ABDUL AZIZ & ORS. –VS- STATE OF ASSAM & ANR. 2011(4) GLT 829 – A CRITIQUE

By
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1. INTRODUCTION

It all began with a telephonic conversation in the evening of the 5th December, 2011 with Sri K. Sarma Pathak, Sub- Divisional Judicial Magistrate, Goalpara. On his request the writer read ABDUL AZIZ & ORS. –VS- STATE OF ASSAM & ANR. 2011(4) GLT 829, a Judgment of the Gauhati High Court dated 15.09.2011 (hereinafter referred as to ABDUL AZIZ). ABDUL AZIZ reminded the writer of what Justice Ruma Paul, a former Judge of the Supreme Court wrote in the FOREWORD of the latest edition of a book on the Law of Arbitration and Conciliation. Justice Ruma Paul in the FOREWORD called it a fiction that Judges are deemed to know the law on every subject and then said thus :-

> **"** *Aberrant decisions are sometimes the outcome of this fiction and sometimes because Judges are inadequately informed by the bar."*

ABDUL AZIZ qualifies to belong to the class of "aberrant decisions" primarily because of the latter reason mentioned by Justice Ruma Paul. This essay is an attempt to explore the validity of this statement.

2. ESSENTIAL FACTS

Gauripur Police Station case No.132/2007 in due course resulted in Sessions Case No.129/2009 before the Sessions Judge, Dhubri. Before the commitment of the case the informant approached the High Court twice, once praying for a direction for further investigation and the second time against the rejection by the Chief Judicial Magistrate, Dhubri of the prayer for reinvestigation. Incidentally the first informant approached the Chief Judicial Magistrate as per observation by the High Court in the first revision petition. In the second revision petition the High Court observed that "the informant may make" a prayer under Section 319 of the Code of Criminal Procedure 1973 (The Code hereinafter) to the Sessions Judge, "at a proper stage through the learned Pubic Prosecutor". Perhaps missing the key time element in the order of the High Court even before the trial of the sessions case commenced the Public Prosecutor on 24.02.2010 filed an application under Section 319 of the Code for impleading Abdul Aziz and four others in the sessions case as accused. This application was allowed and this time Abdul Aziz and others made the third approach to the High Court in the sessions case complaining against their summoning as accused in the sessions Case. ABDUL AAZIZ affirmed their summoning.

3. SUBMISSIONS BY COUNCELS

The Counsel for the petitioners relied on LOK RAM –VS- NIHAL SINGH & ANR, (2006) 10 SCC 192; RAMDAS & ORS. –VS- STATE OF MAHARASHTRA, (2007) 2 SCC 170 and a Judgment of the Gauhati High Court GUNARAM TANTI & ANR –VS- STATE OF ASSAM , 1983 Cri.L.J. 289. On the basis of these decisions the Core of the submissions made was that without taking evidence the Sessions Judge cannot summon additional accused in purported exercise of power under Section 319 of the Code.

The Counsel for the informant clinched the matter in his favour by citing KISHUN SINGH & ORS. –VS- STATE OF BIHAR, (1993)2 SCC 16 (hereinafter referred as KISHUN SINGH). KISHUN SINGH in essence says that apart from the provisions of Section 319 of the Code which applies after trial has commenced there is power in Section 193 of the Code at the pre cognizance stage to summon additional persons as accused. The High Court applied KISHUN SINGH and affirmed the order of the Sessions Judge, Dhubri. It is, therefore, necessary to have a closer look at KISHUN SINGH.

