Neutral Citation No. - 2023:AHC:170412

A.F.R.

Reserved on 18th August, 2023.

Delivered on 24th August, 2023

Court No. - 82

Case :- CRIMINAL REVISION No. - 2941 of 2023

Revisionist :- Krishnapal And Another
Opposite Party :- State of U.P. and Another
Counsel for Revisionist :- Pradeep Kumar Mishra,Sr. Advocate,Tanzeel Ahmad
Counsel for Opposite Party :- G.A.,Ankit Saran,Anuj Srivastava

Hon'ble Shiv Shanker Prasad,J.

1. Heard Mr. Vinay Saran, learned Senior Advocate assisted by Mr. Pradeep Kumar Mishra and Mr. Tanzeel Ahmad, learned counsel for the revisionist, Mr. Ankit Saran, learned counsel for the opposite party no.2 and Mr. R.N. Singh, learned A.G.A. for the State as well as perused the entire material available on record.

CHALLENGE TO THE PRESENT CRIMINAL REVISION

2. This revision has been filed to set aside the judgment and order dated 28.04.2023 passed by learned Additional Sessions Judge, Court no.7, Meerut in Sessions Trial No.297 of 2015, arising out of Case Crime No. 333 of 2014, under Section 302, 504, 506 I.P.C., Police Station Kankarkhera, District Meerut pending before the learned Additional Sessions Judge, Court no.7, Meerut.

GENESIS OF THE CASE

3. For the alleged incident dated 24th May, 2014 at about 11:30 a.m., a first information report has been lodged by Dinesh Kumar Singh i.e. informant/opposite party no.2 on 24th May, 2014 at 1300 hrs. (01:00 p.m.) against Krishnapal, Vikash and Praveen (Krishnapal and Vikas are revisionists herein). The said FIR came to be registered as Case Crime No. 333 of 2014 under Sections 504, 506 and 302 I.P.C., at Police Station Kankarkheda Meerut, District Meerut. In the FIR it has been alleged that on 24th May, 2014 the informant along with his sister and brother, namely,

Rekha and Neeraj respectively were driving to Meerut in his Honda Amaze White Car to visit Dr. Anil Rastogi who was treating him. As they left their Lakhvaya, a White Scorpio Car overtook and stopped their car. The named accused persons got out of the Scorpio Car and threatened to kill Neeraj for helping Dharmendra Kirtal in a criminal case. They fired shots at Neeraj which resulted his death in his car. It is further alleged that the informant, his sister Rekha and Satendra and Harendra, who were coming behind his car saw the said incident.

4. After lodgement of the FIR, investigation proceeded and the Investigating Officer on 24.05.2014 recorded the statement of the first informant, Dinesh Kumar Singh under section 161 C.P.C. in which he reiterated the version of the FIR.

SPECIFIC CASE OF THE REVISIONISTS

5. On the next date of incident i.e. 25th May, 2014 statements of witnesses, namely, Satish Kumar, Sanjeev Kumar and Mehak Singh were recorded by the Investigating Officer under Sections 161 Cr.P.C. wherein they stated that the revisionists namely, Pradhan Krishnapal and Vikash were in the village on the date of incident and they have been falsely implicated in the murder of the deceased Neeraj. As such, the plea of alibi of the revisionists surfaced immediately after the incident. On 29.05.2014, the statement of sister of the deceased Smt. Rekha and one Harendra, who were mentioned as witnesses of the FIR, were recorded under Section 161 Cr.P.C. in which they did not support the version as unfolded in the FIR and statement of the first informant/opposite party no.2 rather stated that one Praveern alias Billu and one Ankit were the ones who had shot the deceased and did not name the revisionists as one of the perpetrators in the incident. Thereafter the name of the revisionists was dropped/exonerated from the investigation and one Ankit alias Guddu was added as an accused in crime in question. However, the aforesaid witnesses namely Smt. Rekha and Harendra were pressurized by the first informant and on

