

Simachal Mishra Vs. State of Orissa

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Court : Orissa

Decided On : Sep-04-2001

Reported in : 92(2001)CLT444; I(2002)DMC33; 2001(II)OLR381

Judge : A.S. Naidu, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 155, 193, 195, 197, 198, 198(1), 198(2), 199, 238, 482 and 493 to 498; [Indian Penal Code \(IPC\), 1860](#) - Sections 17, 34, 193, 195, 197, 198, 406, 494 and 498-A;

Appeal No. : Crl. Misc. Case No. 1167 of 1999

Appellant : Simachal Mishra

Respondent : State of Orissa

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Mr. D.P. Dhal, Adv.

Disposition : Criminal misc. case allowed

Judgement :

A.S. Naidu, J.

1. This application is filed invoking jurisdiction under section 482 of the Code of Criminal Procedure, 1973 (for short, the 'Code'), inter alia, praying to quash the

order of cognizance dated February 1, 1999, passed by the learned Sub-Divisional Magistrate, Berhampur, in G.R. Case No, 1160 of 1997.

2. The moot point which needs determination in the present case is, as to whether in the absence of a complaint as stipulated under section 198 of the Code, there is any scope for taking cognizance under section 491 of the Indian Penal Code (in short 'I, P. C.): For appreciating the position of law, facts, which are very much necessary, are set herein below.

3. On the basis of an information lodged by Manjulata Padhi before the Officer-in-Charge, Mahila Police Station, Berhampur, P. 3. Case No. 57 of 1997 was registered against the petitioner for offences punishable under sections 498A, 494 read with section 34 of the I. P, C. which was subsequently converted to G. R, Case No. 1160 of 1997 in the court of the Sub-Divisional Judicial Magistrate, Berhampur.

In the F.I. R. the informant alleged that she had married the petitioner on July 6, 1992 as per the Hindu Rites and Customs. Though the initial married life was blissful, subsequently dissension cropped up when the wife refused to give her educational certificates for a D. I. C. loan. It is alleged that being enraged, the husband drove her out of the house. She was pregnant at that time and on July 9, 1993 she gave birth to a male child. It is further alleged that in the meanwhile the petitioner has married for the second time.

The police after investigation submitted charge-sheet for the offences punishable under sections 498A, 494 and 406/34, I. P. C. . The learned Magistrate, by order dated September 17, 1998 took cognizance in consonance with the charge-sheet and issued process for appearance of the accused. The said order was impugned by the petitioner before this Court in Crl. Misc. Case No, 5519 of 1998. By order dated January 15, 1999, this Court disposed of the aforesaid application with a direction to the petitioner to renew his prayer before the learned Magistrate to reconsider and to recall the order of cognizance. On the basis of an application filed by the petitioner, the learned Magistrate reconsidered the matter and by order dated February 1, 1999, after a thread-bare discussion of the allegations made in the F.I.R. as well as other documents, held that the charges under section 498A

as well as section 406, I. P. C. are not tenable in law and the order taking cognizance of the offences under the said sections is barred by limitation. The learned Magistrate recalled his earlier order of cognizance so far as offences under sections 498A. and 406, I. P. C. are concerned, but directed that the case shall proceed in respect of the offence under section 494, I. P. C. . The said order as stated above is impugned in this case.

4. The sole point argued by Mr. Dhal, learned counsel for the petitioner, in this criminal misc. case is that, the learned Magistrate erred in law in taking cognizance against the petitioner for the offence punishable under section 494, I. P. C; in view of the specific bar under section 198(1) of the Code. For appreciating the contention raised by the learned counsel for the petitioner, it is necessary to refer to section 198(1) of the Code which is quoted herein below .

'198. Prosecution for offences against marriage :--(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (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 under section 17 of the Indian Penal Code (45 of 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.'

A careful reading of the aforesaid provision leads to an irresistible conclusion that there is clear bar under the Code prohibiting any Court from taking cognizance of an offence under Chapter XX of the I.P.C. except upon complaint made by some person aggrieved by the offence. Chapter XX of the I.P.C. deals with offences relating to marriage and covers from section 493 to 498 of the Code. Thus, section 494 is one of the sections covered under the said Chapter.

Section 198 of the Code like sections 193, 195 and 197 regulates the jurisdiction and competence of the court. This section is in the nature of an exception to the general rule that any person can set the criminal law into motion by filing an F.I.R. at the police station and/or filing a complaint case. The word 'complaint' in section 198 is very pertinent. Complaint has been defined under section 2(d) of the Code and means, any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but does not include a police report. Law is well settled that, absence of the complaint, which is mandatorily required under section 198 of the Code, would vitiate a prosecution. These provisions (sections 193, 195 and 197, I.P.C.) are purely procedural in nature. Procedures are designed to facilitate justice and further its ends cannot be considered as a penal enactment. Procedural safeguards are the handmaid of justice. They are intended to serve the cause of justice and not to create unsurmountable hurdles, as has been observed in the case of *Sarat Chandra Sahoo v. State of Orissa and another*, (1995)9 O.C.R. 563.

