

Ladu Devi and ors. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-23-2004

Reported in : 2005CriLJ543; RLW2005(1)Raj292; 2004(4)WLC526

Judge : Sunil Kumar Garg, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 319 and 482; Indian Penal Code (IPC) - Sections 304B and 498A

Appeal No. : S.B. Criminal Misc. Petition No. 177 of 2004

Appellant : Ladu Devi and ors.

Respondent : State of Rajasthan

Advocate for Pet/Ap. : O.P. Boob, Public Prosecutor; Ranjeet Joshi,; I.R. Chaud

Disposition : Petition allowed

Judgement :

Sunil Kumar Garg, J.

1. This criminal misc. petition under Section 482 Cr.P.C. has been filed by the present petitioners on 27.2.2004 with the prayer that the FIR No. 103/2001 registered at Police Station Merta Road District Nagaur qua the petitioners be quashed and further, in the meanwhile, if challan has been filed against the

petitioners, the same may be quashed.

2. It arises in the following circumstances:-

On 4.12.2001 at about 9.35 AM, parcha bayan was given by Smt. Sabu Devi (hereinafter referred to as the deceased) d/o Ramkaran and wife of one of accused Jagdish stating inter-alia that on 3.12.2001 at about 6.00 AM in the morning, her father-in-law Dev Karan (one of accused) and her nanad Ladu Devi (petitioner No. 1) lifted her after catching hold her hands and thereafter, accused Dev Karan caught hold her hands and the petitioner No. 1 Ladu Devi poured kerosene oil on her body and then, put a match-stick on her body, as a result of which, she caught fire.

On that parcha bayan, police registered the case for the offence under Section 498A, 307 IPC and later on, since deceased died, therefore, Section 304B IPC was added.

After usual investigation, police submitted challan against accused Dev Karan, who was father-in-law of deceased and accused Jagdish, who was husband of the deceased in the Court of Judicial Magistrate First Class, Merta on 2.4.2002 for committing offence under Sections 498A and 304B IPC and in the said charge-sheet, it was also mentioned by the police that investigation under Section 173(8) Cr.P.C. was pending against the present petitioners Ladu Devi and Ramu Ram.

On the basis of the said charge-sheet, the learned Judicial Magistrate committed the case to the court of Session and on 9.5.2002, the learned Sessions Judge, Merta framed charges for the offence under Sections 498A and 304B IPC against accused Dev Karan and Jagdish in Sessions Case No. 63/2003 (27/2002) and the same were read over and explained to them. They pleaded not guilty and claimed trial. Thereafter, trial of the case commenced.

During the course of trial against accused Dev Karan and Jagdish, when about 19 witnesses had already been examined, an application under Section 319 Cr.P.C. was filed by complainant Ram Karan on 17.1.2003 that cognizance be also taken against the present petitioners for the offence under Section 302, 498A and 304B

IPC since as per dying declaration of deceased, the main accused was Smt. Ladu Devi (petitioner No. 1).

The learned Special Judge, SC/ST (Prevention of Atrocities) Cases, Merta through order dated 2.9.2003 rejected the said application of . complainant Ram Karan filed under Section 319 Cr.P.C. and revision petition filed against the said order dated 2.9.2003 by the complainant Ram Karan before this Court being S.B. Cr. Revision Petition No. 918/2003 was also dismissed by this Court through order dated 24.9.2003 meaning thereby no cognizance on application under Section 319 Cr.P.C. was taken against the present petitioners. This is one of the aspects of the matter.

It may be stated here that on 8.12.2003, the prosecution closed its evidence and the statements of accused Dev Karan and Jagdish under Section 313 Cr.P.C. were recorded on 17.12.2003 and on 3.1.2004, one witness DW1 Om Prakash was examined and on 9.1.2004, witnesses DW2 Shravanram and DW3 Omaram were examined and thereafter, the case was fixed for final hearing on 19.1.2004 and since then, the case was being put up for final hearing from time to time. This is another aspect of the matter.

