

Sumitra Devi Vs. Rajinder Singh and Anr

Sumitra Devi Vs. Rajinder Singh and Anr

SooperKanoon Citation : sooperkanoon.com/52036

Court : Jammu and Kashmir

Decided On : May-29-2015

Judge : Honble Mr. Justice Janak Raj Kotwal-Judge

Appellant : Sumitra Devi

Respondent : Rajinder Singh and Anr

Advocate for Def. : Mr. Vikas Razdan

Judgement :

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU Cr Rev No. 13 OF2011
Sumitra Devi Petitioners Rajinder Singh & anr Respondent ! Mr. Sunil Sethi, Sr.
Advocate with Mr. Mohsin Butt, Advocate. ^ Mr. Vikas Razdan, Advocate vice Mr.
Sudershan Sharma, Advocate Honble Mr. Justice Janak Raj Kotwal-Judge Date:

29. 05.2015 :

JUDGMENT

:

1. This revision petition is directed against order dated 04.01.2011 whereby learned Sessions Judge, Jammu dismissed respondents complaint under sections 494/109, 405, 406, 379 & 382 RPC in File No. 08/compliant in terms of section 403 of the Code of Criminal Procedure (for short the Code).

2. Heard. I have perused the record.

3. I may state, briefly, the facts leading to this revision petition: a) Petitioner-Sumitra Devi is wife of respondent No.1, Rajinder Singh. Respondent No.2, Kamlesh Kumari is said to be the second wife of respondent No.

1. In the year 1996, 2 petitioner filed a complaint under section 494 RPC against respondent No.1 alleging inter alia that respondent No.1 contracted second marriage with respondent No.2 in November, 1990 without knowledge or consent of the petitioner. That complaint was filed in the court of the Judicial Magistrate, 1st Class (Sub-Judge), Jammu on 22.01.1996. b) Learned Magistrate on 05.02.1996 recorded statements of the petitioner (complainant) and one witness produced by her and issued process against respondent No.1 for proceeding against him for commission of offence under section 494 RPC. Offence under section 494 RPC being exclusively triable by the Court of Session, learned Magistrate on 17.08.1996 committed the case to the Court of Sessions Judge, Jammu and was assigned to the court of 1st Additional Sessions, Judge, Jammu for trial. On 14.09.1998, petitioner (complainant) filed an application before the trial court stating that parties have entered into an agreement and that in lieu of the compromise she wants to withdraw the complaint with permission to file fresh 3 complaint in case of breach of agreement by the other party. She, therefore, made a prayer for allowing her to withdraw the complaint. Application was supported with a copy of the deed of agreement executed between the parties on 09.09.1998. Learned trial judge on the same day passed order allowing the petitioner to withdraw the complaint and dismissed the complaint as compromised and acquitted the accused. c) On 07.06.2008 petitioner filed a fresh complaint against both the respondents in the court of Judicial Magistrate (1st Additional Munsiff), Jammu under sections 494/109, 405, 406, 379, 382, 418, 422 & 424 RPC. In this complaint the petitioner (complainant), besides alleging that respondent No.1 after his retirement from Government service has refused to comply with the agreement entered into during pendency of the earlier complaint, alleged further that in June, 2008 respondent No.1 took away her gold ornaments. Learned Magistrate after taking cognizance recorded the statement of the complainant and one witness produced by her and issued process 4 against the respondents for proceeding

against them for commission of offences under sections 494/109, 405, 406, 379 & 382 RPC. On 09.10.2010, the learned Magistrate committed the case for trial to the court of Sessions Judge, Jammu and the trial commenced. d) On 04.01.2011 counsel for the respondents produced a copy of order dated 14.09.1998 (supra) passed by learned Ist Additional Sessions Judge, Jammu in the trial Court and made a prayer for dismissal of the complaint on the basis thereof. On the same day learned Sessions Judge dismissed the complaint in terms of section 403 of the Code holding that in the earlier complaint, petitioners prayer for withdrawal from the complaint on the basis of compromise was allowed and accused persons were acquitted. Order dated 04.01.2011 passed by learned Sessions Judge, Jammu is impugned in this revision petition.