20.6.2014, they have filed their affidavits supporting the version of the FIR and denied their earlier statements which were recorded by the Investigating Officer under section 161 Cr.P.C. Two more affidavits of the first informant Dinesh Kumar and Satyendra were brought on record by the investigating officer on 20.6.2014. The police recorded the statement of Sateyndra on 10.07.2014 wherein he supported the version of the FIR but has failed to answer the crucial questions about the entire incident. Thereafter on 19.7.2014 through CD No. XXI, the investigating Officer brought on record the statements of aforesaid Dinesh Kumar, Smt. Rekha, Sateyndra and Harendra recorded under Section 164 Cr.P.C. so to pressurize them not to retract from their statements in future. Thereafter the investigating officer recorded the statement of aforesaid Smt. Rekha on 2.8.2014, Dinesh Kumar on 4.8.2014. After completion of the investigation under Chapter XII Cr.P.C., the investigating officer submitted the charge sheet against the co-accused persons, namely Praveen and Ankit and kept the investigation pending against the revisionists. The investigation thereafter was transferred to Crime Branch and during the investigation vide parcha SCD-III dated 17.11.2014, Call Detail Reports (CDRs) of the revisionist No.1 and his Security Guard namely Gagan and Ankur were obtained and brought on record. The statement of the aforesaid police security guards, namely, Gagan and Ankur of the revisionist No.1 were also recorded by the investigating officer under section 161 Cr.P.C. who supported the plea of alibi of the revisionists and further denied the involvement of the revisionist in the incident in question. After completion of the investigation against the revisionists, their involvement in the alleged incident was found to be false vide parcha dated 28.1.2015. After filing of the charge sheet against the co-accused persons cognizance was taken and later on the case was committed to the Court of Sessions and was registered as Sessions Trial No. 297 of 2015 and is pending in the court of Additional Sessions Judge, Court No. 7, Meerut. During the course of trial, the statements of PW-1 Dinesh and PW- 2

Harendra Singh were recorded in which they again reiterated the prosecution story as narrated in the FIR involving the names of the revisionists as accused. Thereafter on 25.1.2023, opposite party no.2/informant moved an application under section 319 Cr.P.C. for summoning the revisionists before the trial court and the same was numbered as Paper No. 110-Kha but vide order dated 28.2.2023 the same was not pressed without obtaining any permission to file a fresh application. No further material was brought on record thereafter and without any new ground and without seeking any liberty to file a fresh application, while not pressing the application dated 25.1.2023, another application under section 319 Cr.P.C. was moved by opposite party no.2 on 18.4.2023 by giving a lame excuse that the first application was not pressed under the threat of the revisionists, although the fact remains that the revisionist had no knowledge of the application dated 25.1.2023 as they were not attending the court and were not facing the trial.

6. The trial court vide order dated 28.4.2023 allowed the IInd application filed by opposite party no.2 in a most mechanical manner without even properly going through the material available on record collected during the investigation. In the order dated 28th April, 2023 allowing the application of opposite party no.2 under Section 319 Cr.P.C. the trial court has not recorded any finding qua alibi of the revisionists, which were cropped up in the statements of the witnesses and the CDR which was made part of the investigation regarding the location of the revisionists at village Kirthal Baghpat at the time of the alleged incident and also the statement of the police security guards supporting the said facts. The concerned Sessions Judge while passing the order dated 28th April, 2023, was duty bound to consider entire material available on record i.e. the material collected during the investigation as well as material brought during the course of trial by way of deposition etc. However, the Sessions Judge committed gross illegality while ignoring the material available on record collected during the course of

investigation which favoured the revisionists. It is against this order of the concerned Sessions Judge dated 28th April, 2023 allowing the application of opposite party no.2 for summoning the revisionists as accused that the present criminal revision has been filed.

7. **SUBMISSIONS ADVANCED ON BEHALF OF THE REVISIONISTS**

(i) The revisionists are wholly innocent and have been falsely implicated in the present case due to ulterior motive and they have not committed the alleged offence. The allegations as unfolded in the FIR are wholly false and baseless.

