2020 (0) AIJEL-HC 241943

GUJARAT HIGH COURT

Hon'ble Judges:R.P.Dholaria, J.

Natubhai Maganbhai Adenvala Versus State Of Gujarat

SPECIAL CRIMINAL APPLICATION No. 1731 of 2013 ; *J.Date :- FEBRUARY 25, 2020

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 482 , 319
- CONSTITUTION OF INDIA Article - 227

Cases Referred To :

1. Harbhajan Singh & Anr. V. State Of Punjab & Anr., 2009 13 SCC 608
2. Hardeep Singh Versus State Of Punjab, 2014 0 GLHEL-SC 54820
3. Hardeep Singh Versus State Of Punjab, 2014 3 SCC 92

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JUDGMENT :-

1 Rule returnable forthwith. Mr. Ronak Raval, learned APP waives service of notice of rule for and on behalf of the respondent no.1-State and Mr. Aftabhusen Ansari, learned advocate waives service of notice of rule for and on behalf of the respondent no.2-original complainant.

2 With the consent of learned advocates appearing for the respective parties, the matter is taken up for final hearing.

3 The petitioner invoking provisions of Article 227 of the Constitution of India and Section 482 of the Criminal Procedure Code, 1973, has challenged the order passed by learned Additional Sessions Judge, Kheda below application Exh.387 in Sessions Case No.291 of 2003 to implead him as an accused under the provisions of Section 319 of the Cr.P.C.

4 The brief facts of the case leading to filing of the present petition are as under:

> 4.1 On 08.07.2002, an FIR being C.R. No.I-286/2002 with Nadiad Town Police Station at District: Kheda came to be registered on a complaint filed by Usmanghani

Adambhai Vohra for the offences punishable under Sections 147, 148, 149, 364(A), 120(B), 447, 342 and 506(2) of the I.P.C. against 5 accused persons including the petitioner. That the police carried out thorough investigation, recorded the statements of various witnesses, collected documentary evidence and found that the petitioner was not involved in the case and therefore, submitted charge-sheet against remaining accused persons. This case was committed to the Court of sessions and the same was numbered as Sessions Case No.291 of 2003 and on 12.07.2004, the charge was framed in the case. Thereafter, the case was tried by the learned Additional Sessions Judge, Kheda at Nadiad and the evidence of almost all the witnesses had been recorded and concluded. This is a second round of litigation and second attempt on the part of the original complainant-respondent no.2 herein to implead the present petitioner as an accused by invoking the provisions of Section 319 of the Cr.P.C. Earlier an application was moved vide Exh.137 by the very complainant and the said application was rejected on 22.04.2006 and the said order of the learned trial Court came to be challenged before this Court and this Court confirmed the order of rejection passed by the learned trial Court. Against which, the complainant carried the matter up to the Hon'ble Supreme Court by way of filing Special Leave to Appeal (Criminal) No.17262 of 2012 and the Hon'ble Supreme Court on 11.01.2003 passed the following order:

Delay condoned.

We find no reason to entertain this Special Leave Petition which is, accordingly, dismissed.

However, it is open to the petitioner to file an application under Section 319 of Cr.P.C and if such an application is filed, the same will be considered by the Trial Court ignoring the evidence of PW1 to PW18 in accordance with law.

4.2 After rejection of application by the learned trial Court, this Court and the Hon'ble Supreme Court, upon examination of PW.19, 20, 21 and 23, again the complainant had made an application to join the present petitioner as party-accused and the learned trial Court was pleased to grant the aforesaid application below Exh.387 vide order dated 23.05.2013. Precisely, the aforesaid order has been challenged by the petitioner, inter alia, contending that the learned trial Court while considering the matter, ignored the cross-examination wherein improvement made by all the aforesaid four witnesses which they had not stated before the police and by way of making improved version in the examination in chief and the learned trial Court ignored the cross-examination as well as improved version of the aforesaid four witnesses and passed the aforesaid nature of order which is quite vulnerable. Mr. Buch, learned advocate further contended that law as regards to impleadment invoking the provisions of Section 319 of Cr.P.C. is no longer res-integra in the well known decision rendered by the Hon'ble Supreme Court in the case of Hardeep Singh Versus State of Punjab reported in 2014(0) AIJEL-SC 54820, wherein the Hon'ble Supreme Court has clearly laid down that the party who is sought to be impleaded invoking provisions of Section 319 of Cr.P.C. should make out more than the prima-facie case.

