
(2008) 05 AHC CK 0003
In the Allahabad High Court
Case No : Criminal M.W.P. No. 6964 of 2008

Dr. R.S. Upadhyaya and Another	Vs	APPELLANT
State of U.P. and Another		RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 164, 195, 200, 202
Penal Code, 1860 (IPC) — Section 172, 173, 174, 175, 176

Citation : (2008) 3 ACR 2560

Hon'ble Judges : M.K. Mittal, J

Bench : Single Bench

Advocate : Amit Daga, for the Appellant; Ashutosh and A.G.A., for the Respondent

Judgement

M.K. Mittal, J.—This writ petition has been filed for quashing the order dated 24.12.2007, passed by A.C.J.M., Court No. 6, Jhansi in Criminal Complaint Case No. 600 of 1998, whereby he directed to summon the Petitioner No. 2 Namita under Sections 177, 181 and 182, I.P.C. and Petitioner No. 1 Dr. R. S. Upadhyaya, u/s 506, I.P.C. and the judgment and order dated 19.4.2008, passed by Addl. Sessions Judge, Court No. 1, Jhansi in Criminal Revision No. 8 of 2008 filed against this order whereby learned Judge dismissed the revision.

2. I have heard Sri Amit Daga, learned Counsel for the Petitioner, Sri Ashutosh, learned Counsel for the Respondent No. 2 and learned A.G.A., and have perused the material on record. Opposite party No. 2 has also filed counter-affidavit in this case.

3. Brief facts of the case are that Respondent No. 2 filed an application u/s 156(3), Cr.P.C. alleging that he was married with Smt. Namita on 16.1.1998 before the District Marriage Officer, Jhansi, according to provisions of Special Marriage Act, 1954 and the marriage certificate was also issued. Before the Marriage Officer, form was filled up and affidavit was filed and Alok, Sachin and

Sanjeev were the witnesses of the marriage. Smt. Namita was taken by her parents on the false pretext and it being criminal act he filed an application against them u/s 156(3), Cr.P.C. and case was registered under Sections 366, 368, 504 and 506, I.P.C. The Respondent No. 2 and Smt. Namita loved each other and wanted to live throughout their life as husband and wife but Dr. R.S. Upadhyaya wanted to get the marriage dissolved by all means and the Respondent No. 2 was threatened to sign the papers for dissolution of the marriage otherwise he would have to face the dire consequences. Respondent No. 2 also filed an application u/s 98 of the Cr.P.C. but the same was rejected on the basis of the statement and affidavit of Smt. Namita. Respondent No. 2 has also filed a case in the family court for restitution of conjugal rights which is pending. Dr. R.S. Upadhyaya knowing that he was making false statement filed his objections in the Court and Smt. Namita also fled affidavit and gave a false statement u/s 164, Cr.P.C. and said that she never appeared before the Marriage Officer and no marriage took place. According to the Respondent, Court was misguided by false affidavits and statement and even the marriage certificate was alleged to be false document. This is contempt of court. In the circumstances, he prayed that the case be registered.

4. The learned Magistrate, however, directed the case shall proceed as a complaint case and examined the Respondent No. 2 u/s 200, Cr.P.C. and his witnesses Alok Srivastava, Sachin Kapoor and Arnesh Chandra u/s 202, Cr.P.C. It appears that the Criminal Misc. Application No. 26812 of 2007 was filed in this Court and order was passed on 13.11.2007 directing for disposal of the case within three months and the learned Magistrate examined the witnesses under Sections 200/202, Cr.P.C. Learned Magistrate finding that prima facie case was made out directed to summon the accused as aforesaid. Petitioners preferred a Criminal Revision No. 8 of 2008, but the same was dismissed on the ground that the revision was not maintainable. Hence, the writ petition has been filed.

5. The case of the Petitioner is that the complaint is barred by Section 195, Cr.P.C. as no cognizance can be taken for an offence by the Court under Sections 181, 182 and 177, I.P.C. unless the report is filed by the concerned public officer. It has also been alleged that Respondent No. 2 has been harassing the Petitioners unnecessarily for quite some time and this complaint was also filed with ulterior motive only to harass the Petitioners. Petitioner No. 1 is scientist and is presently posted in district Mathura. Earlier he was posted in Indian Grass Land and Fodder Research Institute, Jhansi since September, 1976. Respondent No. 2 is a criminal minded person and fabricated some documents pertaining to his marriage with Petitioner No. 2 and concocted a false story and filed an application u/s 156(3), Cr.P.C. in the Court and that case was registered. The statement of Petitioner No. 2 was recorded u/s 164, Cr.P.C. and she denied any marriage with Respondent No. 2. After investigation final report was submitted in the matter. Application was also given u/s 98, Cr.P.C. but the same was dismissed. Respondent No. 2 did not file any protest petition against that final report and the same was accepted by the learned Magistrate by order dated

