effective testimony on even one date after the first date to be now assigned for the case to be taken up by that court, thereafter that court would pass appropriate orders as regards the closure of evidence of the prosecution, and proceed further to conclude the trial very expeditiously.

Consequently, the parties are now directed to appear before the trial court on 11.07.2018, after which that court would grant simply one opportunity to respondent no.2 to conclude his testimony as PW-1, and

would thereafter proceed with the trial.

It is also directed that the trial shall be concluded now within 6 months, and in case of non-appearance of prosecution witnesses, the trial court would ensure that proceedings under Section 350 Cr.P.C. are followed, if necessary, to secure the presence of government officials, including police officials, and other witnesses as are not appearing before that Court despite summons and warrants issued.

17. It is also made clear that though both learned counsel have addressed arguments on the merits of their case before the trial Court (as regards culpability /non-culpability of the petitioners in the commission of any offence), however, the acquittal of the petitioners by the trial Court having been on the ground of non-leading of prosecution evidence despite many opportunities, and the appellate Courts' finding also being entirely on that aspect alone, the merits of the allegations against the petitioners are not to be gone into at this stage by this Court, with the trial Court to go into the merits of the allegations wholly on the basis of the evidence led before it, if it is led by the prosecution in terms of the direction given hereinabove.

With the aforesaid observations and direction, this petition is dismissed.

July 2, 2018.
vcgarg

(AMOL RATTAN SINGH)
JUDGE

Whether reasoned/speaking: Yes
Whether reportable: Yes