

Deepu And 4 Others vs State Of U.P. And 3 Others on 6 August, 2024

Author: Vivek Kumar Birla

Bench: Vivek Kumar Birla

HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2024:AHC:126843-DB

AFR

Court No. - 42

Case :- CRIMINAL MISC. WRIT PETITION No. - 12287 of 2024

Petitioner :- Deepu And 4 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Rahul Mishra, Sanjay Mishra

Counsel for Respondent :- Bhaiya Lal Yadav, G.A.

Hon'ble Vivek Kumar Birla, J.

Hon'ble Arun Kumar Singh Deshwal, J.

1. Personal affidavit of Superintendent of Police, Hamirpur filed today is taken on record.
2. Heard Sri Sanjay Mishra, learned counsel for the petitioners as well as Sri P.C. Srivastava, Additional Advocate General, assisted by Sri J.K. Upadhyay, Additional Government Advocate and Sri Bhaiya Lal Yadav, learned counsel for the informant.

" The impugned FIR dated 3.7.2024 is registered under the provision of Indian Penal Code and not under Bharatiya Nyaya Sanhita (BNS) which came into force on 1st July, 2024. The Superintendent of Police, Hamirpur shall file an affidavit why the FIR has not been registered under Bharatiya Nyaya Sanhita (BNS) Learned AGA for State submits that the victim is aged about 14 years and she was medically examined and seeks some time to get the instruction in this regard.

5. In compliance with the above quoted order, learned AGA has filed a personal affidavit of the Superintendent of Police, Hamirpur. In the affidavit, it is mentioned that Bharatiya Nyaya Sanhita (B.N.S.) came into force on 1.7.2024 whereas the incident in question had taken place between 2.4.2024 to 28.6.2024, therefore, the first information report was lodged under the provisions of the Indian Penal Code (I.P.C.). It is also mentioned in the personal affidavit that in respect of the procedure after commencement of B.N.S.S., a circular dated 4.7.2024 was issued by the Police Technical Services Headquarters, Uttar Pradesh which provides that if any offence is committed prior to the enforcement of B.N.S., the FIR would be registered under the provisions of Indian Penal code, and procedure of investigation would be followed as per Bhartiya Nagrik Suraksha Sanhita (B.N.S.S.). The said circular dated 4.7.2024 issued by the Police Technical Services Headquarters, Uttar Pradesh is quoted as under:

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1. $f \in L^{\infty}(\Omega)$, $\int_{\Omega} f(x) dx = 0$, $\|f\|_{L^{\infty}(\Omega)} = 1$.

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4. § - ¢ ¢ ¢, ¢ ¢ ¢ ' ¢, ¢ ¢

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Date of occurrence of Crime Date of Registration Provisions of Laws to be applied Procedural Law to
be followed 01 i 2024 < 01 i 2024 < IPC CrPC 01 i 2024
< 01 i 2024 > IPC BNSS 01 i 2024 > 01 i
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SOP.

Signed by Naveen Arora Date 04.07.2024 ,

6. However, learned counsel for the petitioners has contended that the procedure mentioned in the above noted circular dated 4.7.2024 is incorrect for the offence occurred prior to the enforcement of the Bharatiya Nyaya Sanhita, 2023, because for this offence the F.I.R. is registered after enforcement of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as "BNS") as well as the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "BNSS"), then the F.I.R. should be registered under the BNS.

7. To decide this issue, it would be relevant to quote Section 531 of BNSS as under:-

"531. Repeal and savings. - (1) The Code of Criminal Procedure, 1973 is hereby repealed.

(2) Notwithstanding such repeal--

(a) if, immediately before the date on which this Sanhita comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal,

application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1973, as in force immediately before such commencement (hereinafter referred to as the said Code), as if this Sanhita had not come into force;

(b) all notifications published, proclamations issued, powers conferred, forms provided by rules, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the said Code and which are in force immediately before the commencement of this Sanhita, shall be deemed, respectively, to have been published, issued, conferred, specified, defined, passed or made under the corresponding provisions of this Sanhita;

(c) any sanction accorded or consent given under the said Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Sanhita and proceedings may be commenced under this Sanhita in pursuance of such sanction or consent.

(3) Where the period specified for an application or other proceeding under the said Code had expired on or before the commencement of this Sanhita, nothing in this Sanhita shall be construed as enabling any such application to be made or proceeding to be commenced under this Sanhita by reason only of the fact that a longer period therefore is specified by this Sanhita or provisions are made in this Sanhita for the extension of time."