5. Mr. Mishra, learned Standing Counsel, at the other hand, submitted that law can be set into motion on submission of an F.I.R. before the Officer-in-Charge of Police Station by a person aggrieved. In section 198, I. P. C. the emphasis is 'on the information' being given/filed before the court and not the manner as to how it reaches the court. The prohibition under section 198 of the Code cannot simply be treated to be an empty formality. The said section clearly stipulates that a

'complaint has to be made before the court for enabling the court to take cognizance so far as offences punishable under Chapter XX of the I.P.C. are concerned. We live in democracy under a Constitution and democracy will flourish if we follow the rule of law. Justice to be imparted according to law and not according to the whims and fancies of any of the courts. When 'section 198 clearly stipulates that no court shall take cognizance of an offence except upon complaint made by person aggrieved, the said procedure has to be sacrosanctly and mandatorily followed so far as offences covered under Chapter XX of the I.P.C. are concerned. In my conscious view, an F.I.R. filed before the police cannot be treated as a 'complaint' by the court so as to set the law into motion relating to an offence covered under Chapter XX of the I.P.C.

6. In my opinion the offence under section 494, I.P.C. is a separate offence although of the same kind of offence in respect of which facts have been stated in the F.I.R. For this separate offence, a complaint should have been filed and the provisions of section 198, Cr. P. C. should have been complied with. The provisions of section 198, Cr. P. C. are mandatory. The provisions of this section do not authorise the conviction of an offence when no complaint has been made as required by the section. Therefore, the conclusion is irresistible that the Magistrate wrongly took cognizance of an offence under section 494, I.P.C. in absence of any complaint. The learned Magistrate should have discharged the accused and refrained from framing of charge under section 494, I. P. C. in respect of which there is no complaint before him as mandatorily required by section 198, Cr. P. C. . He had no jurisdiction to take cognizance as has been held in the case of Abdul Rehman Mahomed Yusuf v. Mahomed Haji Ahmad Agbotwala and another, A. I. R. 1960S.C.S2. 7, In the case of Bharat Chandra Sahu and another v. State of Orissa, CrI. Misc. Case No. 1169 of 1994. (disposed of on 3-5-1995) though identical points were incidentally urged, but the main issue was regarding the person who is competent and/or authorised to initiate a complaint with regard to an offence covered under Chapter XX I.P.C. The said decision is distinctly separate on facts. Even, otherwise, in the case of Bharat (supra), cognizance was taken by the Magistrate with regard to offences both cognizable and non-cognizable. At the other hand, in the case at hand, the petitioner stands charged only under section 494, I.P.C. which is a non-cognizable offence. The

allegation levelled in the F.I.R. and other relevant material available do. not make out any case under section 494, I.P.C. Neither any particulars of second marriage nor any name is disclosed and the allegation prima facie appears to be vague. Thus, in my opinion, the ratio of the said decision shall not be strictly applicable to the facts of the present case. Inasmuch as, in the said case the accused was also charged under section 498A apart from section 494, I.P.C.

Further, the provisions of section 155, Cr. P.C. are also not attracted to this case, as the petitioner stands charged only under section 494, I.P.C. and there is no charge of any other cognizable offence. Thus, the provisions of section 198, Cr.P.C, shall be attracted. The Apex Court in the decision of Abdul Rehman (supra) held as follows :

'...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 section 198 of section 199 of the Code is emphasised. Clause (3) of 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.

It is clear from the findings of the Presidency Magistrate that the offence of conspiracy and abetment, as alleged in the complaint actually filed, had not been established. He should have then discharged the accused and refrained from framing a charge for an offence in respect of which there was no complaint before him as required by section 198 of the Code of Criminal Procedure. He had no jurisdiction to frame the charge he had framed. His order of acquittal, therefore, must be regarded as nullity.'

The philosophy underlying the scheme of section 198 Cr. P. C. is also discussed by the Hon'ble Supreme Court in the case of V. Revathi v. Union of India and others. A, I. R. 1988 S. C. 835. The Hon'ble Apex Court while holding the provisions of section 198(2) Cr. P. C. as not vulnerable and held as follows :

' ...For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law.'

8. In the result, the criminal misc. case is allowed. The cognizance taken only under section 494 I. P. C. by the learned Magistrate being not in consonance with law, the same cannot be sustained. Therefore, I have no hesitation to set aside the impugned order.

9. Criminal misc. case allowed.

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