AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 1283 of 2016

Reserved on 19.07.2019
Pronounced on 31.07.2019

- Ramesh Kumar Chaubey, S/o Late Murlidhar Chaubey, Aged About 65 Years, R/o Village Gharghoda, Tahsil And Police Station Gharghoda, District Raigarh, Civil And Revenue District Raigarh, Chhattisgarh.,

---- Applicant/Petitioner

Versus

1. State Of Chhattisgarh Through District Magistrate, Raigarh, District Raigarh, Chhattisgarh.,
2. Jyotish Kumar Mahant, S/o Shri Adbad Das Mahant, Aged About 40 Years R/o Sethinagar, Raigarh, Police Station Chakardhar Nagar, Raigarh, Tahsil And District Raigarh, Chhattisgarh., District : Raigarh,

---- Respondents

For Applicant/Petitioner	:	Shri Manoj Kumar Sinha, Advocate.
For Non-applicant 1/State	:	Shri Vimlesh Bajpai, Government Advocate.
For non-applicant 2	:	None appears, though served.

Hon'ble Shri Justice Sanjay Agrawal

C.A.V. Order/Judgment

1. The Petitioner has filed this petition questioning the legality and propriety of the order dated 28.06.2016 passed by the learned Second Additional Sessions Judge, Raigarh (C.G.) in Criminal Revision Case No. 202200000792016 whereby the Revisional Court, while reversing the order dated 26.03.2016 passed by the learned Judicial Magistrate First Class, Gharghoda, in Criminal Case No. 279/2002, has directed for impleadment of the Petitioner as an accused by allowing the application filed by respondent No.2/accused under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.)

2. Briefly stated the facts of the case are that the Petitioner was performing his duty as the Manager of Samiti known as Adimjati Sewa Sahakari Samiti while, Jyotish Kumar Mahant, respondent No.2 herein, as the Salesman of the said Cooperative Society, who has misappropriated the amount of Rs.2,18,750/- (Rupees two lakhs eighteen thousand seven hundred and fifty only) of the said Samiti. A first information report was, therefore, registered against him on 09.06.2001 on the basis of complaint lodged by one N.H.Sao in the Police Station, Gharghoda, District Raigarh. Based upon it, a crime has been registered by the concerned Police Station against respondent No.2 in connection with Crime No.64/2001 for an offence punishable under Section 409 of the Indian Penal Code (for short the IPC). Chargesheet was filed thereafter against him before the Court of Judicial Magistrate First Class, Gharghoda by the Investigating Officer after recording evidence of the witnesses under the offence mentioned herein above.

3. During trial, an application was made by respondent No.2 under Section 190 of the Cr.P.C. for taking cognizance against the Petitioner as his name was also mentioned as one of the co-accused in the audit report as well as the report lodged by Branch Manager of the Samiti, Gharghoda. The said application was, however, rejected by the trial Court vide its order dated 09.10.2002 observing, inter alia, that no materials are available on record so as to hold the Petitioner's involvement and observed further that a proceeding would be initiated against him under Section 319 of the Cr.P.C. if his involvement is found through prosecution witnesses. The said order is affirmed further by the Revisional Court vide its order dated 27.02.2003 in a Criminal Revision No.288/02 preferred by respondent No.2.

4. The trial Court proceeded further in the matter while recording the evidence of the prosecution witnesses including that of the Petitioner. In their

statements, allegations were levelled against the Petitioner regarding embezzlement of the said amount of the Society. An application was, therefore, made by respondent No.2, as per the provisions prescribed under Section 319 of the Cr.P.C. praying for impleadment of the Petitioner as a co-accused in the said crime. The aforesaid application was served upon the Petitioner and after hearing the parties, the trial Court, vide its order dated 26.03.2016, has rejected the said application on finding that there are no sufficient evidence available on record so as to implead the Petitioner as a co-accused.

