

Philip Vs. Raphael and ors.

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Court : Kerala

Decided On : Aug-20-1984

Reported in : 1985CriLJ126

Judge : V. Bhaskaran Nambiar, J.

Appellant : Philip

Respondent : Raphael and ors.

Judgement :

ORDER

V. Bhaskaran Nambiar, J.

1. I would have thought that the decision of the Supreme Court in Patel Laljibhai v. State of Gujarat : 1971 CriLJ1437 settled the judicial conflict on the scope and applicability of Section 195, Cri.P.C. But, contends counsel, the framers of the, new Code of 1973 have deliberately omitted the words 'by any party to any proceeding in any court' in Section 195 and, therefore, the ratio of the decisions of the Supreme Court interpreting the old section cannot apply.

2. The complainant, the petitioner here, alleges that on the 17th of July, 1978 accused 1 and 2 forged a document in his name purporting it to be an agreement to sell his land. Accused 3 and 4 are alleged to be witnesses to this deed and accused 5 is said to be the mediator. The complaint was filed in Sub-Divisional

Magistrate's Court, Aiyaye, on 18-8-1978 and the court took cognisance of the case also on the same date and issued process to the accused. When the case stood posted for prosecution evidence, it was transferred to the Judicial First Class Magistrate's Court, Parur, where it was filed as C.C. 112 of 1980 on 1-2-1980. The accused were arrested on 26-4-1980 and released on bail on the same date.

3. Meanwhile, on the 25th of July. 1978, barely 8 days after the alleged execution, accused 1 and 2 filed a suit as O.S. 119 of 1978 before the Sub Court, Parur, on the strength of the same document. It is now stated that the plaintiffs themselves withdrew the suit on 18-8-1981.

4. When the suit was pending, the accused challenged the validity of the complaint on the ground that there was no complaint in writing by court and hence Section 195 of the Code was violated. The objection was upheld and the accused were discharged Under Section 245(2) of the Code.

5. The complainant challenges this order in this revision. The scope of Section 195(l)(b)(ii) is thus directly in issue in this case.

6. Section 195(l)(b)(ii) of the new Code read 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.--

(1) No Court shall take cognizance --

(a) (i) XXX XXX XXX(b) (i) XXX XXX XXX(ii) of any offence described in Section 463, or punishable Under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or XXX XXX XXX XXX.

The corresponding provision in the old Code was Section 195(l)(c).

6. The difference in the phraseology in the two relevant sections Under the old and new Code are highlighted thus:

OLD CODE (1898)

Section 195(1)(C)

(1) No court shall take cognizance:

(c) xxx of any offence described in Section 463 or punishable Under Section 471. Section 475 or Section 476 of the same Code

When such offence is alleged to have been committed xxx

by a party to any proceeding in any court xxxxxx

in respect of a document produced or given in evidence.

in such proceeding

except on the complaint in writing of such court, or of some other court to which such-court is subordinate.

7. It is also relevant to refer to an allied Section 340(1) (Section 476(1) of the old Code):

Section 476(1) -- Old Code

When any Civil, Revenue or Criminal Court is. whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Section 195, Sub-section (1). Clause (b) or Clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or, if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate :

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

For the purposes of this Sub-section, a Presidency Magistrate shall be deemed to be a Magistrate of the first class.

Section 34C(1) new Code

When, upon an application made to it in this behalf or otherwise, any Court is of

NEW CODE (1973)

Section 195(1)(b)(ii)

(b)(ii)of any offence described in Section 463, or punishable Under Section 471, Section 475 or Section 476 of the said Code.

When such offence is alleged to have been committed xxxxx

xxxxxx

xxxxxx

in respect of a document produced or given in evidence, xxxxxx

in a proceeding in any court

except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Clause (b) of Sub-section (i) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary:

(a) record a finding to that effect ;

(b) make a complaint thereof in writing ;

(c) send it to a Magistrate of the first class having jurisdiction ;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate ; and

(e) bind over any person to appear and give evidence before such Magistrate.

