

Shaifullah & Others vs State Of U.P.& Another on 23 July, 2013

Author: Karuna Nand Bajpayee

Bench: Karuna Nand Bajpayee

HIGH COURT OF JUDICATURE AT ALLAHABAD

? A.F. R.

Court No. - 26

Case :- CRIMINAL MISC. WRIT PETITION No. - 15352 of 2011

Petitioner :- Shaifullah & Others

Respondent :- State Of U.P.& Another

Counsel for Petitioner :- S.P. Pandey

Counsel for Respondent :- Govt. Advocate

Hon'ble Karuna Nand Bajpayee,J.

This writ petition has been filed by the petitioners accused with the prayer to get the impugned summoning order dated 2.4.2010 passed against them by the learned Judicial Magistrate-I, Basti as well as the revisional order dated 16.7.2011 passed by Sessions Judge, Basti, quashed.

The petitioners are represented by their counsel Sri Surendra Mohan Mishra while the respondent no.2 Mamunisha is represented by her counsel Sri S.P. Pandey. Both are present in Court.

A short counter affidavit has been filed on behalf of the respondent no.2 which is taken on record.

I have heard the counsel for both the sides as well as learned AGA and have perused the whole record.

It appears that the petitioners were summoned by the lower court under sections 323, 379, 452, 504, 506 and 427 IPC in complaint case No.1842/2009 filed by the complainant Mamunisha (respondent no.2). The revision filed against the summoning order too got dismissed as it was time barred.

A perusal of the complaint and the statements recorded u/s 200 and 202 Cr.P.C. reveal that the complainant's side as well as the side of the accused(petitioners) had locked their horns because of the marital discord which arose between the complainant's son Mohd.Asalam (husband) and his wife Amirunnisha. The mutual bickerings of the married couple escalated and engulfed the other members of the family also. This unfortunate bad blood between the two families resulted in a number of litigations between them. The present complaint in question giving rise to this petition is also an offshoot of the same marital dispute and nuptial disharmony.

The petitioner's counsel has submitted that through the good offices of some relatives both the parties have agreed to resolve their dispute amicably and have already advanced in this direction substantially resulting in the compromise of other cases which were pending between them at different judicial forums. The counsel for the respondent also has brought my attention to the short counter affidavit filed on behalf of respondent no.2 who is none else but the complainant of the complaint case in question wherein the impugned orders under challenge have been passed. It has been averred by the respondent no.2 in her affidavit that a criminal case no. 468 of 2007 u/s 147, 323, 504, 498A IPC and 3/4 D.P. Act P.S. Walterganj District Basti was filed by her daughter in law against her in laws. Apart from this a case u/s 125 Cr.P.C. for maintenance was also filed by her daughter in law against her husband. Both these cases have been compromised between the parties. In support of the same Annexures-CA-1 and Annexure-C.A.2 have been annexed along with short counter affidavit.. A perusal of Annexure-CA-1 reveals that it is a joint application filed on behalf of the complainant of that case Amirun Nisha as well as by five accused persons of that cases in the concerned court with the submissions that both the parties have entered into a mutual compromise and various terms regarding the maintenance amount as well as their decision to put an end to all the litigations have been settled in between them. The application also reveals the mutual agreement that the present writ petition should also be disposed of in the light of the compromise to which Mamunisha respondent no.2 shall have no objection. Another Annexure-CA-2 is the order dated 13.10.2011 passed by the CJM Sant Kabir Nagar inCrl.Misc.Case No.75/11/2009 u/s 125 Cr.P.C. A perusal of the order reveals that the maintenance case filed by Smt.Amirunnisha has also been decided in terms of the compromise arrived between husband and wife and the same was dismissed in mutual agreement as the lump sum amount of maintenance has been accepted by the wife and the decision to live separately and part their ways had been arrived at between the parties with agreement.

Paragraphs 6 and 7 of the short counter affidavit filed on behalf of complainant respondent no.2 contains the averments that if this court quashes the impugned proceedings of the complaint case the respondents shall not only have no objection to it, but " it is even necessary and expedient in the interest of justice that this court be pleased to quash the entire criminal proceedings of the complaint case in question." In fact the prayer of the petitioner in writ petition and the averments of the respondent in its counter affidavit have completely merged with each other and both the

parties are now jointly seeking the quashing of the impugned orders and the proceedings of the complaint case which is the subject matter of the present writ petition.

