

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

**Criminal Revision No.4875 of 2017 (O&M)
Date of Decision : 30.01.2018**

Satya Prakash

..... Petitioner

Versus

Bhabhuti Singh Tyagi and another

..... Respondents

CORAM : HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present : Mr. Kunal Dawar, Advocate
for the petitioner.

Mr. Raj Kumar Makkad, DAG, Haryana.

RAJ SHEKHAR ATTRI, J. (Oral)

The petitioner has preferred the instant revision petition against the order dated 05.12.2015, passed by the learned Addl. Sessions Judge, Faridabad, vide which judgment of acquittal dated 01.11.2013, passed by the learned Judicial Magistrate Ist Class, Faridabad was set aside and the case was remanded back for a fresh decision after giving opportunity to the prosecution to lead evidence and also with a direction to the trial Court to ensure as to whether process has been issued to the prosecution witnesses well in advance.

The facts of the case, as narrated in the impugned order, are that complainant Bhabuti Singh was the owner of House No.2610, Sector 16, Faridabad. He agreed to sell the said house to the petitioner Satya Prakash for a sum of Rs.32,00,000/-. An agreement was duly executed on 19.03.2007 with the condition that purchaser Satya Prakash would pay the sale consideration of Rs.32,00,000/- by two bank drafts. In consequence

thereof, the petitioner handed over two bank draft Nos.037298 and 037299 dated 16.03.2007 and 19.03.2017, amounting to Rs.5,00,000/- and Rs.27,00,000/- respectively to complainant. However, it was mentioned in the agreement that in case any of the bank drafts found to be invalid or cancelled for any reason the sale shall be deemed to be cancelled. After the receipt of the sale consideration through abovesaid bank drafts, sale deed was executed on 19.03.2007. However, the bank draft bearing No.037299 dated 19.03.2007 for a sum of Rs.27,00,000/- was found to be fake and forged one. Thus, the complainant lodged FIR. The matter was investigated and the accused was arrested. After completion of investigation, challan was presented.

Prosecution examined various witnesses. However, prosecution evidence was closed by order and the petitioner was acquitted of the charges as framed against him.

Complainant preferred an appeal against the judgment of acquittal which was allowed and the impugned order of acquittal was set aside. However, matter was remanded back for decision afresh after giving opportunity to the prosecution to lead evidence.

Learned counsel for the petitioner has submitted that the first appellate court has no jurisdiction to order retrial. It is further contended that it was not mentioned in the impugned order that any prejudice has been caused to the prosecution and the impugned order is not sustainable. To substantiate his arguments, he has placed reliance upon the judgments of Hon'ble Supreme Court in *Ajay Kumar Ghoshal Etc. versus State of Bihar and another 2017 (1) RCR (Criminal) 1061; State of Madhya*

Pradesh versus Bhooraji 2001 (4) RCR (Criminal) 40 and Ukhe Kolhe versus State of Maharashtra 1963 AIR (SC) 1531.

On the other hand, learned State counsel has vehemently contended that the trial court failed to appreciate the evidence available on record. Process was not issued to the witnesses, therefore, the prosecution has been gravely prejudiced and it occasioned the failure of justice and it is an exceptional case where retrial has been correctly ordered.

This Court has given its thoughtful consideration on the rival contentions.

Learned first appellate Court in para No.10 of the judgment has taken note of the epithetical approach adopted by learned trial court. The process was not properly issued to the prosecution witnesses. However, undue haste was committed by learned trial Magistrate and prosecution evidence was closed by order without examining the material witnesses including the eye witnesses. This Court would like to reproduce para No.10 of the first appellate court's judgment hereunder:-

