

Shahjad Ali and ors. Vs. the State of Rajasthan and anr.

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Court : Rajasthan

Decided On : Feb-12-2009

Reported in : 2009CriLJ3400; RLW2009(4)Raj3185

Judge : Raghuvendra S. Rathore, J.

Appellant : Shahjad Ali and ors.

Respondent : The State of Rajasthan and anr.

Disposition : Petition allowed

Judgement :

ORDER

Raghuvendra S. Rathore, J.

1. The order dated 2-2-2001 passed by the learned ACJM, Sikar is under challenge in the criminal misc. petition, whereby the learned Magistrate has taken cognizance against the petitioners for the offences under Sections 498-A and 406 of IPC. Against the said order, the petitioners preferred a revision petition but without any success as the same was dismissed on 27-8-2001 and the order passed by the learned Magistrate was affirmed.

2. The relevant facts giving rise to the present proceedings are that non-petitioner No. 2 had filed a complaint on 19-2-1996 in the Court of Judicial Magistrate, Sikar.

It was averred in the complaint that the non-petitioner No. 2 was married to Mohammad Altaf about three years ago in accordance to Muslim rites and rituals. It was alleged that on 10-2-1994, the accused-persons had demanded an amount of Rs. 30,000/- and when the said demand could not be fulfilled, they had abused and harassed the complainant. Thereafter, non-petitioner No. 2 is said to have brought an amount of Rs. 30,000/- from her father. It is also alleged in the complaint that after a lapse of about 6 months the accused-persons had again started demanding dowry and harassing the non-petitioner No. 2. It is further averred that the non-petitioner No. 2 was continued to be beaten by the accused-petitions and ultimately they left her at the bus stand in Sikar on 30-7-1994. Thereafter, the non-petitioner No. 2 came to her parental house and later delivered a female child.

3. On the receipt of said complaint, the learned Magistrate sent it to the Police Station Kotwali, Sikar under Section 156(3) of Cr. P.C. whereupon an FIR No. 289/96, for the offences under Sections 498-A and 406 of IPC, was registered on 7-6-1996. On conclusion of the investigation, the Police filed a charge-sheet on 27-7-1996, only against the husband, Mohammad Altaf for the offences under Section 498-A and 406 of IPC.

Subsequently, the learned Public Prosecutor submitted an application on 27-7-1996 with the prayer that cognizance be also taken against the present petitioners. The said application was allowed by the learned Magistrate on 30-8-1996 (Annexure-1) whereby cognizance was taken against all the petitioners. Feeling aggrieved of the said order the petitioners filed a revision petition which came to be decided by the learned Additional Sessions Judge No. 2, Sikar. The learned revisional Court by its order dated 3-9-1998 (Annexure-2) accepted the revision petition and quashed and set aside the order of cognizance (Annexure-1) passed by the learned Magistrate. Consequently, the proceedings (229/96) against Mohammad Altaf remained pending in the Court of CJM, Sikar.

4. The complainant did not challenge the order of revisional Court dated on 3-9-1998, nor he raised any grievance, before any forum. In other words, the order of revisional Court dated 3-9-1998, quashing the cognizance against the petitioners,

attained finality. However, later in the year 2000, the complainant filed another complaint on 25-7-2000 alleging against the husband and the present petitioners. It is noteworthy that based on same facts the allegations, which were made in the earlier complaint, were also levelled in the second complaint. Subsequent complaint was registered as Criminal Case No. 12/00. The learned Magistrate then recorded the statement of the complainant non-petitioner No. 2 on 25-7-2000. The statements of the witnesses of the complainant namely Sakina Band and Mohammad Farooq were then recorded, under Section 202 of Cr. P.C. on 24-8-2000. One more witness namely Shabir was examined, in support of the complainant, on 6-11-2000. The learned Magistrate then passed an order of cognizance against the petitioners on 2-2-2001 for the offences under Sections 498-A and 406 of IPC. He issued process against them by way of non-bailable warrants.

It is significant to note that in the order of cognizance (Annexure-3), the learned Magistrate had himself taken note of the fact that as regards the husband, the cognizance has already been taken earlier. Being aggrieved of the said order of the cognizance passed on second complaint, the petitioners preferred a revision petition but the same was dismissed on 27-8-2001.