8. From the perusal of the above section, it is clear that, if any, investigation is pending on the date of repeal of Cr.P.C. then same will continue as per Cr.P.C. As per Section 157 Cr.P.C. (Section- 176 BNSS) investigation would start from the date of registration of F.I.R., therefore if F.I.R. is registered before commencement of new criminal laws then the procedure of the investigation will continue as per the Cr.P.C. because investigation will be deemed to be commenced on the date of registration of the F.I.R. However, in case the F.I.R. is registered after the commencement of new criminal laws for the offence committed prior to the enforcement of new criminal laws then the F.I.R. would be registered under the provision of I.P.C. as the I.P.C. is a substantive law which was prevalent at the time of committing the offence because as per Article 20 of the Constitution of India a person can be convicted of an offence for the violation of law enforced at the time of the commission of the act. Article 20 of the Constitution of India reads as under:-

"20. Protection in respect of conviction for offences.- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

9. However, the question arises, what would be the procedure of investigation, if the F.I.R. is registered after the commencement of new criminal laws for the offence committed prior to the enforcement of new criminal laws, as such investigation is not saved by Section 531(2)(a) of the BNSS to be conducted as per Cr.P.C. To decide this issue, it is relevant to consider Section 6 of General Clauses Act which provides effect of repealing of any Central Act or Regulation. Section 6 of General Clause Act, 1897 is being quoted as under;

"6. Effect of repeal.- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

10. From the perusal of Section 6 of the General Clauses Act, it appears that the repeal of Cr.P.C. shall not affect any investigation, legal proceeding or remedy in respect of any liability, penalty or punishment accrued or incurred under the repealed Act and such investigation, legal proceeding or remedy will continue under the repealed Act. It is also clear from Section-6 of the General Clauses Act, the repeal of I.P.C. or Cr.P.C. will not affect any right, liability accrued or incurred under the repealed Act. Therefore, despite repealing of IPC and Cr.P.C., liability to get punishment under IPC will continue and remedy like an appeal under Cr.P.C. will remain as it is but the forum of appeal being procedural in nature will be as per the B.N.S.S.

11. In the case of Hitendra Vishnu Thakur & Others Vs. State of Maharashtra & Others reported in (1994) 4 SCC 602, the Hon'ble Supreme Court considered the effect of repealed provision by way of

amendment in pending cases and summarised the law relating to the effect of the amendment of procedural and substantive law. Hon'ble Supreme Court in the case of Hitendra Vishnu Thakur (supra) observed that while right to forum and limitation is procedural in nature, while right of appeal or right of action is substantive in nature and further observed that litigants have a vested right in substantive law but no such right exists in procedural law. Paragraph no.26 of the Hitendra Vishnu Thakur (supra) is being quoted as under:

"26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

12. Similarly, in the case of Neena Aneja & Another Vs. Jai Prakash Associates Ltd. reported in (2022) 2 SCC 161, Hon'ble Supreme Court again observed that the amendment on the matter of procedural law will be retrospective unless a contrary intention emerges from the statute. Relevant extract of paragraph no.72 of Neena Aneja's case (supra) is being quoted as under:

"72. In considering the myriad precedents that have interpreted the impact of a change in forum on pending proceedings and retrospectivity--a clear position of law has emerged : a change in forum lies in the realm of procedure. Accordingly, in

compliance with the tenets of statutory interpretation applicable to procedural law, amendments on matters of procedure are retrospective, unless a contrary intention emerges from the statute....."

13. Effect of Repeal of I.P.C. and Cr.P.C. and enforcement of new Criminal Laws (BNS and BNSS) was also considered by the Punjab & Haryana High Court in the case of XXXX Vs. State of Union Territory of Chandigarh and Another (CRM-M-31808-2024 dated 11.07.2024) which was subsequently relied upon by the Kerela High Court in the case of Abdul Khadir Vs. State of Kerala in Crl. Appeal No.1186 of 2024 dated 15 July, 2024 and observed that a fresh appeal or application or revision of the petitioner after the repeal of Cr.P.C. could be filed under the BNSS not under Cr.P.C. and remedial applications/petitions after 01.07.2024 could be filed only under BNSS not under the Cr.P.C. even though the offence was committed prior to 01.07.2024. Paragraph no.9 of the XXXX Vs. State of Union Territory of Chandigarh (supra) is being quoted as under:

"9. As a sequel to the above-said rumination, the following principles emerge:

I. The Code of Criminal Procedure, 1973 stands repealed w.e.f. 01.07.2024. Ergo; no new/fresh appeal or application or revision or petition can be filed under Code of Criminal Procedure, 1973 on or after 01.07.2024.

2. The provisions of Section 4 and Section 531 of BNSS, 2023 are mandatory in nature as a result whereof any appeal/application/revision/petition/trial/inquiry or investigation pending before 01.07.2024 are required to be disposed of continued, held or made (as the case may be) in accordance with the provision of Code of Criminal Procedure, 1973. In other words; any appeal/application/revision/petition filed on or after 01.07.2024, is required to be filed/instituted under the provision of BNSS 2023.

3. Any appeal/application/revision/petition filed on or after 01.07.2024 under the provisions of Cr.P.C., 1973 is non-maintainable & hence would deserve dismissal/rejection on this score alone. However, any appeal/application/revision/petition filed upto 30.06.2024 under the provisions of Cr.P.C., 1973 is maintainable in law. To clarify; in case any appeal/application/revision/petition is filed upto 30.06.2024 but there is defect (Registry objections, as referred to in common parlance) and such defect is cured/removed on or after 01.07.2024, such appeal/application/revision/petition shall be deemed to have been validly filed/instituted on or after 01.07.2024 and, therefore, would be non- maintainable.