1.9.1999. Petitioners filed a Transfer Application No. 224 of 1998 for transfer of this criminal case and by order dated 9.9.1998 it was directed that no coercive process shall be executed against the applicants till further orders. This transfer application was dismissed on 16.5.2002. The summoning order and the order passed in revision are not legal as the complaint was barred by the provision of Section 195, Cr.P.C. This complaint is malicious and should have been dismissed u/s 203, Cr.P.C. Even no offence punishable u/s 506, I.P.C. was made out against the Petitioner No. 1. The Petitioners have also contended that the Respondent No. 2 has been harassing the Petitioners from the very beginning and in order to extort money from them he filed a Habeas Corpus Writ Petition No. 14375 of 1998 and in that petition the Petitioner No. 2 was called and her statement was recorded before this Court and that petition was dismissed with costs of Rs. 5,000 dated 15.5.1998. Again in the year 2007 Respondent No. 2 filed a Habeas Corpus Petition No. 39505 of 2007 on false grounds and that was also dismissed on 30.8.2007. Respondent No. 2 has since married Dr. Neeraja Sunwani on 27.6.2001. Impugned orders are liable to be quashed.

6. The opposite party No. 2 has filed a counter-affidavit and has contended that the writ petition is not maintainable as the summoning order can only be challenged in an application u/s 482, Cr.P.C. and is liable to be dismissed in-limine. Correct facts were mentioned in the application u/s 156(3), Cr.P.C. and it was not filed to harass the Petitioners. The allegations made by the Petitioners in paras 15 to 19 of their petition regarding bar of Section 195, Cr.P.C. as well as the allegations that there are no ingredients to constitute the offence u/s 506, I.P.C. have not been specifically rebutted in the counter-affidavit.

7. Learned Counsel for the opposite party has raised preliminary objection that against the summoning order only remedy available to the Petitioners is petition u/s 482, Cr.P.C. and the writ petition is not maintainable. Against it learned Counsel for the Petitioners has contended that the Petitioners had filed a criminal revision against the summoning order and that has been wrongly dismissed as not maintainable and now they have filed the writ petition which is maintainable. According to him criminal revision is also maintainable against the summoning order.

8. In support of his contention, learned Counsel for the Respondent No. 2 has placed reliance on the case of Adalat Prasad v. Roop Lal Zindal and Ors. JT 2004 (4) SC 243. In that matter the question of review by the Magistrate of the order passed for summoning the accused was considered and it was held that the Magistrate had no power to review the order and the remedy was by way of invoking Section 482, Cr.P.C. In that case the case of K. M. Mathew was overruled. Case of Adalat Prasad (supra) was followed in a subsequent case of Subramaniam Sethuraman v. State of Maharashtra and Anr. (LI)2005 ACC 684: 2004 (3) ACR 2704 (SC). In that case also the question of recall of the summoning order was considered and it was held that the Magistrate has no power to recall the order and the only remedy available to the accused to

challenge the same was by way of invoking extra ordinary inherent power of the Court u/s 482, Cr.P.C. In these cases the question whether revision against the summoning order was maintainable or not was neither in dispute nor was considered nor is there any finding to the effect that revision against the summoning order is not maintainable. A judgment of the Hon''ble Apex Court can be a precedent on any issue if that issue is in dispute and is considered and a finding is recorded thereon. In these two cases this was not the position and it cannot be deduced from these judgments that revision is not maintainable against a summoning order.

9. Learned Counsel for the Petitioners has contended that the view of the Hon''ble Apex Court has been that the summoning order is in the nature of intermediate order and the revision is maintainable against it. In this connection, he referred to the judgment of Amar Nath and Others Vs. State of Haryana and Another, wherein it has been held by Hon''ble Apex Court in para 6 of the judgment that :

Let us now proceed to interpret the provisions of Section 397 against the historical background of the facts. Sub-section (2) of Section 397 of the 1973 Code may be extracted thus:

The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceedings.

The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in Sub-section (2) of Section 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2) of the 1973 Code. But orders which are matters of moment and which

affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.

10. In that case summoning order passed by the learned Magistrate was considered and it was held that "We are therefore, satisfied that the order impugned was one which was a matter of moment and which did involve a decision regarding the rights of the Appellants. If the Appellants were not summoned, then they could not have faced the trial at all, but by compelling the Appellants to face a trial without proper application of mind cannot be held to be an interlocutory matter but one which decided a serious question as to the rights of the Appellants to be put on trial.

