
(1999) 04 PAT CK 0046

In the Patna High Court

Case No : Criminal Miscellaneous No. 28242 of 1998

Sayeed Bhagat and Others

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 28-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 399, 401, 401(2)
Penal Code, 1860 (IPC) — Section 323, 379, 452

Citation : (1999) 47 BLJR 1096 : (1999) CriLJ 4040

Hon'ble Judges : S.K. Chattopadhyaya, J

Bench : Single Bench

Advocate : Girja Prasad, for the Appellant; Damodar Pd. Tiwary, Assistant Public Prosecutor and Ram Krishna Prasad Yadav, for the Respondent

Final Decision : Allowed

Judgement

S.K. Chattopadhyaya, J.—The only question is to be decided in this case as to whether without giving any opportunity to the petitioners the revisional Court would have passed the impugned order dated 3-12-1998, by reason of which the order of the Judicial Magistrate dated 28-11-1996 has been set aside.

2. The facts of this case lies in a narrow compass.

3. On a complaint being filed by the opposite party No. 2 against nine accused persons the learned Magistrate took cognizance of the offences under Sections 323 and 379 of the Indian Penal Code and ordered for Summoning four accused persons to face trial. Out of those nine accused persons, the petitioners, who were other remaining five accused persons, were not proceeded against, as no summon was issued against them. Two prosecution witnesses were examined before charge and thereafter on 8-7-1996 the opposite party No. 2, complainant, filed a petition u/s 319 of the Cr.P.C. before the Court below to summon the remaining five accused persons, who were named by those two witnesses examined before charge. The learned Magistrate refused the said prayer mainly on the ground that the allegations levelled in the petition of complaint were

different than the evidence of the witnesses, there was no evidence of any Mar-pit, Gali Galauj and taking of money against the petitioners and thirdly, independent witnesses were not examined, there were previous enmity between the parties. This order of dismissal of the petition u/s 319 of the Cr.P.C. was passed on 28-11-1996, against which the complainant moved the revisional Court in Cr. Revision No. 633 of 1996.

4. At the very out set a preliminary objection was raised by the Additional Public Prosecutor before the revisional Court that the remaining five persons, namely, the petitioners, who were asked to be summoned, were necessary parties in the revision application and in their absence the revision application cannot be disposed of. However, this objection was overruled by the learned 6th Additional Sessions Judge on the ground that unless the accused is summoned to face trial he has no locus standi to be heard. Having held thus the learned Court below proceeded to hear the counsel for the complainant and the State and by the impugned order set aside the order of the learned Magistrate by observing that the remaining five accused, namely, the petitioners, are also liable to face trial before the Court.

5. Mr. Girija Prasad, learned counsel for the petitioners, fairly does not dispute the position in law that even the accused, who were earlier discharged, can be summoned in exercising powers u/s 319 of the Cr.P.C, if subsequently some materials come to light against them. However, his contention is that a revisional Court before setting aside the order of the learned Magistrate ought to have issued notice to the petitioners because the impugned order admittedly affects them. In support of his contention he has relied on a decision of the Delhi High Court in the case of Mohd. Afzal Vs. Noor Nisha Begum, .

6. Mr. Ram Krishna Prasad Yadav, learned counsel appearing on behalf of the opposite party No. 2, on the other hand, submits that unless the accused persons are summoned and appear before the Court, they have no locus standi to be heard and, as such, the revisional Court was justified in not issuing notices to the petitioners. He has further contended that the scope and ambit of Section 399 of the Cr.P.C. reiterated by this Court as well as by the Supreme Court on more than one occasion. He has relied on the decisions reported in the cases of Rama Sharma v. Pinki Sharma (1989) 2 BLJ 120, Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, and Bishwanath Tato and Others Vs. The State of Bihar . However, learned counsel has failed to cite any decision either of the Supreme Court or of this Court, which has taken contrary view to the decision reported in the case of Mohd. Afzal (supra).

7. In the instant case this Court is not called upon to decide as to whether a person, who has been discharged earlier, can also be summoned to face trial, if the evidence recorded during the trial shows his complicity in the crime in question. This point is well settled by the decisions cited by the learned counsel for the opposite party No. 2. The only question, which falls for consideration, is that as to whether the revisional Court could have set aside the order of the

learned Magistrate without issuing notice to the petitioners. This point has been answered by the Delhi High Court in the aforesaid case where complaint filed by the complainant was dismissed by the Magistrate on appraisal of evidence but the Sessions Court set aside the same and directed to summon the accused u/s 323 read with Section 452 of the Indian Penal Code. This order was passed in absence of the accused-petitioners of that case and in these circumstances it was held that in exercise of revisional jurisdiction u/s 399 or 401 of the Cr.P.C. no order to the prejudice of acquired or any other person can be passed unless an opportunity of being heard. In this context Sections 399 401 and 401(2) of the Cr.P.C. were taken note of and the learned single Judge of Delhi High Court held as follows :

11. It is abundantly clear from the relevant provisions of law reproduced above that no order to the prejudice of an accused or any other person can be made unless the said accused or the said person has been given an opportunity of being heard.

8. In the instant case also though the jurisdiction of the Court to summon a person u/s 319 of the Cr.P.C. cannot be questioned, the revisional Court, in my view should have heard the petitioners before passing the impugned order because the same has prejudiced them.

9. In the result, this application is allowed. The impugned order of the revisional Court dated 3-12-1998 is set aside and the case is remanded to the learned 6th Additional Sessions Judge, Patna, for hearing afresh. Parties are directed to appear before the said Court on 10th of May, 1999. The learned 6th Additional Sessions Judge after hearing both the parties would pass an order afresh on the revision application preferred by the complainant-opposite party No. 2 in accordance with law.