(ii) On the alleged date and time of the incident, revisionist no.1 who was a Pradhan and political person and his security police guards, namely, Constable Ankur Kumar and Constable Gagan Pawar along with his nephew i.e. revisionist no.1 Vikash were in Village Kirthal District Baghpat which is about 100 kilometres away from the alleged place of incident i.e. Village Lokwaya District Meerut, where they were holding a Panchayat to resolve the village dispute qua a drain between two parties. The said plea of alibi of the revisionists have been supported by the witnesses recorded under Sections 161 Cr.P.C., referred to herein above including the statements of the villagers and security guards under Section 161 Cr.P.C. Such plea of alibi of the revisionists has not been considered by the concerned Sessions Judge while passing the impugned order, which is arbitrary and per se illegal. The strong plea of alibi of the applicant is supported by cogent material collected by the investigating officer during the investigation and no new/additional/fresh material was brought on record contradicting/confronting the already available material by PW-1, therefore, the power under Section 319 Cr.P.C. should not have been exercised by the learned trial judge. Reliance in that regard has been placed upon the judgment of this Court in the case of **Shiv Prakash Mishra v. State of Uttar Pradesh**, reported in *(2019) LawSuit (SC) 1340, (Para 10, 11, 12).*

(iii) The concerned Sessions Judge, while passing the impugned order has failed to record his prima facie satisfaction for the revisionists, therefore, the same is illegal. In this regard reliance has been placed upon the judgment of the Apex Court in the case of **Hardeep Singh Vs state of Punjab** reported in *(2014) 3 SCC 92.*

(iv) The concerned Sessions Judge while passing the order dated 28th April, 2023 has not considered the material available on record collected during the course of investigation and committed gross illegality in summoning the revisionist. In support of this submission, reliance upon the judgment of the Apex Court in the case of **Brijendra Singh & Others Vs. State of Rajasthan** reported in *(2017) 7 SCC 706* has been placed.

(v) Initially in the statements recorded under Section 161 Cr.P.C. on 29th May, 2014, the eye-witnesses, namely Rekha sister of the deceased and Harendra have denied the presence of the revisionists on the spot at the time and date of incident and they have specifically named the one Praveern alias Billu and one Ankit that they had shot the deceased. However, after being pressurized by the first informant, they have filed their respective affidavits after 22 days stating that the earlier statements given by them before the Police under Section 161 Cr.P.C. are false and they have supported the allegations made by the first informant/ opposite party no.2 in the FIR as well as in his statement recorded under Section 161 Cr.P.C. On the basis of such contradictory statements of these two eye witnesses and the statements of the witnesses proving the alibi of the revisionists the Investigating Officer has exonerated the revisionists qua their involvement in the murder of the deceased Neeraj from the present case while filing the charge-sheet. However, ignoring the evidence collected by the Investigating Officer, the concerned Sessions Judge has passed the impugned order summoning the revisionists as accused in the present case.

(vi) The first informant/ P.W.-1 has again reiterated the allegations against the revisionist as alleged in the FIR which had already been tested/investigated by the investigating officer and the same was found to false in fair and impartial investigation and he was exonerated from the charge sheet. That no application under section 319 Cr.P.C. has been moved by the state (Prosecution) and the instant application under section 319 Cr.P.C. has been moved by the first informant on his own without protesting the final report at the stage of cognizance.

(vii) The trial Judge without going through the material on record in a most mechanical manner in gross violation of the provision of law and various pronouncements of the Hon'ble Apex Court has committed gross illegality while passing the impugned order and summoned the revisionist vide order dated 28.04.2023 and without discussing a single evidence upon which he has recorded his prima facie satisfaction for summoning the revisionist under section 319 Cr.P.C. It is settled that for summoning the additional accused under Section 319 Cr.P.C. degree of satisfaction is much stricter [Reference: **Brijendra Singh (Supra)].**

(viii) The concerned Sessions Judge while passing the impugned order should have taken into consideration the standard of proof employed for summoning a person as an accused under Section 319 Cr.P.C, is higher than the standard of proof employed for framing a charge and thereby has committed gross illegality (Reference **Sugreev Kumar v. State of Panjab**, reported in *2019 (3) Supreme 7, Para-12*).

On the cumulative strength of the aforesaid, learned counsel for the revisionists submits that the order impugned passed by the concerned Sessions Judge cannot be legally sustained and is liable to be quashed.

8. **SUBMISSIONS ADVANCED ON BEHALF OF OPPOSITE PARTY NOS. 1 AND 2**

Per contra, learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionists by contending that there is no illegality or infirmity in the order passed by the Sessions Judge allowing the application of opposite party no.2 under Section 319 Cr.P.C. for summoning the revisionists as accused in the case in hand.

9. Apart from the above, Mr. Ankit Saran, learned counsel for opposite party no.2 has contended as follows:

(i) The present dispute arose when a first information report was registered on 24.5.2014 at about 1300 hours in respect to an incident which occurred on 24.5.2014 at about 1130 hours, the present revisionists who were specifically and categorically arrayed as an accused persons in the first information report.

