

(2006) 11 AHC CK 0176
In the Allahabad High Court

Asif Hussain

APPELLANT

Vs

State of U.P. and Zafar Ahmed

RESPONDENT

Date of Decision : 30-11-2006

Acts Referred:

Constitution of India, 1950 — Article 134
Criminal Law (Amendment) Act, 1932 — Section 7
Criminal Procedure Code, 1973 (CrPC) — Section 311, 397, 482
Evidence Act, 1872 — Section 123
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 19

Citation : (2006) 11 AHC CK 0176

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Vinod Prasad, J.—Interlocutory Order? This question has drawn the attention of the courts many times and has been subject of various judicial pronouncements by the Apex Court and also by many High Courts albeit with divergent views. This question once again has been mooted for consideration before me compelling this Court to take up the same exercise and get the issue settled, if possible, at least in respect of some of the orders, which are referred to below, so that this Court as well as the lower revisional courts are not thronged with revisionists through spate of revisions which up till now has piled up in it's dockets of backlog cases. Since in all the above revisions the said question is involved directly hence they have been appendage together and are being disposed of by this common order.

2. A resume of facts, however, is necessitated, for a purposes of understanding of the controversy involved, the arguments advanced and for making a decision thereon.

CRIMINAL REVISION No. 6372 OF 2006 ASIF HUSSAIN v. STATE OF U.P. AND Anr.

3. In this revision the challenge has been thrown to the impugned order dated 10.11.2006 passed by Additional Special Judge Azamgarh in S.T. No. 125 of 2002 State v. Asif And Ors. under Sections 147, 148, 149, 307, 302, 395, 347, 323, 427, IPC and 7 Criminal Law Amendment Act PS Mubarakpur District Azamgarh by which the trial court has rejected the application filed by the accused revisionists under 311 Cr. P.C. for summoning the documentary messages sent by District Magistrate and Superintendent of police to Home control , Lucknow, DG Control , Lucknow, IG (Police), Varanasi Zone, and also for summoning the then District Magistrate T.P. Pathak, and the then Superintendent of Police Kuwar Brijesh Singh as witnesses. The Session's trial was fixed for final argument. From the impugned order it is clear that this Court had directed the trial court to conclude the said Session's trial within six months vide it's order dated 10.3.2006, passed in Criminal Misc. Application 2802 of 2006 Jafar Ahmad v. State of U.P. Trial court, in the impugned order, has held that the Special report of the crime is already on record and what ever the information was sent to the State government was based on the Special report. More over it held that u/s 123 of Evidence Act no public witness can be compelled to disclose the source of secret information which has been received to him. It also held in the impugned order that no right of the accused is prejudiced by not allowing the said prayer made by the accused. This order dated 10.11.2006 is under challenge in this revision. It is important to mention here that earlier the revisionist had filed an application u/s 482 Cr.P.C. being Criminal Misc. Application No. 14898 of 2006 but the same was got dismissed as not pressed on 21.11.2006 because this Court (Hon'ble V.K. Chaturvedi, J.) was of the opinion that the order impugned is a revisable order and a revision against such an order is maintainable. Hence the revisionists have filed the present revision with the leave of that bench.

CRIMINAL REVISION No. 6377 OF 2006. SONU THAKUR v. STATE OF U.P. AND Anr.

4. In this revision Additional Session's Judge, Court No. 2, Aligarh has refused to recall PW 7 Sanjiv Kumar Bajpai Circle Officer, who was the investigating officer of crime which resulted into S.T. No. 683 of 2004 State v. Sonu Thakur, u/s 302 IPC and 3(1)(x) SC/ST Act. PS Sasni Gate, Aligarh for being cross examined at the instance of the revisionists who is an accused in the said Session's trial vide his impugned order dated 2.11.2006. The trial court, in the impugned order, has observed that in the trial Sri Ram Babu Sharma and Sri K.B. Gupta are the counsels for the accused revisionist and they were granted opportunities to cross examine the said witness PW 7 many times but they did not cross examine him. It also observed that the said witness appeared in the court many times coming from Meerut, as he is posted there, but he was not cross examined by the accused. It further observed that the opportunity of cross-examination of the said witness was already closed on 10.10.06 and there was no reason for reconsideration of the said order. It is noted here that earlier the revisionist had

filed an application u/s 482 Cr.P.C. being Criminal Misc. Application No. 14731 of 2006 but the same was got dismissed as not pressed on 17.11.2006 because this Court (Hon"ble V.K. Chaturvedi, J.) was of the opinion that the order impugned is a revisable order and a revision against such an order is maintainable. Hence the revisionist has filed the present revision seeking leave of that bench.

