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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 305/2024 & CRL.M.A. 1178/2024**

BANSHI PRASAD YADAVPetitioner

Through: Appearance not given.

versus

STATE OF DELHI & ORS.Respondents

Through: Ms. Kiran Bairwa, APP for State.
Mr. Gunjan Kathpalia, Adv. for R-2
& 3 with R-3 in person.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

03.12.2024

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1. The present petition has been filed challenging the order dated 13.09.2023 of learned Additional Sessions Judge-07, South-East District, Saket Court, Delhi, whereby the revision petition filed assailing the order of learned Trial Court dated 23.11.2019 in Case No.614740/2016 titled as "*Banshi Prasad Yadav vs. Balbir Singh Yadav and Ors.*" was dismissed.
2. Briefly stated the facts are that the petitioner filed a private complaint against the respondent Nos.2 to 4 alleging misappropriation of funds and forgery. Learned Trial Court took the cognizance and after recording pre-summoning evidence, summoned the accused person vide order dated 13.01.2012. In pre-charge evidence, the complainant was only partly examined. Thus, his examination-in-chief remained incomplete and therefore was not cross-examined. CW-2 Sh. Sanjiv Sahni, Senior Manager at OBC, Apollo Hospital was also examined.



The pre-charge evidence was closed vide order dated 22.01.2019. Learned Trial Court discharged respondent Nos.2 to 4 observing that complainant was only partly examined-in-chief and did not subject himself to cross-examination and therefore his testimony could not be read in evidence for proving the alleged facts.

3. The petitioner aggrieved of this, filed the revision petition before the learned Additional Sessions Court. Learned Additional Sessions Judge-07, South-East District, Saket Court, Delhi in Criminal Revision No.75 of 2020 “*Banshi Prasad Yadav vs. Balbir Singh Yadav and Ors.*” vide impugned order dated 13.09.2023 dismissed the same *inter alia* holding that the learned Trial Court has rightly held that mere part examination-in-chief of the complainant was not sufficient to establish any case against the respondent Nos. 2 to 4 and therefore, there was no illegality in the impugned order.
4. Learned Counsel for the Petitioner submits that the order of the learned MM and the learned Additional Sessions Judge suffers from serious infirmities. Learned Counsel submits that as per Section 245 Cr.P.C., it is only the evidence of the complainant which has to be read and therefore both the Courts have fallen into grave error by rejecting the testimony of the complainant on the ground that he was not cross-examined.
5. Learned counsel has invited the attention of the Court to Section 245 of Cr. PC. Learned counsel has relied upon ***R.S. Nayak Vs. A.R. Antulay and Anr.***, (1986) 2 SCC 716 and ***Santosh De and Another Vs. Archana Guha and Others*** (1994) 2 SCC 420 and ***Gopalkrishnan & Anr. vs. State of Kerala & Anr.*** 2001 SCC



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6. Learned counsel for the petitioner states that in ***R.S. Nayak*** (*supra*) in Para 52, it has clearly been held that the only requirement is that the evidence is of such quality which if unrebutted would warrant conviction of the accused. Learned counsel therefore, submits that the analogy which can be drawn from this is that at this stage even the unrebutted testimony of the complainant has to be taken into account.
7. Learned counsel further submits that in ***Santosh De*** (*supra*), the Supreme Court has taken a view the evidence of the complainant already recorded shall be termed as “evidence” within the meaning of Section 245 (3) of Cr. P.C. though she had yet not been subjected to cross-examination.
8. Learned counsel has also relied upon ***Gopalkrishnan*** (*supra*) wherein the Kerala High Court has *inter alia* held that the accused has no absolute right to cross-examination in the prosecution under Section 244 Cr. PC.
9. Learned counsel for the petitioner submitted that under Section 134 of the Indian Evidence Act, no particular number of witnesses are required. Learned counsel therefore submits that in fact, it is the quality of the witnesses to be seen and not the quantity.
10. Learned APP for the State and learned counsel for the complainant have submitted that the learned MM and learned revisional Court have passed the order in accordance with the law. It has been submitted that the cross-examination is a salutary right and without a witness being cross-examined, such evidence cannot be read. It has further been submitted that the judgment as cited by learned counsel



for the petitioner in *R.S. Nayak Vs. A.R. Antulay and Anr.*, (1986) 2 SCC 716 and *Santosh De and Another Vs. Archana Guha and Others* (1994) 2 SCC 420 are distinguishable on the facts of the case.

