A. F. R.

Reserved on 3.12.2020

Delivered on 14.12.2020

Court No. - 29

Case :- U/S 482/378/407 No. - 770 of 2015

Applicant :- C.B.I Thru S.P., New Delhi

Opposite Party :- The State Of U.P And Anr.

Counsel for Applicant :- Amarjeet Singh Rakhra,Varun Pandey

Counsel for Opposite Party :- Govt. Advocate,Pranshu Agrawal

Hon'ble Alok Mathur, J.

1. The entire controversy encompassing this petition can aptly be summed up in the following words of Bentham:-

> *"Witnesses are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial"*

2. The Central Bureau of Investigation has approached this Court with the prayer to quash the order dated 19/08/2014 passed by the Special Judge, C.B.I., Lucknow in Criminal Revision No.711 of 2014 (*CBI versus Shiv Saran Upadhaya)* as well as the order dated 10/03/2014 passed by Special Judicial Magistrate, C.B.I., Lucknow in case No.2 of 2014, whereby the application made by the Central Bureau of investigation for issue of summons to the then Judicial Magistrate, who recorded statements under section 164 of the Cr. P. C. of the witnesses and who subsequently turned hostile during trial, be examined as witness to prove the voluntariness of statements, has been rejected.

3. It has been submitted by the counsel for the petitioner that the opposite party No.2, who has been the erstwhile President of the Central Bar Association, District Court Lucknow, on 06/11/2008 along with a group of lawyers called for a strike and reached the District Court Campus, Lucknow and asked the Chaukidar Shri Mohd Anees and Shri Dinesh Kumar Verma, Lift Operators to hand over the keys of the multi-storey building and lift, with a view to paralyze the functioning of the District Court; that the said employees of the District Court refused to hand over the keys of the multi-storey building and lift to the group of lawyers headed by opposite party No.2, due to which they were mercilessly beaten and keys were forcibly snatched from them.

4. The aforesaid incident was Informed to the then Districts and Sessions Judge and a request was made to deploy additional forces so that peace would be restored in the District Court campus as due to the assault and misbehaviour with District Court Employees, their colleagues had started an agitation resulting in derailment of court proceedings.

5. Initially an FIR no. 460/2008 was registered at Police Station-Wazirganj, Lucknow on 06/11/2008 against opposite party No.2 and 15-20 other unknown advocates under sections 322, 353, 504, 506, 307 IPC, Section 7 of the Criminal Law Amendment Act and Section 3 of Prevention of Damage to Public Property Act. A complaint in this regard was given by Chaukidar Shri Mohd Anees which was duly forwarded by the District and Sessions Judge.

6. The investigation was conducted by the police and the charge sheet was forwarded to the Circle Officer on 26/08/2009 which was duly returned to the Investigating Officer with the remark that the address of the accused (opposite party no.2) has not been mentioned and there is no details of the other 15-20 advocates who have been mentioned in the First Information Report.

7. The investigating officer on 15/11/09 submitted a final report (closure) to the Superintendent of Police (City) (West), Lucknow mentioning that the complainant witnesses were examined but they were not ready to give any evidence against the accused. Subsequently a final report was filed by the local police on 30/10/2009 which was accepted by the court on 18/02/2010.

8. The aforesaid developments came to the knowledge of this Court while hearing writ petition No. 9925 (MB) 2010 and, by means of order dated 28/10/2010 it directed that the investigation of the case be done by the C.B.I.

9. During investigation by the C.B.I. the complainant Shri Mohd Anees confirmed the allegations in the statement given under section 161 Cr.P.C. and also specifically named opposite party No.2. Similarly, other five persons who are employees of the District Court, Lucknow were examined and the statements under Section 161 Cr.P.C. were recorded and all of them confirmed the version of the complaint.

10. Statements under section 164 Cr. P .C. of PW1 to PW6 were also recorded, where these witnesses have voluntarily supported the version of the first information report as well as the previous statement under section 161 of the Cr.P.C.

11. During trial PW1 to PW4 and PW6 turned hostile, which led to the filing of the application requesting for the appearance of Special Judicial Magistrate (Pollution) Lucknow. The trial court by means of the impugned order dated 10/03/2014 rejected the application, against which the revision was preferred before the District and Sessions Judge, Lucknow which was also rejected by means of order dated 19/08/2014 which has been impugned before this Court in this petition.

12. It has been contended by Shri Shiv P. Shukla, learned counsel appearing for the petitioner that five prosecution witnesses after

having been examined and having the statement recorded under section 161 Cr. P.C. were produced before Special Judicial Magistrate, where the statements under section 164 Cr. P. C. were recorded, have subsequently turned hostile during the trial. They have stated that the statements under section 164 Cr. P. C. were recorded under pressure. The C.B.I. in the aforesaid circumstances wanted to examine the Special Judicial Magistrate before whom the said statements were recorded to prove that the statements were recorded voluntarily contrary to what has been stated by the said witnesses during trial.