CRIMINAL REVISION No. 6346 OF 2006. HARI v. STATE OF U.P.

5. In this revision Additional Session's Judge, Court No. 2, Mathura has rejected the prayer of the accused revisionist to recall, for further cross examination, witnesses PW 1 Smt. Janki and PW2 Gokul, u/s 311 Cr.P.C. by his impugned order dated 25.9.06 passed in Special S.T. No. 11 of 1996 (Crime Number 82 of 1994) State v. Hari and Ors. u/s 376 IPC and 3(XII) SC/ST Act PS Govardhan District Mathura, on the ground that both the witnesses were subjected to lengthy cross examination on different dates and therefore there was no need to recall them for further cross examination on those very points which were asked from them. This revisionist had also filed an application u/s 482 Cr.P.C. , Criminal Misc. Application No. 14508 of 2006, but the same was got dismissed as not pressed because this Court (Hon"ble V.K. Chaturvedi J.) was of the opinion that the order impugned is revisable order and a revision against such an order is maintainable. Hence the revisionist has filed the present revision seeking leave of that bench.

CRIMINAL REVISION No. 6410 OF 2006. PRADEEP v. STATE OF U.P.

6. In this revision the trial court Special Judge SC/ST Act Ghaziabad has rejected the prayer of the accused revisionist u/s 311 Cr.P.C. to re-summon PW 1 Kalua Ram and PW 2 Bali Chand for cross examination by the accused revisionist in Special Trial No. 4 of 1996 State v. Pradeep under Sections 307 IPC and Section 3(1)(x) SC/ST Act PS Bahadur Garh District Ghaziabad by his impugned order dated 17.10.2006. The trial Judge held that the question which are now desired to be asked could have been asked before and the said questions are not important and the accused had already availed full opportunity of cross-examining those witnesses.

7. On such factual matrix I have heard Sri G.S. Chaturvedi, learned Senior Counsel, Sri Dharmendra Sigal, Sri Pankaj Sharma, and Sri Samar Singh Advocates in seriatim in support of their respective revisions and the learned AGA in opposition.

8. At the very out set the question of maintainability of these revisions came up for considerations as it was objected that the impugned orders in all these revisions are interlocutory orders and therefore no revision is maintainable against the said order being barred u/s 397(2) Cr. P.C.

9. All the revisionists counsels submitted that they had visualized the difficulty regarding maintainability of the revision therefore all of them but for Sri Samar Singh (Criminal Revision No. 6410 of 2006) had filed criminal Misc. Applications

u/s 482 Cr. P.C. but this Court (Hon"ble V. K. Chaturvedi, J.) was of the view that the impugned orders are revisable and therefore their Criminal Misc. Applications were dismissed as withdrawn with liberty to seek relief in appropriate forum and hence they have filed the revisions. This leads for examination of the nature of the impugned orders for determining the question as to whether they are interlocutory orders or not and whether revision against these impugned orders are barred u/s 397(2) Cr. P.C?

10. Code of Criminal Procedure 1973, for short Code, does not describe interlocutory order unlike CPC where we find a reference of it under Order 39 Rule 6 to 10. Further in C.P.C. under Order 20 Rule 12 to 17 there is a mention of interlocutory Decrees. TADA Act has also a reference of interlocutory order u/s 19 thereof but under the Code only Section 397(2) Cr. P.C. makes a reference of the same.

11. There was no parallel provision like present Section 397 (2) in the old Cr. P.C. of 1898. The said provision was added under the present Code for the purposes of checking delay in trials and to give a fair trial to the accused. Long drawn procedure of criminal justice system was eroding faith of people in courts and therefore the need was felt to shorten the time consumed in concluding the trials. It was with this avowed objective that the change was brought in revisional powers of the criminal courts by adding Sub-section (2) in Section 397 of the Code prohibiting revisions in respect of those orders which are interlocutory orders. This aspect of the matter was dealt with by the Apex Court in the case of Amar Nath and Others Vs. State of Haryana and Another, where the Apex court has held thus:

5. "The concept of an interlocutory order qua the revisional jurisdiction of the High Court, therefore, was completely foreign to the earlier Code. Subsequently it appears that there had been large number of arrears and the high Courts were flooded with revisions of all kinds against interim or interlocutory orders which led to enormous delay in the disposal of cases and exploitation of the poor accused by the affluent prosecutors. Sometimes interlocutory orders caused harassment to the accused by unnecessarily protracting the trials. It was in the background of these facts that the Law Commission dwelt on this aspect of the matter and in the 14th and 41st reports submitted by the commission which formed the basis of the 1973 Code the said commission suggested revolutionary changes to be made in the powers of the High Courts.

