

Allahabad High Court

Taiyab Khan And Anr vs State Of U.P. And Anr on 28 May, 2018

Bench: Suneet Kumar

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Court No. - 32

Case :- APPLICATION U/S 482 No. - 17555 of 2018

Applicant :- Taiyab Khan And Anr

Opposite Party :- State Of U.P. And Anr

Counsel for Applicant :- Tripathi B.G. Bhai

Counsel for Opposite Party :- G.A.

Hon'ble Suneet Kumar,J.

Heard learned counsel for the applicant and learned A.G.A.

The instant application under Section 482 has been filed seeking quashing of the charge-sheet dated 22.3.2014, as well as, entire criminal proceedings of Criminal Case No. 1044 of 2015 (State vs. Taiyab Khan and others) arising out of NCR No. 157 of 2013 under Sections 323, 504, 506 IPC, P.S. Dudhara, District Sant Kabir Nagar, pending before Additional Chief Judicial Magistrate/Civil Judge (S.D.), Sant Kabir Nagar.

The opposite party no. 2 submitted a report against the applicants which was registered as a non-cognizable case. The complainant then moved an application under Section 155(2) of Cr.P.C. before the Magistrate making a prayer that the police of the concerned thana be directed to make an investigation of the case. This application was allowed by the Magistrate and thereafter the investigation ensued. The Investigating Officer found that the offence under Section 323, 504, 506 IPC is made out consequently submitted the charge-sheet for the aforementioned offences. Magistrate took cognizance and summoned the applicants.

The learned counsel for the applicants submitted that the offence under Sections 323, 504, 506 IPC are non-cognizable hence in view of the explanation to Section 2(d) of Cr.P.C., the case can not proceed as State case but has to proceed as complaint case. He further submitted that the learned Magistrate has erroneously passed an order taking cognizance on the charge-sheet. In support of his submission reliance has been placed on the decisions rendered by the Division Bench in Virendra

Singh vs. State of U.P. and others 2000 (2) JCC 649 (All) and on the orders/decisions following the Division Bench decision passed in Bahori and others vs. State of U.P. and others [2017 (10) ADJ 480]; Dr. Rakesh Kumar Sharma vs. State of U.P. and another [2007 (9) ADJ 478]; Awadhesh Kumar and others vs. State of U.P. and another [2008 (2) ADJ 253]; and Dhanveer and others vs. State of U.P. and another [2010 (9) ADJ 496].

I have carefully considered the above submissions.

It is not disputed that the offence under Section 323, 504 IPC are non-cognizable. The offence under Section 506 IPC was made cognizable and non-bailable vide U.P. Govt. notification No. 777/VIII 9-4(2)-87 dated July 31, 1989, published in the U.P. Gazette, Extra, Part-4, Section (kha) dated 2nd August, 1989. This notification was held to be illegal in Virendra Singh (supra). Consequently, offence punishable under Section 506 IPC was held to be non-cognizable and in view of the explanation to Section 2(d) of Cr.P.C. report of the police officer after investigation disclosing case of non-cognizable offence has to be deemed to be a complaint, therefore, the police officer submitting the report has to be deemed to be a complaint. In other words the charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of the complaint case shall be applicable to that case. It is in this backdrop, the learned counsel for the applicant submits that the charge-sheet submitted by the Investigating Officer shall be treated as a complaint and the cognizance taken by the Magistrate shall be deemed to have been taken on a complaint.

Learned A.G.A. has opposed the application placing reliance on the Full Bench decision rendered in Mata Sewak Upadhyay vs. State of U.P. and others, 1995 AWC 2031 (1996 (1) ECRC 97), wherein, the validity of the notification making Section 506 IPC cognizable offence vide U.P. notification was upheld. Relying on Mata Sewak (supra) subsequent decisions have been rendered in Bhagwan Singh vs. State of U.P. and others, 2016 (3) ACR 3365 and Praveen Kumar and another vs. State of U.P. and others, 2011 (2) ACR 2083.

