

Court No. - 27

Case :- APPLICATION U/S 482 No. - 161 of 2023

Applicant :- Sidhique Kappan

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko.

Counsel for Applicant :- Ishan Baghel, Mohd. Khalid

Counsel for Opposite Party :- G.A.

Hon'ble Shree Prakash Singh, J.

1. Heard Sri I.B.Singh, learned Senior Advocate assisted by Sri Ishan Baghel, learned counsel for the applicant, Sri Anirudh Kumar Singh, learned A.G.A.-I for the State.

2. Instant application under section 482 Cr.P.C. has been filed with a prayer to quash the order dated 19-12-2022 passed by the learned Special Judge, NIA/ATS/Additional District & Sessions Judge-5, Lucknow in Sessions Case No. 2219 of 2021, arising out of FIR No. 199 of 2020, Police Station-Mant, District-Mathura, under sections 153-A, 295A, 120-B I.P.C. and sections 17, 18, of U.P.P.A. Act, 1967 & sections 65 & 72 of the I.T. Act, 2008. It has further been prayed to direct the learned Special Judge, NIA/ATS/Additional District & Sessions Judge-5, Lucknow to decide the Discharge Application dated 19-12-2022 of the applicant on merit, after affording opportunity of hearing.

3. The factual matrix of the case in brief is that the applicant is a Journalist and was working for AZHIMUKHAM. COM. and when he was travelling to Hathras to cover the incident of "Hathras Gangrape" for reporting, he was arrested and detained under sections 107, 116 and 151 of Cr.P.C. on 05-10-2020 and was produced before the SDM Court at Mathura on 06-10-2020 and thereafter, he was sent to judicial remand under section 167 Cr.P.C. However, on 06-10-2022, a false narrative was made in the media that four PFI members have been arrested by the police and

thereafter, F.I.R. No. 199 of 2020 dated 07-10-2022 was registered under sections 153-A, 295 A and 124 I.P.C; section 17 & 18 of UAPA Act and 65, 72 & 76 of the IT Act and thereafter, the chargesheet was filed on 02-04-2021 and the matter proceeded.

4. Learned Senior Advocate appearing for the applicant submits that several applications were moved for compliance of Section 207 of Cr.P.C. and ultimately on 07-01-2022, only 106 pages were provided to the applicant and most of the copies are illegible. Thereafter, the applicant moved applications on 21-04-2022 and on 23-09-2022 before the trial court for ensuring compliance of Section 207 of Cr.P.C. He next added that co-accused, Firoz has been provided as many as 4872 pages whereas, the applicant has been deprived of and only 106 pages have been provided to him.

5. He next submits that the trial court without providing the prosecution papers in compliance of section 207 of Cr.P.C., proceeded in the matter and fixed the date i.e. 16-12-2022 for framing of charges. He submits that the accused persons were not present or summoned from jail on that date and therefore, the matter has again been posted for 19-12-2022 for framing of charges.

6. He further contended that on 19-12-2022, the applicant moved a discharge application through his counsel before the trial court and thereafter, the trial court without considering the application of the discharge which was filed by the applicant under section 227 of Cr.P.C., proceeded to frame charges and thereafter, the charges have been framed on 19-12-2022 itself. He next added that though the counsel for the applicant was sitting inside of the court room, but, the court while sitting in his chamber, has passed the order and counsel for the applicant was not heard. In support of his contentions, he has drawn attention towards page no. 21 of the application wherein objection has been recorded by the counsel for the applicant on the same day.

7. He has further drawn attention of this court towards page 21 of the application itself i.e. an order passed by the trial court that "Sri Rama Shanker Dwivedi Ko Nyayamitra Niyukt Kiya Jata Hai." and submitted that neither there was any application moved on behalf of the accused nor the applicant was represented through his counsel for making any prayer for appointment of amicus curiae as is evident from the order itself. Thus, the order appointing an Amicus Curiae is also against the provisions of section 304 of Cr.P.C. Section 304 of Cr.P.C. is extracted hereinunder:-

"304. Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expenses of the State.

The High Court may, with the previous approval of the State Government make rule providing for;

the mode of selecting pleaders for defence under Sub-Section(1);

the facilities to be allowed to such pleaders by the Courts;

the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of Sub-Section (1).

The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of Sub-Sections(1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session."