12. Regarding the object of incorporating the said sub -section it was pointed out in the said judgment:

This is clearly mentioned in the Statement of Objects and Reasons accompanying the 1973 Code. Clause (d) of Paragraph 5 of the Statement of Objects and Reasons runs thus:

the powers of revision against interlocutory orders are being taken away, as it has been found to be one of the main contributing factors in the delay of disposal

of criminal cases.

13. The Apex Court quoted the statement of the Shri Ram Niwas Mirdha, the then concerned Minister which was as follows:

It was stated before the Select Committee that a large number of appeals against interlocutory orders are filed with the result that the appeals got delayed considerably.

14. In the same judgement The Apex Court further held as follows:

Thus it would appear that S. 397(2) was incorporated in the 1973 Code with the avowed purpose of cutting out delays and ensuring that the accused persons got a fair trial without much delay and the procedure was not made complicated.

15. Dealing with the question as to what are interlocutory orders the apex court in the same judgment has held as follows:

The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in Sub-section (2) of S. 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision.... It seems to us that the term "interlocutory order" in S. 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in S. 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2) of the 1973 Code.

(Emphasis Supplied)

16. It was further held by it in the same judgment:

7. In Central Bank of India Vs. Shri Gokal Chand, this Court while describing the incidents of an interlocutory order, observed as follows:

In the context of Section 38(1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are merely procedural and do not affect the rights or liabilities of the parties. In a pending proceeding the Controller, may pass many interlocutory orders under Ss.

36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding: they regulate the procedure, only and do not affect any right or liability of the parties. "The aforesaid decision clearly illustrates the nature and incidents of an interlocutory order and the incidents given by this Court constitute sufficient guidelines to interpret the connotation of the word "interlocutory order" as appearing in Sub-section (2) of S. 397 of the 1973 Code.

(Emphasis Supplied)

17. Thus from the above decision by the apex court it is clear that the purpose of Section 397(2) Cr. P.C. was to make every effort to avoid delay in investigation and trial and not to make the procedure complicated. The said judgement of the Apex Court . in my view, is an authority and the law on the question that order relating to summoning of witnesses is an interlocutory order. The same view was expressed in the case of Dawarka Dass Vs. State of Himachal Pradesh, In that case also the application u/s 311 of the Code was rejected by the trial court. In para 13 of the said judgement it was held by Himachal Pradesh High court as follows:

After hearing the learned Counsel for the parties and after going through the record of the case , I find that the provision of Section 397 of the Code can not be invoked in the present case. The order which is sought to be challenged is an interlocutory order passed by the Magistrate during the course of the trial and such orders are not revisable u/s 397(2) of the Code.

(Emphasis mine)

18. In Buta Ram Moti Ram Vs. The State, it has been held by the same High Court in para 4 thereof as follows:

But, in my opinion, the rejection of an application for summoning a particular document is not a final and conclusive order but it is purely an interlocutory order....

19. The full bench of Supreme court in the case of State of U.P. Vs. Col. Sujan Singh and Others, has held as follows:

8. The learned Counsel for the appellant contended that the order of the High Court dated November 23, 1962 in the criminal revision was a final order within the meaning of Art. 134(1) of the Constitution. The material part of the said article reads:

An appeal shall lie to the Supreme Court from any judgement, final order or sentence in a criminal proceeding of the High Court in the territory of India....

We find it difficult to hold that the order under appeal is a final order within the meaning of the said article...Can it be said that the Special Judge in allowing the petition of the respondents to call for the production of document from the Union Government is a final order in the criminal proceedings? The criminal proceedings were taken against the respondents for an offence under S. 6(1) (a) of the Prevention of Corruption Act, 1947. The proceedings are now pending in the court of the Special Judge. In the course of those proceedings the respondents filed an application for the production of a document by the Union Government and that was allowed by the court. The said order is only an interlocutory order pending the proceedings. It does not purport to decide the rights of the parties, namely, the State of U. P. and the accused. It enables the accused to have the said document duly proved and exhibited in the case. It relates only to a procedural step for adducing evidence.

