
(2019) 08 GAU CK 0049
In the Gauhati High Court
Case No : Criminal Petition No. 708 Of 2019

Syed Muhibur Rahman

APPELLANT

Vs

Central Bureau Of Investigation

RESPONDENT

Date of Decision : 21-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 319, 319(1), 482
Evidence Act, 1872 — Section 3
Indian Penal Code, 1860 — Section 120(B), 319, 397, 401, 420, 423, 467, 468, 471, 511

Citation : (2019) 08 GAU CK 0049

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : Z Kamar

Final Decision : Allowed

Judgement

1. Heard Mr Z Kamar, learned counsel for the petitioner and Mr. SC Keyal, learned Standing Counsel, CBI.

2. By way of this application, the petitioner has sought for quashing of the order dated 11.01.2019 passed by the learned Special Judicial Magistrate 1st Class, Assam in CR Case No.4232/2018 whereby the learned trial court has taken cognizance of the offence against the present petitioner as an accused after filing of the charge-sheet.

3. Mr Z Kamar, learned counsel for the petitioner has laid before this court the relevant documents that has been filed and made a submission that the petitioner herein is referred as a witness No.34 in the charge-sheet but however, the learned trial court after perusing the charge-sheet at the time of taking cognizance on 11.01.2019 has taken cognizance of the offence under Section 120(B)/420/423/467/468/471/511 against 53 accused persons and has also equally held the present petitioner as accused and directs him to face the trial. Relevant portion of the order is reproduced below:

"It is to be mentioned that this is a case where the afore named accused persons hatched conspiracy for getting House Building Advance sanctioned by the Chief Security Commissioner by furnishing false and fabricated documents. On perusal of the charge sheet and other documents pertaining to this case, it has revealed that accused Sri Sanatan Das (A-45), electrical fitter O/O Chief Electrical Engineer (Construction), N.F.Railway, his sister viz. Smt. Bina Das (A-50) and his wife Smt. Lakhi Das (A-51), have conspired to form a society in the name and style of "Housing and Flat Development Society, Bijni" for supplying fake and fabricated documents for the Railway employees in lieu of money for securing house building advance (HBA) from Railway department. Accordingly, the said society has obtained false and fabricated documents of flats and submitted those false and fabricated documents with the HBA applications against flats to get HBA sanctioned by the Chief Security Commissioner, NF Railway, Zonal Headquarters, Maligaon. It is further to be mentioned that to accomplish the said conspiracy, the said society acquires 8 plots of land from different 8 different pattadar and got prepared 8 numbers of plans and estimates from one registered technical person, Syed Muhibur Rahman for construction of RCC buildings on 8 plots of land, which they later showed to have constructed on papers although practically, no construction was done. The role which accused Syed Muhibur Rahman has played in the commission of the alleged offence cannot be overlooked, in as much as, from the facts and circumstances it is very much clear that he played an active role and was instrumental throughout the journey to the commission of the alleged crime.

Thus, on being made out a strong prima facie case against the accused Syed Muhibur Rahman, apart from the forenamed accused persons I also take cognizance against accused Syed Muhibur Rahman, under the said provisions of law, who has prepared plan and estimate of RCC buildings on the eight plots of land, on the basis of fake and fabricated documents supplied to him by other co-accused. Issue summons to all the accused persons."

4. Challenging the aforesaid order so far it concern to the present petitioner, present petition has been preferred under Section 482 Cr.P.C. read with Sections 401/397 of the Code for quashing and setting aside the order for taking cognizance against the present petitioner as an accused.

5. Learned counsel for the petitioner has vehemently objected to such finding of the learned court inasmuch as the stage has not come for making a witness as an accused which tantamounts to invoking provision of Section 319 of Cr.P.C. It has been pointed out that such an order has been passed at a very pre-mature stage i.e. after immediate filing of the charge-sheet as the trial has not commenced to speak of recording any evidence. The learned trial court has suo moto made such findings on the basis of charge-sheet which is not at all permissible under the law. It has been contended that although power of the court under Section 319 of the Code is un-fettered to make a person as an accused in a case in course of trial after recording evidence but not before that.

In support of the contention, the learned counsel for the petitioner has referred to the decision of Hardeep Singh Vs State of Pubjab and others reported in (2014) 3 SCC 92, Rajesh and others vs State of Hariyana reported in 2019 CRI.L.J. 2968 and Sunil Kumar Gupta and others vs State of Uttar Pradesh and others reported in 2019 (4) SCC 556 wherein the Hon'ble Supreme Court has dealt with the scope and ambit of Section 319 of Cr.P.C. and as to when the court can exercise the power under Section 319 Cr.P.C.

