
(1999) 06 CAL CK 0029

In the Calcutta High Court

Case No : Criminal Appellate Jurisdiction Cri. R. No. 3480 of 1997

Rabiyul Mondal

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 18-06-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155(4), 198, 198(1), 199, 238
Penal Code, 1860 (IPC) — Section 109, 376, 493, 494, 499

Citation : (1999) 3 CALLT 19

Hon'ble Judges : Debiprasad Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.P. Sengupta, J.—This revisional application is for quashing of a proceeding being G.R. No. 164 of 1997 under sections 376/109/493 of the Indian Penal Code pending in the court of learned Sub-Divisional Judicial Magistrate, Basirhat.

2. On the basis of a complaint lodged by one Nazrul Sardar a case was registered with Swarupnagar Police Station against the present petitioner and his younger brother alleging commission of an offence under sections 493/376/109 of the Indian Penal Code. In the first information report it was alleged that the brother of the petitioner and the daughter of the defacto complainant came in contact of each other and as a result of such free mixing the intimacy between the parties grew up and they got married according to Muslim rites on 2.1.97. The daughter of the defacto complainant became pregnant. It was further alleged that few months after the marriage the said Safiquil Mondal (brother of the present petitioner) refused to accept the daughter of the defacto complainant and in such act of Safiquil, he was encouraged by his elder brother Rabiyul Mondal (present petitioner).

3. On completion of investigation police submitted charge-sheet against the petitioner and his younger brother under sections 493/376/109 of the Indian Penal Code. On the basis of the said charge-sheet the learned Sub-Divisional

Judicial Magistrate by his order dated 16.6.97 took cognizance of the offence.

4. Mr. Sekhar Basu, learned Advocate appearing for the petitioner submits that if a Magistrate takes cognizance of the offence under chapter XX of the Indian Penal Code on a complaint filed by one who is not an aggrieved person, the trial would be void and illegal. Mr. Basu drawn my attention to the provision of section 198 of the Code of Criminal Procedure, the relevant portion of which provides as follows :

" 198. Prosecution for offences against marriage :

(1) No Court shall take cognizance of an offence punishable under chapter XX of the Indian Penal Code. 1860 (45 of 1860) except upon a complaint made by some person aggrieved by the offence :

Provided that -

(a) where such person is under the age of eighteen years or is an idiot or a lunatic. or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may. with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his commanding officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable u/s (494 or 495) of the Indian Penal Code. 1860 (45 or 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister (or, with the leave of the court, by any other person related to her by blood, marriage or adoption.)

5. Mr. Basu submits that in the instant case the cognizance of the offence was taken by the learned Magistrate on the basis of charge-sheet submitted by the police, not on the basis of the complaint lodged by the aggrieved person as provided u/s 198 of the Code of Criminal Procedure. It is his further submission that the provision of section 198 of the Code of Criminal Procedure being a mandatory provision, the cognizance of offence u/s 493 of the Indian Penal Code taken by the learned Magistrate is bad in law and the trial and conviction of an accused in such a case by the Magistrate would be void and illegal. Mr. Basu argued that the alleged offences, namely, offences u/s 493 and 376 of the Indian Penal Code, are the own positive act of the principal accused Safiqul Mondal and such offences are not abatable offences and cannot be abetted.

6. Mr. Basu, in support of his contention, relied on a judgment reported in Abdul

Rehman Mahomed Yusuf Vs. Mahomed Haji Ahmad Agbotwala and Another, . The relevant portion in the said judgment is quoted below :

"In our opinion the provisions of that section are mandatory. Even in section 238 of the Code of Criminal Procedure the importance of the provisions of the section 198 of the Code is emphasised. Clause (3) of the section specifically states that the provisions of this section do not authorise the conviction of an offence referred to in section 198 or 199 when no complaint has been made as required by these sections. The Presidency Magistrate wrongly framed the charge, as on the record, when in respect of the offence charged there was no complaint filed and the facts as stated in the complaint actually filed did not make out the offence as charged."

7. The next judgment which was relied upon by Mr. Basu is reported in G. Narasimhan, G. Kasturi and K. Gopalan Ors. Vs. T.V. Chokkappa, . The relevant paragraph 13 in the said judgment of three-Judges-Bench of the Hon''ble apex court runs as follows :

"On these contentions, the principal question for determination is whether the respondent could be said to be an aggrieved person entitled to maintain the complaint within the meaning of section 198 of the Code. That section lays down that no magistrate shall take cognizance of an offence falling inter alia under chapter XXI of the Penal Code (that is, sections 499 to 508) except upon a complaint made by some persons aggrieved of such offence. Section 198, thus, lays down an exception to the general rule that a complaint can be filed by anybody whether he is an aggrieved person or not. and modifies that rule by permitting only an aggrieved person to move a magistrate in cases of defamation. The section is mandatory, so that if a magistrate were to take cognizance of the offence of defamation on a complaint filed by one who is not an aggrieved person, the trial and conviction of an accused in such a case by the Magistrate would be void and illegal."

8. The aforesaid judgment relates to an offence u/s 500 of the Indian Penal Code under the old Code of Criminal Procedure, 1898. But the ratio of the judgment is that the provision of section 198 of the Code of Criminal Procedure is a mandatory provision and non compliance of the same would vitiate the trial and conviction.

