
(2017) 01 AHC CK 0163
In the Allahabad High Court
Case No : U/S 482/378/407 No. 264 of 2017

Rajmani Dubey @ Rajmal Dubey	Vs	APPELLANT
State of Uttar Pradesh		RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), Section 401(2)

Citation : (2017) 99 ACrC 65 : (2017) 173 AIC 934 : (2017) 2 ALLJ 482

Hon'ble Judges : Abhay Mahadeo Thipsay, J.

Bench : Single Bench

Advocate : Dinesh Kumar Ojha, Advocate, for the Applicant; Govt. Advocate, for the Opposite Party

Final Decision : Partly Allowed

Judgement

Abhay Mahadeo Thipsay, J. (Oral)—Heard Shri Dinesh Kumar Ojha, learned counsel for the petitioner and Shri Anurag Verma, learned Additional Government Advocate for the State.

2. By consent, heard finally forthwith.

3. In view of the order that is being passed, it is not necessary to issue any notice to the opposite party No.2.

4. The opposite party No.2 herein had made an application before the Magistrate praying that investigation into a certain matter be ordered under the provisions of Section 156(3) of the Code of Criminal Procedure (the "Code"). This application was rejected by the learned Magistrate by his order dated 30.06.2015. Being aggrieved thereby, the opposite party No.2 herein had filed an application for revision in the Court of Sessions. This revision application was partly allowed by the learned Additional Sessions Judge vide his order dated 28.10.2016, whereby the order of the Magistrate was set aside and the Magistrate was directed to rehear the application and decide it, afresh. It is being aggrieved by the said order dated 28.10.2016, that the petitioner, who was

named as the accused in the application filed by the opposite party No.2 herein under Section 156(3) of the Code, has approached this Court by filing the present petition invoking the inherent powers of this Court, and praying that said order be quashed/set aside.

5. Only one contention has been raised by the learned counsel for the applicant; and that is, that the revision application came to be decided without hearing the petitioner.

6. Undoubtedly, the petitioner, named as an accused in the application filed by the opposite party No.2 herein before the Magistrate, had no right to be heard before the Magistrate. The question that then arises, is that "whether the petitioner had a right to be heard when the correctness of the order passed by the Magistrate was challenged by the opposite party No.2 herein before the Court of Sessions?" It would be quite logical to argue that "when the petitioner had no right to be heard in the proceedings before the Magistrate, how would he have any right to be heard in the Court of Sessions when the opposite party No.2 complainant was challenging the order passed by the Magistrate by filing an application for revision before the Court of Sessions". However, on a careful consideration of the provisions in the Code and the pronouncements of the Supreme Court of India, the legal position appears to be quite otherwise.

7. Sub section (2) of Section 401 of the Code reads as under:

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

8. The crucial words would be "to the prejudice of the accused or other person". In *Raghuraj Singh Rousha v. Shivam Sundaram Promoters (P) Ltd.*, (2009) 2 SCC 363, Their Lordships of the Supreme Court of India had an occasion to deal with this aspect. In that case, the original complainant (respondent No.1 before the Supreme Court) had filed an application before the Magistrate seeking an order for investigation as contemplated under Section 156(3) of the Code. The Magistrate declined to order investigation into the matter by observing that there was no necessity of collection of evidence by police; and that the complainant could be conveniently dealt with under Section 200 and 202 of the Code. Aggrieved by this decision the complainant filed an application for revision before the High Court impleading only the State as a party. The High Court had set aside the order passed by the Magistrate with a direction to the Magistrate to examine the matter afresh, after calling for a report from the police authorities. It is under these circumstances, that the original accused appealed to the Supreme Court. A contention was taken before the Supreme Court of India by the appellant-original accused that, that the revision application could not have been disposed of without notice to the accused. On behalf of the original complainant (respondent No.1 before the Supreme Court) it was contended that since the criminal revision application had been filed at the precognizance stage

the accused had no right to be heard. Their Lordships of the Supreme Court of India referred to sub Section (2) of Section 401 of the Code and noted the submissions of the learned counsel for the accused-appellant before the Supreme Court of India that, "that the accused was not prejudiced by the impugned order and that in any event at the presummoning stage he was not an accused". This contention was rejected by Their Lordships. It was observed that,

"Submission of that by reason of the impugned order the appellant was not prejudiced and in any event at the presummoning stage, he was not an accused, cannot be accepted.

Sub-Section (2) of Section 401 of the Code refers not only to an accused but also to any person and if he is prejudiced, he is required to be heard.

An order was passed partially in his favour. The learned Metropolitan Magistrate has refused to exercise its jurisdiction under Section 156(3) of the Code. Had an opportunity of hearing been given to the appellant, he could have shown that no revision application was maintainable and/or even otherwise, no case has been made out for interference with the impugned judgment....."

9. Their Lordships categorically observed that the order passed by the High Court could not be sustained and set it aside by directing that the original accused should be impleaded as a party to the revision application and that thereafter the High Court should hear the matter afresh and pass an appropriate order.

10. There are a number of pronouncements of the Supreme Court of India wherein it has been held that "though an accused does not have a right to participate in the proceedings till process is issued against him, once the complaint filed by the complainant is dismissed and the complainant approaches a higher court in revision challenging the order dismissing the complaint, the accused shall have a right to be heard in the revision proceedings". The argument, that "since the accused had no right to be heard in the proceedings before the Magistrate, when the order passed by the Magistrate is challenged by way of revision, the accused cannot have any right to be heard in the matter", has not been accepted by the Supreme Court of India. [See under noted cases:

(i) Criminal Appeal No. 1700 of 2015, Chhatradari Ram v. State of Jharkhand and others, decided on 15.12.2015;

(ii) Criminal Appeal No. 781 of 2012, Priyanka Srivastava and others, v. State of U.P. and others, decided on 19.03.2015;

(iii) Manharibhai Muljibhai Kakadia and another v. Shaileshbhai Mohanbhai Patel and others: (2012) 10 SCC 517; and

(iv) A. N. Santhanam v. K. Elangovan : (2012) 12 SCC 321].

11. The legal position, that, thus emerges is that though an accused would have no right to be heard before the Magistrate when an application seeking an order for investigation under the provisions of Section 156(3) of the Code is filed

before the Magistrate, if such application is dismissed or rejected, and this order of the Magistrate is challenged by the applicant by filing an application for revision, the accused becomes entitled to be heard in the matter. This is how the provisions of Sub section (2) of Section 401 of the Code have been interpreted. When the prayer of the opposite party No.2 herein was rejected by the Magistrate; and the correctness of that order was challenged before the Court of Sessions, it was necessary for the Court of Sessions to have heard the petitioner before reversing or setting aside the order of the Magistrate.

12. It, therefore, follows that the order passed by the revisional court, without giving any opportunity of being heard to the petitioner, is not in accordance with law, and needs to be interfered with.

13. The petition is partly allowed.

14. The impugned order is set aside.

15. The learned Additional Sessions Judge shall rehear the revision application No. 229 of 2015, after giving to the petitioner (opposite party No.2 in the revision application) an opportunity of being heard in the matter. He shall take a decision in the matter preferably within three months from the date of receipt of this order by him.