(Emphasis Supplied)

20. The Apex Court further held in the same judgement as follows:

The High Court confirmed that order in revision. But the learned Counsel contends that it negatives the claim of privilege made by the Union Government and, therefore, it decides against the right of the Union Government to withhold the production of the document. Assuming that the order decides some right of the Union Government, on which we do not express any opinion, the Union Government is neither a party to the criminal proceedings nor is it a party either before the High Court or before us. The indirect effect of that order on a third party to the proceedings, who does not seek to question that order, does not deprive the order of its interlocutory character. We therefore, hold that the order made by the High Court is not a final order within the meaning of Art. 134(1) of the Constitution.

(Emphasis Supplied)

21. Though the said judgement was rendered in connection with Article 134 but it's reasoning is fully applicable u/s 397(2) Cr.P.C. and thus order refusing to summon the document during the trial is nothing but an interlocutory order a no revision lay against such an order before this Court or the lower revisional court being barred u/s 397(2) Cr.P.C.

22. The question of an order being an interlocutory order or not? Came up for consideration before the apex court also in the case of V.C. SHUKLA v. STATE THROUGH C.B.I: 1980 SC 962 where the Apex Court has exhaustively dealt with this aspect of the matter and after relying upon various text books has held as follows:

We have, therefore, first to determine the natural meaning of the expression "interlocutory order." To begin with, in order to construe the term "interlocutory", it has to be construed in contradistinction to or in contrast with a final order. We are fortified by a passage appearing in the Supreme Court

Practice 1976 1. 853 where it is said that an interlocutory order is to be contrasted with a final order, referring to the decision of Salaman v. Warner (1891) 1 OB 734. In other words, the words "not a final order" must necessarily mean an interlocutory order or an intermediate order. That this is so was pointed out by Untwalia J. speaking for the Court in the case of Madhu Limaye v. State of Maharashtra, as follows:

Ordinarily and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term, final orders".

Thus, the expression "interlocutory order" is to be understood and taken to mean converse of the term final order". Now, let us see how this term has been defined in the Dictionaries and the text books. In Webster's Third International Dictionary (Vol. II, p. 1179) the expression "interlocutory order" has been defined thus:

not final or definitive : made or done during the progress of an action : INTERMEDIATE, PROVISIONAL.

Stroud's Judicial Dictionary (Fourth Edition, Vol. 3, p. 1410) defines interlocutory order thus:

"Interlocutory order" (Judicature Act 1873 (c.66) S. 25 (8) was not confined to an order made between writ and final judgment, but means an order other than final judgment.

Thus, according to Stroud, interlocutory order means an order other than a final judgment This was the view taken in the case of Smith v. Cowell (1880) 6 OB D 75 and followed in Manchester and Liverpool Bank v. Parkinson (1889) 22 QBD 175. Similarly, the term final order" has been defined in volume 2 of the same Dictionary (p. 1037) thus:

The judgment of a Divisional Court on an appeal from a county court in an interpleader issue, was a "final order" within the old R.S. C, Order 58, Rule 3 (Hughes v. Little (1886) 18 QBD 32); so was an order on further consideration (Cummins v. Herron (1877) 4 Ch D 787) : unless action was not thereby concluded.... But an order under the old R.S. C. Order 25, Rule 3, dismissing an action on a point of law raised by the pleadings was not "final" within the old Order 58, Rule 3, because had the decisions been the other way the action would have proceeded.

Halsbury's Laws of England (Third Edition, Vol. 22, pp. 743-744) describes an interlocutory or final order thus:

Interlocutory judgment or order: An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory". An

interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals....

It general a judgment or order which determines the principal matter in question is termed "final".

At page 743 of the same volume, Black-stone says thus:

Final judgments are such as at once put an end to the" action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for....Four different tests for ascertaining the finality of a judgment or order have been suggested:- (1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute? (2) Was it made upon an application upon which the main dispute could have been decided? (3) Does the order, as made, determine the dispute? (4) If the order in question is reversed, would the action have to go on.