(ii) The first information report was prompt and the ingredients therein will go to show that first informant, Rekha sister of the deceased and Harendra were ocular witnesses who had categorically pointed fingers upon the present revisionists of their involvement in the commission of the alleged crime, directly. Once the first information report gets lodged, the investigating officer setting the procedure into motion prepared site plan, send the corpse of the deceased for autopsy, and he further proceeded to record the statement of first informant as well as other witnesses of the incident.

(iii) The Investigating Officer was being hand-in-gloves with the revisionists and manipulated the statements of sister of the deceased, namely, Rekha and the independent witness, namely, Harendra recorded u/s 161 Cr.P.C., which will go to show that the Investigating Officer from the very beginning of the investigation was inclined to exonerate the revisionists. Having gained the knowledge regarding the aforesaid act of the Investigating Officer, the complainant/informant as well as the eye-witnesses of the incident immediately rushed to the Investigating Officer and submitted their respective versions on oath by way of affidavits in

which they all demolished the entire version recorded by the Investigating Officer under Section 161 Cr.P.C., and confirmed the previous version as unfolded in the first information report. Apart from the versions made in the affidavits, the statements of first informant Dinesh, eye-witnesses, namely, Rekha, Satendra and Harendra under Sections 164 Cr.P.C., unanimously deposed against the revisionists and have categorically shown the involvement of the present revisionists in the murder of Neeraj (deceased). Not even in the statements recorded under Section 164 Cr.P.C. the first informant as well as the eye-witnesses, namely, Harendra confirmed their version when they were produced before the Court as Prosecution Witnesses Nos. 1 and 2 in the respective testimonies and have also categorically assigned the role of causing fire- arm injuries to the deceased upon the revisionists.

(iv) The submission as advanced by the learned counsel for the revisionists regarding the CDR report as well as location of the mobile phones of the revisionists were at distant place than that of the place of incident showing that they were not present at the place of incident, is incomplete, wrong and has no force, as the plea of alibi which has been raised on behalf of the revisionists, is not palpable. Mere the location of the devices (mobile phones) which the revisionists were using at the time of incident, is insufficient to establish their non-involvement in the commission of the alleged crime. The devices (mobile phones) which the revisionists were using at the time of incident and its CDR report would not defy the versions so placed by the ocular witnesses. Moreover, the admission of such alibi would not be considered at the stage of their summoning under Section 319 Cr.P.C. for the reasons that the same is an electronic evidence which under the provisions of Section 3 of the Evidence Act, would needed to be certified by an Expert under the provisions of 65-B of the Evidence Act, which is required to be certified after the prosecution evidence is over. Hence, the plea of alibi adduced by the revisionists is sketchy. It is not a case where the accused has

proven with absolute certainty so as to exclude the possibility of their presence at the place of occurrence. The evidence adduced by the revisionists is not of such quality that the court would entertain any reasonable doubt.

(v) The burden on the accused/revisionists is rather heavy and they are required to establish the plea of alibi with certitude. In the instant case, nothing has been brought on record to establish that the revisionists were not present at the scene of offence at the time of incident and they were present at another place at such time. In support of the aforesaid submission a judgment and order passed by the Hon'ble Supreme Court in the case of **Vijaypal Vs. State (GNCT) of Delhi,** reported in *2015 0 Supreme (SC) 214* has been relied upon.

(vi) The precise argument of the learned counsel for the revisionists was in regard to the recording of satisfaction before summoning the revisionists under the provision of 319 Cr.P.C. and further argument was that the court ought to have recorded the evidence so placed on the point of alibi, which are incorrect. Such evidence cannot be accepted at the stage of consideration of application under Section 319 Cr.P.C., the merits of the evidence has to be appreciated only during the course of trial by cross-examination of the witnesses and scrutiny by the Court. This is not to be done at the stage when an application under Section 319 Cr.P.C. has to be entertained. In support of such plea, reliance has been placed upon the judgment and order of the Hon'ble Supreme Court in the case of **Manjeet Singh Vs. State of Haryana and others (Para 38)** reported in *MANU/SC/0546/2021* which has been followed in the recent judgment of the Hon'ble Supreme Court in the case of **Sandeep Kumar Vs. State of Haryana and others** reported in *2023 SCC OnLine SC 888.*