5. Being aggrieved with the aforesaid order, respondent No.2 preferred a revision petition without impleading the Petitioner. The Revisional Court, in turn, has examined the statements of the prosecution witnesses, vis-a-vis, audit report and F.I.R. and thereby arrived at a prima facie conclusion that the Petitioner is also involved in connection with the said crime. In consequence, set aside the order dated 26.03.2016 vide its impugned order dated 28.06.2016 by allowing the said application as filed by respondent No.2 under Section 319 of the Cr.P.C. This is the order, which has been questioned by way of this petition.

6. Shri Manoj Kumar Sinha, learned counsel for the Petitioner submits that the order of the Revisional Court is bad in law to the extent that the trial Court had initially at the first instance, while considering the application under Section 319 of the Cr.P.C. filed by respondent No.2 herein, considered threadbare evidence, which has come on record and after considering the entire facts and circumstances of the case, reached to the conclusion that the evidence against the present Petitioner prima facie has not been established nor can it be remotely suggested to have been committed by the Petitioner. According to the counsel for the Petitioner, if at all there is any lacuna on the

part of the Petitioner, that is only in course of the discharge of his duties, i.e., in not properly supervising the subordinate officials worked under him. According to him, it was not the Petitioner, who had committed the embezzlement rather it is a case where the Salesman of the Society, who had committed the offence and the Petitioner has wrongly been ordered to be impleaded as an accused in the case. He further submits that in the instant case, even procedurally, the Petitioner could not have been made an accused for the reason that he is a witness on behalf of the prosecution and has already examined as P.W.9, and therefore, the witness, having already been examined, cannot be subsequently made as an accused. In support, he placed his reliance upon the decision rendered in the matter of ***R. Dinesh Kumar @ Deena*** vs. ***State Rep. By Inspector of Police*** and ***Brijendra Singh and Others*** vs. ***State of Rajasthan*** reported respectively in (**2015**) **7 SCC 497** and (**2017**) **7 SCC 706** and placed his reliance further upon the decision rendered in the matter of ***Labhuji Amratji Thakor & Others*** vs. ***The State of Gujarat & Another*** by the Supreme Court on 13.11.2018 in Criminal Appeal No. 1349 of 2018. It is contended further by him that when an application was made under Section 319 of the Cr.P.C. by respondent No.2, the copy of it was not only served upon the Petitioner but also upon hearing him, the trial Court, by its order dated 26.03.2016, has rejected the said application, however, at the time of preferring the revision petition against the said order, he was neither impleaded nor any opportunity of hearing was provided to him. As such, the order impugned has been passed without providing sufficient opportunity of hearing in utter violation of the principles of the natural justice, and therefore, it is not at all sustainable and deserves to be quashed.

7. On the other hand, Shri Vimlesh Bajpai, learned Government Advocate for the State, while supporting the order impugned, submits that it is a case

where the name of the Petitioner has been reflected both in the F.I.R. as well as in the audit report of the Society of being involved in the offence. In addition, the witnesses, who have been examined till now, majority of them also have named the Petitioner to have played some role in the commission of offence, and therefore, the finding of the trial Court at the initial stage was not proper rather the Revisional Court has properly considered the case and passed the order impugned. He submits further that while deciding the application enumerated under Section 319 of the Cr.P.C. no prior notice, as contended by Shri Sinha, is required to be issued to him and the person other than the accused could be impleaded as a co-accused if his involvement appears to be reflected from the evidence. The order impugned is, therefore, liable to be upheld.

8. I have heard learned counsel for the parties and perused the entire record carefully.

9. What is reflected from the record is that the Petitioner was undisputedly working as a Manager while respondent No.2 as a Salesman in the Society, namely, Adimjati Sewa Sahakari Samiti Maryadit and certain embezzlement amounting to Rs.2,18,750/- (Rupees two lacs eighteen thousand seven hundred and fifty only) took place, as alleged in chargesheet coupled with the evidence of the prosecution witnesses. It is also not in dispute that the Petitioner's name has been reflected both in the F.I.R. and the audit report. Further, on the basis of the evidence of the witnesses, who have been examined till now the majority of the witnesses have taken the name of the Petitioner having been involved in the commission of offence.