But there is a desenting voice raised by the A.G.A. who has expressed his grave reservations about the legal soundness of any such course which this court may adopt in order to quash the impugned criminal proceedings. His contention is that section 452 IPC being a non compoundable offence cannot be quashed on the basis of any compromise between the parties by resorting to the powers vested in this court under Article 226 of the Constitution or through the exercise of the inherent powers u/s 482 Cr.P.C. The submission is that once legislature in its wisdom has chosen to declare some offences compoundable and others non compoundable, this court must accept that distinction and must not indirectly over ride the statutory scheme of the law by resorting to its extra ordinary powers u/s 482 Cr.P.C. or the powers vested in it under Article 226 of the Constitution of India. The hub of his argument is that anything which cannot be done directly must also not been done indirectly by the courts. According to learned AGA the parties must go through the process of the trial and get their acquittal if the same can be arrived at on the basis of the evidence produced in the trial. He apprehends that if this court quashes the criminal proceedings pending in the lower court, then this exercise shall be tantamount to conversion of non compoundable offences into compoundable ones.

I have carefully cogitated upon the submissions placed by the AGA.

This question as to whether the non compoundable offences should be quashed by this court or not has seized the attention of Apex court time and again and there is no need to go into the same at any great length. There is no question for this court to convert non compoundable offences into the compoundable ones but the powers of this court while sitting to exercise the writ jurisdiction have been invoked many a time to arrive at the ends of justice when there is no course equally efficacious open for the parties to reach the same. There are authoritative judicial precedents where the Apex Court has approved the quashing of the proceedings when it found that they emanated from mutual marital discord, even though the proceedings included some offences which were not compoundable. The dockets of the pending cases are already bursting on there seams. If this court can clearly see that the continuation of some criminal proceeding in the lower court is going to result into nothing fruitful and the same will be a sheer wastage of public time and money then it shall not be loath to put an end to that fruitless exercise. The fate of the present case shall depend on the evidence produced in the court, while the resolve not to produce evidence against the petitioners is already apparent on the face of record in the form of counter affidavit filed by the respondent. I therefore, deem it appropriate and expedient both to quash the impugned orders as they will result into a fruitless exercise in vain.

But as the advisability to exercise the powers of this court to quash the non compoundable offences has been questioned it may be useful to give a brief reference to the law in this regard.

There were three important cases decided by the Apex Court in which the quashing of non compoundable offences was, in the given circumstances of the case, approved. The quashing was done chiefly because of the inter-se compromise between the litigating adversaries and also because

it was found that the continuation of the criminal proceedings after the compromise between the parties shall be a rank abuse of the courts process. These cases were (1) B.S.Joshi and others Vs. State of Haryana and another(2003) 4 SCC 675 (2) Nikhil Merchant (2008) 9 SCC 677 and (3) Manoj Sharma,(2008) 16 SCC 1 In B.S. Joshi's case the wife had lodged an FIR u/s 498 A, 323 and 406 IPC against her husband. During the pendency of the case the dispute between them got settled with mutual concord. Both husband and wife jointly prayed in the High Court for quashing the criminal proceedings launched by the wife against the husband and other in laws. As section 498A and 406 IPC are not compoundable the High Court refused to quash the proceedings despite the compromise arrived at between them. Thereafter the matter reached the Apex Court which gave its approving nod to the existence and exercise of the High Court's power to quash the criminal proceedings in suitable cases. The Hon'ble Supreme Court in para 14 and 15 of B.S.Joshi case held as under:

"14. There is no doubt that the object of introducing Chapter XX-A containing Section 498A in the Indian Penal Code was to prevent torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hypertechnical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."

In another case of Nikhil Merchant the accused company, its Managing Director and other officials were being prosecuted u/s 120B read with 420, 467, 468, 471 IPC and also under 5(2) and 5(1)(d) of Prevention of Corruption Act. Subsequently this matter also got compromised and parties decided to withdraw all the allegations and counter allegations made against each other. The Special Judge CBI rejected the application for discharge and the High Court of Bombay too approved the Special Judges' refusal to discharge the accused in the criminal cases on the basis of compromise arrived between the parties. Thereafter the matter reached the Supreme Court. The Apex Court once again applied the legal rationale of B.S. Joshi's case and set aside Bombay High Court's decision. The entire criminal proceedings were quashed. The relevant extracts of Nikhil Merchant case are being quoted below:

" 30. In the instant case, the disputes between the Company and the Bank have been set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not appear to have any further claim against the Company. What, however, remains is the fact that certain documents were alleged to have been created by the appellant herein in order to avail of credit facilities beyond the limit to which the Company was entitled. The dispute involved

herein has obertones of a civil dispute with certain criminal facets. The question which is required to be answered in this case is whether the power which independently lies with this Court to quash the criminal proceedings pursuant to the compromise arrived at, should at all be exercised?