11. It was also held in that case in para 11 that "for these reasons, the order of the Judicial Magistrate, Ist Class, Karnal dated November 15, 1976 cannot be said to be an interlocutory order and does not fall within the mischief of Sub-section (2) of Section 397 of the 1973 Code and is not covered by the same. That being the position, a revision against this order was fully competent u/s 397(1) or u/s 482 of the 1973 Code, because the scope of both these sections in a matter of this kind is more or less the same."

12. In the case of Madhu Limaye Vs. The State of Maharashtra, it was observed by the Full Bench of the Hon"ble Apex Court that "the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry or trial or other proceedings is to bring about expeditious disposal of the case finally." While interpreting the interlocutory order and intermediate order it was observed that "an order rejecting the plea of the accused on a point which when accepted will conclude the particular proceedings, will surely be not an interlocutory order within the meaning of Section 397(2), Cr.P.C." In this case, the case of Amar Nath (supra), was approved. If this principle is applied to a summoning order same cannot be said to be interlocutory order and revision against that order is therefore, maintainable.

13. In the case of Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another, the Hon"ble Apex Court has held that it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and therefore, the bar under Sub-section (2) of Section 397 would apply. On the other hand it must be held to be intermediate or quasi final and, therefore, the revisional jurisdiction u/s 397 could be exercised against the same. In this case the cases of Amarnath (supra) and Madhu Limaye (supra) were followed.

14. In the case of K.K. Patel and Another Vs. State of Gujarat and Another, the question regarding the cognizance taken by the Magistrate on the basis of the complaint filed wherein the objection was raised by the accused that complaint was barred by limitation u/s 161 of the Bombay Police Act was involved and it was held that if the objection was up-held it would have effect of terminating the entire prosecution proceedings against the Appellant and hence the Magistrate's

order cannot be treated as interlocutory order and would not be hit by Section 397(2), Cr.P.C. It was observed in para 11 of the judgment that "It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the Appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

15. Learned Counsel for the Petitioners has referred the case of V.K. Jain and Ors. v. Pratap V. Padode and Anr. 2006 (2) Crim 295, Bombay High Court, wherein it has been held that in the case of Adalat Prasad and Subramaniam Sethuraman (supra) the sole question which fell for consideration was whether a Magistrate could recall process. No objection arose for consideration in both cases as to whether a revision could be preferred against order issuing process. Hence, it could not be held to be ratio decidendi of said judgments that a revision against order issuing process was not maintainable.

16. It is also important to mention that in these two cases of Adalat Prasad and Subramaniam Sethuraman the judgments as rendered in the cases of Amarnath and Madhu Limaye (supra), have neither been distinguished nor over ruled and therefore, I come to the conclusion that the revision against the summoning order is maintainable and the learned revisional court has erred in rejecting the revision on this ground.

17. Learned Counsel for the Petitioners has contended that they have preferred a writ petition and the writ petition is maintainable against the summoning order. Learned Counsel for the Respondent No. 2 has contended that the writ petition has been filed under Article 226 of the Constitution and not under Article 227 of the Constitution which provides for supervisory power of High Court and therefore, this writ petition is not maintainable. In support of his contention, learned Counsel for the Respondent referred the case of Kanak Projects Ltd. v. Amrita Bazar Patrika Private Ltd. and Ors. AIR 2007 (NOC) 679 (Cal), wherein it has been held that the writ jurisdiction and superintendence jurisdiction of High Court under Articles 226 and 227 are in different spheres and interlocutory judicial order passed by the Tribunal can be challenged by moving an application under Article 227 and not Article 226 and that jurisdiction cannot be exercised by converting application under Article 226 into application under Article 227.

18. On this point learned Counsel for the Petitioners cited the case of Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. (1985) 5 SCC 749, wherein it has been held by the Hon'ble Apex Court that nomenclature under which petition is filed is not relevant and the petition under Article 226 can be treated as one under Article 227 or Section 482, Cr.P.C. In the circumstances the plea as raised

by learned Counsel for the Respondent regarding the non-maintainability of the writ petition is baseless and cannot be accepted.

19. Now it has to be seen whether the summoning order is barred by Section 195, Cr.P.C. It will be relevant to refer the relevant portion of Section 195(1) (a) and (b) of Cr. P.C. which reads as under :

Section 195. Prosecution for contempt of lawful authority of public servants, for offence against public justice and for offences relating to documents given in evidence.-(1) No Court shall take cognizance?

(a) (i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860) ; or

(ii)

(iii)

except on the complaint in writing of the public servant concerned or of same other public servant to whom he is administratively subordinate.