The further case of the prosecution is that since in the initial challan, which was filed against accused Dev Karan and Jagdish on 2.4.2002, it was observed by the police that investigation under Section 173(8) Cr.P.C. was pending against the present petitioners, therefore, police submitted a supplementary challan against the present petitioners in the Court of Judicial Magistrate, First Class, Merta on 25.2.2004 for committing offence under Sections 498A, 304B IPC in the same FIR in which challan had already been filed against accused Dev Karan and Jagdish on 2.4.2002.

On that supplementary challan, which was filed on 25.2.2004, the learned Judicial Magistrate, First Class, Merta vide order dated 25.2.2004 took cognizance against present petitioners for the offence under Sections 498A, 304B IPC. He has further observed that since the petitioners had already been declared absconders on 21.2.2004, therefore, standing warrant of arrest be issued against them and he has further observed that, proceedings under Sections 82-83 Cr.P.C. be also

initiated against them.

3. Now in this petition, which was filed on 27.2.2004, the main case of the learned counsel for the petitioners is that since the application under Section 319 Cr.P.C. filed by the complainant Ram Karan for summoning the present petitioners as additional accused had already been rejected by the learned trial Judge on 2.9.2003 and revision against that order dated 2.9.2003 has been dismissed by this Court vide order dated 24.9.2003 and no SLP against the order of this Court dated 24.9.2003 has been filed before the Hon'ble Supreme Court, therefore, the order of learned trial Judge dated 2.9.2003, by which application under Section 319 Cr.P.C. was dismissed, had become final one meaning thereby when this Court, after recording evidence of nearabout 19 witnesses did not find any case for summoning the present petitioners as additional accused, therefore, in these circumstances, submitting of supplementary challan against the present petitioners as well as taking of cognizance against them on the basis of that supplementary challan is nothing, but an abuse of the process of the court and thus, supplementary charge sheet filed against the present petitioners on 25.2.2004 and the order dated 25.2.2004 by which the learned Judicial Magistrate took cognizance against the petitioners on that supplementary challan be quashed and set aside.

4. On the other hand, the learned counsel for the complainant and the learned Public Prosecutor have submitted that since investigation under Section 173(8) Cr.P.C. was pending against the present petitioners when the original challan was filed against two accused Dev Karan and Jagdish on 2.4.2002, therefore, if after some time supplementary challan has been filed by the police against present petitioners on 25.2.2004, it was within the framework of law and no illegality or irregularity has been committed by the police in doing so and similarly, on that supplementary challan, if the learned Judicial Magistrate has taken cognizance against the petitioners, it was within the framework of law and he has also not committed any illegality or irregularity in doing so. It was further submitted that if before submitting supplementary challan by the police on 25.2.2004 and before taking cognizance against petitioners by the learned Judicial Magistrate on 25.2.2004, if any order had been passed on the application under Section 319

Cr.P.C., it will have no effect whatsoever on supplementary challan as well as order of taking cognizance against petitioners. Hence, no interference is called for in this petition and the same deserves to be dismissed.

5. I have heard the learned counsel for petitioners, learned counsel for the complainant and the learned Public Prosecutor and gone through the record of the case.

6. There is no dispute on the point that in the dying declaration of the deceased dated 4.12.2001, there is specific allegation against petitioner No. 1 Ladu Devi that she poured kerosene oil on the body of the deceased and put match stick on her body, as a result of which, she caught fire and died later on.

7. There is also no dispute on the point that initially challan was filed against two accused Dev Karan and Jagdish on 2.4.2002 and in that charge-sheet, it was mentioned by the police that investigation under Section 173(8) Cr.P.C. was pending against present petitioners.

8. There is also no dispute on the point that on the basis of initial challan filed against two accused Dev Karan and Jagdish on 2.4.2002, the learned Judicial Magistrate committed the case to the Court of Session and the learned Sessions Judge, Merta vide order dated 9.5.2002 framed charges for the offence under Sections 498A and 304B 1PC against accused Dev Karan and Jagdish and the same were read over and explained to them. They pleaded not guilty and claimed trial. Thereafter, trial of the case started.

