

(2006) 04 GUJ CK 0012
In the Gujarat High Court

Case No : Criminal Revision Application No. 358 of 2005

Farida Yusuf Ibrahim Mulla

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 13-04-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 188
Penal Code, 1860 (IPC) — Section 498A, 506(2)

Citation : (2006) 04 GUJ CK 0012

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

Advocate : Zubin F Bharda, for the Appellant; HB Punani, Additional Public Prosecutor for Respondent 1 and N.V. Solanki, Respondent 2, for the Respondent

Final Decision : Allowed

Judgement

Ravi R. Tripathi, J.—The applicant original complainant is before this Court being aggrieved by judgment and order dated 19.04.2005 passed by the learned Sessions Judge, Navasari in Criminal Revision Application No. 8 of 2005 whereby the learned Judge is pleased to allow the revision application and quash the order passed below Exhs.13 and 42 in Criminal Case No. 3086 of 2003 and also quashing of the process issued against accused No. 2 (applicant in Criminal Revision Application). In the later part of the operative order, the learned Sessions Judge has stated that the original complainant can take necessary action against accused No. 2 after obtaining prior sanction of the Central Government, as contemplated u/s 188 of the Criminal Procedure Code.

2. At the out set, it is required to be mentioned that the Criminal Revision Application, a certified copy of which is made available by the learned advocate Mr.Z.F.Bharada, was filed only against order passed below Exh.42 in Criminal Case No. 3086 of 2003 dated 02.02.2005. What made the learned Sessions Judge to expand the scope of the revision application and quash the order passed below Exh.13 in Criminal Case No. 3086 of 2003 is not borne out from

the record. On this ground alone, the order deserves to be quashed and set aside.

3. Besides, even on merits, the order passed by the learned Sessions Judge deserves to be quashed and set aside as discussed hereinbelow:

Criminal Case No. 3086 of 2003 was registered on a complaint being filed by the present applicant original complainant alleging offences under Sections 498-A and 506(2) of the Indian Penal Code against one Hanif Ahamad Patel husband and Fatimabibi Ahamad Patel mother-in-law. The complaint runs into great details and sets out the ingredients of Sections 498-A and 506(2) of the Indian Penal Code. According to Mr. Bharada, learned advocate for the applicant, necessary ingredients are made out against accused Nos.1 and 2. Both these propositions are vehemently opposed by Mr. N.V. Solanki, learned advocate appearing for respondent No. 2 herein the mother-in-law.

4. So far as accused No. 1 is concerned, he is not before this Court and therefore, for the present, the case is not gone into from the point of view of accused No. 1. But, so far as accused No. 2 is concerned, there are allegations to the effect that while the complainant was in Kuwait with her husband, accused No. 2 was also there. She extended not only moral support to her son, but also physical support to see that the complainant is subjected to physical and mental torture. That is the reason why Exh.13 was filed by accused No. 2, wherein it is specifically mentioned that all the allegations made by the complainant in the complaint have taken place outside India in Kuwait; that none of the incidents, complained in the complaint have taken place within the territorial jurisdiction of this Court (the Court of Chief Judicial Magistrate, Navasari); that in view of the provisions of Section 188 of the Criminal Procedure Code, prior sanction of the Central Government is required and as the complainant is lodged without taking such prior sanction of the Central Government, the Court should not proceed with the case and drop the same.

This application Exh.13 was filed on 21.06.2003. The same was heard by the learned 2nd Judicial Magistrate, First Class, Navasari and was rejected with costs by order dated 25.08.2003. Then started the well thought and designed methods of frustrating the complaint of an unfortunate wife who was tortured to an extent which can be said to be "inhuman treatment" by accused No. 1, with support of accused No. 2, as alleged in the complaint.