(vii) So far as the consideration of the plea of alibi at the stage of summoning of the accused under Section 319 Cr.P.C. is concerned, such consideration would be premature. The plea of

alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused beyond reasonable doubt. Reliance in that regard has been placed upon the judgment of the Hon’ble Supreme Court in the case of **Darshan Singh Vs. State of Punjab** reported in *2016 0 Supreme (SC) 2.*

(viii) The prosecution witnesses at every stage i.e. statements recorded under Section 164 Cr.P.C., in the affidavits given to the Investigating Officer and testimonies recorded before the Court, has categorically stated about the involvement of the revisionists in the commission of the alleged crime, directly, and would definitely have a higher evidentiary value than that of the version so placed in the statements given before the Investigating Officer under Section 161 Cr.P.C. by the witnesses of fact, namely, Rekha sister of the deceased and the independent witness Harendra.

(ix) In catena of judgments, the Hon'ble Supreme Court has held that only prima-facie case is to be established from the evidence laid before the Court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of their complicity. The test has to be applied in one which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence, if goes un-rebutted would lead to conviction.

On the cumulative strength of the aforesaid, Mr. Ankit Saran, learned counsel for opposite party no.2 submits that in totality of the fact that the accused/revisionists have been rightly summoned by the learned trial court and the heavy burden is upon them to discharge. Qua the plea of alibi so raised on behalf of the revisionists, the Court has rightly overlooked the same as the same has to be dealt with after the prosecution has placed its case against the revisionists beyond all reasonable doubts. Therefore, the impugned order is just and reasonable and does not warrant any interference by this Hon'ble Court while exercising its powers under Section 397/401 Cr.P.C.

10. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present criminal revision specifically the order impugned passed by the trial court on an application filed by opposite party no.2 under Section 319 Cr.P.C. for summoning the revisionists as accused in the present criminal proceedings.

11. Except the submissions made by the learned counsel for the revisionists that the trial court vide order impugned while allowing the application of the complainant/opposite party no.2 and summoning the revisionists as accused, has not considered the plea of the alibi of the revisionists on the basis of oral as well as evidence collected by the Investigating Officer during the course of investigation nor has recorded any finding in that regard in the impugned order, all other submissions made by the learned counsel for the revisionist qua the legality, illegality or otherwise of the present criminal proceedings which have been initiated by opposite party no.2 against the revisionists cannot be examined by this Court while exercising its revisional power under Section 397/401 of Code of Criminal Procedure. Such submissions can only be examined by the Bench having its extraordinary jurisdiction under Sections 482 Cr.P.C. This Court can only examine the correctness, legality, illegality or otherwise of the order which is under challenge in the present criminal revision on the plea of alibi raised by the learned counsel for the revisionists.

12. The Apex Court in the case of **Amit Kapoor Vs. Ramesh Chander & Another** reported in (2012) 9 SCC 460 has opined that the jurisdiction of the court under Section 397 Cr.P.C. can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be, whereas Section 482 Cr.P.C. confers a very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.

13. Paragraph nos. 12, 13,18, 20 and 21 of the judgment in the case of **Amit Kapoor (Supra)**, which are relevant on the aforesaid issue, are being quoted herein below:

> *"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well- founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.*
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> *13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C.*
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> *….*
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> *18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.*
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> *….*

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397 (2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor & Ors. Vs. State of Punjab & Ors. [AIR 1980 SC 258 : (1980) 1 SCC 43]}. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397 (2) and 397 (3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High

> *Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397 (2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction."*

13. Now this Court comes to examine the legality or otherwise of the impugned order only on the submissions made by the learned counsel for the revisionists that the trial court while passing the same has not considered the plea of alibi of the revisionists on the basis of oral, electronic as well as documentary evidence collected by the Investigating Officer.

14. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those, who are guilty of an offence. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power in the court to proceed against others not arrayed as accused in the circumstances set out by this Section. It is a salutary power enabling the discharge of court's obligation to the society to bring to book all those guilty of a crime.