9. There is also no dispute on the point that when application under Section 319 Cr.P.C. was filed by the complainant on 17.1.2003, evidence of about 19 witnesses had already been recorded and that application was dismissed by the learned trial Judge vide order dated 2.9.2003 and that order of learned trial Judge dated 2.9.2003 was upheld by this Court in revision filed by the complainant Ram Karan.

10. There is also no dispute on the point that at present the case was fixed for final arguments against two accused Dev Karan and Jagdish.

11. There is also no dispute on the point that on 25.2.2004, police submitted supplementary challan against the present petitioners in the Court of Judicial Magistrate, First Class, Merta for committing offence under Sections 498A, 304B IPC in the same FIR in which challan had already been filed against accused Dev Karan and Jagdish on 2.4.2.004 and on that supplementary challan, the learned Judicial Magistrate, First Class, Merta vide order dated 25.2.2004 took cognizance against the present petitioners for the offence under Sections 498A, 304B IPC.

12. In the facts and circumstances just narrated above, the question for consideration is when application under Section 319 Cr.P.C. for summoning the present petitioners as additional accused has been rejected by the learned trial Judge vide order dated 2.9.2003 and revision against that order has been dismissed by this Court vide order dated 24.9.2003 and when that order had become final, whether subsequent filing of supplementary charge- sheet by the police on 25.2.2004 against the petitioners as well as order of taking cognizance dated 25.2.2004 against them by the learned Judicial Magistrate on that supplementary charge-sheet, can be sustained or not.

Further investigation whether permissible after charge-sheet being filed under Section 173(8) Cr.P.C.

13. There was no specific provision for further investigation in the old Cr.P.C.

14. There was a controversy whether supplementary charge-sheet could be filed or not in the old Cr.P.C. The Hon'ble Supreme Court in *Ram Lal Narang v. State*, AIR 1979 SC 1791, upheld the view laying down that there was nothing in old Cr.P.C. (the Act of 1898) to prohibit a further investigation after cognizance has been taken on the previous charge sheet.

15. In the light of that observation, sub-section (8) in Section 173 in new Cr.P.C. has been added and therefore, after the submission of a report under Section 173(8) Cr.P.C. and after the Magistrate had taken cognizance of the offence, if fresh facts come to light which require further investigation the police can investigate again and file a subsequent charge sheet. For that, the laid down in *State of Bihar v. J.A.C. Saldauna*, AIR 1980 SC 326, may be referred to.

16. The addition of sub-section (8) in Section 173 Cr.P.C. has clarified that sending of report under sub-section (2) does not preclude further investigation and sending supplementary report or reports and cognizance on the basis of supplementary report can be taken by the Magistrate. Subsequent charge sheet can be filed even after cognizance has been taken on police report under Section 173(2) Cr.P.C. Furthermore, if Magistrate has taken cognizance against some accused, that cognizance of Magistrate does not bar further investigation by police. In this respect, law laid down by the Hon'ble Supreme Court in Ram Lal Narang's case (supra), Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanatha Maharaj v. State of A.P. AIR 1999 SC 2267, and Suresh Chand Jain v. State of MP, RLW 2001 (2) SC 317, may be referred to.

CONCLUSION

17. Thus, it can be held that even after the Court took cognizance of any offence on the strength of police report first submitted against some accused persons, it is open to the police to conduct further investigation and in the subsequent investigation, if involvement of persons who were not accused in the first charge-sheet, comes to the notice of the investigation officer, he can submit a supplementary charge sheet against them and a valid cognizance can be taken by the Magistrate against them on the basis of that supplementary charge-sheet. It is made clear that cognizance of Magistrate does not bar further investigation.

18. In this respect, it may further be stated here that in the matter of such further investigation, notice to the accused against whom supplementary charge sheet is going to be filed, is not necessary since at the stage of investigation, rules of natural justice do not apply.