4. KISHUN SINGH

(i) Like ABDUL AZIZ in KISHUN SINGH, a Two Judge Bench decision, also the Sessions Judge without recording any evidence impleaded KISHUN SINGH and Another in the relevant Sessions Case. The order like here was impugned before the High Court and met the same fate as here. The matter reached the Supreme Court. It is not known whether ABDUL AZIZ also has reached the Supreme Court. The Supreme Court reiterated the law under Section 319 of the Code extant since before and even now but curved out another power within Section 193 of the Code affirming the same law earlier found by the Full Bench of Patna High Court in S.K. LUTFUR RAHMAN –VS- STATE OF BIHAR, 1985 CRI.L.J. 1238. The core of the law declared in KISHUN SINGH can be gathered from the following extracts :

> **"***The question then is whether de hors Section 319 of the Code, can similar power be traced to any other provision in the code or can such power be implied from the scheme of the code ?..... the stage for the exercise of power under Section 319 of the Code had not reached, in as much as the trial had not commenced and evidence was not led, since the court of Sessions had the power under Section 193 of the Code to summon the appellants as their involvement in the commission of the crime prima facie appeared from the record of the case we see no reason to interfere with the impugned order."*

(ii) KISHUN SINGH FOLLOWED :

KISHUN SINGH dated 11th January, 1993 was followed by another Two Judge Bench of the Supreme Court in NISAR AND ANOTHER –VS- STATE OF U.P. (1995) 2 SCC 23 dated 9th November, 1994. There after commitment of the case to the Court of Sessions an application was moved under Section 193 of the Code for summoning of NISAR and Another as two additional accused. Upon perusal of the statements recorded during investigation under Section 161 of the Code the application was granted. The High Court, when the matter was taken there held that not Section 193 of the Code but Section 319 of the Code would cover the order to summon the two additional accused. The Supreme Court dubbed the enunciation of the law by the High Court as "patently incorrect" and relying on KISHUN SINGH expressed its "respectful agreement with the principle laid down" there.

(iii) KISHUN SINGH – DOUBTED

The question posed in RAJ KISHORE PRASAD –VS- STATE OF BIHAR AND ANOTHER, (1996)4 SCC 495 dated 1st May 1996 by yet another Two Judge Bench was this : Can a Magistrate undertaking commitment under Section 209 Cr.P.C. of a case triable by a Court of Sessions, associate another person as accused, in exercise of power under Section 319 of the Code of Criminal Procedure or under any other provision ? The question was answered with a categorical negative and later in para 14 and 15 of the Judgment of the Two Judge Bench a lot of reasons have been recorded to negative the principle laid down in KISHUN SINGH based on Section 193 of the Code . Paragraph 15 of the Judgment was ended thus :

> *"Having thus expressed our doubts we do not, as at present advised, take the matter any further because the fact situation of the present case does not, warrant its resolution, a dire necessity."*

(iv) KISHUN SINGH –OVERRULLED

KISHUN SINGH held the field for five years one month eleven days until the 22nd of September 1998 when a Three Judge Bench of the Supreme Court in RANJIT SINGH –VS- STATE OF PUNJUB (1998) 7 SCC 149 overruled it. The issue raised in the case was this :

> **"***Whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence ?"*

Because of the conflict of views on the question in KISHUN SINGH and NISAR (Supra) on one hand and RAJ KISHORE PRASAD (Supra) on the other the question was directed to be considered by a Larger Bench. Paragraphs 12 to 22 of the Judgment of the three Judge Bench narrate the detailed reasons for inability to agree with the law laid down in KISHUN SINGH. Provisions of the Code such as those of Section 204(I) (b), 207, 208, 209 and of Chapter XVIII of the Code relating to trial before a Court of Session were considered and the law is declared thus :

> *"Once the Sessions Court takes cognizance of the offence pursuant to a committal order, the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused."*

The Three Judge Bench also took into account the illustration narrated in KISHUN SINGH, gave another illustration on its own and indicated that a Report to the High Court by the Sessions Judge to exercise inherent powers by the High Court would meet the necessities of extra ordinary situations sampled in the illustrations arising in extremely rare

cases without going for recording of evidence. This may be read in paragraph 21 to 23 of the Judgment.