31.On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S.Joshi case and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise."

The third case is that of Manoj Sharma. In this case the point that came under the judicial scanning was whether the offence u/s420,468,471,34,120B IPC can be quashed in exercise of constitutional powers of the High Court under Article 226 or in the exercise of inherent jurisdiction u/s 482 Cr.P.C. Here too the impediment of non compoundable nature of certain offences was covertly or overtly involved. Here also the point to be decided was whether the non compoundable nature of certain offences can act as trammels on the judicial powers of the High Court and whether the same shall circumscribe the extent and ambit of High Court's inherent jurisdiction under S. 482 Cr.P.C. or the powers under Article 226 of Constitution of India. The Apex Court while adjudicating upon the matter approved B.S.Joshi's case and granted its judicial countenance to the quashing of criminal proceeding. The relevant portion of Manoj Sharma's case may be cited hereinbelow:

" 6.....The ultimate exercise of discretion under Section 482 Cr.P.C. Or under Article 226 of the Constitution is with the court which has to exercise such jurisdiction in the facts of each case. It has been explained that the said power is in no way limited by the provisions of Section 320 Cr.P.C. We are unable to disagree with such statement of law. In any event, in this case, we are only required to consider whether the High Court had exercised its jurisdiction under Section 482 Cr.P.C. Legally and correctly."

Then in paras 8 and 9 of the Report, Hon'ble Altamas Kabir, J., inter alia, held as under:

".....8. Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. We do not suggest that while exercising its powers under Article 226 of the Constitution the High Court could not have refused to quash the first information report, but what we do say is that the matter could have been considered by the High Court with greater pragmatism in the facts of the case.

9..... In the facts of this case we are of the view that continuing with the criminal proceedings would be an exercise in futility."

It so happened subsequently that the correctness of the law laid down in these three aforesaid cases was doubted & questioned. It was a curious fact that one of the Hon'ble Judges (M. Katju,J) who himself was a member to the last two decisions mentioned above, expressed his skepticism about the correctness of law laid down in the above noted cases. As a result thereof these cases were once again referred to the larger bench to examine the correctness & validity of the law contained therein. This reference was made in the case of Gian Singh Vs. State of Punjab(2012) 10 SCC 303. The matter was heard and the issue involved was threshed threadbare. More than forty judicial precedents were referred to and cited before the Apex Court and all of them were thoroughly considered and examined. Ultimately three Judges Bench of the Apex Court upheld the correctness of all the three cases mentioned above, wherein the quashing of the criminal proceedings even in non compoundable offences was approved of, if the nature and circumstances of the case so warranted. The crux of the ratio laid down in Gian Singh's case may be profitably quoted herein below:

"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominantly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of

the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

62. In view of the above, it cannot be said that B.S. Joshi¹, Nikhil Merchant and Manoj Sharma were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the concerned Bench(es)."

The law laid down by the three Judges Bench leaves the matter concluded and it remains res-integra no more.

The objections raised by learned AGA could not have been more convincingly answered than by the ratio of the above noted pronouncement by the Hon'ble Supreme Court in Gian Singh's case.

The present case too emanates from the disruption of a wedlock. The mischief of the offences involved is more or less confined to the members of the two disgruntled families concerned and does not seem to spill beyond the few individuals. The mature couple has decided to bury the hatchet. If this court cold shoulders them under a hyper technical view of law and forces them to enter the trial, in all likelihood the witnesses shall perjure themselves, eat their words, go back on their statements and turn hostile. The solemn proceedings of the court shall be reduced to nothing more than a farce, a sham exercise. And to what end shall all this perjury lead to! Perhaps to nothing except the acquittal of the accused. That was the reason why the Apex Court approved of a more pragmatic view of the matter so that the judicial rostrums may not be abused to perform a meaningless exercise in vain.

In the light of the aforesaid factual circumstances and the position of law, the petition stands allowed. The impugned orders stand quashed.

Order Date :- 23.7.2013 Hsc/