8. In interpreting Section 195 of the old Code, the Supreme Court in AIR 1971 SC 1935 : 1971 Cri LJ 1437 noted the two divergent views in decided cases thus:

According to one view, to attract the prohibition contained in Clause (c) the offence should be alleged to have been committed by the party to the proceeding in his character as such party, which means after having become a party to the proceeding, whereas according to the other view the alleged offence may have been committed by the accused even prior to his becoming a party to the proceeding provided that the document in question is produced or given in evidence in such proceeding. The language used seems to us to be capable of either meaning without straining it.

and held (para 7) :.... It, therefore, appears to us to be more appropriate to adopt the strict construction of confining the prohibition contained in Section 195(1)(c) only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party.

9. The Supreme Court approved the decision in Emperor v. Kushal Pal Singh AIR 1931 All 443 : 1931-32 Cri LJ 1105 (SB) and the long line of decisions following the same. This decision of the Supreme Court was reaffirmed in Raghunath v. State of U.P. : AIR 1973 SC1100 , Mohan Lal v. The State of Rajasthan : 1974 CriLJ350 and in Legal Remembrancer, Govt. of W.B. v. Haridas : 1976 CriLJ1732 where again, it was held thus (para 4 of AIR 1976 SC):

Sections 195(l)(c), 476 and 476A read together indicated beyond doubt that the legislature could not have intended to extend the prohibition contained in Section

195(l)(c) to the offences mentioned therein when committed by a party to a proceeding prior to his becoming such party.

10. The contention that is advanced is that the reasoning that Section 195 can apply only to offences committed by a party as such party can no longer be pressed into service as the crucial words 'by a party to any proceeding in any court' have been omitted in the new section. It is sufficient, according to counsel for the respondents that offence is alleged to have been committed in respect of a document produced or given in evidence.

11. The reasons which weighed with the Supreme Court in the decisions referred to above for concluding that Section 195 is attracted only if the offence is committed by a party after he becomes a party to the suit are these:

(1) The main purpose of Section 190 is to ensure freedom and safety of the subject by giving him a right to approach the Court if he considers that a wrong has been done to him. Sub-section (1) of Section 195 places some restrictions on this general power AIR 1971 SC 1935 at 1937 : 1971 Cri LJ 1437 at p.1439.

(2) Sections 195 and 476 (340 now), 476A (340(2)) form part of a 'statutory scheme dealing with the subject of prosecution for offences against administration of justice and have to be read together to have a more vivid picture of the legislative intendment in preserving the prohibition in the two Clauses in Section 195(1) and the procedure for initiating prosecution AIR 1971 SC 1935 at 1938 (1939) : 1971 Cri LJ 1437 at pp.1440-41.

(3) The private party designed ultimately to be injured through the offence against the administration of public justice is undoubtedly entitled to move the court for persuading it to file the complaint. The offences about which the court alone, to the exclusion of the aggrieved private party, has jurisdiction to file the complaint is in respect of a commission of an offence which has a reasonably close nexus with the proceedings in court, so that it can, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. AIR 1971 SC 1935 at 1940 : 1971 Cri LJ 1437 at p.1442.

(4) These are offences committed by a party to a proceeding in that court.

(5) To adopt the construction that documents forged long before the commencement of a proceeding would also be subject to Sections 195 and 476 would unreasonably restrict the right Under Section 190 without promoting the real purpose and object Underlying these two sections. The court in such a case may not be in a position to satisfactorily determine the question of expediency of making a complaint. AIR 1971 SC 1935 at 1940 : 1971 Cri LJ 1437 at P.1442.

(6) The Code postulates formation of judicial opinion that it is expedient to hold an enquiry into an offence referred to Clause (b) or Clause (c) of Section 195(1) which appears to the Court to have been committed either in or in relation to a proceeding in that court. Expression of opinion by the court as to the expediency of prosecution serves a useful purpose because of the close nexus between the offence and the proceeding.