13. Opposing the petition counsel for opposite party No.2 Sri Pranshu Agarwal, Advocate submitted firstly that the petition under section 482 was not maintainable in as much as the application under section 311 of the Cr. P. C. was rejected by the trial court against which the revision was preferred before the Additional District Judge. The rejection of an application under section 311 of the Cr. P. C. amounts to an interlocutory order, against which no revision was maintainable, and also that once revision has been rejected, a petition under section 482 Cr.P.C. would not be maintainable.

14. Secondly, it was submitted that the statement under Section 164 of the Cr. P. C. was a public document and it was not necessary to summon the Judicial Magistrate to prove the authenticity of such document and, therefore, the application for summoning of the Judicial Magistrate was rightly rejected. He further submitted that an embargo was placed as per the provisions of Section 121 of the Evidence Act for summoning of judicial officers and, therefore, the Judicial Magistrate cannot be summoned to give evidence with regard to the fact where he was acting in the capacity of a judicial officer.

In support of his contentions reliance has been placed on the case of ***Union of India Vs. Orient Engg.& Commercial Co. Ltd., (1978) 1 SCC 10 at page 11*** as under:-

> "*Counsel for the appellant has objected, in this appeal, to the examination, as a witness, of an*

> *arbitrator who has given his award on a dispute between the appellant and the 1st respondent. His contention is that, on broad principle and public policy, it is highly obnoxious to summon an arbitrator or other adjudicating body to give evidence in vindication of his award. This is a wholesome principle as- is evident from s. 121 of the Indian Evidence Act. That provision states that no Judge or Magistrate shall, except upon the special order of some court to which he is subordinate be compelled to answer any questions as to his own conduct in court as such Judge or Magistrate or as anything which came to his knowledge in court as such Judge or Magistrate, but he may be examined as toother matters which occurred in his presence whilst he was so acting. Of course, this--section does not apply proprio vigore to the situationpresent here. But it is certainly proper for the court to bear in mindthe reason behind this rule when invited to issue summons to an arbitrator. Indeed, it will be a very embarrassing and, in many cases, objectionable if every quasi-judicial authority or tribunal were put to the necessity of greeting into the witness box and testify as to what weighed in his mind in reaching his verdict. We agree with the observations of Walsh, A.C.J. in Khub Lal v. Bishambhar Sahai(1) where the learned Judge has pointed out that the slightest attempt to get to the materials of his decision,, to get back to his mind and to examine him as to why and how he arrived at a particular decision should be immediately and ruthlessly excluded as undesirable.*"

15. The first objection raised by the counsel for the opposite party is with regard to the maintainability of the petition under section 482 Cr.PC. Undoubtedly, the rejection of an application under section 311 of the Cr. P. C. would amount to an interlocutory order against which a revision is not maintainable as per section 397(2) of the Cr. P. C. This aspect of the matter has been considered by the Hon'ble Supreme Court in the case of ***Sethuraman vs Rajamanickam (2009) 5 SCC 153*** wherein the Supreme Court has held:-

> *"5.* Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision

against those orders was clearly barred under Section 397 (2) Cr.P.C.*"*

16. The Division Bench of this Court in the case of ***Asif Hussain vs State of U.P. and another*** reported in ***2007 SCC online All 1125*** has also taken the same view and held:-

> *"5. It has been held by a large number of decisions of this Court as well as Supreme Court that order summoning or refusing to summon witnesses are interlocutory as they do not decide any substantive of right of the litigating parties, which are in an issue at the trial. Again the number of such decision has been referred to in the referring order of the learned single judge dated 30/11/2006 and, therefore it is not necessary to reproduce the same here.*
>
> *6. We therefore, answer the reference by holding that the order of learned Sessions Judge under section 3 Cr. P. C. refusing to summon witnesses, sought to be called by the accused, is a purely interlocutory order from the point of view of the accused – applicant and no revision again the same is maintainable."*

17. Considering the aforesaid legal proposition which is squarely applicable to the facts of the present case, once the application under section 311 of the Cr. P. C. was rejected by the trial court, it was not open for the Central Bureau of Investigation to move a revision under section 397 before the Additional District & Sessions Judge. The revision, therefore, was not maintainable and the judgment would be no-est and of no consequence. Further, even the Additional District and Sessions Judge ruled against the petitioner and therefore no interference is required in the present petition with the order of trial court.

18. To consider the arguments raised by the applicant even on merits it is necessary to go through the various statutory provisions in this regard.

19. According to section 164 Cr. P. C. :-

"164. Recording of confessions and statements.
(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial: Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.
(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-" I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
(Signed) A. B. Magistrate".
(5) Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.
(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

20. According to the aforesaid provision if any confessional statement is being recorded during course of investigation before the Judicial Magistrate then it has to be ensured that the person making such a statement is making it voluntarily and in case there is doubt in the mind of the Magistrate that the same is not being made voluntarily, he has sufficient discretion to decline from recording such a statement.