6. The decision of Hardeep Singh (Supra) is followed in all the subsequent cases.

In Hardeep Singh (Supra) elaborately dealt with the power of the court to proceed under Section 319 against the person arraigned as an accused. The word evidence under Section 319 has to be broadly understood in literary as evidence brought during the trial. It has been held that materials which has come before the court in course of inquiry can be used for corroboration of evidence recorded by the court after commencing the trial, for exercise of power under Section 319 and also to add an accused whose name is not shown as an accused in the charge-sheet. Following observation is quoted below:

"105. Power under Section 319 Cr.P.C. is discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination it requires much stronger evidence than mere probability of this complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not bring the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted." There is, therefore, no scope for the court acting under section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

7. In Rajesh and others vs State of Hariyana wherein the Hon'ble Supreme Court has considered in detail the scope and ambit of the power of the Magistrate under Section 319 Cr.P.C. and the object and purpose of Section 319 Cr.P.C. and following five questions taken for consideration by the Court:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean

evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

While considering the aforesaid question it was held as follows:

"55. Accordingly, we hold that the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained hereinabove.

78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

82. This pretrial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

92. Thus, in view of the above, we hold that power under Section 319 CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence."

8. Thus it has been held that the court can exercise the power under Section 319

Cr.P.C. even on the basis of the statement made in examination in chief of the witnesses concern and the court need not wait till cross-examination of such witnesses and the court need not wait for the evidence against the accused to be adduced by cross-examination. The court has also power to summon the person who has not been named in the FIR or in the charge-sheet but on the basis of the evidence emerged in course of trial.

9. In *Sunil Kumar Gupta and others vs State of Uttar Pradesh and others* observed as follows (Relevant para quoted):

"9. Section 319(1) Cr.P.C. empowers the Court to proceed against any person not shown as an accused if it appears from the evidence that such person has committed any offence for which such person could be tried together along with the accused. It is fairly well settled that before the court exercises its jurisdiction in terms of Section 319 Cr.P.C., it must arrive at satisfaction that the evidence adduced by the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as the accused in the case.

10. Observing that for exercising jurisdiction and its discretion in terms of Section 319 Cr.P.C., the courts are required to apply stringent tests, in *Sarabjit Singh and Another vs. State of Punjab and Another* (2009) 16 SCC 46, it was held as under:-

"21. An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other persons(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

22. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

23. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied."

10. The basis that has to be tested is one which is more than a prima facie case

as exercised at the time of framing charge but sort of satisfaction to an extent that the evidence, if unrebutted would lead to conviction. In absence of such satisfaction, the court should refrain from exercising the power under Section 319 of Cr.P.C.

11. The plain reading of the Section 319 Cr.P.C. read as follows:

"319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. Thus from the provision of Section 319 coupled with the legal proposition as discussed above it is clear that there is no scope on the part of court to invoke Section 319 so as to make a person as an accused in case unless and until the evidence is brought to the record and only on the opinion of the Magistrate concern such an extra ordinary power cannot be invoked.

13. Turning to the present case it is found that the Magistrate herein immediately after filing of the charge-sheet of his own opinion has laid the present petitioner who was otherwise witness in the said case, made him an accused and summoned him to face the trial as an accused which is not at all correct proposition of law as indicated in the aforesaid decisions as well as the plain reading of Section 319 of the Code as because the evidence is not to speak about the role played by the present petitioner and it is far below the stage so as to pass the role and conduct of the present petitioner in the entire prosecution case.

14. Learned standing counsel for the CBI has also conceded to the aforesaid status of the case that such cognizance has been taken in a pre-mature stage by the court itself whereas the court has ample power to invoke such provision in

the proper stage.

15. Considering the entirety of the matter and the legal proposition discussed above, this Court is of the opinion that the impugned order passed by the learned Magistrate dated 11.01.2019 so far as regard the present petitioner is concerned is liable to be interfered into and the same is accordingly set aside. At present the status of the petitioner will be simply a witness as charge-sheeted. However, the court is at liberty for invoking the Section 319 Cr.P.C. at an appropriate stage if such evidence emerged against the petitioner.

16. Petition stands allowed accordingly.