10. Another aspect which cannot be brushed aside is the fact that on an earlier occasion also, an application filed under Section 190 of the Cr.P.C. for

impleading the Petitioner as an accused, was dismissed by the Court below, at that point of time with an observation that correctness can be considered after the material witnesses are examined. Now, after the material witnesses have been examined and in their deposition, the name of the present Petitioner is reflected in the statement of majority of the witnesses, it cannot be said that the Revisional Court was wrong or unjustified while passing the order impugned.

11. In so far as the judgment cited by Mr. Sinha, learned counsel for the Petitioner in the matter of **R. Dinesh Kumar @ Deena** vs. **State Rep. By Inspector of Police** (supra) is, however, distinguishable from the facts involved in the present one. As in the said matter, an application enumerated under Section 319 of the Cr.P.C. was made by the accused seeking to summon one of the witnesses, namely, Shri L. Venkatesh as an additional accused on the ground that his statement, which was recorded under Sections 161 and 164 of the Cr.P.C. and also before the Court revealed that he had accepted the offer/proposal from one of the accused to kill Vijayan @ Vijay Kumar and had accepted the initial amount of Rs.50,000/- from him. There was no other evidence on record except to the said statement of him. As such, it was held therein that the evidence of said witness recorded as a prosecution witness before the trial Court and the incriminating answers given by him would amount to that of “compelled testimony” falling within the sweep of Section 132 of the Evidence Act, and therefore, he is entitled to be protected by the proviso to the said provision as he was summoned as a witness by the prosecution, and therefore, the evidence given by him cannot be used as the evidence of the prosecution. However, in the instant case, not only the prima facie involvement of the Petitioner is visualised from the said audit report and F.I.R., but also in the evidence of the other prosecution witnesses. In view of

that, the principles laid down in the said matter are apparently distinguishable from the facts involved in the present one.

12. Likewise, the principles laid down in the matter of **Brijendra Singh and Others** vs. **State of Rajasthan** (supra) is also distinguishable from the facts involved in the present case. In the said matter, the appellants sought to be summoned by the complainant under Section 319 of the Cr.P.C. who were not present on the fateful day, i.e., 29.04.2000 at the place of incident and in fact they were approximately 175 kilometers away from the said place, which was reflected based upon by the statement of the prosecution witness recorded under Section 161 of the Cr.P.C. As a consequence, the plea of alibi of theirs was found to be proved and accordingly the application filed by the complainant under Section 319 of the Cr.P.C. seeking to summon the appellants as an additional accused persons and which was allowed by the Courts below, was rejected.

13. Further reliance of Shri Sinha, learned counsel for the Petitioner in the matter of **Labhuji Amratji Thakor & Othrs** vs. **The State of Gujarat & Another** passed by the Supreme Court on 13.11.2018 in Criminal Appeal No. 1349 of 2018 is also of no use as in the said matter, offence punishable under Sections 363 and 366 of Indian Penal Code and also under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012, was registered on the basis of the complaint lodged by victim's mother that her daughter was abducted by one Natuji. The statement of complainant's daughter was also recorded by the Police who had taken the name of said Natuji alone. Thus, neither in the F.I.R. nor in the chargesheet, the names of Appellants, sought to be summoned under Section 319 Cr.P.C., were mentioned. In that factual scenario, the application filed under Section 319 Cr.P.C. was rejected. However, that is not the position here as the name of Petitioner was not only

depicted from the F.I.R. but also reveals from the Audit Report, vis-a-vis, the statements of the prosecution witnesses. The principles laid down in the said matter is, therefore, distinguishable.

14. Now, as far as the further contention of the learned counsel for the Petitioner that as the order impugned has been passed without providing an opportunity of hearing to the Petitioner, and therefore, suffers from the principles of natural justice, is, however, noted to be rejected. Before considering the said contention of the learned counsel for the Petitioner, it is necessary to examine the provisions prescribed under Section 319 of the Cr.P.C. which reads as under:-

> "**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.
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> (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.
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> (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----
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> (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;
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> (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."

