

A.F.R.

Neutral Citation No. - 2024:AHC:4001

Reserved on 07.12.2023

Delivered on 09.01.2024

Court No. - 82

Case :- MATTERS UNDER ARTICLE 227 No. - 5914 of 2023

Petitioner :- Diwakar Singh

Respondent :- State of U.P.

Counsel for Petitioner :- Utkarsh Birla

Counsel for Respondent :- G.A.

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri Utkarsh Birla, learned counsel for the petitioner and Sri Ram Kumar Verma, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed by the petitioner-Diwakar Singh with a prayer to set aside the order dated **18.01.2023** passed by the Judicial Magistrate, Court no. 5, Varanasi in criminal case no. 3272 of 2019, by which the applications dated 19.07.2021 and 02.08.2021 were rejected, with a further prayer to issue an appropriate direction to the Judicial Magistrate/ the court concerned to comply with the interim order passed by this court in criminal misc. petition no. 2160 of 2023 dated 27.04.2023.

3. Relevant facts are as below:-

(i) The petitioner Diwakar Singh was posted as Sub-Inspector of police and he lodged an FIR, case crime no. 444 of 2000 under sections 307 and 392 IPC and section 3 of FEMA Act against Durga Prasad Agarwal and few others;

(ii) The police investigated the matter and filed a chargesheet, not against the persons named therein but against the petitioner the first informant Diwakar Singh himself, under sections 392, 218, 467, 468, 120-B IPC on 25.07.2003, stating therein that Sub-Inspector Diwakar Singh, with his unknown associates hatched a conspiracy showing a fake incident of loot and he also prepared false papers to show a false incident as genuine one. Durga Prasad Agarwal and number of others were made witness against Sub-Inspector Diwakar Singh;

(iii) During the course of proceedings of the trial, the accused Diwakar Singh moved an application on 13.10.2020, requesting the trial court concerned to summon the files of departmental proceedings and to summon/direct the police officers to remain present on the dates of hearing.

(iv) The trial court wrote a letter dated 20.10.2020 to Additional Director General of Police, Anti-Corruption for production of original record. The department concerned sent the original record by a covering letter dated 29.10.2020;

(v) The prosecution examined its witnesses and the prosecution evidence stood closed on 04.05.2021. Thereafter the statement the accused were recorded under section 313 Cr.P.C.;

(vi) At the stage of defence evidence, the accused moved an application dated 19.07.2021 with following prayers:-

“to pass order directing the prosecution to provide copy of DFR dated 05.06.2022, Interrogation Report dated 15.09.2000 and Statements of PW-5 Shri Shashank Agrawal and Pw-6 Shri Durga Prasad Agrawal which were recorded by the SIT, summon the case property Rs. 2,47,500/- and re-call PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal and

summon Shri Bua Singh (Retd. DGP) and Shri Atul (Retd. DGP) as defense witnesses to meet the ends of justice.”

(vii) *He moved another application dated 02.08.2021 with following prayer:-*

“..... to pass order directing to the prosecution to re-call the PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal. It is further prayed that Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP) may also be summoned as defense witnesses for verifying letters, approval orders and DFRs and exhibiting them as Exhibit-Kha to meet the ends of justice.”

(viii) *The learned Magistrate dismissed his both the applications (dated 19.07.2021 and 02.08.2021) by a detailed order passed on 16.09.2021;*

(ix) *The accused preferred a **criminal revision no. 242 of 2021**. The revisional court partly allowed the revision and passed an order on 26.04.2022 as below:-*