5. The learned Counsel for the accused-petitioners has submitted that the impugned order of cognizance passed by the learned Magistrate on 2-2-2001 as well as the order passed by the revisional Court on 27-8-2001 are illegal and contrary to the settled principles of law and as such the same deserves to be quashed and set aside by this Court. Further, he has submitted that in the facts and circumstances of the present case, the impugned orders passed by the learned Courts below are sheer abuse of the process of the Court and the same be set aside in exercise of the inherent powers of this Court. He has also submitted that the second complaint filed by the non-petitioner No. 2, herein, was a verbatim reproduction of the earlier one and in that view of the matter the learned Magistrate should neither have entertained the same nor issued process against the petitioners. In support of his submissions, the learned Counsel for the petitioners has placed reliance on the judgment of the Apex Court in the case of T.T. Antony v. State of Kerala : (2001) 6 SCC 181 : 2001 Cri LJ 3329.

6. On the other hand, the learned Counsel for the non-petitioner has submitted that there was no illegality in filing the second complaint. He has further submitted that the first complaint was sent to the Police wherein challan was filed only against the husband and the non-petitioner No. 2 being dissatisfied with the investigation conducted by the Police, was therefore entitled to file another complaint on which the learned Magistrate had rightly passed the order of cognizance against the petitioners by proceedings under Sections 200 and 202 of Cr. P.C.

7. I have given my anxious and thoughtful consideration to the submissions made by the counsel for the rival parties. I have carefully gone through the materials on record, particularly the two complaints filed by non-petitioner No. 2, which were placed for perusal of the Court by the learned Counsel for the petitioners. The learned Magistrate had taken cognizance, by the impugned order dated 2-2-2001, against the petitioners on the second complaint filed by the non-petitioner No. 2 after proceeding to record the statements of the complainant and his witnesses under Sections 200 and 202 of Cr.P.C. A perusal of the said order reveals that the learned Magistrate had passed the order in a casual manner. However, the learned Magistrate had mentioned in the operative part of the order that challan had already been filed against the husband and therefore the cognizance is being taken against the remaining three accused-persons (the petitioners) for the offences under Sections 498-A and 406 of IPC and issued process by way of arrest warrant, against them. In other words the learned Magistrate, without noting the details of the proceedings which had taken place earlier, was aware of the fact that cognizance had already been taken against the husband in the present dispute between the parties. When the impugned order of cognizance was challenged by the petitioners before the revisional Court, the learned Sessions Judge had proceeded on the premise of the procedure under Section 210(2) of Cr. P.C. He had referred to the case law which related to the procedure to be adopted in a trial where the cases were lodged on Police report as well as of complaint and were separately taken up in respect of recording the evidence but the same could be looked into the other case and the decisions were to be given simultaneously.

8. So far as the case of T.T. Antony 2001 Cri LJ 3329 (supra) heavily relied upon by the learned Counsel for the petitioners is concerned, it would be worthwhile to note here that in the said case a second first information report was registered on the same facts and fresh investigation was started by the police. It was in that situation that the Hon'ble Apex Court held that the course adopted namely, registration of the information as the second first information report with regard to the same incident and making a fresh investigation was not permissible under the scheme of the Code of Criminal Procedure. Therefore, it was held that the report and the investigation undertaken thereof cannot, but be invalid. The same was, therefore, quashed. In the instant case, as mentioned above, a second complaint was filed by non-petitioner No. 2 on which the impugned order of cognizance had been passed whereas on the first complaint, which was sent to the Police and after receiving of the conclusion of the investigation the learned Magistrate, on the same facts and circumstances of the case, had already taken cognizance against the accused other than the petitioners. When the prosecution was not satisfied with the conclusion of the investigation agency, wherein it had filed challan only against the husband and was of the opinion that no offence was made out against the petitioners, it had filed an application before the learned Magistrate on 27-7-1996. On having considered the said application filed by the learned Public Prosecutor, the learned Magistrate had passed an order of cognizance on 30-8-1996 against all the petitioners. But the learned Sessions Court, on the revision filed by the petitioners, set aside the said order of cognizance vide order dated 3-9-1998. Therefore the case of T.T. Antony 2001 Cri LJ 3329 (supra) being on a different fact-situation is not applicable to the instant case.

