

(2010) 01 AHC CK 0036
In the Allahabad High Court
Case No : Criminal R. No. 3065 of 2006

Smt. Preeti Agrawal and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 200, 202, 245(2), 362
Penal Code, 1860 (IPC) — Section 494, 497, 506

Citation : (2010) 1 ACR 986

Hon'ble Judges : Ram Autar Singh, J

Bench : Single Bench

Advocate : Ajay Rajendra, for the Appellant; Afshan Shafaut and Swati Agrawal and A.G.A., for the Respondent

Judgement

Ram Autar Singh, J.—I have heard Sri Ajay Rajendra, learned Counsel for the revisionists, learned A.G.A. for Respondent No. 1 and Sri Afshan Shafaut, learned Counsel for Respondent No. 2 on this revision and perused the record.

2. This revision has been filed against summoning order dated 10.4.2006, passed by Judicial Magistrate, Hasanpur, district J.P. Nagar in Complaint Case No. 973 of 2004, Rajeev Kumar v. Smt. Preeti Agrawal, under Sections 494, 497 and 506, I.P.C. The Respondent No. 2/complainant Rajeev Kumar filed a Complaint Case No. 973/IX of 2004 against Smt. Preeti Agrawal, Rakesh Kumar, Vinay Bansal, Smt. Usha Bansal and Mangal Sen Gupta with this allegation that accused No. 1 Smt. Preeti Agrawal was married with complainant Rajeev Kumar on 11.3.1996, according to Hindu rites and Customs, but the accused Nos. 3, 4 and 5 got Smt. Preeti Agrawal again married with accused No. 2, Rakesh Kumar without obtaining decree of divorce. Accused Preeti Agrawal and accused No. 2 Rakesh Kumar started to live in adultery as husband and wife. The complainant made a complaint before accused No. 3 Vijay Bansal with regard to this fact, at which he became aggressive. On 3.10.2004 at about 4 p.m. at Bus Stand, Hasanpur these

accused persons threatened to kill the complainant, in respect of which complainant sent a report to Deputy Superintendent of Police, Hasanpur and S.H.O. Kotwali (Sadar) as well as S.O. Partapur.

3. The police did not take any action on the report and then the complainant lodged a complaint in the court below, which recorded the statement of complainant u/s 200 and statement of Shahid Hasan u/s 202, Code of Criminal Procedure and found prima facie offences under Sections 494, 497 and 506, I.P.C. made out against accused persons and thus the court below summoned the accused persons to face trial in the said case vide order dated 16.10.2004.

4. Accused persons Smt. Preeti Agrawal and two others filed Criminal Revision No. 42 of 2005 challenging the order passed by learned Magistrate in the Court of Sessions Judge, J.P. Nagar and this revision was allowed by the Additional Sessions Judge, F.T.C. Court No. 1, J.P. Nagar with this observation that nothing was found in the order passed by the court below as to when, where and on what date second marriage of revisionist Smt. Preeti Agrawal took place and with whom. The learned revisional court directed the complainant to appear in the court below and the court below was directed to pass an appropriate order in accordance with evidence on record.

5. The learned court below further recorded the statements of Shahid Hasan as C.W. 1 and Mohan Lal as C.W. 2 and again summoned the accused persons for trial vide order dated 10.4.2006, aggrieved by which this revision was preferred.

6. The learned Counsel for the revisionists contended that the Respondent No. 2 filed above complaint with mala fide intention and concocted facts just to harass revisionist No. 1 and her old ailing parents revisionist Nos. 2 and 3. But in the said complaint no date, place and time of alleged second marriage of revisionist were mentioned and address of her alleged second husband was also not mentioned. It was also a question of common sense as to why revisionist No. 1 would go to Hasanpur and walk with her alleged second husband on roads, nor there was any occasion for her parents to go to Hasanpur where the complainant used to reside. In fact the revisionist No. 1 did not marry with any person nor started to live with him and this complaint was filed with wrong facts. The statement of Respondent No. 2 was recorded u/s 200, Code of Criminal Procedure wherein the contradictory stand was taken about the place where the parents of revisionists allegedly threatened.

7. The learned Counsel for the revisionists further contended that on 16.10.2004, learned Judicial Magistrate, Hasanpur summoned the revisionists without applying his judicial mind and ignoring contradictory stand of Respondent No. 2. The said order was also set aside by revisional court vide order dated 31.8.2005, passed in Criminal Revision No. 42 of 2005 filed by revisionists before Sessions Judge J.P. Nagar and the matter was remanded to the court below, but the court below again summoned the revisionists through this illegal order. There was no direction issued by the revisional court for taking fresh evidence u/s 202, Code of

Criminal Procedure, but the court below again recorded statement of C.W. 2 Mohan Lal and summoned the revisionists by his order dated 10.4.2006.