"निगरानीकर्ता द्वारा प्रस्तुत निगरानी आंशिक रूप से स्वीकार किया जाता है। अवर न्यायालय द्वारा श्री बुआ सिंह, श्री अतुल, श्री विजय कुमार अग्रवाल को तलब न किये जाने के बिन्दु पर पारित आदेश दिनांकित 16.09.2021 निरस्त किया जाता है। दिनांक 16.09.2021 के पारित आदेश के द्वारा प्रार्थनापत्र दिनांकित 02.07.2021, 02.08.2021 व 19.07.2021 के परिप्रेक्ष्य में अन्य बिन्दुओं पर पारित आदेश को पुष्ट किया जाता है। अवर न्यायालय को निर्देशित किया जाता है कि साक्षीगण के तलबी के बिन्दु पर निगरानीकर्ता को पुनः सुनकर विधिनुसार आदेश पारित किया जाना सुनिश्चित करें। निगरानीकर्ता को निर्देशित किया जाता है कि दिनांक 12.05.2022 को अवर न्यायालय में उपस्थित हों।"

(x) *The order dated 26.04.2022 of revisional court was challenged in misc. petition no. 3972 of 2022 before the High Court, which is still pending;*

(xi) *During the pendency of aforesaid misc. petition, the trial court proceeded and passed a fresh order dated 20.09.2022 allowing the applications of the accused dated 19.07.2021 and 02.08.2021 to the extent that Bua Singh (Retd. DGP), Atul (Retd. DGP) and Vijay Kumar Agrawal (Retd. IGP) may be produced as defence witnesses. This order dated 20.09.2022 was passed in the light of the order of the revisional court dated 26.04.2022 and the case was posted for defence evidence;*

(xii) *This order passed by the trial court for summoning the defence witness, was challenged in **criminal revision no. 393 of 2022** by the State, which was decided by order dated 22.12.2022 by the District Judge, Varanasi. By this order, the revision was allowed and the order of summoning the police officers, as defence witnesses was set-aside and the trial court was directed to pass a fresh order, mentioning therein the reasons and the grounds for summoning those persons as defence witnesses;*

(xiii) *In the light of the aforesaid order of the revisional court, the Judicial Magistrate, Court no. 5, Varanasi passed a fresh order dated 18.01.2023 and the applications dated 19.07.2021 and 02.08.2021 were rejected by the court concerned, on the basis of discussions and reasons disclosed in the order;*

(xiv) *The aforesaid order dated 18.01.2023 is now under challenge in this petition.*

4. The submissions of the petitioner are that in his applications dated 19.07.2021 and 02.08.2021, he has given detailed reasons for the purpose of summoning Bua Singh (Retd. DGP), Atul (Retd. DGP) and Vijay Kumar Agrawal (Retd. IGP), as defence witnesses; further submission is that adducing evidence in support of defence is a valuable right, denial whereof is equivalent to denial of fair trial. Further that the court below did not cite any good reason for rejecting the applications. The petitioner relied on the judgment of the Supreme Court given in **Criminal Appeal No. 1293 of 2006 (Mrs. Kalyani Baskar vs. M.S. Sampooram)** decided on 11.12.2006. Further on **Suo Moto Writ (Crl.) No. 1 of 2017 (In Re:**

To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials vs. The State of Andhra Pradesh and Others decided on 20.04.2021 and also on the judgment of *the Delhi High Court in Criminal Revision No. 1169 of 2018 (Shyam Manohar Saxena vs. C.B.I. and others)* decided on 01.07.2019.

5. The accused made following prayer in his application dated 19.07.2021:-

“ It is, therefore, respectfully prayed to this Hon’ble Court may be pleased to pass order directing to the prosecution to provide copy of DFR dated 05.06.2022, Interrogation Report dated 15.09.2000 and Statements of PW-5 Shri Shashank Agrawal and Pw-6 Shri Durga Prasad Agrawal which were recorded by the SIT, summon the case property Rs. 2,47,500/- and re-call PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal and summon Shri Bua Singh (Retd. DGP) and Shri Atul (Retd. DGP) as defense witnesses to meet the ends of justice.”

In continuation of this application dated 19.07.2021, the accused moved another application dated 02.08.2021 to supplement the earlier one with following prayer as below:-

“It is, therefore, respectfully prayed that this Hon’ble Court may be please to pass order directing to the prosecution to re-call the PW-1 Shri Babu Chand and PW-6 Shri Durga Prasad Agrawal. It is further prayed that Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP) may also be summoned as defense witnesses for verifying letters, approval orders and DFRs and exhibiting them as Exhibit-Kha to meet the ends of justice.”