11. Learned counsel for the complainant has stated at bar that in *Santosh De* (Supra) case based upon Section 245(3) Cr. PC., the Section 245(3) was inserted by the West Bengal Amendment Act No. 24 of 1988 and therefore it has no applicability.
12. Chapter XIX of the Cr. P.C. deals with the trial of warrant cases triable by Magistrate. Section 244 provides that in warrant cases situated otherwise on police report after the accused appears, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. Thus, under Section 244 of Cr.PC pre-charge evidence is recorded.
13. Section 245 Cr.PC provides that if upon taking all the evidence referred to in Section 244, the Magistrate shall discharge the accused with the reasoned order if given the unrebutted evidence could not warrant the conviction of the accused. Section 245(2) of the Code of Criminal Procedure (Cr.PC) empowers the Magistrate to discharge the accused at any stage prior to the conclusion of the prosecution's evidence, provided certain conditions are met. Specifically, the Magistrate must record the reasons for such discharge and must be satisfied that the charges against the accused are baseless or lack sufficient grounds to proceed. This provision ensures that the accused is not subjected to unnecessary proceedings if the evidence or circumstances fail to establish a prima facie case against them.
14. Section 246 Cr.PC provides that if upon such evidence so recorded,



the Magistrate is of the opinion that there is ground to presume that the accused has committed an offence rival under this chapter. The charges shall be framed.

15. Before proceeding further, this Court had an opportunity to deal with Section 245(4) and Section 245 Cr.PC in Cr. M.C. 4080/2018 titled as *O.P. Dawar vs. State and Anr.* in its order dated 03.07.2024, it was *inter alia* held that:-

“11. Thus, the bare perusal of Section 227-228, 239-240 and 244-245 of Cr.P.C. makes it clear that the scope of jurisdiction to be exercised in all the three cases is entirely different. The degree of satisfaction to be required in the “cases instituted otherwise than on the police report” is much higher than the warrant cases on police report or the Session triable cases. The procedure to be adopted in such cases has been lucidly explained by the Supreme Court in Ajoy Kumar Ghose vs. State of Jharkhand & Anr., 2009 (14) SCC 115 wherein it was inter alia held that the essential difference of procedure in the trial of warrant case on the basis of a police report and that instituted otherwise than on the police report, is particularly marked in Sections 238 and 239 Cr.P.C. on one side and Sections 244 and 245 Cr.P.C., on the other. It was further inter alia held that in a warrant trial instituted otherwise than on a police report, when the accused appears or is brought before the Magistrate under Section 244(1) Cr.P.C., the Magistrate has to hear the prosecution and take all such evidence, as may be produced in support of the prosecution, and it is after all this, evidence is taken, then the Magistrate has to consider under Section 245(1) Cr.P.C., whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge him, on the other hand, if he is satisfied about the prima facie case against the accused, the Magistrate would frame a charge under Section 246(1) Cr.P.C.



12. It is pertinent to mention that in the warrant trial instituted otherwise than the police report, the complainant gets two opportunities to lead evidence, firstly, before the charge is framed and secondly, after the charge. Of course, under Section 245(2) Cr.P.C., a Magistrate can discharge the accused at any previous stage of the case, if he finds the charge to be groundless.

13. It was further inter-alia held in *Ajoy Kumar Ghose (Supra)* that there is a clear difference in Sections 245(1) and 245(2) of the Cr.P.C. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) Cr.P.C. The situation under Section 245(2) Cr.P.C. is, however, different. There, under sub-Section (2), the Magistrate has the power of discharging the accused at any previous stage of the case, i.e., even before such evidence is led. However, for discharging an accused under Section 245 (2) Cr.P.C., the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the Court or the evidence is led under Section 244 Cr.P.C.

14. It was further inter alia held that at the stage of Section 245(1) Cr.P.C., the Magistrate takes up the task of considering all the evidence taken under Section 244(1) Cr.P.C., and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.