5. ACKNOWLEDGEMENT

On the 10th of August, 2011 the Supreme Court decided SAROJBEN ASHWINKUMAR SHAH ETC –VS- STATE OF GUJRAT & ANR. 2011 (8) SCALE 542 which records the current thinking of the Supreme Court on the provisions of Section 319 of the Code. After reviewing the law in this regard enunciated by the Supreme Court in seven previous decisions starting from JOGINDER SINGH (1979)1 SCC 345 and ending with GURIYA (2007)8 SCC 224 the Supreme Court in SAROJBEN (Supra) declared the law in Section 319 of the Code thus "

> **"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.

But for the adequate information received from Sri K. Sarma Pathak, SDJM(S), Goalpara and the initiative taken by him, this essay may not have been written at all. A list of relevant cases, which contain SAROJBEN (Supra) extracted above and a few others referred to in this essay forwarded by him has helped. The writer gratefully acknowledge the assistance thus rendered.

6. CONCLUSION

The brief legal and Judicial biography of KISHUN SINGH as narrated in para 4 above was not brought to the notice of the High Court in ABDUL AZIZ. To borrow the words of Justice Ruma Paul quoted earlier the High Court was "inadequately informed by the bar." An "aberrant decision" a judgment per incuriam of the first water was thus born.

Lord Denning in, The Discipline of Law at page 289 confessed thus :

> **"***On many occasions I have done my own researches and given an opinion on matters on which the Court has not had the benefit of the arguments of Counsel or of the judgement of the Court below. I have done this because counsel vary much in their ability and I do not think that their clients should suffer by any oversight or mistake of counsel"*

Modern Judges can rarely be expected to do a Denning in cases like ABDUL AZIZ primarily because of explosion of the docket and resultant constraints of time.

7. POSTSCRIPT

On December 1, 2004 another Three Judge Bench of the Supreme Court in DHARAM PAL AND OTHERS –VS- STATE OF HARYANA AND ANOTHER, (2004) 13 SCC 9 went into the effect of RANJIT SINGH –VS- SATE OF PUNJUB (1998)7 SCC 149 as regards the powers of a Magistrate and those of a Sessions Judge in the matter of summoning additional persons as accused. The Three Judge Bench in DHARAM PAL (Supra) took a "prima facie" view that RANJIT SINGH (Supra) has not been correctly decided and that the law in

KISHUN SINGH was correct. The matters is now pending before the Constitution Bench of the Supreme Court. DHARAM PAL (Supra) does not give any detailed reasons for the "prima facie" view, nor does it refer to the illustration given in RANJIT SINGH (Supra). Had there been a detailed Judgment the High Courts and the subordinate Judiciary would have been confronted with an apparent dilemma of following one or the other. However, SALMOND ON JURISPRUDENCE, TWELFTH EDITION at page 151 under subheading (5) "inconsistency between earlier decisions of the same rank" considered the dilemma and in effect said that better in law not later in time is the rule in such cases. The Court, before which two conflicting decisions rendered by two benches of equal strength vie for acceptance has a choice of following the one laying down the better law. Thus KISHUN SINGH though presently remains buried may still be resurrected by the Constitution Bench of the Supreme Court when RANJIT SINGH (Supra) and DHARAM PAL (Supra) would be considered there. Until that happens RANJIT SINGH (Supra) continues to hold the field and ABDUL AZIZ continues to carry the label of an "aberrant decision" and a judgment per incuriam of the first water.

The postscript may be ended by recording the following information downloaded from the Supreme Court Website.

As on 17th of December 2011 DHARAM PAL (Supra) is pending hearing by a Constitution Bench. Order of a Three Judge Bench of the Supreme Court dated 29.08.2008 was this :-

> **"***Learned counsels for the petitioners and respondents shall submit brief argument notes, the number of documents and list of cases proposed to be cited in support of their arguments on or before 1st October, 2008.*
>
> *List the matters on 4th November, 2008 before the Constitution Bench."*

Order of the Registrar dated 04.08.2009 reads thus :

> *"Both parties to comply with the order dated 29.08.2008 of the Hon'ble Court within two weeks and list the matter before the Constitution Bench as per order."*

The Website does not provide any further data regarding listing of the case before the Constitution Bench during 2009, 2010 and 2011.