5 Mr. Hriday Buch, learned advocate for the petitioner has taken this Court through the evidence of all the four witnesses and pointed out that PW.19 himself in the examination in chief itself clearly admitted that he had no personal knowledge as regards to incident in question. The said witness further clearly admitted that whatever he had stated was upon the strength of the say of his father who apprised him as regards to the incident afterwards and therefore, according to his submission, his entire evidence is hearsay in nature, though in the examination in chief, he stated as if he had witnessed the incident and in his presence, the present petitioner threatened the victim for settlement of account and tried to involve the petitioner as if at the behest of the petitioner, the amount of ransom came to be demanded and the incident of abduction happened, but, in the cross-examination, he clearly admitted as stated above that he has no personal knowledge and not only that, but, he clearly admitted the same in police statement, he had not mentioned the aforesaid fact as stated in examination in chief. The same is the evidence of rest of the witnesses namely PW.20, PW.21 and PW.23.

6 In view of aforesaid nature of evidence and as contended by Mr. Buch, learned advocate for the petitioner, after conclusion of trial, the accused who were booked and chargesheeted by the investigating agency have already been convicted and the case is already over against them. He further argued that during the course of examination of investigating officer also, the aforesaid improved version of depositions of PW.19, PW.20, PW.21 and PW.23 is already brought on record in the deposition of the investigating officer and therefore, according to his submission, if the improvement made by the aforesaid all the four witnesses may be overlooked, then, there appears neither any complicity, nor any involvement of the present petitioner and no case is made out, though, the learned trial Court ignored the crossexamination and solely based upon examination in chief, wrongfully exercised the power vested under Section 319 of Cr.P.C. and therefore, present petition deserves to be allowed.

7 On the other hand, Mr. Aftabhusen Ansari, learned advocate for the respondent no.2-original complainant tried to convince this Court that while considering the application under Section 319 of Cr.P.C., the Court is only obliged to read ignoring the cross-examination and that part of evidence is crucial as to whether a person is to be impleaded as an accused under Section 319 of Cr.P.C. and he also tried to convince this Court placing reliance upon the celebrated decision of Hon'ble Supreme Court in the case of Hardeep Singh Versus State of Punjab reported in (2014) 3 SCC 92, more particularly, paragraphs-5, 80 to 85 and 110 of the said decision which read as under:

> 5. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:
>
> (i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?
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> (ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by crossexamination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

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

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

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

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80. 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 utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The evidence is thus, limited to the evidence recorded during trial. Q.(ii) Does the word evidence in Section 319 Cr.P.C. means as arising in Examination-in-Chief or also together with Cross- Examination?

81. The second question referred to herein is in relation to the word `evidence` as used under Section 319 Cr.P.C., which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In Rakesh (Supra), it was held that It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the courts power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not. In Ranjit Singh (Supra), this Court held that it is not necessary for the court to wait until the entire evidence is collected, for exercising the said power. In Mohd. Shafi (Supra), it was held that the pre-requisite for exercise of power under Section 319 Cr.P.C. was the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the cross examination is over and that there would be no illegality in doing so. A similar view has been taken by a twoJudge Bench in the case of Harbhajan Singh & Anr. v. State of Punjab & Anr. (2009) 13 SCC 608. This Court in Hardeep Singh (Supra) seems to have misread the judgment in Mohd. Shafi (Supra), as it construed that the said judgment laid down that for the exercise of power under Section 319 Cr.P.C., the court has to necessarily wait till the witness is cross examined and on

complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 Cr.P.C.

82. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.

83. As held in Mohd. Shafi (Supra) and Harbhajan Singh (Supra), all that is required for the exercise of the power under Section 319 Cr.P.C. is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The pre-requisite for the exercise of this power is similar to the prima facie view which the magistrate must come to in order to take cognizance of the offence. Therefore, no straight-jacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/Court is convinced even on the basis of evidence appearing in Examinationin-Chief, it can exercise the power under Section 319 Cr.P.C. and can proceed against such other person(s). It is essential to note that the Section also uses the words such person could be tried instead of should be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section 4 of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of Examination- in-Chief, the Court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by Cross Examination, undoubtedly in itself, is an evidence.

84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the crossexamination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section

299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

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

Q. (iv) What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?

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110. We accordingly sum up our conclusions as follows:

Question Nos.1 & III

Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND

Q.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?

A. In Dharam Pal's case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

- Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. II

Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by crossexamination or the court can exercise the power under the

said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

?A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV

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

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No.V

Q.V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of ?Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh. The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.

8 Heard Mr. Hriday Buch, learned advocate assisted by Mr. Nandish Thackar, learned advocate for Thakkar and Pahwa Advocates for the petitioner, Mr. Ronak Raval, learned APP and Mr. Aftabhusen Ansari, learned advocate for the respondent no.2-original complainant.

9 This Court has gone through the entire record and proceedings and also perused the depositions of all the respective witnesses came to be examined as PW.19, PW.20,

PW.21 and PW.23. This Court has also noticed that all the four witnesses in the cross-examination undertaken by learned advocate who was representing other accused who were facing trial and in their cross-examination, they have admitted that so far as abduction and demanding ransom at the behest of the present petitioner was not stated before the police. Precisely, in the reading of this Court, the complicity and involvement of the present petitioner is washing away if cogent reading of cross-examination is undertaken.