Broadly, four kinds of prayers were made:-

- (i) *summoning certain papers;*
- (ii) *summoning the case property;*
- (iii) *recall of certain prosecution witnesses who were already examined/cross-examined;*
- (iv) *calling certain persons as defence witnesses.*

6. The matter has gone into several rounds of litigation. In the first round, the trial court heard the matter of summoning/recall/re-examination of the witness/papers/case property and dismissed the same by an order dated **16.09.2021**. The court of revision partly allowed the same and directed the trial court to re-hear only the matter of summoning three persons as defence witnesses namely, Bua Singh, Atul and Vijay Kumar Agrawal, all retired police officers. The revisional court at the same time affirmed the rest of the order passed by the trial court. The learned trial court, therefore, passed a fresh order on **20.09.2022** and summoned the aforesaid persons, as defence witnesses. The State started a second round of litigation by filing a criminal revision no. 393 of 2022, which was allowed by order dated **22.12.2022**. The trial court was directed to hear the matter again and pass a speaking order, mentioning therein the reasons, in case the trial court found the witnesses fit to be summoned, as defence witnesses, therefore, the trial court passed an order for the third time on **18.01.2023** and this time rejected the prayer for summoning the aforesaid persons, as defence witnesses.

7. Admittedly the interim stay orders were passed by the High Court in Misc. Petition No. 2160 of 2023 after a fresh order was already passed by the trial court, hence is of no consequence.

8. This is significant to note that the accused made several prayers in his applications but the point in issue has narrowed down to the question of

summoning three persons as defence witness. This may be noted that none of the orders passed in revision i.e., Criminal Revision no. 242 of 2021 passed on **26.04.2022** and in Criminal Revision no. 393 of 2022 passed on **22.12.2022**, are under challenge in this petition. In the former criminal revision, part of the order passed by the trial court was affirmed meaning thereby that the order of trial court rejecting the prayer to summon the witnesses PW1 and PW6, who stood already examined and a further prayer to summon Rs. 2,47,500/-, seized in the incident as case property were not interfered at by the court of revision. The findings on those points have become final and cannot be re-agitated in the present petition for the simple reason that those orders have not been challenged. It may be reiterated that the petitioner has challenged only the third order passed by the trial court, by which the matter of summoning three persons was rejected. In these circumstances, the matter has boiled down to above issue only i.e., whether to summon retired police officers namely, Shri Bua Singh (Retd. DGP), Shri Atul (Retd. DGP) and Shri Vijay Kumar Agrawal (Retd. IGP), as defence witnesses or not.

9. Now the question which arises is whether the trial court was correct in rejecting the prayer on the grounds that it was made for the purpose of vexation or delay or for defeating the ends of justice. For this purpose, it will be appropriate to reproduce the provisions of section 243 Cr.P.C. as below:-

“243. Evidence for defence.

(1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing: Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court. B.- Cases instituted otherwise than on police report.”

10. From bare perusal of section 243 Cr.P.C., it occurs that a clear distinction has been maintained between the persons who are sought to be produced by the defence before the court for the first time with the persons who have been already produced as witnesses. The law provides two kinds of parameters, first one which shall apply to the witnesses for the purpose of fresh examination and the second when some witness who has already been examined and cross-examined or the accused had an opportunity to cross-examine them before he entered on his defence. The law provides that in the first case ordinarily the Magistrate may issue process unless he considered that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the second case (i.e., when a person who has already been cross-examined by the defence or the defence had an

opportunity of cross-examining him), the attendance of such witness shall not be compelled unless the Magistrate is satisfied that it is necessary for the ends of justice. The first part of section 243(2) Cr.P.C. has been worded in a positive manner while the proviso to section 243(2) Cr.P.C which applies in a latter case, has been worded giving only a little scope to the defence. The law imposes obligation on the Magistrate not to compel the attendance of any such witnesses unless it is satisfied that it is necessary for the ends of justice. The aforesaid distinction should be kept in mind while dealing the matter under section 243 Cr.P.C.