9. The next Judgment referred to by Mr. Basu is a three-Judges Bench decision of the Hon''ble Court reported In Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another, . Relying on all the Judgments referred to above Mr. Basu submits that the ratio of all those judgments is that provision of section 198 of the Code of Criminal Procedure is mandatory in nature and non-compliance of the same makes the entire proceeding, void and illegal. He further submits that since the cognizance of the offence u/s 493 of the Indian Penal Code was not taken on the basis of the complaint of the aggrieved person. as provided in section 198 of the Code of Criminal Procedure, the same is illegal and void.

10. Mr. Sudipta Moitra, learned Additional Public prosecutor appearing for the State draws my attention to the provision of sub-section (4) of section 155 of the Code of Criminal Procedure and submits that it is apparent from the said provision that if the facts reported to the police disclose both cognizable and non-cognizable offence, the police will be authorised to investigate both the case, because in that situation even a non-cognizable case shall be treated as cognizable. In the instant case, offence u/s 493 of the Indian Penal Code is a non-cognizable offence and the offence u/s 376 of the Indian Penal Code is a cognizable offence, but by virtue of the provision of section 155(4) of the Code of Criminal Procedure, the whole case was investigated by the police as cognizable and accordingly a charge-sheet was submitted by the police. Mr. Moitra further submits that if cognizance of offence was taken on the basis of the said charge-sheet the same cannot be bad in law. In support of his contention Mr Moitra cited a judgment of the Hon''ble apex court reported in 1996 SCC 1387. In paragraphs 12 and 14 of the said judgment it was held as follows :

"12. Sub-section (4) of section 155 is a new provision introduced for the first time in the Code in 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in the language employed in sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences. the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in subsection (4) provides that even a non-cognizable case shall, in that situation, be treated as cognizable.

14. The High Court was thus clearly in error in quashing the charge u/s 494 IPC on the ground that the trial court could not take cognizance of that offence unless a complaint was filed personally by the wife or any other near relation contemplated by clause (c) of the proviso to section 198(1)"

11. Mr. Basu. learned Advocate of the petitioner cites a judgment of the Special Bench of Hon''ble apex court reported in AIR 1995 SCW 3014. In the said judgment it was decided that where in a two-Judge Bench decision of the Hon''ble Supreme Court the attention of Bench was not invited to a three-Judge Bench decision holding the field and taking contrary view, the two-Judge Bench decision is per incuriam as the attention of the two-Judge Bench was not invited to the decision of the three-judge Bench. In the said judgment it was held by the Hon''ble Supreme Court as follows :

"It is, therefore, obvious that the decision rendered in the case of Chand Kaur is per incuriam, inasmuch as, the attention of the Bench was not invited to a three Judge-Bench decision in the case of scheduled castes Co-operative Land Owning Society Ltd. which was holding the field. The decision in Chand Kaur's case, thus being per incuriam, does not in fact consciously differ from the decision in the case of Scheduled Castes Co-operative Land Owning Society Limited. We. therefore, put the matter beyond the pale of doubt by stating that the law as laid

down in the decision in The Scheduled Caste Co-operative Land Owning Society Ltd., Bhatinda Vs. Union of India and others, , is correct and should hold the field."

12. I have carefully gone through the judgments referred to above and I am inclined to follow the three-Judge Bench decisions of the Hon''ble Supreme Court. From the ratio of those Judgments it becomes evident that the provision of section 198 of the Code of Criminal Procedure is mandatory and if cognizance is taken without complying with the said provision, the same will be bad in law. In my considered opinion the cognizance of offence u/s 493 of the Indian Penal Code is bad in law as the same was not taken on the basis of a complaint filed by the aggrieved person as provided in section 198 of the Code of Criminal Procedure.

13. Apart from what has been discussed above, I have also gone through the First Information report and other connected papers and I find that the facts and circumstances disclosed in the FIR do not make out an offence u/s 493/376/109 of the Indian Penal Code against the present petitioner, who is the elder brother of the principal accused Safiqui Mondal. FIR was lodged by the father alleging that his daughter was given in marriage with Safiqui Mondal on 2.1.97 and after marriage the said Safiqui Mondal refused to accept the daughter of the defacto complainant as his wife. It also appears from the FIR that the only allegation against the present petitioner is that in such act of refusal to accept his wife, Safiqui is encouraged by his elder brother Rabiul Mondal (present petitioner). In my opinion, offences under sections 493 and 376 are one's own positive act, which is not abatable and cannot be abetted in such a way. The allegation made in the FIR is not sufficient to implicate the present petitioner for abetment of such offences.

14. In the result the revisional application succeeds and the same is allowed. The proceeding being case No.G.R. 164 of 1997 pending in the court of learned Sub-Divisional Judicial Magistrate, Basirhat against the present petitioner is hereby quashed. But so far as the other accused namely, Safiqui Mondal is concerned, the proceeding against him will continue and the learned Magistrate is directed to proceed with the case against the said accused in accordance with law. I also direct the learned Magistrate to conclude the trial with utmost expedition since the matter is pending for a long time.

This order may be communicated to the court below immediately.

15. Application succeeds