

Ashok and ors. Vs. the State

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Court : Madhya Pradesh

Decided On : Oct-09-1986

Reported in : 1987CriLJ1750

Judge : K.L. Shrivastava, J.

Appellant : Ashok and ors.

Respondent : The State

Judgement :

ORDER

K.L. Shrivastava, J.

1. This revision petition is directed against the appellate judgment and order dated 1-7-83 passed by the Additional Sessions Judge, how in Criminal Appeal No. 247 of 1982 confirming the conviction of each of the petitioners under Section 353/34, I.P.C. and reducing the sentence of rigorous imprisonment for one year and a fine of Rs. 500/- recorded by the Additional Chief Judicial Magistrate, how in Criminal Case No. 183 of 1978 to R.I. for 6 months and fine.

2. Circumstances giving rise to this petition are these. According to the prosecution story on 2-2-78 Sub-Inspector Y.P. Yadav (P.W. 1) after search-warrant from the Deputy Superintendent of Police, raided the house of the petitioner Shankarlal and finding his son Subbash (since acquitted in appeal)

indulging in Satta gambling, arrested him with money and articles. Later when Subhash was being taken to the police station, he himself and the three petitioners and 15 to 20 other persons pelted stones at the police party and were shouting that Panchnamas be snatched and the police party be beaten. They followed the police party up to the police station thereby obstructing the Sub-Inspector Yadav in the discharge of his public functions.

3. At the conclusion of the investigation, the petitioners along with Subhash were prosecuted. Charges under Sections 186 and 353, I.P.C. were framed against each of them.

4. At the conclusion of the trial, the learned Magistrate held that the offence under Section 186, I.P.C. is not proved. He, however, convicted Subhash and the petitioners under Section 353 read with Section 34, I.P.C

5. In appeal, by the impugned judgment and order the learned Additional Sessions Judge acquitted Subhash and maintained the convictions of the petitioners under Section 353/34, I.P.C. reducing the sentences as already stated.

6. The contention of the petitioners' learned Counsel is that in the instant case, facts relating to the offences under Sections 186 and 353, I.P.C. being the same or at least interwoven, it has to be held that as cognizance of the offence under Section 186 I.P.C could not, in view of Section 195(1)(a)(i) of the Criminal P.C. 1973 (for short 'the Code') have been taken in absence of a written complaint by the public servant concerned or by some other public servant to whom he was administratively subordinate cognizance of the offence under Section 353 *ibid* was, for that reason, also barred. Reliance was placed on the decision in *State of Karnataka v. Hemareddy* AIR 1981 SC 1417 : 1981 Cri LJ 1019.

7. The contention of the learned Counsel for the petitioners further is that the charge being under Section 353, I.P.C, the petitioners could not be convicted for the said offence with recourse to Section 34, I.P.C. in absence of relevant evidence. It is further contended that the offence under Section 353, I.P.C. is an aggravated form of the offence under Section 186, I.P.C. and in view &l; the acquittal under Section 186 *ibid* conviction under Section 353, I.P.C. could not be

entered.

8. The¹ petitioners' learned Counsel goes on to contend that the offence for which Subhash was arrested being bailable, it was the duty of the police under Section 50 of the Code to inform him that he could be released on bail and it was illegal on its part to take him to the police station. It is urged that, in the circumstances, those insisting on his being released, could not be held to have committed any offence under Section 353, I.P.C.

9. It was lastly contended that the petitioner Ashok being below 21 years of age could not have been sentenced by the learned trial Magistrate to imprisonment, without complying with the mandatory requirements of Section 6 of the Probation of Offenders Act, 1958. this Court's attention was also invited to the provision of Sections 360 and 361 of the Code.

10. learned Counsel for the respondent contends that when the police was taking Subhash to the police station, the petitioners could demand his release on bail but they could not have indulged in obstructing and assaulting the police party and on the facts and in the circumstances of the case, their convictions and sentences do not deserve interference in revision.

11. The point for consideration is whether the revision petition deserves to be allowed.

12. I shall first take up the contention raised with reference to Section 195(1)(a)(i) of the Code. The provision reads thus:

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence:

(I) 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....except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate:

The underlying purpose behind the provision seems to be to check misuse of the machinery of criminal prosecution by unconcerned persons on frivolous, vexatious or insufficient grounds inspired by a revengeful desire to harass or spite their opponents. As pointed out in *State v. Kantilal*, 1977 MPLJ (Notes) 1 the fact that the offence under Section 188 of the I.P.C. is made cognizable and non-bailable does not affect the mandatory provision regarding special complaint under Section 195 of the Code.