(7) The object of the legislature creating a bar against the cognizance of private complaints in regard to the offences mentioned in Section 195(l)(b) and (c) is both the same and the court has been entrusted to consider the expediency in the larger interest of a criminal trial and as it is the proceedings in court that is the target of the offence of perjury.

12. Parliament was aware or at least should be deemed to have been aware of the decisions of the Supreme Court when enacting the new Code in 1973. The Objects and Reason extracted in the 41st Report of the Law Commission read thus:

15-90. Section 195 deals with prosecution for three different groups of offences, viz. contempt of lawful authority of public servants, certain offences against public justice and certain offences relating to documents given in evidence. The second and third groups are connected in that both of them affect the administration of justice. Clause (a) of Sub-section (1) and Sub-section (5) concern public servants, Sub-section (2) and Sub-section (3) concern the courts and Sub-section (4) relates to both. It would, in our opinion, be conducive to clarity if the two subjects are dealt with in separate sections. We recommend that Section 195 may be split up on

lines indicated above.

15.93. The purpose of the section is to bar private prosecutions where the course of justice is sought to be perverted, leaving it to the court itself to uphold its dignity and prestige. On principle there is no reason why the safeguard in Clause (c) should not apply to offences committed by witnesses also. Witnesses need as much protection against vexatious prosecutions as parties and the court should have as much control over the acts of witnesses that enter as a component of a judicial proceeding as over the acts of parties. If, therefore, the provisions of Clause (c) are extended to witnesses the extension would be in conformity with the broad principle which forms the basis of Section 195.

13. The decisions of the Supreme Court 'clearly hold that complaint of court is not necessary when the offence is committed before the commencement of the proceedings in court. Recognising this accepted position, the Law Commission moved forward in the same direction and took one step ahead to recommend that the safeguard in this provision should not be confined to parties to the proceedings but should extend to others including witnesses as well. The framers of the Code accepted the recommendation and deleted the words 'by any party to any proceeding in any court', so that the court's right to file complaint was not confined to parties. The deletion of the words was not intended to affect the right in respect of the offences committed prior to the proceedings in court or to achieve any object which was farthest from their' minds.

14. The right to file a complaint is contained in Section 190 of the Code. However there is a statutory curtailment of this right Under Section 195. When Under certain circumstances the court alone can file a complaint. The content of this restriction has therefore to be confined within reasonable limits keeping in view 'the real purpose and object Underlying the two sections'. The court is not concerned with any offence which has no close nexus with the proceedings in court. The court cannot satisfactorily determine the question of expediency of making a complaint in respect of an offence alleged to be committed prior to the commencement of the proceedings. Thus with or without the words 'by any party to any proceeding', the same object is achieved and the new Code rightly omitted these words assuring

themselves that the principles laid down by the Supreme Court would even then apply. The broad principles laid down by the Supreme Court which form the basis of Section 195 remain untouched.

15. Deletion of the words 'by any party to any proceeding in any court' is inconsequential for another reason. Section 195 only directs a court to file a complaint. It specifies the offences in respect of which it can take action ; but does not refer to any offender. The human agency involved in the offence did not require any statutory differentiation. The Underlying principles that private prosecutions are barred when the course of justice is perverted and it is then for the court to uphold its dignity and prestige do not rest for their support on these words 'by any party to any preceeding in any court'.

16. In fact, the Supreme Court had specifically noted thus in AIR 1971 SC 1935 : 1971 Cri LJ 1437:

It is no doubt true that quite often, if not almost invariably the documents are forged for being used or produced in evidence in Court before the proceedings are started. But that in our opinion cannot be the controlling factor, because to adopt that construction, documents forged long before the commencement of, a proceeding in which they may happen to be actually used or produced in evidence, years later by some other party would also be subject to Sections 195 and 476, Cr.P.C. This in our opinion would unreasonably restrict the right possessed by a person and recognized by Section 190, Cr.P.C., without promoting the real purpose and object Underlying these two sections. The Court in such a case may not be in a position to satisfactorily determine the question of expediency of making a complaint.