5. Accused No. 2 approached this Court by filing Criminal Misc. Application No. 908 of 2004 which was disposed of by this Court (Coram: A.M. Kapadia, J.) by order dated 01.09.2004. The order is reproduced so as to see that the contents of the same are appreciated in true perspective:

Mr. N.D. Nanavaty, learned Senior Counsel for Nanavaty Advocates of the petitioners, upon instructions received from the petitioners, seek leave to withdraw the petition, reserving liberty to raise all the contentions which have been raised in this petition, at appropriate stage before appropriate forum. He further prays that appropriate direction may be issued to the learned Magistrate

that if the petitioners apply for exemption from remaining personally present in the Court during the course of the proceedings, the same may be considered sympathetically and in accordance with law, keeping in mind the age of petitioner No. 2. He states that he has received instructions from the Advocate of the local Court that non-bailable warrant against both the petitioners has been issued. He, therefore, urges that if the petitioners apply for cancellation of non-bailable warrant, same may be decided in accordance with law.

2. Mr. V.M. Pancholi, learned APP appearing on behalf of respondent No. 1 State of Gujarat has no objection if leave as prayed for is granted. Hence, leave to withdraw the petition is granted. Petition stands disposed of as it is withdrawn. It would be open for the petitioners to raise all the contentions which they have raised in this petition at appropriate stage before appropriate forum. The learned JMFC, Navsari is directed that if the petitioners tender application claiming exemption from remaining personally present in the Court during the course of trial, same shall be considered sympathetically and in accordance with law and having regard to the old age of petitioner No. 2. It is further directed that if the petitioners tender application seeking appropriate relief against issuance of non-bailable warrant the same shall also be considered in accordance with law and having regard to the old age of petitioner No. 2.

Direct service is permitted.

6. The ill-designs of the applicant proceeded further. Despite the fact that Exh.13 application was rejected, another application Exh.42 came to be filed. This application is longer than Exh.13. But in substance, it is for the same relief/s. Certain later developments are included. Besides, almost in every paragraph, it is stated that the Court has no jurisdiction and the ground for that contention is that the allegations contained in the complaint are about the incidents which took place outside India.

In paragraph No. 3 of the application (Exh.42), Section 188 of the Criminal Procedure Code is referred and it is stated that, as the complainant has not obtained prior sanction of the Central Government, the Court has no jurisdiction to proceed further against the applicant (accused No. 2).

In paragraph No. 5, there is a reference of Criminal Misc. Application No. 908 of 2004, filed before this Court. It is stated that, in the said Criminal Misc. Application, it was prayed that the complaint against the applicant (accused No. 2) be quashed. It is further stated that, during hearing of that application, it was declared on behalf of the Government that the trial Court has issued non-bailable warrant against the applicant (accused No. 2) therefore, the applicant was instructed to appear before the trial Court in the first instance and she was granted permission to raise all those contentions which are raised in that Criminal Misc. Application before the trial Court. It was also provided in the order that if the applicant wants to obtain exemption from remaining present before the trial Court, an application be made to the trial Court. Thereafter, it is stated

that, "the applicant had instructed her advocate to withdraw the application from the High Court and accordingly, the application was withdrawn".

Paragraph No. 6 mentions that the applicant then obtained certified copy of the order of the High Court, about which it is stated that, "the High Court had instructed the applicant that all contentions which were raised before the High Court, can be raised by the applicant before the trial Court.

In paragraph No. 8, once again Section 188 of the Criminal Procedure Code is referred to and it is mentioned that, "earlier an application Exh.13 was filed which is rejected by this Court. It is further mentioned that, it is likely to be argued that earlier an application u/s 188 of the Criminal Procedure Code is already decided, this application cannot be decided again by this Court having no jurisdiction to do that. Such a contention is not maintainable as the order passed below Exh.13 is not a final order, but is an interim order and it is a settled position of law that when the Court has passed an interim order, the Court can pass another order and for that, the applicant relied upon decision of Calcutta High Court, reported in 2002 (1) Crimes 369.

Finally, it is prayed in paragraph No. 9 that as the Court has no jurisdiction to proceed against the applicant (accused No. 2), the process issued against the applicant be cancelled and the complaint be quashed.