15. In **Hardeep Singh's case,** which has heavily been relied upon by the learned counsel for opposite party no.2 as well as the learned counsel for the revisionists, the Apex Court has observed as follows:

> *"12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.*
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> *It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?*
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> *The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.*
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> *13. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court.*
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> *This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression 'magistrate of first class' and 'any magistrate' to include Metropolitan Magistrates who are empowered to try the*

offences under the said Schedule but excludes Executive Magistrates.

14. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2 (g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

15. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

16. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the

> *courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."*

16. Essentially, the main thrust of the learned counsels for the revisionists is to the plea of alibi which according to them was of an impeccable quality and thus, the trial judge should have considered the same taking into consideration the statements of witnesses recorded by the Investigating Officer under Section 161 Cr.P.C. to record a positive finding that the revisionists could not have been present at the scene of commission of crime as also the trial judge should have also taken into consideration the electronic evidence i.e. Call Detail Reports of the revisionists to establish the plea of alibi of the revisionist. It is well settled that statement recorded under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker of the statement thereof in the manner laid down in the said proviso. Therefore, the trial judge was perfectly justified in not placing reliance on wholly inadmissible evidence of alibi collected during investigation and if he had relied upon the same it would squarely be against interpretation given by Constitution Bench of Hon'ble Apex Court in **Hardeep Singh's case** being extraneous material collected during investigation and could not be treated as an evidence for the purposes of exercise of powers under Section 319 Cr.P.C. Consideration of plea of alibi while exercising powers under Section 319 Cr.P.C. may also be looked into from another angle i.e. Section 103 of Evidence Act which stipulates that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person. Second illustration to Section 103 of Evidence Act reads as under:

> *"B wishes the court to believe that at that time in question he was elsewhere, he must prove it."*

17. This provision makes it obvious that burden of establishing plea of alibi of the revisionists before this Court lay squarely upon them. There is hardly any doubt regarding this legal proposition. Reference may be made to the cases of State of **Haryana Versus Sher Singh,** reported in *Manu SC/0236/1981,* **Gurcharan Singh Versus State of Punjab,** reported in *Manu SC/0122/1955* and **Chandrika Prasad Singh Versus State of Bihar** reported in *Manu SC/0084/1971.*

18. This could be done by leading evidence in trial court and not by relying on the material collected during investigation. In such a case the prosecution would have to be given an opportunity to cross-examine this witness to demonstrate that their testimony was not correct. The Court also in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C. The revisionists accused will have ample opportunity to place their evidence at the appropriate stage. In this behalf the judgement of the Hon'ble Apex Court, rendered in the case of **State of Orissa Versus Debendra Nath Padhi**, reported in *2004(8) Supreme Court Cases 568* be referred to. It was held:

> *" .....Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention*

> *of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."*

19. The plea of alibi of the revisionists on the basis of Call Detail Reports of the revisionists can also not be considered at the stage of summoning under Section 319 Cr.P.C. on the ground that the same is an electronic evidence which as per Section 3 of the Evidence Act would needed to be certified by an Expert under Section 65-B of the Evidence Act, which is required to be certified after the prosecution evidence i.e. examination-in-chief and cross-examination of prosecution witnesses is over.

20. In the case of **Darshan Singh (Supra)**, which has been relied upon by the learned counsel for opposite party no.2, the Apex Court has opined as under:

> *"The word alibi means "elsewhere". The plea of alibi is not one of the General Exceptions contained in Chapter IV of IPC. It is a rule of evidence recognized under Section 11 of the Evidence Act. However,* ***plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused. In the present case said condition is fulfilled."***
>
> ***("Emphasis added")***

21. In the case of **Sandeep Kumar (Supra)**, which has heavily been relied upon by the learned counsel for opposite party no.2, the Apex Court has opined in paragraph 12 as follows:

> *"The reasoning given by the High Court, cannot be accepted at the stage of consideration of application under Section 319 Cr.PC.* ***The merits of the evidence has to be appreciated only during the trial, by cross examination of the witnesses and scrutiny of the Court.*** *This is not to be done at the stage of Section 319, though this is precisely what the High Court has done in the present case. Moreover, the High Court did not appreciate the important fact that the charges being faced by the accused were under Sections 458, 460, 323, 285, 302, 148 and 149 I.P.C. Thus, one of the charges being Section 149, which is of being a member of an unlawful assembly, for attracting the offence under Section 149 IPC, one simply has to be a part of an unlawful assembly. Any specific individual role or act is not material. [See : 2021 SCC OnLine SC 632- Manjeet Singh Vs. State of Haryana & Ors. Para 38]."*

22. In view of the settled legal proposition of law as explained by the Apex Court in the above series of judgments, this Court finds that the trial court has not committed any illegality or irregularity in not considering the plea of the alibi of the revisionists while passing the order impugned allowing the application of opposite party no.2 under Section 319 Cr.P.C. and summoning the revisionists as accused. This Court also finds substance in the submissions made by learned counsel for opposite party no.2 in that regard.