4. Section 531 of BNSS shall apply to "revision", "petition" as also "petition of complaint" (ordinarily referred to as complaint before Magistrate) with the same vigour as it is statutorily mandated to apply to "appeal/application/trial/inquiry or investigation" in terms of Section 531 of BNSS."

14. From the above-discussed case, the following legal position is culled out:

- (i) that amended/repealed procedural law will be applicable retrospectively unless otherwise provided in the new Act itself;
- (ii) liability or right accrued under the repealed Act will not be affected and same will continue as if the repealing Act did not come into force;
- (iii) procedure of investigation, trial, revision and appeal as well as a forum of remedy is part of procedural law, and the same will be applicable retrospectively unless otherwise provided in the new procedural law;
- (iv) Litigants have no vested right in procedural law but has vested right in substantive law with accrued right or liability. The statute which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in nature unless otherwise provided.

15. From the above analysis it is clear that if any offence is committed prior to the enforcement of new criminal laws, then if the F.I.R. is registered after the enforcement of new criminal laws, then the same will be registered under the provision of I.P.C. in view of the Article 20 of the Constitution of India, but the procedure for the investigation will be as per the BNSS. Similarly, in case the offence is committed after the enforcement of new criminal laws and thereafter the F.I.R. is registered, then the investigation would be conducted as per the BNSS. However, in case the offence is committed prior to the enforcement of new criminal laws, and F.I.R. is also registered prior to the enforcement of new criminal laws then the procedure of investigation would be as per the Cr.P.C. in view of Section 531(2)(a) of the BNSS. Therefore, the procedure of investigation provided by the circular dated 7.4.2024 of the Police Technical Services Headquarter, U.P. is absolutely correct.

16 On the basis of above analysis, this Court is also summarising the law regarding effect of repealing the IPC and Cr.P.C. by BNS and BNSS respectively and same is being mentioned as below:

- (i) If an FIR is registered on or after 1.7.2024 for the offence committed prior to 1.7.2024, then FIR would be registered under the provisions of IPC but the investigation will continue as per BNSS.
- (ii) In the pending investigation on 01.07.2024 (on the date of commencement of New Criminal Laws), investigation will continue as per the Cr.P.C. till the cognizance is taken on the police report and if any direction is made for further investigation by the competent Court then same will continue as per the Cr.P.C.;
- (iii) The cognizance on the pending investigation on or after 01.07.2024 would be taken as per the BNSS and all the subsequent proceeding including enquiry, trial or appeal would be conducted as per the procedure of BNSS.

(iv) Section 531(2)(a) of BNSS saved only pending investigation, trial, appeal, application and enquiry, therefore, if any trial, appeal, revision or application is commenced after 01.07.2024, the same will be proceeded as per the procedure of BNSS.

(v) The pending trial on 01.07.2024, if concluded on or after 01.07.2024 then appeal or revision against the judgement passed in such a trial will be as per the BNSS. However, if any application is filed in appeal, which was pending on 01.07.2024 then the procedure of Cr.P.C. will apply.

(vi) If the criminal proceeding or chargesheet is challenged before the High Court on or after 01.07.2024, where the investigation was conducted as per Cr.P.C. then same will be filed u/s 528 of BNSS not u/s 482 Cr.P.C.

17. Coming back to the facts of the case, it has been pointed out that in view of the statement of the victim recorded under Section 164 CrPC, Section 376 (2)(n) has been deleted and all other offences are punishable with imprisonment upto seven years.

18. Although the prayer for quashing of FIR has been made, but without insisting on the same, only submission is that all alleged offences are punishable with imprisonment upto seven years, therefore the police authorities are bound to follow the procedure laid down under Section 41-A Cr.P.C. The petitioners have been wrongly implicated and should not be arrested. Reliance has been placed on the judgement of Apex Court in Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273 and Social Action Forum for Manav Adhikar Vs. Union of India, Ministry of Law and Justice and others in Writ Petition (Civil) No. 73 of 2015 with Criminal Appeal No. 1265 of 2017 Writ Petition (Criminal) No. 156 of 2017 and in Satendra Kumar Antil vs. Central Bureau of Investigation and Another (2022) 10 SCC 51 and co-ordinate Division Bench of this Court in Vimal Kumar & 3 others Vs. State of U.P. & 3 others in 2021 (2) ACR 1147.

19. We have gone through the impugned first information report and without interfering in the same, we are of the opinion that the guidelines framed by the Apex Court in the above noted judgement are equally applicable to the facts of the instant case.

20. Accordingly, the instant petition also stands disposed of in terms of the judgements as noted above.

21. Registrar (Compliance) is directed to send a copy of this order to the Director General of Police, Uttar Pradesh who will circulate the same to all the District Police Chiefs who will further sensitize the investigating officers under their supervision.

Order Date : 06.08.2024 Abhishek