Corpus Juris Secundum (Vol. 49 p. 35) defines interlocutory order thus:

A final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it, While and interlocutory judgment is one which reserves or leaves some further question or direction for future determination.... Generally, however, a final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which does not so dispose of the cause, but reserves or leaves some further question or direction for future determination.... The term "interlocutory judgment" is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment, and in such sense the term is in constant and general use even in code states." (Emphasis ours) Similarly, Volume 60 of the same series at page 7 seeks to draw a distinction between an interlocutory and a final order thus:

The word "interlocutory", as applied to rulings and orders by the trial court, has been variously defined. It refers to all orders, rulings, and decisions made by the trial court from the inception of an action to its final determination. It means, not that which decides the cause, but that which only settles some intervening matter relating to the cause. An interlocutory order is an order entered pending a cause, deciding some point or matter essential to the progress of the suit and collateral to the issues formed by the pleadings and not a final decision or judgment on the matter in issue....An intermediate order has been defined as one made between the commencement of an action and the entry of the judgment.

22. To sum up, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an

action and the entry of the judgment, Untwalia J. in the case of *Madhu Limaye v. State of Maharashtra* clearly meant to convey that an order framing charge is not an interlocutory order but is an intermediate order as defined in the passage, extracted above, in *Corpus Juris Secundum*, Vol. 60. We find ourselves in complete agreement with the observations made in *Corpus Juris Secundum*. It is obvious that an order of framing the charge being an intermediate order falls squarely within the ordinary and natural meaning of the term "interlocutory order" as used in S. 11(1) of the Act. Wharton's Law Lexicon (14th Edition, p. 529) defines interlocutory order thus:

An interlocutory order or judgment is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties.

23. Thus, summing up the natural and logical meaning of an interlocutory order, the conclusion is inescapable that an order which does not terminate the proceedings or finally decide the rights of the parties is only an interlocutory order. In other words, in ordinary sense of the term, an interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all. This would be the result if the term interlocutory order is interpreted in its natural and logical sense without having resort to Criminal Procedure Code or any other statute. That is to say, if we construe interlocutory order in ordinary parlance it would indicate the attributes, mentioned above, and this is what the term interlocutory order means when used in S. 11 (1) of the Act.

(Under line Emphasis supplied)

23. Here in all the above revisions the accused does not have any vested right to get the witnesses recalled. It is the discretion vested in the court to be exercised judicially only in the interest of justice for a proper decision on the charge levelled. The right of an accused is only for a fair and meaning full opportunity to cross examine the witnesses and not recall or re-summoning of witnesses for further cross examination which power lies with the court . If the witnesses are allowed to be cross examined at the will of the accused then it will defeat the very purpose for which Sub-section (2) was incorporated in Section 397 of the Code. Recently this issue came up again before the apex court in *State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate*, After examining various case laws and the meaning given to the term "Interlocutory Order", the apex court has held thus:

8. The first question which needs examination is whether the revision petition was maintainable. Sub-section (2) of Section 397, Cr. P. C lays down that the power of revision conferred by the Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, enquiry, trial or other proceedings. The expression "interlocutory order" has not been defined in the Code. It will, therefore, be useful to refer to its meaning as given in some of the dictionaries:

The New Lexicon Webster's Dictionary Pronounced and arising during legal procedure, not final.

Webster's Third New International Dictionary

Not final or definitive; made or done during the progress of an action.

Wharton's Law Lexicon An interlocutory order or judgment is one made or given during the progress of action, but which does not finally dispose of the rights of the parties e.g., an order appointing a receiver or granting an injunction, and a motion for such an order is termed an interlocutory motion.

Black's Law Dictionary Provisional; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.

9. Ordinarily and generally, the expression interlocutory order has been understood and taken to mean as a converse of the term "final order". In volume 26 of Halsbury's Laws of England (Fourth Edition) it has been stated as under in para 504:

... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. It is impossible to lay down principles about what is final and what is interlocutory. It is better to look at the nature of the application and not at the nature of the order eventually made. In general, orders in the nature of summary judgment where there has been no trial of the issues are interlocutory.

In para 505 it is said that in general a judgment or order which determines the principal matter in question, is termed "final". In para 506 it is stated as under :

An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory". An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

10. In AIR 1949 1 (Federal Court) the following principle laid down in Salaman v. Warner, (1891) 1 OB 734, was quoted with approval: 1948 Cri LJ 625

If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute. I think that for the purposes of these rules it is final On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.

The test laid down therein was that if the objection of the accused succeeded, the proceeding could have ended but not vice versa. The order can be said to be

a final order only if, in either event, the action will be determined.