13. Now as to the two offences in respect of which the petitioners were prosecuted, Section 186 embodies the penal provision for voluntarily obstructing any public servant in the discharge of his public functions. Section 353, I.P.C. is in these terms:-

353. Assault or criminal force to deter public servant from discharge of his duty-Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

14. In the decision in *Radhe Shyam v. State* AIR 1968 All 342 : 1968 Cri LJ 1329 it had been held that if in truth and substance an offence falls in the category of sections in Section 195, it is not open to the Court to convict an accused without complying with the provisions of that section. Therein the prosecution was for offences under Sections 228 and 353, I.P.C. committed in the course of the same transaction, and it was held that the offences could not be split up to avoid the provision of Section 195 of the Code. In paragraph 4 of the decision it had been stated as under:

Now the crux of the allegation in the present case was that the Sub-Registrar was obstructed in the discharge of his official duty by the accused offering insult in to and committing assault on him. It was said that accused used filthy language and displayed an attitude of defiance to his authority by means of gestures. On these facts it would hardly be possible to separate the element of insult from that of so-

called assault because the two are so interwoven in the episode, that they become merged one with the other. It seems, therefore, clear that the Magistrate could only have proceeded to try the accused under Section 353 by disregarding the fact that the two offences fell in the same category and were of the same nature.

15. In the aforesaid decision, the one in Bashir-ul-Haq v. State of West Bengal AIR 1953 SC 293 : 1953 Cri LJ 1232 has been referred to. According to this Supreme Court decision, the provision in Section 195 of the Code should not be evaded by resorting to devices and camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the Court or of the public servant is required. If in truth and substance the offence falls in the category of sections mentioned in Section 195 of the Code, prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it or changing its garb. If the facts disclose an offence requiring special complaint under Section 195 of the Code the provision could not be circumvented by filing a complaint for which no special complaint is required under law, the nature of the offence being the same.

16. Paragraphs 8 and 9 of the decision in Radhe Shyam's case : 1968 Cri LJ 1329 (All) (supra) may profitably be reproduced. They run thus:

8. Again In Re. Chinnayya Goundan AIR 1948 Mad 474 : 1948-49 Cri LJ 737 Govinda Menon, J. after considering the case law stated:

The principle deducible from these cases is that when a complaint is made to a Court the facts should be considered as a whole and there should be no splitting up of the facts. Therefore, the Court is not entitled to disregard some of the facts and try an accused person for an offence which the remaining facts disclose. Considering the acts as a whole if they disclose an offence for which a special complaint is necessary under the provisions of Section 195, Cr. P.C., the Court cannot take cognizance of the case at all unless that special complaint has been filed.9. In State v. Kathi Unad AIR 1955 Saurashtra 10 : 1955 Cri LJ 52, the learned Judge relying on the Supreme Court case of Bashir-ul-Haq AIR 1953 SC 293 : 1953 Cri LJ 1232 said that the very act of obstruction lay in the assault and the hurt to complainant and that the offence primarily committed was under

Section 186, I.P.C. and to convict the accused for the offence under Section 332, I.P.C. would be tantamount to holding them guilty under Section 186, I.P.C. and then convicting them for the offence under Section 332, I.P.C. They came to the conclusion that the prosecution could not circumvent the provisions of Section 195 by a dubious method. (See also Makaradhwaj Sahu v. State AIR 1954 Orissa 175 : 1954 Cri LJ 950. The decision in AIR 1953 Nag 290 : (1953 Cri LJ 1573) is also pertinent.

17. In the instant case too, the very act of obstruction lies in the alleged assault and use of criminal force. In truth and substance the offence in question falls in the category of sections mentioned in Section 195 of the Code and it was not open to bypass its provisions even by choosing to prosecute under Section 353; I.P.C. only.

18. According to Section 461(1)(k) of the Code if any Magistrate not being empowered by law in this behalf takes cognizance of an offence under Section 190(1)(c) of the Code, his proceedings shall be void. In the case in hand the proceedings before the learned trial Magistrate must be held to be void, as in view of the provisions in Section 195(1)(a)(i) of the Code and the authorities mentioned above, he could not take cognizance of the offences without complaint by the public servant concerned or by any other officer to whom he is administratively subordinate. When Magistrate acts in contravention of bar under Section 195 of the Code, the proceeding has to be quashed.

19. In the light of the view taken by me in regard to the contention of the petitioners' learned Counsel based on Section 195(1)(a)(i) of the Code, the merits of the other contentions need not be gone into.

20. In passing, reference may, however, be made to the provisions in Section 50 of the Code and the effect of their non-compliance. The provision reads thus:

(1) ...

50. Person arrested to be informed of grounds of arrest and of right to bail - Every police officer, or other person arresting any person without warrant shall forthwith,

communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) ...

Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

The provisions are in conformity with Article 22(1) of the Constitution of India and non-compliance with the aforesaid mandatory provisions of the Code amounts to non-compliance with the procedure established by law and renders the arrest and detention of 'the person concerned illegal. In this connection the decision in Govind Prasad's case, 1975 Cri LJ 1249 (Cal) may usefully be perused.

21. In the ultimate analysis I hold that the trial for the offences under Sections 186 and 353 of the I.P.C. without a special complaint as required under Section 195(1)(a)(i) of the Code being illegal is vitiated and deserves to be quashed.

22. In the result, the revision petition succeeds and is allowed. The conviction and sentence passed on each of the petitioners are set aside. The proceedings in the Courts connected therewith are quashed. The bail bonds of the petitioners shall stand discharged. Fine if paid shall be refunded to the petitioners.

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