8. Referring the aforesaid, he submits that there is a specific provision under section 304 Cr.P.C. that an Amicus Curiae can be appointed if the accused is not represented by a pleader or the accused has not sufficient means to engage a pleader. He added that both the conditions were not prevelant and thus, the appointing an Amicus Curiae is uncalled for and is against the intent of the provisions of section 304 of Cr.P.C.

9. Adding his arguments, he submits that so far as provision of Section 227 of Cr.P.C. is concerned, if an application is filed, the same is to be considered and

decided. He submits that an application under section 227 of Cr.P.C. was filed by the present applicant, which was pending consideration and the court without considering the same, has proceeded for framing of charges. He submits that it is wrong to say that no one was present for pressing the application for discharge filed by the counsel for the applicant. The discharge application is still pending. Adding his arguments, he submits that even the application for discharge is not required to be filed by the accused and it is incumbent upon the court itself that if the court considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused. He submits that there is not a single whisper with regard to the application of mind in the order dated 19-12-2022 with respect to the fact that the court below has ever applied its mind as to whether there is sufficient ground for proceeding in the matter.

10. He next added and has drawn attention of this court towards the Judgment and order dated 12-12-2022 passed by the Apex Court in the case of Chandi Puliya Versus The State of West Bengal (Criminal Appeal No. of 2022(Arising from SLP(Criminal)No. 9897 of 2022) and has referred to paragaph nos. 3.2, 4, 4.1. and 7 of the aforesaid Judgment and the aforesaid paras are extracted hereinunder :-

3.2 Accordingly, a discharge application under Section 227 r/w Section 300(1) Cr.P.C. was filed by the appellant before the learned trial Court. The learned trial Court dismissed the said application by observing that such an objection can be raised at the stage of framing of charge and not discharge. The order passed by the learned trial Court has been confirmed by the High Court, by the impugned judgment and order. Hence, the present appeal.

4. It is submitted that the stage of discharge under Section 227 Cr.P.C. is a stage prior to charge and it is at this stage alone that the court can consider an application under Section 300 Cr.P.C. It is submitted that once the court rejects the discharge application, it would proceed to framing of charge under Section 228 Cr.P.C. and the only question before it would be as to the nature of the offence, and not that the appellant has not committed an offence,

or that he cannot be tried on account of the bar under section 300 Cr.P.C.

4.1 It is further submitted that the courts below have failed to appreciate that the present proceedings arise from the discharge proceedings and that the stage of discharge under Section 227 Cr.P.C. precedes the stage of framing of charge under Section 228 Cr.P.C. It is submitted that as observed and held by this Court in the case of Ratilal Bhanji Mithani v. State of Maharashtra, (1979) 2 SCC 179, once the charges are framed, the accused is disentitled from praying for discharge.

7. On a fair reading of Section 227 Cr.P.C, if, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. As per Section 228 Cr.P.C. only thereafter and if, after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence, the trial Court shall frame the charge. Therefore, as rightly submitted by Shri Siddhartha Dave, learned senior counsel appearing on behalf of the appellant-accused that the stage of discharge under Section 227 Cr.P.C. is a stage prior to framing of the charge (under Section 228 Cr.P.C.) and it is at that stage alone that the court can consider the application under Section 300 Cr.P.C."

11. Referring the aforesaid paragraphs, he submits that the settled proposition of law in the aforesaid Judgment has been violated by the trial court and thus he submits that the whole proceedings of the trial court so far as order dated 19-12-2022 for framing of charges is concerned, vitiates in the eyes of law and thus, the order dated 19-12-2022 as well as other consequential action is liable to be set aside.

12. On the other hand, learned A.G.A. appearing for the State has vehemently opposed the contentions aforesaid and submits that in case of non appearance of counsel for the applicant, the court has passed the order on 19-12-2022. He added that it seems that the counsel for the applicant came later on and the order impugned was passed during the court hours. He submits that none appeared to press the application for discharge and thus,

the trial court had no option, but to pass the order dated 19-12-2022 and to proceed under section 228 of Cr.P.C. He further submits that after thorough investigation, sufficient material was found against the applicant and therefore there is no illegality or infirmity in the order dated 19-12-2022 passed by the trial court.