8. The learned Counsel for the revisionists further contended that the revisionist No. 1 filed an affidavit dated 24.9.2004 in Civil Suit No. 107 of 2002 specifically stating therein that the revisionist No. 1 did not marry with any person and she furnished an undertaking in her affidavit that she would not marry in future, but due to typographical error the name of husband of revisionist No. 1 was written as Rakesh Kumar instead of Rajeev Kumar and the said mistake of her counsel was bona fide and unintentional, as his name happened to be Rakesh Kumar. The stamp paper of said affidavit was purchased in the name of revisionist No. 1 showing her to be the wife of Rajeev Kumar. In view of settled law the revisionist should not suffer for the mistake of her counsel. The revisionist No. 1 by her subsequent affidavit dated 25.2.2005, corrected the said mistake occurring in the name of her husband. She did not marry with any person so far and on 26.2.2005, the revisionist No. 1 filed an application u/s 151, CPC to cancel her earlier affidavit dated 24.9.2004.

9. The Respondent No. 2 Rajeev Kumar also filed his counter-affidavit controverting the allegations made in the revision and stated that the learned trial court on the basis of allegations made in the complaint and evidence recorded under Sections 200 and 202, Code of Criminal Procedure applied his judicial mind and found a prima facie case against the revisionist. The Respondent No. 2 has further stated that the revisionist has no right to challenge summoning order dated 10.4.2006 and the same cannot be reviewed and recalled as the same is barred by Section 362, Code of Criminal Procedure. The revision has been preferred on the basis of finding of fact which cannot be disturbed in the revisional jurisdiction in view of proposition of law laid down by the Hon'ble Apex Court in Duli Chand Vs. Delhi Administration, and Adalat Prasad Vs. Rooplal Jindal and Others, as well as Subramaniya Sathi Raman v. State of Maharashtra 2005 SCC 242, wherein it has been held that the only remedy against summoning order can be availed by way of filing a petition u/s 482, Code of Criminal Procedure.

10. The learned Counsel for Respondent No. 2 has further contended that the entire facts as alleged in this revision can be looked into at the stage of framing of charge meaning thereby the revisionists can move an application for discharge u/s 245(2), Code of Criminal Procedure. It has also been established on record that Smt. Preeti Agrawal is the legally wedded wife of Rajeev Agrawal and she has married with Rakesh Kumar Agrawal, while her first husband is alive. The divorce petition has been filed by Smt. Preeti Agrawal, which is being proceeded ex parte, against which the Respondent No. 2 will file restoration application. An application u/s 125, Code of Criminal Procedure for maintenance allowance has also been moved by Smt. Preeti Agrawal against Respondent No. 2 Rajeev Kumar. It appears from the record that Divorce Petition No. 188 of 2004, Smt. Preeti Agrawal v. Rajeev Kumar, has been decreed ex parte by family court.

Meerut on 31.5.2005 and the same has not been set aside so far.

11. The reliance has been placed on Dhariwal Tobacco Products Ltd. and Ors. v. State of Maharashtra and Anr. (LXIV)2009 ACC 962 : 2009 (1) ACR 773, wherein the Hon''ble Apex Court has held:

8. Indisputably issuance of summons is not an interlocutory order within the meaning of Section 397 of the Code. This Court in a large number of decisions beginning from R.P. Kapur Vs. The State of Punjab, and Som Mittal Vs. Government of Karnataka, has laid down the criterion for entertaining an application u/s 482. Only because a revision petition is maintainable, the same by itself, in our considered opinion, would not constitute a bar for entertaining an application u/s 482 of the Code.

Even where a revision application is barred, as for example the remedy by way of Section 115 of the Code of Civil Procedure, 1908, this Court has held that the remedies under Articles 226/227 of the Constitution of India would be available. (See Surya Dev Rai v. Ram Chander Rai and Ors.).

Even in cases where a second revision before the High Court after dismissal of the first one by the Court of Sessions is barred u/s 397(2) of the Code, the inherent power of the Court has been held to be available.

12. The Hon''ble Apex Court also considered Amar Nath and Others Vs. State of Haryana and Another, wherein it was observed that it would be difficult to hold that the order to summon the Appellants straightaway was merely an interlocutory order which could not be revised by the High Court under Sub-sections (1) and (2) of Section 397 of the 1973 Code. The order of the Judicial Magistrate summoning the Appellants in the circumstances of the present case, particularly having regard to what had preceded, was undoubtedly a matter of moment, and a valuable right of the Appellants had been taken away by the Magistrate in passing an order prima facie in sheer, mechanical fashion without applying his mind. 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.