4. On the strength of the averments in the revision petition, Mr. Sunil Sethi, learned Senior Advocate, appearing for the petitioner submitted that petitioner was compelled to enter into a 5 compromise in the earlier complaint under pressure and allurements by the promise of providing maintenance to her made by respondent No.1. Respondent No.1, who is a Government teacher, had been providing maintenance to the petitioner in terms of the compromise but after his retirement from Government service he refused to provide maintenance to her from his pension. She was thus compelled to file the complaint afresh as respondent No.1 had breached the terms of the compromise. Assailing the impugned order, Mr. Sethi argued that under compelling circumstances and having been allured by the promise of providing maintenance to her by respondent No.1, petitioner had conditionally withdrawn her earlier complaint and as the respondent committed breach of the agreement, petitioner is not precluded from filing the complaint afresh. Referring to the explanation to section 403 of the Code, Mr. Sethi argued that earlier it was simple dismissal of the complaint having been conditionally withdrawn by the petitioner so the scope of filing fresh complaint is protected under the Explanation as such a 6 dismissal was not acquittal of the accused-respondent. Contextually, Mr. Sethi read out the contents of the application for withdrawal of complaint filed by the petitioner in the earlier complaint and sought to make out a point that petitioner had sought only withdrawal of the complaint with permission to file fresh complaint in case of breach of agreement by the other party and dismissal of the complaint by the

learned trial Court is to be construed in that sense and not as the acquittal of respondent No.1 as contemplated under section 403 of the Code.

5. Per contra, Mr. Vikas Razdan, learned counsel for the respondents, argued that vide order dated 14.09.1998, learned trial Court had recorded acquittal of respondent No.1 on the basis of compromise between the parties so fresh complaint and trial of respondent No.1 for the same offence is barred under section 403 of the Code.

6. The short question, thus, arising for determination is whether the subsequent complaint filed by the petitioner was not maintainable as per section 403 of the Code and 7 has been rightly dismissed by the learned Sessions Judge, Jammu vide the impugned order dated 04.01.2011? 7. Sub-sections (1) and (2) of section 403 of the Code and Explanation thereto are relevant. They read as under: 403. Person once convicted or acquitted not be tried for the same offence (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub- section (1). (3) (4) . (5) .. Explanation- The dismissal of a complaint, the stopping or proceedings under section 249, the discharge of the accused or any 8 entry made upon a charge under section 273, is not an acquittal for the purposes of this section. < 8. A close look at sub-sections (1) and (2) of section 403 of the Code would show that subsequent trial of a person for the same offence for which he has once been tried by a court of competent jurisdiction and convicted or acquitted is not permissible. It being so, the impugned order dated 04.01.2011 passed by the learned Sessions Judge, Jammu is ex facie wrong insofar as it relates to dismissal of the complaint qua offences under sections 405, 406, 379 and 382 RPC. Allegations giving rise to these offences are certainly independent of and not related to the allegation of second marriage by respondent No.1 with respondent No. 2 constituting offence under section 494 RPC, which

alone was the subject matter of trial on the earlier complaint that was dismissed as compounded and respondent No. 1 acquitted by the learned 1st Additional Sessions Judge, Jammu.

9. In regard to offence under section 494 RPC for which respondent No.1 (accused) was being tried in the earlier complaint, it is noticed that the petitioner (complainant) in her application filed on 14.09.1998 had not sought permission for compounding the offence with respondent No.1. She rather had submitted in that application that the parties to the complaint have entered into an agreement and in lieu of the compromise she wants to withdraw the complaint with permission to file fresh complaint in case of breach of agreement by the other party and on that count she had sought permission to withdraw the complaint. Intention of the petitioner was clear than evident from the contents of the application. She never intended to compromise the offence with the respondent No.1 (accused) and while seeking withdrawal of the complaint, she intended to keep her option open to proceed against him in case of breach of agreement by him. As against this, the order passed by the learned court on the same day would show that the court not only allowed the petitioner to withdraw the complaint but had gone a step ahead by dismissing the complaint as compounded and acquitting the accused. 10 10. As per section 345 (2) of the Code an offence under section 494 RPC falls in the category of offences which can be compounded by the persons specified therein with the permission of the court before which any prosecution for such offences is pending. An offence under section 494 RPC can be compounded by the husband or the wife of the person who marries in the circumstances which amounts to an offence punishable under that section. It would thus imply that the person desirous of compounding the offence has to make a request in this behalf to the trial court. As pointed out above, no request for compounding the offence with the respondent No. 1 (accused) was made by the petitioner (complainant) so dismissal of the complaint as compounded and acquittal of the accused recorded by the learned trial court was illegal.

