

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Qazi Muhammad Amin Ahmed

Criminal Petition No.46-P of 2016

(Against the order dated 20.04.2016 passed by the Peshawar High Court Peshawar passed in Cr. R. No.66-P/2015 with Cr. Misc. No.189-P/2016)

Muhammad Iltaf Khan

...Petitioner(s)

Versus

Basheer and others

...Respondent(s)

For the Petitioner(s): Mr. Muhammad Tariq Hoti, ASC
Mr. Muhammad Ajmal Khan, AOR

For the State: Mr. Shumayl Butt, Advocate General KP
Malik Akhtar Hussain, Addl. Advocate General
KP
Mr. Aamir Javed, Addl. Attorney General for
Pakistan.

Date of hearing: 26.07.2021

ORDER

Qazi Muhammad Amin Ahmed, J.- Aggrieved by certain imputations, viewed as calculatedly malignant, the petitioner instituted a criminal complaint under section 500 of the Pakistan Penal Code, 1860 (**P.P.C.**), directly in the Court of Session at Mardan against his accusers, respondents herein; they were summoned pursuant to the process of the Court to face indictment vide order dated 18.05.2015, challenged on the ground that the learned Sessions Judge could not have issued the process without taking cognizance in derogation to the procedure provided under section 193 of the Code of Criminal Procedure, 1898 (**the Code**). The argument weighed with a learned Judge-in-Chamber of the Peshawar High Court and the process was quashed in pursuance thereto vide impugned judgment dated 20.04.2016, being assailed herein. Respondents alongside the Attorney

General for Pakistan and Advocate General Khyber Pakhtunkhwa were sent for, latter to assist the Court.

2. According to the learned counsel for the petitioner, in the wake of addition of section 502-A in the P.P.C., introduced by *Act IX of 2004*, there was no embargo left in the field for the Court of Session, standing in impediment to assumption of cognizance by itself for offences enumerated under Chapter XXI thereof as the said amendment expressly excluded the conventional magisterial route; he has laid emphasis on the *non-obstante* clause inserted in section 502-A, to argue that it expressly left out application of the Code. Prominent amongst his various submissions and references was the argument that the legislature, in its wisdom and competence, devised a special procedure for expeditious disposal of cases of defamation within a stipulated timeframe and, thus, the Court of Session was consciously empowered to take direct cognizance in order to obviate procedural delays, a purpose that can be clearly '*Read Down*' without possibility of error; he was supported by the Advocate General Khyber Pakhtunkhwa who addressed on Court call.

Learned counsel for the respondents, contrarily, defended the impugned judgment on the ground that *non-obstante* clause merely envisaged prosecution of the offence by a Court of Session, notwithstanding the quantum of sentence provided therefor and, thus, it could not be construed to have swept away the entire mechanism provided under the Code as embargo under section 193 of the Code expressly stood in impediment thereto; he has referred to section 203-A, B and C of the Code to argue that expression "*taking of cognizance*" of designated offences, "*in the court of competent jurisdiction*" is conspicuously missing in section 502-A of the P.P.C. to unambiguously suggest that the complaint was to have been routed through the regular procedure; he has been supported by the Deputy Attorney General for Pakistan.

3. Heard. Record perused.

4. Section 193 of the Code places a complete and clear bar on taking of cognizance of any offence by the Court of Session in its original jurisdiction unless the case is sent up by a Magistrate under subsection 2 of section 190 of the Code. It is petitioner's case that introduction of section 502-A inserted through the Defamation (*Amendment Act IX*) of 2004 in the P.P.C. circumvents the *supra* bar

and a complaint for prosecution of defamation under section 500 of the P.P.C can be directly instituted in the Court of Session for decision within the stipulated period of ninety days; the argument is built on the *non-obstante* clause that reads as under:

"502-A. Trial of offences under this chapter.- Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), the Court of Session shall have the jurisdiction to try an offence under this Chapter and decide it within a period of ninety days."

A *non-obstante* clause in a Statute is a potent legislative tool often employed, essentially to achieve a limited/specific statutory purpose, nonetheless, the concomitant overriding effect is purpose specific without impinging upon the structural integrity of the Statute; it merely presents a restricted deviation or departure without disturbing the overall functionality of the Statute.

Offence under section 500 of the P.P.C. is punishable with imprisonment that may possibly extend to a period of 5 years and as such, triable by a Magistrate. The legislature in its wisdom desired an expeditious trial of the offence with right of appeal going to the High Court and this appears to be the dominant purpose for insertion of section 502A in the P.P.C. with no bearings upon the procedure, otherwise provided for the institution of a complaint; aforesaid construction is supported by the law declared by this Court in the cases reported as Syed Azhar Hussain Shah and another Vs. The State and others (2019 S C M R 537), Major ((Retd.) Barkat Ali and others Versus Qaim Din and others (2006 S C M R 562), Habibul Wahab-el-Kheiri Vs. Ch. Saeed Ahmad (1979 S C M R 545), Rahim Dad Vs. The State and another (1980 P Cr. L J 500), Riffat Hayat Vs. Judge Special Court for Suppression of Terrorist Activities, Lahore and another (1994 SCMR 2177), JK Industries Limited and Ors. Vs. Amarlal Versus Jumanji and Ors. (AIR 2012 SC 1079), Madhav Rao Jivaji Rao Scindia Bahadur and Ors. Vs. Union of India (UOI) and Ors. (AIR1971 SC 530), Central Bank of India Vs. State of Kerala and Ors. (2009) 4 SCC 94, Balveer Singh and Ors. Vs. Respondent: State of Rajasthan and Ors. (AIR 2016 SC 2266), P.C. Gulati Vs. Lajya Ram Kapur and Ors (AIR 1966 SC 595) and Basdeo and Ors. Vs. Emperor (AIR 1945 All 340).

The High Court though well within the remit of law, nonetheless, should have preferred to return the complaint for its proper institution, therefore, the complainant/respondent, successive failures, notwithstanding, may still present his complaint before the Area Magistrate for its onward transmission to the Court of Session for redressal of grievance complained, if so advised. Petition fails. Leave declined.

Judge

Judge

Announced in open Court on 16.11.2021
at Islamabad
Approved for Reporting
Azmat/*

Judge