15. A bare perusal of the aforesaid provision would show that it authorises the Court making any inquiry into or conducting of the trial of an offence to "proceed" against any person (other than accused facing trial) subject to two conditions; firstly that from the "evidence", it appears to the Court that such a

person has “committed any offence” and, secondly that such a person “could be tried altogether with the co-accused”. In other words, it authorises the Court to proceed against any person not shown or mentioned as an accused if it appears from the evidence that such person has been committed an offence for which he could be tried altogether with the main accused against whom an inquiry or trial is being held. The basic requirement, as visualised from the said provision is that, it appears to the Court, from the evidence collected pre-trial or in the inquiry that some other person could also be tried together with the accused already impleaded. What is, therefore, essential from a bare perusal of this provision is that the need to proceed against the person other than the accused would arise only on the basis of the evidence recorded in the course of any inquiry or trial. The provision nowhere provides for issuance of any notice and as such, persons have no right to hear before they are summoned, as contended by the learned counsel for the Petitioner. According to the said provision, the Court is required to take the cognizance of the offence, if reflected from the evidence during the course of trial and not of the offenders. The proposed accused are, therefore, not entitled for hearing.

16. At this juncture, the principles laid down in the matter of ***Raghubans Dubey*** vs. ***State of Bihar*** reported in **AIR 1967 SC 1167** are to be noted wherein it has been held at paragraphs 9 & 10 that once the Magistrate takes cognizance of the offence, it is his duty to find out as to who the offenders really are and once he comes to the conclusion that apart from the persons cited by the Police some other persons are involved, it is his duty to proceed against those persons and observed further that summoning of the additional accused is part of the proceeding initiated by his taking cognizance of the offence. It has been held further that where a Magistrate takes cognizance under Section 190 (i) (b) of the Cr.P.C. on a police report he takes cognizance

of the offence and not merely of the person named in the chargesheet, and therefore, the Magistrate is entitled to summon an additional accused against whom he considers that there was good evidence, after perusal of the statement recorded by the Police under Section 161 of the Cr.P.C. and other documents referred to in Section 173 even without examining of the witnesses in Court.

17. Likewise, in the matter of ***M/s. Indian Carat Private Limited*** vs. ***State of Karnataka and another*** reported in (**1989**) **2 SCC 132** that the Magistrate can take cognizance of an offence under Section 190 (i) (b) even if the police report is to the effect that no case is made out against the accused and it was also held that the Magistrate can ignore the conclusion arrived at by the Police and independently applied his mind to the facts emerging from the investigation taking into the statement of witnesses made during Police investigation and issue process to accused and that the Magistrate is not bound to follow the procedure laid down in Section 200 and 202 of Cr.P.C.

18. In the matter of ***Rawoof Patel and another*** vs. ***State and another*** reported in **1996 Cr.L.J. 1471** wherein it has been observed by Andhra Pradesh High Court while relying upon the decisions rendered in the matter of ***Joginder Singh*** vs. ***State of Punjab and another*** and ***Municipal Corporation of Delhi*** vs. ***Ram Kishan Rohtagi & Ors.,*** reported respectively in **AIR 1979 SC 339** and **AIR 1983 SC 67** at paragraph 3 as under:-

> "3..... It is also seen that the section itself does not contemplate any notice. In any view, the decisions of the Supreme Court in Joginder Singh vs. State of Punjab, AIR 1979 SC 339 and in Shri Mahant Kumarnath vs. State of Haryana, AIR 1983 SC 67 as seen above, do not contemplate any notice before action is taken u/Sec. 319 of Cr.P.C."
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> (Note: In **AIR 1983 SC 67, p**arties' names have inadvertently been mentioned as 'Shri Mahant Kumarnath vs. State of Haryana' whereas the

correct parties' names in the citation are 'Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and others' and it be read as such).

19. Reverting back to the case in hand, while keeping the aforesaid principles in mind, the Judicial Magistrate First Class although decided the said application filed under Section 319 of the Cr.P.C. after hearing the Petitioner but merely on the basis of this, it cannot be held that the Petitioner has acquired any right of hearing before action is taken under the said application. Consequently, I do not find any legal ground so as to warrant interference in the order impugned passed by the learned Second Additional Sessions Judge, Raigarh, in Revision.

20. The petition is accordingly dismissed. No order as to costs.

Sd/-
(**Sanjay Agrawal**)
Judge

Anjani