

SUPREME COURT OF INDIA

Sarojben Ashwinkumar Shah

Vs.

State of Gujarat & Anr.

Crl.A.No.1554-1557 of 2011

(Aftab Alam and R.M.Lodha,JJ.,)

10.08.2011

JUDGEMENT

R.M. Lodha,J.,

SLP(Crl.)No.9527-9530 of 2010

1. Leave granted.

2. These four appeals, by special leave, are directed against the common order of the Gujarat High Court whereby single Judge of that Court refused to interfere with the orders (all dated July 11, 2000) of the Judicial Magistrate First Class, Prantij directing addition of the present appellant as an accused (Accused No. 5) in various complaints.

3. For the sake of brevity and convenience, we shall refer to the facts from the appeal arising from complaint (Criminal Case no. 1132 of 1999) pending in the Court of Judicial Magistrate First Class, Prantij. Respondent no. 2--Gulamnabi Hebatkhan Sumara- filed a complaint against (i) M/s. Rashmi Builders, a partnership firm, (ii) Ashwinkumar Tribhovandas Shah and (iii) Chandravadan Gopaldas Thakkar in the Court of Judicial Magistrate, First Class, Prantij. It was alleged in the complaint that M/s. Rashmi Builders (Accused No. 1) is a duly registered partnership firm and Ashwinkumar Tribhovandas Shah (Accused No. 2) and Chandravadan Gopaldas Thakkar (Accused No. 3) are its partners. On the recommendation and advise of one Balkabhai alias Himatlal Dwarkadas Lal, a financial broker, the complainant lent and advanced a sum of Rs. 5 lakhs to the firm. The firm through its partner Ashwinkumar Tribhovandas Shah acknowledged the receipt of the said amount and also executed and delivered a promissory note for Rs. 5 lakhs on the same date. Later in discharge of its liability, the firm through its partner (Accused No. 2) issued a cheque for Rs. 5 lakhs drawn on the Federal Bank of India, Fort Branch, Bombay and delivered the same to Balkabhai alias Himatlal Dwarkadas Lal who handed over the said cheque to the complainant along with the promissory note. The complainant presented the said cheque for encashment on May 31, 1999 with his Banker but the same was dishonoured on June 3, 1999 with the remark "account closed". The complainant then sent a statutory notice of 15 days to

the firm and its two partners which was received by them on or about June 23, 1999. The accused failed and neglected to make payment within the statutory period and instead in its reply dated June 29, 1999, the firm denied having entered into any financial transaction with the complainant. The complainant thus alleged that the accused have committed offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, `N.I. Act') and under Section 420 and Section 114 of the Indian Penal Code. The other complaints were lodged by Usmanmiya Nanumiya Ghori, Mohamad Umarghan Akbarkhan Ghori and Daudbhai Rasulbhai Mansuri against the above three accused on the identical facts.

4. The Judicial Magistrate, First Class, Prantij took cognizance in the above complaints against the three accused, namely, (i) M/s. Rashmi Builders (a partnership firm), (ii) Ashwinkumar Tribhovandas Shah and (iii) Chandravadan Gopaldas Thakkar.

5. On November 4, 1999, the complainant in each of the complaints made an application under Section 319 of the Code of Criminal Procedure, 1973 (for short, `the Code') for joining Paresh Lakshmikant Vyas and Sarojben Ashwinkumar Shah (appellant herein) as Accused Nos. 4 and 5 respectively. It was averred that Accused Nos. 2 and 3 have submitted a copy of the registration of the firm--M/s. Rashmi Builders (Accused No. 1) wherein the proposed Accused No. 4 and Accused No. 5 have been shown as the partners of the firm and in this view of the matter, it was prayed that complainant may be permitted to join them as accused.

6. The Judicial Magistrate First Class, Prantij, as noted above, has directed that Paresh Lakshmikant Vyas and Sarojben Ashwinkumar Shah (appellant herein) be joined as Accused Nos. 4 and 5 and the High Court maintained such direction.