17. Can it be said that these statements can have no significance simply because the words 'by any party to any proceeding in any court' have been omitted? I do not think so. This reasoning has as much relevance in the present context as in the past.

18. Section 195(1)(b) ; Cr.P.C., 1973 therefore postulates that the court can file a complaint in respect of the specified offences, when a document is produced or

received in evidence in any proceeding in court only when the offence is committed after the commencement of the proceedings. In' this view, as the offences punishable Under Sections 465 and 467 are alleged to be committed on 17th July 1978 and the suit was filed on 25th July, 1978, a private complaint is maintainable ; Section 195(1)(c) is not attracted and the court's intervention for the purpose is not called for. But the offence Under Section 471, IPC, in 131 this case arose only after the suit was instituted. The complaint for this offence cannot be pursued and the lower court is not entitled to proceed with the trial in respect of the offence Under Section 471. IPC.

19. Counsel for the respondents relied on Ram Pal Singh v. State of UP 1982 Cri LJ 424 (All) in sup(1982) 2 SC 43port of his contention that Section 195 is a bar. Of course, that decision has held that the omission of the words 'by a party to any proceeding' in Section 195(1)(c) affects a change in law. The reasoning is (at p.429) :

As already discussed, the Supreme Court while interpreting the provisions of Section 195(1)(c) of the old Cr.P.C. held that the bar created by that section applies only to such cases where offence had been committed by a party to the proceeding in its capacity as such party, leading to the further conclusion that it applied only to cases where the offence had been committed during the pendency of the particular judicial proceeding in which the concerned document was filed, because of specific words by a party to the proceeding, used in that section and not for any other reason.***

20. With great respect. I am not prepared to accept his view as correct, as their Lordships seem to have thought that the words now deleted alone persuaded the Supreme Court to arrive at the conclusion that the offence should have been committed by the party in its capacity as such party to the proceeding. I have already stated that the Supreme Court was guided not by any single solitary fact but by a consideration of several factors, to settle the judicial conflict and to define the scope and ambit of this provision.

21. Counsel for the respondents also relied on the decisions of this Court in Krishna Nair v. State of Kerala (1962) 1 Cri LJ 340 and in Chacko v. State of

Kerala 1983 Ker LT 1060 : 1985 Cri LJ 120 (1962) 1 Cri LJ 340 was specifically cited in : 1971 CriLJ1437 with the observation that the decision in AIR 1931 All 443 : 1931-32) Cri LJ 1105 (SB) was not significantly noted by this Court The point raised in the present form was not the subject matter of discussion and decision in these cases.

22. Counsel for the respondents contended that the lower court based its decision on a concession by the counsel for the complainant and he cannot therefore be allowed to urge in revision that Section 195 is a bar. Just as concession by counsel cannot confer jurisdiction, so also a concession on a question of law cannot estop any party or affect his right to challenge the same in the appellate or revisional court. The counsel missed the drift of the section and the gist of the decisions when he conceded that Section 195 was a bar. The lower court, probably, emboldened by the concession, came to the same conclusion on his own reasoning as well. The question in this case was thus not decided by the lower court on the basis of the sole concession by the counsel for the complainant.

23. It is also relevant to note that the suit itself has been withdrawn. If the contention of the respondents is correct, when once a document is forged, prosecution can be shelved by the simple device of filing a suit and withdrawing the same, for in that event, it might not be possible for the court to form an opinion whether it is expedient to launch, a prosecution, and the aggrieved party cannot also file a complaint. I have no doubt that Parliament never intended to protect such culprits when Section 195(1)(c) was enacted.

24. In the result, the order of the lower court discharging the accused is set aside and the case is remanded to the lower court for fresh disposal in the light of the observations contained in this judgment and according to law.