9. However, the present case can be looked into from the angle of filing a second complaint, wherein the case of the prosecution is no better. It is noteworthy that a perusal of both the complaints reveals that they are based on the same sets of facts and allegations. The position of law in respect of maintainability of second complaint is well settled since long. As early as in the year 1962, the Hon'ble Supreme Court had considered this question in the case of Parmatha Nath Talukdar v. Saroj Ranjan Sarkar : AIR 1962 SC 876, wherein it was laid down that it is not in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should

be given another opportunity to have his complaint enquired into. The Hon'ble Supreme Court in the majority view, had observed in para 48 as under:

Under the Code of Criminal Procedure the subject of 'Complaints to Magistrates' is dealt with in Chapter XVI of the Code of Criminal Procedure. The provisions relevant for the purpose of this case are Sections 200, 202 and 203. Section 200 deals with examination of complaints and Sections 202, 203 and 204 with the powers of the Magistrate in regard to the dismissal of complaint or the issuing of process. The scope and extent of Sections 202 and 203 were laid down in : 1961 (1) SCR 1 at pages 9, 10 : (AIR 1960 SC 1113 at pp. 1116, 1117). The scope of enquiry under Section 202 is limited to finding out the truth or otherwise of the complaint in order to determine whether process should issue or not and Section 203 lays down what materials are to be considered for the purpose. Under Section 203 of Criminal Procedure Code the judgment which Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry, if any. He must apply his mind to the materials and from his judgment whether or not there is sufficient ground for proceeding. Therefore if he has not misdirected himself as to the scope of the enquiry made under Section 202, Criminal Procedure Code, and has judicially applied his mind to the material before him and then proceeds to make his order, it cannot be said that he has acted erroneously. An order of dismissal under Section 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g. where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interests of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into. ILR 12 Lah 9 at p. 12 : AIR 1930 Lah 879 at p. 880 : : AIR 1949 Pat 256 : : AIR 1949 Bom 384; Doraisami v. Subramania AIR 1918 Mad 484. In regard to the adducing of new facts for the bringing of a fresh complaint the Special Bench in the judgment under appeal did not accept the view of the Bombay High Court or

the Patna High Court in cases above-quoted and adopted the opinion of Macleam, C.J. in ILR 28 Cal at p. 216 affirmed by a Full Bench in ILR 28 Cal 652 (FB). It held therefore that a fresh complaint can be entertained where there is manifest error, or manifest miscarriage of justice in the previous order or when fresh evidence is forthcoming.

10. Similar view was also expressed in the minority judgment wherein, para 21, it was observed as under:

The question was then considered by a Full Bench of the Calcutta High Court in Dwarka Nath Mondul v. Beni Madhab Banerjee ILR 28 Cal 652 and it was held by the Full Bench (Ghose, J. Dissenting) that a Presidency Magistrate was competent to rehear a warrant case triable under Ch. XXI of the Code of Criminal Procedure in which he had earlier discharged the accused person. Nilratan Sen's case ILR 23 Cal 983 and Kamal Chandra Pal's case ILR 24 Cal 286, were referred to in the arguments as summarised in the report, but the view expressed therein was not accepted. Dealing with the question Prinsep, J. said: 'There is no bar to further proceedings under the law, and, therefore, a Magistrate to whom a complaint has been made under such circumstances, is bound to proceed in the manner set out in Section 200, that is, to examine the complainant, and, unless he has reason to distrust the truth of the complaint, or for some other reason expressly recognised by law, such as, if he finds that no offence had been committed, he is bound to take cognizance of the offence on a complaint, and, unless he has good reason to doubt the truth of the complaint, he is bound to do justice to the complainant, to summon his witness and to hear them in the presence of the accused.' The same view was expressed by the Madras High Court in *In re, Koyassan Kutty* AIR 1918 Mad 494 and it was observed that there was nothing in law against the entertainment of a second complaint on the same facts on which a person had already been discharged, inasmuch as discharge was not equivalent to an acquittal. This view was reiterated in *Kumariah v. Chinna Naicker* AIR 1946 Mad 167, where it was held that the fact that a previous complaint had been dismissed under Section 203 of the Code of Criminal Procedure was no bar to the entertainment of a second complaint. In *Hansabai Sayaji v. Ananda Ganuji* : AIR 1949 Bom 384, the question was examined with reference to a large number of