11. However, in *Madhu Limaye Vs. The State of Maharashtra*, such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order was not accepted as this will render the revisional power conferred by Section 397(1) nugatory. After taking into consideration the scheme of the Code of Criminal Procedure and the object of conferring a power of revision on the Court of Sessions and the High Court, it was observed as follows : *Madhu Limaye Vs. The State of Maharashtra*,

In such a situation, it appears to us that the real intention of the Legislature was not to equate the expression "interlocutory order" as invariably be converse of the words final order". There may be an order passed during the course of a proceeding which may not be final in the sense noticed in AIR 1949 1 (Federal Court) but yet it may not be an interlocutory order -pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in Sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate order.

12. Same question has recently been considered in *K.K. Patel and Another Vs. State of Gujarat and Another*,

In the appeal preferred by the accused, this Court after referring to *Amar Nath and Others Vs. State of Haryana and Another*, , *Madhu Limaye Vs. The State of Maharashtra*, and *V.C. Shukla Vs. State through C.B.I.*, held that in deciding whether an order challenged is an interlocutory or not, as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings. If so, any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. It was further held that as in the facts of the case, if the objections raised by accused were upheld, the entire prosecution proceedings would have been terminated, the order was not an interlocutory order and consequently it was revisable

(Emphasis Supplied)

24. Now coming to the facts of revisions at hand. In all these revisions the accused applied at the end of the trial or after the prosecution evidence was over that the witness be recalled and re-summoned for further cross examination. In all these cases but for one he had already availed opportunity for a considerable length of time to cross examine the witnesses desired by him for further cross examination. In one case of *Sri Dharmendra Singhal* (Cr. Revision No. 6377 of 2006) the opportunity and a very fair one was afforded by the trial Judge to the two counsels for the accused but they did not avail of it. In all theses revisions the revisionist do not possess any right for recall or re- summoning of witnesses and the impugned orders in this cluster of revisions decided nothing against them. Thus from the above discussions it is clear that orders relating to the

summoning of witness is an interlocutory order and is not a revisable order because of statutory bar u/s 397(2) Cr.P.C. as it does not terminate any proceeding and it is only a step in procedure of trial. It does not culminate in ending any proceeding and hence it cannot be bracketed with final orders.

25. More over from the facts mentioned above it is clear that in all these revisions the trial is pending for nearly five years or more but for one case. The incident has taken place more that a decade ago. The victim is waiting in queue of justice seekers. The provision which was incorporated in the Code for the benefit of the accused is now being misused by the accused themselves for lingering on the trial for years together and are now, being wielded for delaying the trials. Such an attempt at the instance of those who are charged with serious offence of murder, rape, dacoity, or like has to be checked if the faith of people in courts has to be reposed and for whom the courts are created. The facts indicate that the revisionists who are accused in murder, attempt to murder and abduction are indulging into derelectics tactics to thwart the course of justice. This has to be curbed. If such tactics are allowed to go on every unscrupulous culprit at the fag end of the trial will move an application u/s 311 and will file a revision to get the trial stayed for years together and then there will be no end to the miseries of those who are victims and craving for justice to ointment their injury

26. From what I have stated above I find my self in disagreement with my esteemed brother Hon"ble V.K. Chaturvedi, J. that the order u/s 311 Cr. P.C. is a final order and is a revisable one. In my view it is nothing but an interlocutory order and revision against such an order is barred u/s 397(2) Cr. P.C.

27. Since I differ with my esteemed brother Hon"ble V.K. Chaturvedi, J. on the above law point therefore I consider it appropriate to exercise my power under Chapter V Rule 2(ix)(b) of the Allahabad High Court Rules (RULES OF THE COURT 1952) and refer all the above revisions before the Hon"ble The Chief Justice with humble request to His Lordship to constitute a larger bench (division or full) as his Lordship deems fit and proper , to decide these revisions including the question of maintainability of all these revisions at the behest of the accused against whom an order has been passed, u/s 311 Cr.P.C, by the trial court, refusing to exercise it's power to recall or resummon witnesses for further cross examination by them . The matter to me seems to be very urgent as it relates with interpretation of a statutory provision and this Court is saddled with spate of such revisions piled up in it's dockets.

28. Since I am referring the entire cases (Revisions) for decision by a larger bench on the question of law, I consider it appropriate to stay further proceeding of respective trials for a period of one month from to day. Revisionist may seek further relief if available and desired by them from the nominated bench henceforth.

29. Registry of this Court is directed to place the record of all these revisions

before Hon''ble The Chief Justice by 1st December 2006 for seeking His lordship''s order.