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(2009) 05 DEL CK 0149

In the Delhi High Court

Case No : Criminal Revision Petition 359 of 2007

Sarfraz — APPELLANT

Vs

The State (NCT of Delhi) and Others — RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 173, 227, 239, 245, 249

Citation : (2009) 05 DEL CK 0149

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : S. Kohli, APP, S.P. Singh Chaudhary, Navdeep Kumar and Imran Khan, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—The petitioner is aggrieved by an order passed by the Additional Session Judge dated 6th February, 2007 whereby, the application moved by the complainant i.e. the present petitioner, requesting the Sessions Judge to take cognizance of the offence of murder of his father against Yusuf, Ashfaq, Imran, Ms. Afsari and Ms. Salma who had been discharged by the Sessions Court vide its earlier order dated 7th February, 2001 on the ground that evidence which came up for consideration in terms of the report u/s 173 CrPC does not make out a case against them. The said order which was passed by the Additional Sessions Judge on 7th February, 2001 was assailed by the present petitioner by filing a Revision petition before this Court registered as Criminal Revision Petition No. 109/2001 and the said revision petition was disposed of by Hon''ble Mr. Justice R.S. Sodhi as his Lordship then was by passing the following order:

with the assistance of Counsel for the petitioner as also Counsel for the State, who is not aggrieved by the order under challenge, I have gone through the judgment under challenge, I find that the learned Additional Sessions Judge has discharged the females on the ground that there is no material giving rise to

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such grave suspicion as to warrant a charge. Merely because one witness may have named them is not incumbent to frame a charge. The court is required to consider the entire material and if grave suspicion arises will go on to frame charge. In that view of the matter, I find no infirmity, perversity, impropriety, illegality or jurisdictional error in the order under challenge. It is needless to point out that in the event during trial there is evidence on record to show that some more persons have committed the offence, surely they can be summoned u/s 319 Cr.P.C.

2. It is the case of the petitioner that in terms of the aforesaid directions, he moved an application before the trial judge which has been dismissed by the impugned order dated 06.02.2007. The relevant portion of the order which is subject matter of the present revision petition is as under:

It is submitted by Ld. Counsel for applicant that from the statements of latter who was examined as PW1, Mohd. Akil (PW2), Smt. Rahisa (PW6), Mohd. Shokeen (Pw7) and Maulana Mohd. Alam (Pw9) it is clear that the persons sought to be summoned as accused in this case were also involved in the commission of the crime. It is further the plea of ld. Counsel that from the statement of Pws mentioned above, it has become apparent that accused Mustakeen Khan knew that deceased was suffering with heart ailment and knowing that, same caused injuries on the person of latter which was sufficient to cause his death. Ld. Counsel requested to amend the charge and try accused Mustakeen for offence of murder of deceased Wali Mohd.

Application is opposed by Ld. Counsel appearing on behalf of accused persons stating that same will unnecessarily prolong the trial of the case and an early disposal of a case is a fundamental right of accused persons. Ld. Counsel also referred a case titlted as Sohan Lal and others Vs. State of Rajasthan, alleging that the accused persons once discharged in a case cannot be summoned again to face trial in view of Section 319 Cr.PC.

Section 319 Cr.PC empowers a trial court to proceed against a person/persons for the offence which he/they appear to have committed, where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any such person not being an accused has committed any offence for which the same could be tried together with the accused.

Ld. Counsel reminded me about an order of our own High Court dated 17.5.04 in this very case filed by present applicant it was observed by the High Court that "it is needless to point out that in the event during trial there is evidence on record to show that some more persons have committed the offence, surely, they can be summoned u/s 319 CrPC". Contending that from the statements of material witnesses referred above, there is clear evidence against the persons who have already been discharged in this case to implicate in offence in question. Though, it is not a stage to evaluate the evidence meticulously as same may amount giving finding before evidence is concluded, I think it necessary to

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peek into the evidence on record to come into conclusion as to whether there is sufficient evidence against persons mentioned above to summon them as accused in this case, in view of Section 319 Cr.PC.

