Reserved

Court No. - 78

Case :- CRIMINAL REVISION No. - 5702 of 2023

Revisionist :- State of U.P.

Opposite Party :- Dr. Sanjay Kumar Nishad

Counsel for Revisionist :- Ashutosh Kumar Sand

WITH

Case :- APPLICATION U/S 482 No. - 39709 of 2023

Applicant :- Dr Sanjay Kumr Nishad

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Vineet Pandey,Pranvesh

Counsel for Opposite Party :- G.A.

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Hon'ble Raj Beer Singh,J.

1. Criminal Revision No. 5702 of 2023 has been preferred on behalf of the State of U. P. against the order dated 29.9.2023 passed by learned Additional Civil Judge (Senior Division) / Additional C. J. M., Gorakhpur in Criminal Case No. 6427 of 2016, arising out of Case Crime No. 280 of 2015, under Section-174 of Railways Act, 1989, Police Station-R. P. F. Post, district-Gorakhpur, whereby the application filed by the Special Public Prosecutor under Section 321 Cr. P C. for withdrawal of prosecution of respondent Dr. Sanjay Kumar Nishad, has been rejected.

2. Application under Section 482 Cr. P. C. No. 39709 of 2023 has been filed on behalf of applicant Dr. Sanjay Kumar Nishad against the same aforementioned order dated 29.9.2023 passed in the aforesaid case.

3. As in both the cases one and the same impugned order has been challenged, thus, both the cases are being decided by this common order.

4. Heard Sri A. K. Sand, learned Government Advocate for the revisionist and Sri Vineet Pandey, learned counsel for the applicant, in the application under Section 482 Cr. P. C. and perused the record.

5. Perusal of record shows that the respondent in Criminal Revision (applicant in Application under Section 482 Cr. P. C.) is an accused in the aforesaid case under Section 174 of Railways Act. The report of this case was lodged on 8.6.2015 alleging that on 7.6.2015 accused Dr. Sanjay Kumar Nishad, Chairman of Nishad Ekta Parishad, along with a number of persons belonging to Nishad community, laid a demonstration at railway track due to which railway traffic was hampered between Maghar-Sahjanwa. It appears that during pendency of the said case, the State of U. P. decided to withdraw the prosecution and the leave of this Court for withdrawal of the prosecution was granted vide order dated 2.8.2023 passed in Criminal Misc. Writ Petition No. 10256 of 2020. Thereafter an application under Section 321 Cr. P. C. was moved by the Special Public Prosecutor for withdrawal of the prosecution, which has been rejected by the trial Court vide impugned order dated 29.9.2023.

6. Learned Government Advocate submitted that the impugned

order is against the facts and law and thus, is liable to be set aside. It was submitted that the said application under Section 321 Cr. P. C. has been rejected by the trial Court on the ground that the case is pending at the stage of final hearing and that no order regarding leave of High Court to withdraw the prosecution, as laid down in the case of ***Ashwani Kumar Upadhyay Versus Union of India*** Writ Petition (Civil) No. 699/2016, decided on 10.8.2021, has been produced. It was submitted that the trial Court below failed to peruse the record that this Court has already granted leave for withdrawal of prosecution vide order dated 21.3.2023 and in fact, the copy of the said order was filed along with the application under Section 321 Cr. P. C. Learned Government Advocate has referred copy of the application filed under Section 321 Cr. P. C., wherein it was shown that the order dated 7.8.2023 passed by the State of U. P. and the order dated 21.3.2023 passed by this Court regarding grant of leave to withdraw the prosecution, has been filed along with that application. Learned Government Advocate submitted that in view of these facts the observation of the trial Court that in terms of law laid down by the Hon'ble Apex Court in the case of ***Ashwani Kumar Upadhyay Versus Union of India (supra),*** no leave has been granted by the High Court is wholly false and without any basis. Further, it is well settled position that the prosecution can be withdrawn at any stage during pendency of the case. Thus, application under Section 321 Cr. P. C. cannot be rejected merely on the basis that the case is pending at the stage of final hearing. Referring to these facts it was submitted that the impugned order is against facts and law and thus, liable to be set aside.

7. Learned counsel for the applicant in application under Section 482 Cr. P. C., has also concurred with the abovestated contentions

and submitted that the impugned order is against the facts and law and thus, is liable to be set aside.

8. I have considered the rival submissions and perused the record.

9. To appreciate the contentions raised by the learned counsel for the parties, it would be useful to refer the provisions of section 321 of Cr.P.C. which read as follows:-

> *"321. Withdrawal from prosecution. - The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, –*
> *(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;*
> *(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:*
> *Provided that where such offence-*
> *(i) was against any law relating to a matter to which the executive power of the Union extends, or*
> ii. *was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or*
> *(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or*
> *(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."*

10. In case of ***Sheonandan Paswan v. State of Bihar and others AIR 1987 SC 877***, the Court referred to Section 333 of the old Code and after taking note of the language employed under Section 321 of the present Code, came to hold that Section 321 enables the Public Prosecutor, in charge of the case, to withdraw from the prosecution of any person at any time before the judgment is pronounced, but the application for withdrawal has to get the consent of the court and if the court gives consent for such withdrawal the accused will be discharged if no charge has been framed or acquitted if charge has been framed or where no such charge is required to be framed. It clothes the Public Prosecutor to withdraw from the prosecution of any person, accused of an offence, both when no evidence is taken or even if entire evidence has been taken. The outer limit for the exercise of this power is 'at any time before the judgment is pronounced'. It has also been observed that the judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. The Apex Court after referring to the authorities in ***Bansi Lal v. Chandan Lal and others (1976) 1 SCC 421 Balwant Singh v. State of Bihar (1977) 4 SCC 448, Subhash Chander v. State (Chandigarh Admn.) (1980) 2 SCC 155, Rajender Kumar Jain v. State (1980) 3 SCC 435 and the principles stated in State of Bihar v. Ram Naresh Pandey AIR 1957 SC 389***, came to hold thus:

> *".99. All the above decisions have followed the reasoning of Ram Naresh Pandey case (supra) and the principles settled in that decision were not doubted.*
> *100. It is in the light of these decisions that the case*

on hand has to be considered. I find the application for withdrawal by the Public Prosecutor has been made in good faith after careful consideration of the materials placed before him and the order of consent given by the Magistrate was also after due consideration of various details, as indicated above. It would be improper for this Court, keeping in view the scheme of Section 321, to embark upon a detailed enquiry into the facts and evidence of the case or to direct retrial for that would be destructive of the object and intent of the section."

11. In ***Rahul Agarwal v. Rakesh Jain and another (2005) 2 SCC 377***, the Court while dealing with the application under Section 321 Cr.P.C. referred to certain decisions and held:-

"From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only

when valid reasons are made out for the same."

12. Recently in case of State of **Kerala Vs. K. Ajith, (2021) SCC Online SC 510**, the Hon'ble Apex held as under:

> *"The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:*
> *(i) Section 321 entrusts the decision to withdraw from a prosecution to the Public Prosecutor but the consent of the court is required for a withdrawal of the prosecution;*
> *(ii) The Public Prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;*
> *(iii) The Public Prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;*
> *(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the Public Prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;*
> *(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:*
> *(a) The function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;*
> *(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;*
> *(c)The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;*
> *(d) The grant of consent sub-serves the administration of justice; and*
> *(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the Public Prosecutor is duty bound to*

maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(viii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

13. From above referred case laws, it is apparent that for withdrawal of prosecution, consent of the Court is necessary. While submitting such an application, the Public Prosecutor is required to apply his own mind and the effect thereof on the society in the event such permission is granted. The Public Prosecutor is required to act in good faith, peruse the material on record and form an independent opinion that the withdrawal from the prosecution would really subserve the public interest at large. The Public Prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice but the Public Prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution. The mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the Public Prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons. In deciding whether to

grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature.

14. Keeping in view the aforesaid position of law, in the instant case it may be observed that the impugned case was registered under Section 174 of Railway Act and it was alleged that on 7.6.2015 the respondent-accused Dr. Sanjay Kumar Nishad along with a number of persons belonging to Nishad community made a demonstration at the railway track, due to which, railway traffic was hampered between Maghar-Sahjanwa. It appears that the application moved by public prosecutor for withdrawal of the case was rejected by the trial Court mainly on the ground that in view of the law laid down by the Apex Court in the case of ***Ashwani Kumar Upadhyay Versus Union of India (supra)***, no prosecution against the sitting or former M. P. / M. L. A. shall be withdrawn without leave of the High Court and that no such leave of High Court was obtained in this matter. It has been shown that the High Court has granted leave to the State to withdraw the impugned prosecution by order dated 21.3.2023 passed by this Court in Criminal Misc. Writ Petition No. 10256 of 2020. It appears from the application of withdrawal filed by public prosecutor that the said order of the High Court was filed along with application filed by the Public Prosecutor under Section 321 Cr. P. C. and thus, the observation of the trial Court appears incorrect.

15. Considering the nature of accusations and the facts of the matter, a case for withdrawal of the impugned prosecution was made out. It is also apparent from the facts of the matter that the Public Prosecutor has applied his mind independently and exercised his discretion in accordance with law. It is well settled that the Public Prosecutor, incharge of the case, may withdraw from a prosecution not merely on the ground of paucity of

evidence but also in order to further brought on so public justice. The Court, while considering such matters, is not to re-appreciate the grounds which laid the Public Prosecutor to request for withdrawal from prosecution but to consider whether the Public Prosecutor has applied his mind in a free and impartial manner. Considering the settled position of law and the facts of the present case, it appears that the impugned order dated 29.9.2023 suffers from patent illegality and perversity and thus, the same is not sustainable. This Court is of considered view that it would be futile exercise to remand back the matter and to pass an order afresh, when the application under Section 321 Cr.P.C. fulfills all the required conditions.

16. Thus, the impugned order dated 29.09.2023, passed by learned Additional Civil Judge (Senior Division) / Additional C. J. M., Gorakhpur in Criminal Case No. 6427 of 2016, arising out of Case Crime No. 280 of 2015, under Section 174 of Railways Act, 1989, Police Station-R. P. F. Post, district-Gorakhpur, is hereby set aside and the application filed by learned Public Prosecutor under Section 321 Cr.P.C. for withdrawal of the prosecution of accused Dr. Sanjay Kumar Nishad, is hereby allowed. The prosecution of accused Dr. Sanjay Kumar Nishad in the aforesaid case stand withdrawn accordingly.

17. In view of aforesaid, Criminal Revision No. 5702 of 2023 and Application under Section 482 Cr. P. C. No. 39709 of 2023 are hereby allowed. Consequences to follow.

Order Date :- 29.11.2023
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