earlier decisions of several High Courts on the subject and it was held that there was nothing, in law against the entertainment of a second complaint on the same facts. The same view was also expressed in *Ram Narain v. Panachand Jain* : AIR 1949 Pat 256; *Ramanand v. Sheri* : ILR 56 All 425 : AIR 1934 All 87 and *Allah Ditta v. Karam Baksh* ILR 12 Lah 9 : AIR 1930 Lah 879. In all these decisions it was recognised further that though there was nothing in law to bar the entertainment of a second complaint on the same facts, exceptional circumstances must exist for entertainment of a second complaint when on the same allegations a previous complaint had been dismissed. The question of the existence of exceptional circumstances for the entertainment of a second complaint is a question to which I shall come later. At the present moment, I am considering the argument of Mr. Purshottam Tricumdas that the law prohibits altogether the entertainment of a second complaint when a previous complaint on the same allegations had been dismissed under Section 203 of the Code of Criminal Procedure. On this question the High Courts appear to me to be almost unanimously against the contention of Mr. Purshottam Tricumdas, and for the reasons given in the decisions to which I have earlier referred, I am unable to accept his contention. I accept the view expressed by the High Courts that there is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under Section 203 of the Code of Criminal Procedure. I also accept the view that as a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under Section 204(1) of the Code of Criminal Procedure, exceptional circumstances must exist for the entertainment of a second complaint on the same allegations; in other words, there must be good reasons why the Magistrate thinks that there is 'sufficient ground for proceeding' with the second complaint, when a previous complaint on the same allegations was dismissed under Section 203 of the Code of Criminal Procedure.

11. However, the Hon'ble Supreme Court in paras 22 and 23, after taking note of the decisions in *Queen Empress v. Dolegobinda Das* ILR (1901) Cal 211; *In re, Koyassan Kutty* AIR 1918 Mad 494 and *Kumariah v. Chinna Naicker* AIR 1946 Madras 167, observed thus:

It will be noticed that in the test thus laid down the exceptional circumstances are brought under three categories; (1) manifest error, (2) manifest miscarriage of justice, and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings. Any exceptional circumstances coming within any one or more of the aforesaid three categories would fulfil the test. In AIR 1949 Pat 256, it was observed that an exhaustive list of the exceptional circumstances could not be given though some of the categories were mentioned. One new category mentioned was where the previous order of dismissal was passed on an incomplete record or a misunderstanding of the nature of the complaint. This new category would perhaps fall within the category of manifest error or miscarriage of justice.

It appears to me that the test laid down in the earliest of the aforesaid decisions ILR 28 Cal 211, is really wide enough to cover the other categories mentioned in the later decisions. Whenever a Magistrate is satisfied that the previous order of dismissal was due to a manifest error or has resulted in a miscarriage of justice, he can entertain a second complaint on the same allegations even though an earlier complaint was dismissed under Section 203 of the Code of Criminal Procedure. I do not think that in a matter of this kind it is either possible or even desirable that the exceptional circumstances must be stated with any more particularity or precision. The learned Advocate for the respondent argued before us that a new category should be added and he called it 'frustration of justice'. I am of the view that apart from any question of felicity of this new expression, this new category does not give any more assistance towards explaining the exceptional circumstances which must exist before a second complaint on the same allegations can be entertained. I am content in this case to proceed on the footing that, the Magistrate must be satisfied that there was a manifest error or a miscarriage of justice before he can entertain a second complaint on the same facts.

12. Subsequently, in the case of Bindeshwari Prasad Singh v. Kali Singh : (1977) 1 SCC 57 : AIR 1977 SC 2432 it was observed in para 4, as follows:

It is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out.

13. In the latest judgment on the point, in the case of Mahesh Chand v. B. Janardhan Reddy : (2003) 1 SCC 734 : 2003 Cri LJ 866 the Hon'ble Supreme Court had reiterated the principles in para 19 as under:

Keeping in view the settled legal principles, we are of the opinion that the High Court was not correct in holding that the second complaint was completely barred. It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204, Cr. P.C. may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in Pramatha Nath Talukdar case AIR 1962 SC 876 (supra) second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case. Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. In the facts and circumstances of this case, the matter, therefore, should have been remitted back to the learned Magistrate for the purpose of arriving at a finding as to whether any case for cognizance of the alleged offence had been made out or not.

14. In other words a second complaint on the same facts could be entertained only in exceptional circumstances namely where the previous order was passed on incomplete record or misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. In the instant case no such circumstances exist for entertaining a second complaint and to proceed thereupon against the petitioners after a complete proceedings had been undertaken on the previous complaint and the question of cognizance in respect of the petitioners had attained finality when the same was

set aside by the learned revisional Court on 3-9-1998.