On Section 319 Cr.P.C.

19. It may be stated here that Section 319 Cr.P.C. cannot be invoked unless evidence is recorded during trial or enquiry in Court. The power under Section 319(1) can be exercised only in those cases where involvement of persons other than those arraigned in the charge-sheet comes to light in the course of evidence recorded during the enquiry or trial. In this respect, the law laid down by the

Hon'ble Supreme Court in Nisar and Anr. v. State of UP, 1995 Cr.L.R. (SC) 19, may be referred to.

20. Section 319 Cr.P.C. gives ample powers to any court to take cognizance and add any person not being an accused before it and try him alongwith the other accused. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused those who have not been arrayed as accused against whom proceedings have been quashed, have also committed the offence, the court can take cognizance against them and try them alongwith the other accused. But, this is really an extra ordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. In this respect, the law laid down by the Hon'ble Supreme Court in Municipal Corporation of Delhi v. Rak Kishan, AIR 1983 SC 67, may be referred to.

21. Thus, it can be concluded that before Section 319 Cr.P.C. could be invoked, evidence in. court during trial must be recorded and this power should be exercised very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

22. If the above principles are applied to the facts of the present case, it can easily be concluded that so far as the submission of supplementary charge-sheet by the police on 25.2.2004 against present petitioners is concerned, such power lies with the police as per Section 173(8) Cr.P.C. and in this respect, it may further stated here that when initial challan was submitted on 2.4.2002 against two accused Dev Karan and Jagdish, police has also mentioned in it that further investigation under Section 173(8) Cr.P.C. against the present petitioners was pending. Thus, police had the power to submit supplementary challan against present petitioners and similarly, the learned Magistrate had also the power to take cognizance on the basis of that supplementary challan.

Peculiar facts of present case

23. As already stated above, in this case, before submitting supplementary challan by the police against the petitioners on 25.2.2004 and before taking cognizance against petitioners by the Judicial Magistrate vide order dated 25.2.2004 on the basis of that supplementary charge sheet, an application under Section 319 Cr.P.C. was filed by the complainant Ram Karan on 17.1.2003 for taking cognizance and summoning the present petitioners as additional accused and at that stage, about 19 witnesses had already been examined and that application was dismissed by the learned trial Judge vide order dated 2.9.2003 holding inter-alia that no prima facie case existed for taking cognizance or summoning present petitioners as additional accused and that order of rejecting application under Section 319 Cr.P.C. was challenged by the complainant Ram Karan in revision before this Court and that revision was dismissed by this Court through order dated 24.9.2003 holding inter-alia that the learned trial Judge has given good reasons meaning thereby the order of the learned trial Judge dated 2.9.2003 rejecting application under Section 319 Cr.P.C. had become final on 24.9.2003 when the revision filed by the complainant was rejected by this Court. Thus, all proceedings on application under Section 319 Cr.P.C. upto the final stage had taken place before the supplementary challan against the present petitioners was filed by the police on 25.2.2004 as well as before cognizance was taken by the learned Judicial Magistrate against petitioners vide order dated 25.2.2004 on the basis of that supplementary charge sheet.

24. There is also no dispute on the point that at this stage, trial had been concluded against two accused Dev Karan and Jagdish and the case is being fixed for final arguments.

25. Now the question for consideration is whether rule of issue estoppel and res judicata is applicable to the facts of the present case or not.

Issue estoppel and res judicata

26. The rule of issue estoppel and res judicata is not the result of any enactment. It has been borrowed from English decision. It must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication.

27. The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent court on a former occasion and a finding of fact has been reached in favour of the accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for different offence. Thus, the rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent court at a previous lawful trial. In this respect, the decision of the Hon'ble Supreme Court in *Lalta v. State of UP* AIR 1970 SC 1331, may be referred to.

28. The essentials of the rule of issue estoppel are.-

- (i) the parties in the two proceedings must be same;
- (ii) the issue that was decided earlier must be identical with that which is sought to be reagitated.