23. Now this Court examine the applicability of the judgment of the Apex Court in the case of **Brijendra Singh (Supra)**, which has heavily been relied upon by the learned counsel for the revisionists.

24. I would like to deal with legal aspect as to what material/evidence is to be considered under Section 319 Cr.P.C. as laid down in the judgements of the Hon'ble Apex Court in the Constitution Bench decision rendered in the case of **Hardeep Singh (supra).** The Hon'ble Apex court in it's decision of Constitution Bench in the case of **Hardeep Singh (supra)** has considered the scope, ambit and sweep of Section 319 Cr.P.C. in detail and has framed several questions including question No. (iii) which is reproduced below:-

> *"Question (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 ?"*

25. The above said question has been answered in the following manner by the Apex Court:-

> *"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus limited to the evidence during trial."*

26. This Court, after carefully considering the Constitution Bench decision of Apex Court in the case of **Hardeep Singh (supra)** and subsequent decisions in **Brijendra Singh's case** is of the opinion that a bare perusal of two Judges's Bench decision of Apex Court in the **Brijendra Singh's case** reveals that though earlier decision of **Hardeep Singh's case** was considered, however, the scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the judgement was not considered in the subsequent cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

27. With profound respect and utmost humility at my command, I may record that it is well settled that authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam.

28. In **Quinn v. Leathem,** (*1901) AC 495, Earls of Halsbury L.C.* stated:

> *"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other case is only an authority for what it actually decides."*

29. It is also well settled that a decision is precedent on its own facts. Each case presents its own feature. It is not everything said by a Judge while giving judgement that constitutes a precedent. The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

30. This Court always respects any view expressed by the Apex Court like the view expressed in the case of **Brijendra Singh (Supra)** but the conflicting view appeared to exist on the same point of meaning of expression ''evidence' used in Section 319 Cr.P.C., the decision of Hon'ble Apex Court in the case of **Hardeep Singh (Supra)** rendered by Bench of larger composition shall prevail upon the case of **Brijendra Singh (Supra)** and another decision. Therefore, the judgment of the Apex Court in the case of **Brijendra Singh (Supra)** does not apply in the facts of the present case.

31. This Court has also find substance in the submission made by the learned counsel for opposite party no.2 that the statements given by the eye witnesses, namely, Rekha i.e. sister of the deceased in the affidavit submitted before the Investigating Officer and given before the Magistrate under Section 164 Cr.P.C. as well as the statements given by independent eye witness, namely, Harendra in the affidavit submitted before the Investigating Officer, given before the Magistrate under Section 164 Cr.P.C. and also given before the trial court as P.W.-2 have more evidentiary value rather than that the statements given by them before the Police under Section 161 Cr.P.C.. In the statements given in the affidavit and before the Magistrate under Section 164 Cr.P.C., eye witness Rekha has categorically stated qua the involvement of the revisionists in the

commission of the alleged crime i.e. murder of the deceased. Similarly, in the affidavits submitted before the Investigating Officer, in the statements given before the Magistrate under Section 164 Cr.P.C. and in the statements given before the trial court, both the prosecution eye witnesses, namely, Dinesh Kumar (first informant/opposite party no.2) and Harendra, who is also an independent eye witness, have pin-pointed the revisionist for commission of the alleged offence.

32. In the light of aforesaid, the present revision is bereft of merit. The impugned order passed by trial judge is perfectly justified and well within the guidelines/ parameters laid down by Constitution Bench decision of Hon'ble Apex Court in the case of **Hardeep Singh (Supra)** and the judgments on the subject of alibi referred to herein above.

33. The present criminal revision is accordingly dismissed. There shall be no order as to costs.

(Shiv Shanker Prasad, J.)

Order Date :- 24.8.2023

Anurag-Sushil/-