11. From here, I find it necessary to relate the matter to the submissions as contained in the applications moved by the accused before the trial court. The accused has submitted in his application that the proposed D.F.R. i.e., draft final report was approved by Bua Singh, the then HOD, Anti-Corruption Organization, UP. Except the above averments, there is no other material fact brought before the court as regard summoning of Bua Singh, as defence witness. As regard the second witness namely, Shri Atul, the then ADG, Police is concerned, the defence seeks to examine him for verification of inquiry closure report and no more. This is all which is contained in the application dated 19.07.2021 seeking Shri Bua Singh and Shri Atul to be produced as defence witnesses. A second application, which was moved on 02.08.2021 to supplement the previous application, there is mention of name of Vijay Kumar Agrawal, the then SP, Anti-Corruption Organization, UP in para no. 2(c) of the application. In the aforesaid portion of the application, there is a plain statement suggesting that there was close nexus between the investigating agency and Vijay Kumar Agrawal, the then SP, Anti-Corruption Organization, UP. From bare perusal of the statements, as mentioned in the original applications dated 19.07.2021 and 02.08.2021, it can fairly be inferred that the defence has not been able to demonstrate that how and why examination of these witnesses is important for his defence and that why and how their evidence may prove helpful to disprove the prosecution case or to prove his innocence or even to create cracks or doubts in the prosecution story.

12. In the background of above facts, the learned trial court rightly observed as below:-

“On the perusal of record and the observation made in the order dated 22.12.2022, the Court is of the view that through application dated 19.07.2021 and 02.08.2021, the accused summoning Shri Bua Singh, Shri Atul & Shri Vijay Kumar as defence witnesses because they have sanctioned the permission to conduct departmental enquiry on the basis of documents and certain evidences. Accused has mentioned in detail the lacunae in those departmental & privileged documents & proceedings which has been conducted in the departmental enquiry. For this purpose, the accused has presented application dated 19.07.2021 & 02.08.2021 in order to summon the defence witnesses which are mentioned above.

It is found that, on perusal of records and hearing both the parties, Shri Bua Singh, Shri Atul & Shri Vijay Kumar are retired senior officers who have been sought to be summoned as defence witnesses by accused/applicant are neither eye witnesses, nor circumstantial witnesses. They have neither been questioned by investigating officer during investigation nor their statements have been recorded. On the perusal of record, it is found that Shri Bua Singh, Shri Atul & Shri Vijay Kumar have sanctioned the departmental enquiry to conduct against the applicant. It is on the because of this act which these officers have done in discharge of their official duty, the accused

through application dated 19.07.2021 & 02.08.2021 seek permission under section 243 Cr.P.C. to summon them as defence witnesses. In the light of above, facts & circumstances, the court is of the view that the accused has failed to show as to how the evidences of these persons are material in the present case.”

After mentioning the above facts and circumstances, the learned trial court has taken a view that the defence seeks to summon these retired officers as witness for the purpose of vexation or delay and to defeat the ends of justice. In the light of the material as disclosed in the applications moved by the defence, the observations made by the trial court appear to be cogent and pertinent. And the opinion formed that defence in fact seeks to summon the retired police officers as witness for the purpose of vexation or causing delay do not appear to be far-fetched or unfounded.

13. As a matter of caution, I went through all the averments made in the applications as well as in the petition and all the material on record, to find out some good ground the accused may have taken. There are long winding statements and descriptions all weaved together to give a false impression of having a good case, but a discerning judicial eye can see through the web created by a legal mind. Outwardly the contentions are appealing but they do not have any substance. The case laws cannot help when there is no substance in the submissions.

14. The power under Article 227 of the Constitution of India is definitely supervisory in nature, but it should be exercised sparingly and in appropriate cases, only to prevent miscarriage of justice or flagrant violation of law.

Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected.

15. I do not find any good reason to interfere in the order impugned in exercise of powers under Article 227 of the Constitution of India, hence the petition is **dismissed**.

Order Date:- 9.1.2024

#Vikram/-