15. It was further inter-alia held that that while Section 245(2) Cr.P.C. speaks about the discharge of the accused on the ground that the charge is groundless, Section 246(1) operates in entirely different sphere. An order under Section 245(2) Cr.P.C. results in discharge of the accused, whereas, an order



under Section 246 Cr.P.C. creates a situation for the accused to face a full-fledged trial. Therefore, the two Sections would have to be interpreted in slightly different manner, keeping in mind the different spheres, in which they operate. The words "or at any previous stage of the case" appearing in Section 246 Cr.P.C. would include Section 245 also, where the accused has not been discharged under Section 245 Cr.P.C., while the similar term in Section 246(2) can include the stage even before entire evidence is recorded. It cannot, therefore, be held that the words "at any previous stage of the case" as appearing in Section 245 (2) Cr.P.C., would have to be given the same meaning when those words appear in Section 246 (2) Cr.P.C."

16. It is pertinent to mention here that in ***Sunil Mehta and Anr. vs. State of Gujarat & Anr.*** [2013 3 SCC CrL. 881], the entire law on the issue and inter alia held that the expression "Evidence" in S.244 should be construed as per Sections 3 and 138 of Indian Evidence Act. It has further been inter alia held that the cross-examination by accused even before framing of charges would not cause any prejudice to the complainant, but denial of such right shall prejudice the accused in its defence and cause failure of justice. It was further inter alia held that under Section 246(4) for exercise of such right by the accused after the court decides to frame charges, would not negate such right of the accused under Section 244 Cr.P.C. before framing of charge.
17. Thus, if we peruse the scheme of Section 244 Cr. P.C. and 245 Cr. P.C., it is necessary, that the accused should be given the right to cross-examination, being a salutary right. I consider that the judgment, as cited in ***R.S. Nayak*** (*supra*), is respectfully distinguishable in the facts and circumstances of the case. Similarly, the judgment of ***Santosh De*** (*Supra*) is also distinguishable as Section



245 (3) Cr. PC was based on a West Bengal amendment. Similarly, the judgment in ***Gopalkrishnan*** (supra) also distinguishable on the basis of the judgment of the Supreme Court in ***Sunil Mehta and Anr*** (Supra).

18. The revisional jurisdiction of High Courts, as established through numerous judicial precedents, operates within carefully defined parameters that distinguish it from regular appellate powers. This jurisdiction, exercised under Section 397 read with Section 401 of the Criminal Procedure Code, is fundamentally supervisory in nature and is designed to prevent miscarriage of justice rather than function as a routine appeal mechanism.
19. In ***Amit Kapoor v. Ramesh Chander*** (2012) 9 SCC 460, the apex court inter-alia held that revision is not a second appeal and should be exercised sparingly only when there exists a glaring procedural defect or manifest error on a point of law leading to flagrant miscarriage of justice. This principle was further reiterated in ***State of Kerala v. Puttumana Illath Jathavedan Namboodiri*** (1999) 2 SCC 452, where the Court held that High Courts should refrain from interfering with trial court orders unless they are perverse or wholly unreasonable.
20. As established in ***Ganesh Narayan Hegde v. S. Bangarappa*** (1995) 4 SCC 41, the High Court may intervene when the lower court's order is based on no evidence, there is serious misapplication of law affecting fundamental rights, grave procedural irregularities cause prejudice, or the findings are so perverse that they shock the judicial conscience.
21. The parameters for exercising revisional jurisdiction primarily revolve around four key elements: illegality, perversity, incorrectness, and



material infirmity. Illegality refers to orders that are contrary to law or exceed jurisdictional bounds. Perversity encompasses findings that are against the weight of evidence or based on no evidence whatsoever. Incorrectness pertains to substantial procedural errors that materially affect the case's outcome. Material infirmity relates to serious defects that strike at the root of justice.

22. The essence of revisional jurisdiction lies in its extraordinary and discretionary nature. The paramount consideration is whether substantial justice has been done, and the revisional court must show due regard to the findings of the lower court. Interference is not warranted merely because another view is possible on the same evidence. This careful balance ensures that while gross injustice can be remedied, the finality of lower court decisions is generally respected, maintaining the hierarchical integrity of the judicial system while providing a safety valve for exceptional cases requiring intervention.

23. Considering the above facts and judicial precedents as discussed above, I do not find any illegality, perversity, incorrectness or infirmity in the order of the learned Trial Court, hence, the present petition along with the pending application is dismissed.

DINESH KUMAR SHARMA, J

DECEMBER 3, 2024

Pallavi/HT