15. Reverting to the facts of the present case, after filing of the first complaint a report was registered and an order of cognizance was passed by the learned Magistrate after taking into consideration the conclusion of the investigation in the year 1996. Subsequently, the order of cognizance passed against the petitioners by the learned Magistrate on the application filed by the learned Public Prosecutor, the revisional Court had set aside the same in the year 1998. Since then nothing had been heard from the side of the complainant and the question not to proceed against the petitioners had become final. Second complaint filed by non-petitioner No. 2 on the same facts and allegations and thereafter passing of the impugned order of cognizance by the learned Magistrate against the petitioners is not sustainable under law and the process issued against them is a sheer abuse of the process of the Court. The learned Magistrate though took note of the fact that as cognizance had already been taken against the husband and same would not be ordered to be taken against him again but it had overlooked the fact that as against the petitioners also the order of cognizance passed on 30-8-1996 was set aside by the learned revisional Court on 3-9-1998 and it had already become final. Therefore, the second complaint containing same sets of facts and allegations should not have been even entertained by the learned Magistrate, much less to say, to pass the impugned order of cognizance and issue process against the petitioners in the year 2001. The learned revisional Court had erred in holding that in accordance with the principle laid down in the case of *Gopal Vijay Verma v. Bhuneshwar Prasad Sinha and Ors.* 1982 Cr LR (SC) 510, after taking cognizance on a Police report, a complaint could be filed. A bare reading of the said judgment would show that the Magistrate had refused to take cognizance on a Police report. It was in that situation that the Hon'ble Apex Court had held that the cognizance could be taken upon a complaint.

16. The principle of law is well settled that where the Police has filed challan against some of the persons, as in the present case, then it is not open to the Magistrate to take cognizance against the remaining persons. However, a distinction lies in cases where the Police submits a total negative report then the Magistrate has power of taking cognizance. This question has been elaborately

considered in the case of Sukhdas and Ors. v. The State of Rajasthan 2001 (1) RCC 576 : 2001 Cri LJ 3138.

Therefore, the order impugned is not sustainable in law yet from another angle that because Police had filed challan against some person, the cognizance against the petitioners could not have been taken by the Magistrate on the complaint filed by the non-petitioner on 26-6-2000. Moreover, the learned Public Prosecutor had earlier filed an application on 27-8-1996, soon after the filing of the charge-sheet against the husband alone, on which the learned Magistrate had taken cognizance against the petitioners (Annexure-1) but the said order was rightly set aside by the revisional Court on 3-9-1998, as cognizance against the remaining persons after filing of the challan against some, could not have been taken by the learned Magistrate. The only course available in such a situation was in exercise of powers under Section 319 of Cr. P. C. after recording the evidence during the course of trial which revealed the involvement of the petitioners in the commission of the crime. The said principle of law has been well settled in the cases of Jogendra Singh v. State of Punjab : AIR 1979 SC 339 : 1979 Cri LJ 333 and Ranjit Singh v. State of Punjab : AIR 1998 SC 3148 : 1998 Cri LJ 4618.

17. For the aforesaid reason, I am of the considered opinion that after proceeding on the complaint filed on 19-2-1996, the challan having been filed against the husband and the cognizance having been taken by the learned Magistrate, on the application of the learned Public Prosecutor on 30-8-1996 which was set aside by the revisional Court on 3-9-1998, the impugned order of cognizance passed by the learned Magistrate on 2-2-2001, on the second complaint filed by the non-petitioner No. 2 on 26-6-2000, is illegal and contrary to the settled principles of law and therefore it is not sustainable. Similarly, the learned Sessions Judge had misdirected himself in considering the present case in the light of the provisions of Section 210(2) of Cr. P. C. which is not the case emerging out of the facts and circumstances and also misread the law laid down by the Supreme Court in the case of Gopal Vijay Verma (supra). In the light of above-referred judgments of the Supreme Court and in the fact-situation of the present case, I am of the considered opinion that the impugned orders passed by the learned Courts below has to be set aside.

18. Consequently, this Misc. Petition is allowed. The impugned order dated 2-2-2001 passed by the learned Magistrate and also the order dated 27-8-2001 passed by the revisional Court are hereby quashed and set aside. It is made clear that the proceedings against the husband Mohammad Altaf which was initiated in Criminal Case No. (229/96) shall proceed in accordance to law.

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