3. The petitioner submits that this order of the learned Additional Sessions Judge is not tenable in view of the order of this Court whereby directions were given to consider the question of summoning other persons named in the application based upon the evidence which has come on record. It is also submitted that once during evidence anything comes on record as disclosed by the petitioner in his application, it was incumbent upon the Additional Sessions Judge to have acted u/s 319 Cr.P.C. and summon the accused person name in the application.

4. However, the prayer made by the petitioner is opposed by the learned Counsel appearing for the respondent on three grounds:

(i) A bare perusal of the order passed by this Court nowhere says that persons who had been discharged may be re-summoned by the Additional Sessions Judge even after recording of the evidence.

(ii) It is stated that the order only empower the Additional Session Judge to summon other accused person who had not been summoned earlier or sent for trial by the police in their report u/s 173 CrPC.

(iii) It is submitted that the order of discharge which has come in favour of the respondent has conferred a valuable right which cannot be taken away even by exercising power u/s 173 CrPC qua those petitioners.

5. He has relied upon a judgment delivered by the Apex Court in case of Sohan Lal and others Vs. State of Rajasthan, also referred to by the Additional Session Judge in the impugned order, which judgment for the sake of reference is reproduced as under:

14. The crucial words in the Section are ''any person not being the accused''. This Section empowers the Court to proceed against persons not being the accused appearing to be guilty of offence. Sub-sections (1) and (2) of this Section provide for a situation when a Court hearing a case against certain accused person finds from the evidence that some person or persons, other than the accused before it is or are also connected in this very offence or any connected offence and it empowers the court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the Section is wide enough to include cases instituted on private complaint....

30. The question therefore is whether the necessity of making a further inquiry as envisaged in Section 398 could be obviated or circumvented by taking resort

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to Section 319. As has already been held by this Court, there is need for caution in resorting to Section 319. Once a person was an accused in the case he would be out of reach of this section. The word "discharge" in Section 398 means discharge of an offence relating to the charge within the meaning of Sections 227, 239, 245 and 249. Refusing to proceed further after issue of process is discharge. The discharge has to be in substance and effect though there is no formal order. The language of the Section does not indicate that the word "discharge" should be given a restricted meaning in the sense of absolute discharge where the accused is set at liberty after examination of the whole case. The cases of appellants 4 and 5 would be one of total discharge. But it could not be said that they were not some of the accused in the case, or that cognizance was not taken of the offences against them. A person may be accused of several offences and he may be discharged of some offences and proceeded against for trial in respect of other offences. This was the position regarding appellants 1, 2 and 3, who were partially discharged....

32. The High court in the instant case followed the decision in Saraswatiben v. Thakurlal Himmatlal reported in AIR 1967 Guj 263, holding that if at one stage on the evidence before him the Magistrate found that there was no primafacie case against the accused, subsequently on enquiry as a result of further evidence if he felt that there was prima facie case against the accused whom he had discharged u/s 251-A(2), Cr.P.C., it was open to him to fram a charge against the accused and that it was not necessary to take cognizance again and the Magistrate did not become functus officio. The same view was taken in Amarjit Singh alias Amba v. State of Punjab reported in (1983) 85 PLR 324.

6. Another aspect which has been brought to the notice of this Court that the order of this Court dated 17th May, 2004 was assailed by the petitioner before the Apex Court by way of an SLP which SLP was dismissed but this fact has not been brought to the notice of this Court by the petitioner and in this manner petitioner tried to suppress the material fact.

7. Be that as it may, the fact that the petitioner were not entitled to invoke the jurisdiction of Sessions Judge qua those persons who had been discharged and as per the order of this Court were not the persons who could have been summoned again by the Additional Session Judge. On the basis of the said order were rightly not summoned by the Additional Sessions Judge. Hence, there is no merit in the petition.

8. Dismissed.

9. TCR be sent back forthwith.

10. Interim orders, if any, are vacated.

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