The issue estoppel applies only when both the earlier and the present proceedings are criminal prosecutions.

29. Thus, it can be concluded that where an issue has been decided by a competent court on a former occasion, such a finding constitutes an estoppel or res judicata against the parties to that proceedings. It may be clarified here that the principle of issue estoppel would not be applicable if the offence for which accused is to be tried subsequently is distinct offence.

30. Therefore, if the above principle of issue estoppel and res judicata is applied to the facts of the present case, it can easily be said that cognizance against the present petitioners on application under Section 319 Cr.P.C. on the basis of evidence recorded in court was not taken by the learned trial Judge and that order of the learned trial Judge dated 2.9.2003 had become final because revision against the said order was dismissed by this Court vide order dated 24.9.2003 meaning thereby the issue whether present petitioners could be added as

additional accused persons or not had been decided by the competent court on former occasion and therefore, the findings recorded by the learned trial Judge in favour of the present petitioners in the order dated 2.9.2003 rejecting application under Section 319 Cr.P.C., which were affirmed by this Court in revision through order dated 24.9.2003, operate as an estoppel or res judicata against prosecution because the parties in both proceedings are the same and the issue which was decided earlier is the same and identical.

31. When this being the position, no doubt the police had the power to submit supplementary charge sheet and the Magistrate had the power to take cognizance on that supplementary charge sheet, but since on earlier occasion, there was a finding in favour of the present petitioners recorded by the learned trial Judge vide order dated 2.9.2003 an application Under Section 319 Cr.P.C. which was affirmed by this Court in revision vide order dated 24.9.2003 that they could not be added as additional accused persons, therefore, in these circumstances, submission of supplementary charge sheet by the police on 25.2.2004 against the petitioners as well as taking of cognizance by the learned Judicial Magistrate against petitioners vide order dated 25.2.2004 on the basis of that supplementary charge-sheet, cannot be sustained as they would hit the principle of issue estoppel/res judicata and would frustrate earlier orders passed by the learned trial Judge as well as by this Court.

32. It may be stated here that this Court is aware that doctrine of issue estoppel is not applicable when there is a finding on erroneous view of law and in such a case, subsequent order was held incurriam and non est meaning thereby not binding on the parties.

33. However, in this case, it cannot be said that findings recorded by the learned trial Judge vide order dated 2.9.2003 rejecting application under Section 319 Cr.P.C. are erroneous one as that order has been upheld by this Court in revision vide order dated 24.9.2003 and SLP against the order of this Court has not been filed by the complainant.

34. Since in the present case, the order dated 2.9.2003 by which the learned trial Judge rejected the application under Section 319 Cr.P.C. was upheld by this Court

in revision through order dated 24.9.2003, therefore, it is made clear that the case of present petitioners is not going to be considered on merits. Had there would have been single order passed under Section 319 Cr.P.C. by the learned trial Judge and there would have not been any revision against that order and that order would have not been upheld by this Court, the position would have been different one and in that event, the merit could have been considered by this Court.

35. For the reasons stated above, submission of supplementary challan by the police against present petitioners on 25.2.2004 as well as taking of cognizance against the petitioners by the learned Judicial Magistrate, First Class, Merta vide order dated 25.2.2004 on the basis of that supplementary charge-sheet, cannot be sustained as they would hit the principle of issue estoppel and res judicata and if the proceedings are allowed to continue against the present petitioners in pursuance of that supplementary charge-sheet, it would amount to abuse of the process of the Court and would defeat the ends of justice and thus, it is a fit case for exercise of inherent power under Section 482 Cr.P.C. and this petition deserves to be allowed.

Accordingly, this misc. petition under Section 482 Cr.P.C. filed by the petitioners is allowed and the supplementary charge sheet filed by the police against present petitioners on 25.2.2004 and the order dated 25.2.2004 passed by the learned Judicial Magistrate, First Class, Merta taking cognizance against present petitioners for the offence under Sections 498, 304B IPC on the basis of that supplementary charge-sheet are quashed.