In Virendra Singh (supra) the Court was not called upon to adjudicate upon the validity of the notification dated July 31, 1989. The petition was filed against a first information report under Section 506 IPC, however, the Court proceeded to make observations on the validity of the notification thereby declaring Section 506 as non-cognizable and non-bailable offence. The Court made the following observation in paragraph 8, which reads thus:

"It is surprising that while Sections 323, 324 and 325, I.P.C. are bailable offences the State Government has chosen to declare by this illegal notification of 1989 that Section 506, I.P.C. is a non bailable and cognizable offence. This means that if person breaks someone's hand, or attacks him with a knife on his leg or hand he will be granted bail by the police on his mere request, but if he gives a threat he will be arrested and will have to apply for bail to the Court. This is an anomalous situation. At any event, we are of the opinion that the notification dated 31-7-1989 issued under Section 10 of the Criminal Law Amendment Act, 1932 making Section 506, I.P.C. cognizable and non bailable is illegal. "

The Division Bench, however, did not take notice of Mata Sewak (supra) upholding the validity of the notification. The questions, inter alia, that was referred and were permitted to be raised in Mata Sewak reads thus:

"i. ....

ii. ....

iii. ....

iv. Whether provisions of Section 10 of Criminal Law Amendment Act, 1932 are constitutionally invalid?

v. Whether the U.P. Amendment Notification No. 777/VIII 94(2)87 dated July 31, 1989, published in the U.P. Gazettee, dated August 2, 1989, making offence under Section 506, IPC cognizable and non-bailable is invalid?"

In para 195 the answers to the questions referred to the Full Bench or permitted to be raised before it was answered as follows:

"1. ....

2. ....

3. ....

4. ....

5. ....

6. Section 10 of the Criminal Law Amendment Act, 1932 is valid.

7. U.P. Government Notification dated July 31, 1989, making offence under Section 506 IPC cognizable and non-bailable is valid."

Full Bench unanimously upheld the validity of the Government Notification making Section 506 IPC cognizable and non-bailable. Decisions relied upon by the learned counsel for the applicant including Virendra Singh (supra) have not noticed the Full Bench decision rendered in Mata Sewak (supra), it appears that the decision was not placed nor brought to the notice of the Court. The decision of the Division Bench and the subsequent decisions following Virendra Singh (supra) in my opinion is a per incuriam and does not lay down the correct legal position. The decisions rendered in Praveen Kumar (supra) and Bhagwan Singh (supra) following Mata Sewak (supra) lays down the correct law.

In Narmada Bachao Andolan Vs. State of Madhya Pradesh & Anr., AIR 2011 SC 1989, the Supreme Court considered the Doctrine of "Per Incuriam", paragraph 60, reads thus:

"PER INCURIAM - Doctrine:

'60. 'Incuria' literally means 'carelessness'. In practice per incuriam is taken to mean per ignoratium. The Courts have developed this principle in relaxation of the rule of stare decisis. Thus, the 'quotable in law' is avoided and ignored if it is rendered, in ignorance of a statute or other binding authority. While dealing with observations made by a seven Judges-Bench in India Cement Ltd. etc. etc. v. State of Tamil Nadu etc. etc., AIR 1990 SC 85, the five Judges-Bench in State of West Bengal v. Kesoram Industries Ltd. & Ors., (2004) 10 SCC 201: (AIR 2005 SC 1646: 2004 AIR SCW 5998), observed as under: -

'A doubtful expression occurring in a judgment, apparently by mistake or inadvertence, ought to be read by assuming that the Court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the context,.....A statement caused by an apparent typographical or inadvertent error in a judgment of the Court should not be misunderstood as declaration of such law by the Court.' Thus, 'per incuriam' are those decisions which are given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by inadvertence or conclusions that have been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. It is also well settled, if intricacies of relevant provisions are either not noticed or brought to the notice of the Court or if the view is expressed without analysing the said provision or the settled position of law, such a view cannot be treated as binding precedent. The Division Bench in Virendra Singh (supra) did not notice the judgment of a larger Bench in Mata Sewak (supra) upholding the validity of the notification making offence under Section 506 cognizable and non-bailable.

In view of the law laid down in Mata Sewak (supra) followed in Praveen Kumar (supra) and Bhagwan Singh (supra), Section 506 is cognizable and non-bailable and has to be tried as a State case not as complaint case.

In the circumstances, the petition being devoid of merit is, accordingly, dismissed.

Order Date :- 28.5.2018 S.Prakash