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii)

(iii)

except on the complaint in writing of that Court by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

20. The main allegations as made by the complainant Respondent No. 2 are to the effect that the Petitioner No. 2 made false statement and gave false affidavits before the Court. If it was so the concerned Court was competent to lodge the complaint for giving false evidence in the Court for the offence u/s 193, I.P.C., and on the complaint made by the Respondent No. 2 learned Magistrate could not have taken any cognizance. Moreover the application u/s 156(3), Cr.P.C. as well as the statement recorded u/s 200, Cr.P.C. show that the false statement and false affidavit were allegedly given in the Court and therefore, no offence could be made under Sections 177, 181 and 182, I.P.C. Therefore, the learned Magistrate erred in summoning the Petitioner No. 2 under these sections as his order is without jurisdiction as he could not take cognizance in view of Section 195, Cr.P.C.

21. Learned Counsel for the Petitioner has contended that the Petitioner No. 1 has been wrongly summoned u/s 506, I.P.C., but the learned Counsel for the Respondent No. 2 has contended that the offence u/s 506, I.P.C., is prima face made out against him as he gave criminal intimidation to the Respondent. In the

application u/s 156(3), Cr.P.C., the allegation is that the Petitioner No. 1 threatened the Respondent No. 2 to sign the papers for dissolution otherwise he would have to face the consequences. In his statement u/s 200, Cr.P.C., he stated that Petitioner No. 1 pressurized him and also threatened him to sign the dissolution papers before the District Marriage Officer otherwise his life would be spoiled. The offence of criminal intimidation has been defined in Section 503, I.P.C. According to it whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

22. Therefore according to this section, it is necessary to give a threat to cause injury to the person, reputation or property to make out the offence of criminal intimidation. In the instant case, that threat as allegedly advanced was not to cause any injury to the person, reputation or property of the Respondent No. 2 and even no specific threat has been alleged and, therefore, it cannot be treated to be criminal intimidation. It may be only intimidation but not criminal intimidation and, therefore, Section 506, I.P.C. is not applicable and the learned Magistrate erred in summoning the Petitioner No. 1 u/s 506, I.P.C. Moreover, from the facts and circumstances of the case as have come, it appears that Respondent No. 2 was bent upon to harass and pressurize the Petitioners by making false allegations regarding his marriage with Petitioner No. 1 and he even filed habeas corpus petitions which were dismissed. The Petitioner had earlier filed a case u/s 156(3), Cr.P.C. for alleged kidnapping of the Petitioner No. 2 but final report was submitted in that matter.

23. In this case the Respondent No. 2 had made allegations that the Petitioner No. 2 had given false affidavit and had made false statement in the Court and in the circumstances the learned Magistrate, instated of summoning her under Sections 177, 181 and 182, I.P.C. should have directed for registration of the Misc. case u/s 340, Cr.P.C., so that necessary enquiry could have been made and thereafter if found necessary proper action could have been taken by the concerned Court. The Respondent No. 2 had also made a request for taking action u/s 340, Cr.P.C., but the learned Magistrate only mentioned in this regard that there is provision for enquiry u/s 340, Cr.P.C. and punishment could not be awarded under that section.

24. The Respondent No. 2 purportedly gave the application u/s 156(3), Cr.P.C. and perhaps this misled the learned Magistrate. It is settled law that the sections mentioned in the application are not material and the contents of the same have to be seen. This mistake of the Court can be rectified now.

25. In this matter the Petitioner No. 2 has taken a consistent case that her marriage was not performed with the Respondent No. 2 and he produced forged marriage certificate in the Court. Therefore, it also needs to be inquired whether

the Respondent No. 2 filed a false marriage certificate in the Court. He himself has alleged in his application that it is to be enquired as to who has made a false statement. In the circumstances the inquiry u/s 340, Cr.P.C. is to be confined to the evidence given by Smt. Namita (Petitioner No. 2) and Vikram Simon (Respondent No. 2) in the Court of the Magistrate and no inquiry is required against Dr. R.S. Upadhyaya. While making inquiry u/s 340, Cr.P.C., the learned Magistrate shall also consider the effect of the dismissal of the application u/s 98, Cr.P.C. the acceptance of the final report in the Case Crime No. Nil of 1998, under Sections 363, 365, 366, 504 and 506, I.P.C. and the dismissal of habeas corpus petitions besides any other relevant evidence that may be adduced by the parties.

26. Therefore, it is expedient in the interest of justice that the learned Magistrate is directed to register a misc case u/s 340 Cr.P.C., wherein the necessary enquiry shall be made against Smt. Namita and Vikram Simon according to law and suitable action shall be taken thereafter.

27. In the circumstances, the writ petition is to be allowed and is hereby allowed. The impugned orders dated 24.12.2007 and 19.4.2008 are hereby quashed. Learned Magistrate is directed to register a misc. case u/s 340, Cr.P.C. and to make necessary enquiry as above and according to law.