11. There is another aspect of the matter, which is even more important. Respondent No. 1 (accused) in the earlier complaint was being tried for offence under section 494 RPC, which is exclusively triable by the Court of Session by

following the procedure prescribed under 11 Chapter XXIII of the Code. There is no provision in the Code which enables complainant to withdraw a complaint in the cases other than those falling under Chapter XX thereof, which deals with trial in summons cases by Magistrates. Section 248, which is comprised in Chapter XX, enables a complainant to withdraw a complaint in a case falling under that Chapter any time before final order is passed, provided he satisfies the Magistrate that there are sufficient grounds for permitting him to do so. No provision corresponding to section 248 has been provided in Chapter XXI that deals with trial of warrant cases by the Magistrates or Chapter XXIII that deals with trial before a Court of Session. The only provision in the Code which refers to withdrawal of a criminal cases, nature of trial and offence notwithstanding, is section 494. That section, however, enables a public prosecutor to withdraw from prosecution of any person either generally or in respect of any one or more offences for which he is tried with the consent of the Court. When any such withdrawal is permitted before a charge has been framed, accused shall be discharged in 12 respect of such offence or offences and shall be acquitted when withdrawal is permitted after framing of the charge.

12. Having filed the complaint and trial having commenced before the learned Ist Additional Sessions Judge, the complainant was left with no power to withdraw the complaint even on the basis of agreement between the parties so neither it was possible for the complainant to withdraw the complaint nor on the basis of application made by her and the relief sought therein, complaint could have been dismissed as withdrawn or compounded by the learned court. What course learned trial Judge should have taken could have been sorted out by the learned Judge at that time but in no case complaint should have been dismissed as compounded and accused acquitted. The order of acquittal recorded by the learned trial Court in the earlier complaint, therefore, was without jurisdiction and illegal on that score also.

13. Having held that the order of dismissal of the complaint and acquittal of the accused recorded by the learned Ist Additional Sessions 13 Judge, Jammu on 14.09.1998 was illegal, question arising would be whether such acquittal would operate as a bar against subsequent complaint and trial of the respondent for

offence under section 494 RPC after he allegedly committed breach of the agreement arrived at between the parties.

14. In Ramesh Chandra J.

Thakur v. A.P.Jhaveri and anr., AIR 1973 SC84 their Lordships have held in para (6) of the reporting: It would follow from the above that where an acquittal is based on the compounding of an offence and the compounding is invalid under the law, the acquittal would be liable to be set aside by the High Court in exercise of its revisional powers. As the acquittal of the appellant by the trial court in the present case was based upon the compounding of an offence which was not compoundable, the High Court in our view right set aside the acquittal of the appellant. 15. An acquittal to operate as a bar to subsequent trial for the same offence under section 403 of the Code must arise in a trial by a Court of competent jurisdiction. Not only the Court 14 should have the jurisdiction to try the case but also jurisdiction to record the acquittal.

16. I would thus hold that the acquittal earned by the respondent No. 1 from the Court of learned Ist Additional Sessions Judge vide order dated 14.

9. 1998 was illegal and such illegal acquittal would not operate as bar against subsequent trial of the respondent for the same offence. I would hold further that the learned Sessions Judge, Jammu was not legally corrected in dismissing the complaint and seems to have acted in haste in this regard. Order dated 04.01.2011 passed by the court of learned Sessions Judge, Jammu is, therefore, set aside and the court is directed to commence the trial from the stage it was on the date of passing of the impugned order.

17. Record of the trial Court be remitted back along with copy of this order.

18. Disposed of. (Janak Raj Kotwal) Judge Jammu:

29. 05.2015 Pawan Chopra

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com