“A perusal of the record shows that charge was framed on 31.05.2007. Two prosecution witnesses were present on 06.08.2008 but accused absented. No PW was present on 14.01.2010 and, thereafter, case remained pending for awaiting of supplementary challan and appearance of accused. On 20.09.2012, one PW Anil was partly examined and further examination was deferred on the request of Public Prosecutor. On 16.10.2012, 12.11.2012, 23.11.2012, 05.12.2012, 08.02.2013 and 29.04.2013, no PW was present. On 29.04.2013, case was adjourned to 01.06.2013 and last opportunity was granted. On 01.06.2013, three witnesses were present but not examined on the request of learned

defence counsel and case was adjourned to 10.06.2013, on which date, two PWs were examined and one was not examined. On 17.07.2013, one PW was present but accused was not produced from jail and case was adjourned to 25.07.2013, on which date one witness was examined and case was adjourned to 21.08.2013 for evidence and last opportunity was granted. Thereafter, case was adjourned to 11.09.2013 and last opportunity was granted on which date, it was observed that summons have not been received back and the evidence was ordered to be closed. However, there is no endorsement by the concerned Ahlmad/Clerk of the Court on the order sheet that in pursuance of order dated 21.08.2013, ordering summoning of prosecution witnesses for 11.09.2013, summons have been issued by him. The learned Trial court also did not take any pain in verifying this fact from the Ahlmad by seeking his report or from the Naib Court whether summons to prosecution witnesses have been issued or not. Once there is no endorsement by the Ahlmad that summons have been issued by him and no summons had also been received back, it can be presumed that summons had not been issued for 11.09.2013. Once last opportunity was granted, it was the duty of the learned trial Magistrate to ensure that summons to all the prosecution witnesses were issued well in advance but no such summons were issued for 11.09.2013 and the prosecution evidence was ordered to be closed. The material witnesses including Investigating Officer remained unexamined and great prejudice thus has been caused to the prosecution on this account which result in acquittal of the accused without giving proper opportunity to the prosecution to lead its evidence. As such, impugned judgment is not sustainable and is liable to be set aside.”

A bare perusal of the impugned order transpires that the adequate opportunity to lead evidence has not been given to the

prosecution.

A fair trial is the heart of the criminal jurisprudence. Equally, this is an important facet of a democratic polity which is governed by Rule of Law. It is well settled that denial of fair trial is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasizing the principle of fair trial and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases, because of non-compliance of a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred. Hon'ble Supreme Court in **Zahira Habibullah Sheikh vs. State of Gujarat (SC)** has made the following observations:-

*“The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair **Criminal***

prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.”

It was the paramount duty of the trial Magistrate to afford adequate opportunity to the prosecution to adduce evidence.

The record transpires that on 01.06.2013, three prosecution witnesses were present but those were not examined on the request of learned defence counsel, as such, the case was adjourned for 10.06.2013 and on the said date, two prosecution witnesses were present and out of them only one was examined. No reason has been assigned by the trial court as to why it failed to record the evidence of the second witness, who was present on abovesaid dates and returned unexamined. Surprisingly, on next date i.e. 17.07.2013, one prosecution witness was present but his evidence could not be recorded on the ground that accused was not produced from the jail. Thus, case was adjourned to 25.07.2013. On that date, only one witness was examined and last opportunity was granted to the prosecution to produce its evidence. After affording last opportunity, it was the duty of the Courts to issue summons to the remaining prosecution witnesses. Right of prosecution to adduce evidence cannot be throttled under the garb of 'last opportunity'. No reason has been assigned as to why the court failed to take appropriate action against the witnesses who were present on the previous dates, especially, on 01.06.2013, 10.06.2013 and 17.07.2013 but did not appear thereafter. It has gravely caused the prejudice to the case of prosecution and occasioned the failure of justice. It

is an exceptional case where retrial is necessary and learned first appellate court has correctly exercised this power under Section 386 (b) to order the retrial. However, the judgments cited by the learned counsel for the petitioner, having distinguishable facts and the ratio decidendi is not applicable in the instant case.

Keeping in view the facts and circumstances of the case, this Court finds that the impugned order does not suffer from any illegality, infirmity or irregularity, therefore, the same does not call for interference.

In view of aforesaid discussion, the instant petition stands dismissed.

30.01.2018
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(RAJ SHEKHAR ATTRI)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable :

Yes/No