21. As per the dictum of the Apex court in the case of ***Mohd. Jamiludin Nasir v. State of W.B.*, (2014) 7 SCC 443** wherein it has been held:-

> **"21.** Going by the prescriptions contained in Section 164 Cr. P. C., what is to be ensured is that the confession is made voluntarily by the offender, that there was no external pressure particularly by the police, that the person concerned's mindset while making the confession was uninfluenced by any external factors, that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for suffering the conviction which may result in the imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not to make the confession after appearing before the Magistrate, the Magistrate should ensure that he is not entrusted to police custody. All the above minute factors were required to be kept in mind while recording a confession made under Section 164 CrPC in order to ensure that the confession was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and relied upon by the prosecution, the duty of the Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if while making such analysis the learned Sessions Judge develops any iota of doubt about the confession so recorded, the same will have to

be rejected at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under Section 164 CrPC and convince itself that none of the above factors were either violated or given a go-by to reject the confession outright. Therefore, if the Sessions Judge has chosen to rely upon such a confession recorded under Section 164 CrPC, the appellate court as well as this Court while examining such a reliance placed upon for the purpose of conviction should see whether the perception of the courts below in having accepted the confession as having been made in its true spirit provides no scope for any doubt as to its veracity in making the statement by the accused concerned and only thereafter the contents of the confession can be examined."

22. In ***Guruviindapalli Anna Rao Vs. State of A.P. [2003 Crl. L. J. 3253],*** a Division Bench of the Andhra Pradesh High Court held that since the previous statement of a witness under Section 164 Cr. P. C., has been recorded by a Magistrate, it is a public document, the Magistrate need not be summoned and examined as a witness. The Division Bench observed as under :

"7.We would like to put one more discrepancy on record, viz., that while recording evidence, the learned II Additional Sessions Judge had summoned the I Additional Munsif Magistrate, Tenali (PW.10) to prove the statement of P.W.1 recorded by him under Section 164 Cr.P.C. This Court has already ruled if any Magistrate records the statement of a witness under Section 164 Cr.P.C, it is not necessary for the Sessions Judges to summon that Magistrate to prove the contents of the statement recorded by him. This Court has already ruled that when a Magistrate, discharging his official functions as such, records the statement of any witness under Section 164 Cr.P.C, such statement is a 'public document' and it does not require any formal proof. Moreover, it is seen that the learned II Additional Sessions Judge, Guntur, while recording the evidence of the I Additional Munsif Magistrate, Tenali (PW.10), has exhibited the statement of P.W.1 recorded by the Magistrate as Ex.P.10. As a matter of fact, such statement cannot be treated as a substantive piece of evidence. Such statement can be made use of by the prosecution for the purpose of corroboration, or by the

> *defence for contradiction, under Section 145 of the Evidence Act. Therefore, the II Additional Sessions Judge, Guntur, is directed to note the provisions contained in Section 145 of the Evidence Act. Even if a statement is recorded by a Magistrate, it is not a substantive piece of evidence, but it is only a previous statement."*

23. The manner of recording confessions and statements has been dealt differently in Section 164 Cr. P. C. With regard to recording of confession it has been provided under subsection (2) the Magistrate is bound to explain to the person making the same about the confession about to be recorded and its impact upon the person making, and further that a declaration has to be made by the Magistrate with regard to the fact that the Magistrate has duly explained to the person making it about the nature of the confession and also that the same is voluntary. With regard to a statement other than confession, has to be recorded in the manner provided for recording of evidence and further there is one more distinction, as laid down in sub clause (4) of section 164 which provides that while recording a confession a declaration is to be made by the Magistrate that the same has been made voluntary and also that the same has been duly explained to the person making it.

24. Considering the aforesaid statutory provisions in light of the facts of the instant case, it is clear that the petitioner is requiring summoning of the Judicial Officer only with regard to giving evidence to the fact that the statement was made voluntarily and was not taken under pressure as deposed by the witnesses during trial.

25. In light of the provisions of section 164 read with section 281 of the Cr. P. C. the statement of the complainant as well as the other witnesses of the prosecution were to be recorded in the manner provided in the said sections and further no declaration was required by the Magistrate with regard to the voluntariness of the statement as it was only a statement of the complainant. The application of the

petitioner requiring summoning of a judicial officer to prove the voluntariness of the statement was clearly misconceived.

26. The statement recorded under section 164 of the Cr. P. C. would be a public document as per Section 74 of the Evidence Act and, therefore, does not require any formal proof by summoning the Magistrate to prove the same. This view of the matter has been has been so interpreted.

27. Learned trial court has rightly rejected the application moved under Section 311 Cr. P. C. for summoning the Judicial Officer and no interference is required to be made with the said order.

28. In light of the above, the order dated 19/08/2014 passed by the Special Judge, C.B.I., Lucknow (Court No.4) in Criminal Revision No.711 of 2014 (*CBI versus Shiv Saran Upadhaya)* is set aside and the order dated 10/03/2014 passed by Special Judicial Magistrate, C.B.I., Lucknow in case No.2 of 2014 (C.B.I. Vs. Shiv Sharan Upadhyay) is upheld.

29. The petition is **partly allowed.**

Dated: 14.12.2020. (**Alok Mathur, J.)**

RKM.