13. Considering the submissions of learned counsel for the parties and after perusal of the material placed on record, it is evident that an application for discharge was moved by the present applicant on 19-12-2022 and from perusal of the order dated 19-12-2022, by virtue of which charges were framed, it reveals that the discharge application dated 19-12-2022 was neither accepted nor rejected by the court. Further, the noting on the ordersheet discloses that the counsel for the applicant was present in the court, but, it prima facie seems that he was not heard. This court has also noticed the fact that one Rama Shanker Dwivedi, Advocate, was also appointed as Amicus Curiae on 19-12-2022 itself though there was no occasion for such appointment.

14. Since, the provision of Section 227 of Cr.P.C. itself mandates that the trial court shall consider that whether there is sufficient ground for proceeding against the accused or not and if trial court reaches to the conclusion that there is no sufficient ground, the accused shall be discharged. Section 227 of Cr.P.C. is extracted hereinunder :-

"227.If, upon consideration of the record of the case and the documents submitted therewith, and after hearing submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

15. Having at a glance of the aforesaid provisions, it is crystal clear that while passing an order in abovesaid provisions, the trial court shall consider ;-

First, the record of the case and documents submitted therewith;

Secondly submissions of the accused;
and thirdly the submissions of the prosecution.

16. It is settled law that even after such considerations, two views are possible and if one of them gives rise to the suspicion, which is distinguished from grave suspicion, the trial Judge is empowered to discharge the accused without going into the question as to whether a case for trial has been made out by the prosecution or not.

17. This court is of considered opinion that after the application of judicial mind on discharge, the trial Judge shall enter into the next proceeding i.e. framing of the Charge. It is prima-facie overt from the wordings of Section 228 of Cr.P.C. i.e. "Framing of Charge" and "if, after such consideration and hearing, as aforesaid", the procedure of Section 227 of Cr.P.C. is of much importance and that cannot be skipped by the trial court. The intent of the legislature is very clear that the procedure prescribed in Section 227 of Cr.P.C. for discharge of the accused is in fact safeguard and rider so that a person who has been alleged to commit an offence, may not be harassed for facing trial proceedings. Therefore, the application of mind as well as assigning reasons for passing the order under section 227 of Cr.P.C. is of much importance, which has to be taken care of by the trial court.

18. Further it is also not incumbent upon the accused that he must have moved an application for discharge. Even in a situation that there was no application for discharge moved, then it is incumbent upon the trial court to decide it that whether there is sufficient material available against the accused so as to frame charges, but opportunity of hearing to the accused at this stage is an essential condition.

19. From perusal of the order dated 19-12-2022, it reveals that it has been recorded by the trial court that no one is present to press the application filed under section 227 of Cr.P.C. but, it is noted by the counsel for

the applicant that he was present in the court and he was not heard.

20. Further so far as issue of the appointment of an Amicus Curiae is concerned, as per provisions of section 304 of Cr.P.C., there are two conditions, wherein an Amicus Curiae can be appointed and so far as the present case is concerned, prima-facie, there seems to be no such conditions prevalent. From perusal of the order dated 19-12-2022, it reveals that while appointing the amicus-curiae, the trial court did not mention the exigency as is envisaged in Section 304 of Cr.P.C. and no judicial mind has been applied while appointing the Amicus-Curiae

21. It is noteworthy that time and again, the Hon'ble Apex Court has held that if statute provides for anything to be done in a particular manner, then it must be done in that manner alone and not otherwise and thus the impugned order dated 19-12-2022 is against the law propounded by the Hon'ble Apex Court.

22. Now, it is settled proposition of law that the trial court has to make every endeavour to keep the trial fair but in the order of framing of charges, certain illegalities and ambiguities are apparent and therefore, the order dated 19-12-2022 prima-facie, seems to unsustainable and thus the order dated 19-12-2022 is hereby set aside.

23. Resultantly, the matter is remitted back to the trial court for deciding the discharge application of the applicant dated 19-12-2022 afresh. For the purpose of hearing on the application for discharge dated 19-12-2022, the concerned parties are directed to appear before the trial court on 27-12-2022. Counsel for the applicant shall also remain present before the trial court on the said date and after hearing the parties, the trial court shall proceed in the matter. The parties or their counsels shall not seek any adjournment on the said date.

24. With the aforesaid observations, the instant application is hereby **allowed**.

25. It is made clear that observations made herein above, will have no bearing on the merits of the case pending consideration before the trial court.

Order Date :- 16.1.2023

AKS