7. Section 319 of the Code reads as under :

"S. 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 afresh, and 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."

8. The ambit and scope of the power of the Court under Section 319 of the Code has come up for consideration before this Court on more than one occasion.

9. In *Joginder Singh and Another v. State of Punjab and Another*¹, this Court stated that the power conferred under Section 319(1) of the Code is applicable to all courts including a Sessions Court and the Court has power to add any person, not being the accused before it, against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused.

10. In the case of *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Others*², this Court (at page 8) held as under :

"19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

11. In *Michael Machado and Another v. Central Bureau of Investigation and Another*³, this Court on extensive consideration of the provision contained in Section 319 stated the (at pages 267-268) as follows :

"11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then, what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.

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14. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of subsection (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action.

12. In *Shashikant Singh v. Tarkeshwar Singh and Another*⁴, this Court considered the scope of Section 319 of the Code at page 743 of the Report in the following words:

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The 4 (2002) 5 SCC 738 words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be

held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

13. In *Krishnappa v. State of Karnataka*⁵, this Court reiterated what has been repeatedly stated that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

14. In *Palanisamy Gounder and Another v. State represented by Inspector of Police*⁶, this Court referred to two earlier decisions of this Court in *Michael Machado*³ and *Krishnappa*⁵ and observed that power under Section 319 of the Code cannot be exercised so as to conduct a fishing inquiry.

15. In *Guriya alias Tabassum Tauquir and Others v. State of Bihar and Another*⁷ most of the above decisions were referred to and it was observed that the parameters for dealing with an application under Section 319 of the Code have been laid down in these cases.

16. The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this :

“(i) The Court can exercise the power conferred on it under Section 319 of the Code suo motu or on an application by someone.

(ii) The power conferred under Section 319(1) applies to all courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the court.

(iv) The power to proceed against any person, not being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word 'evidence' in Section 319 contemplates the evidence of witnesses given in court in the inquiry or trial. The court cannot add persons as accused on the basis of materials

available in the charge- sheet or the case diary but must be based on the evidence adduced before it. In other words, the court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the court to the constraints imposed in Section 319 (4) that proceedings in respect of newly - added persons shall be commenced afresh from the beginning of the trial.

(viii) The court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion.

17. Now, if the order of the High Court is seen, it would transpire that after noticing the provisions contained in Section 319 and its scope, the High Court proceeded to hold that the order of the Magistrate did not call for any interference. The High Court, however, failed to consider whether Magistrate has addressed to the essential aspects before invoking his power under Section 319 of the Code. Moreover, the High Court did not advert to the question whether or not filing of copy of registration of the firm by Accused Nos. 2 and 3 would be covered by expressions 'in the course of any inquiry into or trial' and 'evidence' occurring in Section 319 of the Code and also the aspect as to whether such document could be treated as an evidence to show that the appellant (newly added accused) has committed an offence of cheating under Section 420 IPC. As regards the criminal liability of a partner in the firm, in light of the provisions contained in Section 141 of the N.I. Act, there has to be evidence that at the time the offence was committed, the partner was in-charge of and was responsible to the firm for the conduct of the business of the firm. A perusal of the impugned order would show that all these relevant aspects have not been considered by the High Court at all and the petitions under Section 482 of the Code were dismissed. As, in our view, the matter needs to be considered by the High Court afresh, we refrain from dealing with the orders of the Magistrate on merit lest it may prejudice the consideration of the petitions under Section 482 of the Code before the High Court.

18. Consequently, these appeals are allowed and the impugned order dated May 5, 2010 is set aside. Criminal Miscellaneous Application Nos. 5157 of 2000, 5158 of 2000, 5159 of

2000 and 5160 of 2000 are restored to the original number for hearing and reconsideration by the High Court in accordance with law.

Judgment Referred.

¹(1979) 1 SCC 0345

²(1983) 1 SCC 0001

³(2000) 3 SCC 0262

⁵(2004) 7 SCC 0792

⁶(2005) 12 SCC 0327

⁷(2007) 8 SCC 0224