7. This Court called for the papers of Criminal Misc. Application No. 908 of 2004 for perusal. First thing which is noticed is that the application was filed by both the accused. Second thing which is noticed is that the application is filed without being supported by an affidavit. A prayer is inserted in handwriting as Clause (D) in paragraph No. 11 which reads as under:

Your Lordship may be pleased to dispense with the affidavit as the applicant is out of country.

The prayer is made in singular, without clarifying as to which of the applicant is out of country and why it is not affirmed by the other applicant. Besides, Exh.13 was filed on 21.06.2003 on instructions of accused No. 2 on behalf of accused No. 2. The same was decided on 25.08.2003. Whereas, application (Criminal Misc. Application No. 908 of 2004) was filed before this Court on 28.01.2004. Vakalatnama is signed by two applicants and it bears the date, 28.01. the year is not legible. In the entire application, there is no mention about filing of Exh.13 in Criminal Case No. 3086 of 2003 and the order passed below Exh.13 on 25.08.2003. In paragraph No. 11 in Clause (B), it is prayed that:

Your Lordship be pleased to quash and set aside the complaint filed against the applicant and further be pleased to dismiss the complaint being Criminal Case No. 3086 of 2003 pending in the Court of the learned Judicial Magistrate, First Class, Navasari.

In the entire application, only in paragraph No. 4 it is stated that:

the petitioner submits that the learned Judge has no jurisdiction to entertain such complaint. It is submitted that the learned Judge has no jurisdiction to take cognizance of the said complaint and only on the ground of the territorial jurisdiction, the impugned complaint as well as proceedings initiated there upon deserves to be quashed and set aside.

There is no mention about Section 188 of the Criminal Procedure Code.

In light of these facts, to file an application Exh.42 and raise a contention mentioning Section 188 of the Criminal Procedure Code, to state that liberty is reserved in favour of applicant accused No. 2, is a deliberate act on the part of accused No. 2, (as Exh.42 application is filed by accused No. 2 only) amounting to "abuse of process of law". Besides, there is sufficient material on the record of the case to come to the conclusion that the accused mis-represented before this Court, suppressed the material information from the Court while filing Criminal Misc. Application No. 908 of 2004.

13.04.2006

Aforesaid discussion reveals that this is a case which requires a serious note to be take.

8. So far as the present revision application is concerned, the same deserves to be allowed. Mr. Bharada, learned advocate for the applicant relied upon a decision of the Hon''ble the Apex Court in the matter of Ajay Agarwal v. Union of India and Ors. reported in AIR 1993 S.C. 1637. The learned advocate invited the attention of the Court to paragraph No. 27 of the said judgment. Relevant part of which reads as under:

Thus, we hold that sanction u/s 188 is not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins.

Mr. N.V. Solanki, learned advocate appearing for respondent No. 2 herein submitted that the said decision has no application to the facts of the present case. He submitted that the case which was before the Hon''ble the Apex Court, related to a conspiracy which by itself is a continuing offence and continues to subsist wherever one of the conspirators does an act or series of acts. He submitted that the said decision of the Hon''ble the Apex Court cannot be made applicable to the facts of the present case.

The submissions of learned advocate Mr. Solanki are not acceptable for the simple reason that the proposition of law laid down by the Hon''ble the Apex Court is more than clear and does not have any ambiguity in it. When it is said that the sanction u/s 188 is not a condition precedent to take cognizance of the offence, the order passed by the learned Sessions Judge who allowed the revision application and quashed the orders passed below Exhs.13 and 42 in Criminal Case No. 3086 of 2003 is required to be quashed and set aside. The learned Sessions Judge has also observed that the original complainant can take action against the present respondent No. 2 only after obtaining prior sanction

from the Central Government, as required u/s 188 of the Criminal Procedure Code, also runs contrary to the aforesaid decision. That being so, the judgment and order of the learned Sessions Judge dated 19.04.2005 in Criminal Revision Application No. 8 of 2005 is quashed and set aside. The resultant effect is, the orders passed below Exhs.13 and 42 stand revived and the Criminal Case No. 3086 of 2003 must proceed in natural course in accordance with law. The Criminal Revision Application is allowed with the aforesaid observations. Rule is made absolute. Direct service is permitted.