13. The Hon''ble Apex Court in Dhariwal Tobacco Products Ltd. v. State of Maharashtra, case has observed that it is difficult to curtail this remedy u/s 482, Code of Criminal Procedure merely because there is a revisional remedy available. The alternate remedy is no bar to invoke power under Article 227. What is required was to see the facts and circumstances of the case while entertaining such petition under Article 227 of the Constitution and/or u/s 482 of Code of Criminal Procedure Taking into consideration the facts and circumstances of the cases it would be appropriate for the parties to file revision application

against the order of issuance of process. There is nothing mentioned or observed that there is total bar to file petition u/s 482, Code of Criminal Procedure or under Article 227 of the Constitution of India.

14. So far as the question of merit of this revision is concerned that the learned Additional Sessions Judge, J.P. Nagar in Criminal Revision No. 42 of 2005 categorically stated that the name and address of main accused Rakesh Kumar Agrawal were not mentioned in the complaint lodged by Respondent No. 2 and the matter was sent back to the court below for passing an appropriate order on the basis of the evidence recorded under Sections 200 and 202, Code of Criminal Procedure, but the court below recorded additional evidence of C.W. 1 Shahid Hasan, C.W. 2 Mohan Lal and again summoned the revisionists for trial, while the situation was the same and the name of the father and address of the main accused Rakesh Kumar Agrawal were still found missing in the complaint as well as in the statements recorded under Sections 200 and 202, Code of Criminal Procedure

15. The revisionist Smt. Preeti Agrawal has categorically explained the situation that due to error of her counsel the name of her husband as Rakesh Kumar Agrawal was wrongly mentioned in the affidavit filed in civil suit and taking the benefit of that typing mistake the Respondent No. 2 filed this complaint with concocted facts and story. Till now, the Respondent No. 2 could not fix the identity of Rakesh Kumar Agrawal so called second husband of revisionist No. 1, as a result of which no cognizance could be taken against a person whose identity could not be established so far and the court below did not care of the direction issued by the learned Additional Sessions Judge in above Criminal Revision No. 42 of 2005 and again passed a cryptic and mechanical order without applying his judicial mind. There was no occasion for the trial court to record fresh statements of witnesses u/s 202, Code of Criminal Procedure before passing the order under revision, while the trial court must have heard the complainant on the same evidence and material available on record and passed an appropriate order in accordance with the same. Moreover, the complainant also failed to adduce any evidence relating to the second marriage as well as the names of the witnesses, in whose presence, the second marriage took place. Thus, the trial court committed illegality and irregularity in recording the statements of court witnesses. The order passed by the court below is absurd, perverse and cryptic.

16. The learned Counsel for the revisionists rightly pointed out that the contradictory stand was taken by the complainant about the alleged offence u/s 506, I.P.C. There was no occasion for revisionist No. 1 Smt. Preeti Agrawal residing in 5, Rajban, Bara Bazar, P.S. Kotwali, Meerut Cantt. to go with her alleged second husband to Hasanpur and there was no occasion for her parents to go to the said place where the complainant used to live. The complainant/Respondent No. 2, in his statement recorded u/s 200, Code of Criminal Procedure stated that the parents of revisionist No. 1 threatened to kill him at

Gajraula Bus Stand while his complaint disclosed that her parents threatened him at Hasanpur Bus Stand and thus there was material contradiction in respect of the place of alleged occurrence, but the trial court did not consider this aspect and issued process against the revisionist without applying his mind. Consequently the order passed by the court below is perverse and against the facts and evidence on record. Thus, the impugned order can be interfered with and set aside in this revision, which is maintainable against issuance of summons, because issuance of summons is not an interlocutory order within the meaning of Section 397, Code of Criminal Procedure, in view of proposition laid down by the Hon"ble Apex Court in Dhariwal Tobacco's case.

17. In view of above facts and circumstances of the case this revision succeeds and is allowed and order dated 10.4.2006, passed by Judicial Magistrate, Hasanpur in Complaint Case No. 973 of 2004, Rajeev Kumar v. Smt. Preeti Agrawal, under Sections 494, 497 and 506, I.P.C., P.S. Hasanpur, district J.P. Nagar is quashed. The learned trial court is directed to pass a fresh order in view of observations made in this judgment as well as on the basis of the evidence on record.