10 In view of aforesaid factual position, Mr. Ansari, learned advocate for the respondent no.2-original complainant has tried to convince this Court that while considering application under Section 319 of Cr.P.C. at the behest of the complainant, the Court has to ignore the cross-examination and the part of the examination in chief would be the only evidence as envisaged under Section 319 of Cr.P.C.

11 Mr. Ansari, learned advocate for the respondent no.2 further contended that though the present petitioner was named in the FIR, police did not chargesheeted him and thereafter, the aforesaid witnesses had deposed against him involving him as an accused. As stated above, previously also, the complainant filed such an application which came to be dismissed not only by the learned trial Court, but it went up to the Hon'ble Supreme Court and the Hon'ble Supreme Court had not approved his say and the Hon'ble Supreme Court clearly directed that evidence of PW.1 to 18 may be ignored and permitted the present complainant to make a new application if fresh evidence comes thereafter and therefore, the aforesaid aspect as argued by Mr. Ansari, learned advocate has already been considered in the previous litigation also and even if the petitioner was named in the FIR and thereafter, police did not file charge-sheet against him and thereafter, he failed to implead the present petitioner in previous litigation and in this second round of litigation, an attempt is made solely based upon the improved version of four witnesses itself is suggestive of the fact that nothing is available against the present petitioner.

12 This Court has thoughtfully considered the ratio laid down in the celebrated decision of Hardeep Singh (supra) and in that case, when the application was considered and went up to the Hon'ble Supreme Court, there was no cross-examination and therefore, the Hon'ble Supreme Court referred the examination in chief as an evidence. As in the common parlance prior to examination of any witness, the police statement may also be considered to be an evidence, primafacie evidence for putting a person to trial. In corollary to same, since cross-examination was not available and therefore, at every stage, the Hon'ble Supreme Court in the aforesaid decision, referred the examination in chief as the evidence and therefore, Mr. Ansari, learned advocate for the respondent no.2 tried to convince this Court that this Court should ignore the cross-examination and should also ignore the improved version in order to establish complicity of the present petitioner made by respective witnesses namely PW.19, PW.20, PW.21 and PW.23 should only be taken into consideration, is not at all acceptable and there cannot be such preposition of law. Whenever the Courts are required to consider as an evidence, if the cross-examination is available along with examination in chief, the Courts are always duty bound to read cross-examination also altogether with the examination in chief in order to form the version as an evidence. If the arguments of Mr. Ansari, learned

advocate for the respondent no.2 would be accepted, then, it would provide a hazardous mode of impleading the persons in the pending trial invoking provisions of Section 319 of Cr.P.C. For example, a person whenever came to be examined by the police while recording his statement under Section 161 of Cr.P.C not involving a particular person 'A' in his statement, and when he may be put to trial and in the examination in chief by way of making improvement if he proceed to implicate and depose against 'A' involving under a particular offence and while he may be cross-examined, he would state that such things he did not state before the police, in that case, no person would be safe, if that preposition is accepted as contended by Mr. Ansari. Even otherwise also, whenever cross-examination is available, the Court could never ignore the cross-examination and a witness's deposition is available, the Court is duty bound to not only read the examination in chief, but also duty bound to read the cross-examination and in totality it would furnish as an evidence and not solitary part of the examination in chief for forming the decision, if that is available.

13 The record and proceedings indicates that here in the present case, examination in chief as well as crossexamination of all the four witnesses namely PW.19, PW.20, PW.21 and PW.23 are available and when the learned trial Court considered the application at Exh.387, the crossexamination of PW.19 and PW.20 were available, though the learned trial Court ignored the cross-examination, which course is not permissible while exercising the powers as envisaged under Section 319 of Cr.P.C.

14 On the overall consideration of the evidence on record as referred to pertaining to PW.19, PW.20, PW.21 and PW.23, this Court is of the considered opinion that all the four witnesses on getting failed to implead the present petitioner in the previous round of litigation given the improved version in examination in chief and thereafter, again given the same application to implead the present petitioner, though some of the witnesses have clearly admitted that they had no personal knowledge and they have deposed upon the strength of whatever stated to them by other witnesses. In that view of the matter, even prima-facie, material is also not available to implead the present petitioner as an accused. The learned trial Court has totally fallen in error in ignoring the cross-examination and placing reliance upon the improved version of all the four witnesses and wrongfully granted the application Exh.387 to implead the present petitioner as an accused as such, which deserves to be quashed and set aside. In the result, the present petition succeeds and the same is allowed. The impugned judgment and order dated 23.05.2013 passed by learned Additional Sessions Judge, Kheda on application below Exh.387 stands quashed and set aside. Direct service is permitted.