

FATMA BIBI AHMED PATEL

v.

STATE OF GUJARAT & ANR.

(Criminal Appeal No.873 of 2008)

MAY 13, 2008

[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.]

Penal Code, 1860; s.4/Code of Criminal Procedure, 1973; s.188:

Intra-territorial offences – Applicability of Penal Code to – Jurisdiction of courts in India – Held: Accused is a citizen of Mauritius and has been in India on visas issued by India – Since accused is not resident of India and offence has not been committed within the territorial limit of India, the provision of the Penal Code as also the Code of Criminal Procedure do not apply – The order of Judicial Magistrate taking cognizance of the complaint by her daughter in law against her son and herself was without jurisdiction.

A Complaint Petition was filed by the daughter-in-law of the appellant alleging physical and mental torture by her husband and instigation thereof by the mother-in-law, the appellant. Though all of them were residents of Kuwait and they were in India on visiting visas, the Chief Judicial Magistrate took cognizance of the complainant and directed issuance of summons to appellant. The appellant challenged the order of trial court as bad in law as complaint was filed by her daughter-in-law without obtaining sanction in terms of provisions u/s 188 Cr.P.C. The Application was dismissed by the trial judge. The Revision Application filed thereagainst by the appellant was allowed by the Revisional Court. The complainant challenged the order, which was allowed by the High Court. Hence, the present appeal.

A Appellant contended that having regard to the provisions contained in S.4 of the Indian Penal Code and S.188 of the Code of Criminal Procedure, the order of the trial judge taking cognizance as against the appellant was bad in law.

B Respondent No.2 submitted that having regard to the fact that the appellant having filed an application for quashing the proceedings on the ground of non-compliance of the provisions of S.188 of the Code of Criminal Procedure as also having filed another application for quashing the proceedings which stood withdrawn, the said application was not maintainable.

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Allowing the appeal, the Court

D HELD: 1.1 In terms of S.4 of the Indian Penal Code, the Indian courts will have jurisdiction to try an accused only if the accused is a citizen of India even if the offence was committed outside India or by any person on any ship or aircraft registered in India wherever it may be. Neither of the aforementioned contingencies is attracted in the instant case. Section 188 of the Code of Criminal Procedure also deals with offences committed outside India. Clause (a) brings within its sweep a citizen of India, whether on the high seas or elsewhere, or by a person, although not citizen of India when the offence is committed on any ship or aircraft registered in India. In view of the fact that the offence is said to have been committed in Kuwait, the provisions of the Indian Penal Code or the Code of Criminal Procedure cannot be said to have any application. [Para 5] [397 D-F]

G *Central Bank of India Ltd. vs. Ram Narain* AIR 1955 SC 36 – relied on.

H 1.2 Appellant is a citizen of Mauritius. She has been visiting India on Visas issued by India. She, thus, indisputably is not a citizen of India. She might have been stay-

ing in India with her relatives as has been contended by the complainant, but it has not been denied and disputed that she is not a citizen of India. If she is not a citizen of India having regard to the provisions contained in S.4, IPC and S. 188, Cr.P.C., the order of the Judicial Magistrate taking cognizance must be held to be illegal. [Para 5] [397B,C]

2.1 Principles analogous to *res judicata* have no application with regard to criminal cases. An accused has a fundamental right in terms of Article 21 of the Constitution of India to be proceeded against only in accordance with law. [Para 5] [401A]

Ajay Agarwal vs. Union of India AIR 1993 SC 1637 – referred to.

2.2 The entire proceedings having been initiated illegally and without jurisdiction, all actions taken by the court were without jurisdiction, and thus are nullities. In such a case even the principle of *res judicata* (wherever applicable) would not apply. [Para 5] [401EF]

Chief Justice Of Andhra Pradesh And Others v. L. V. A. Dixitulu And Others AIR 1979 SC 193 and *Union of India v. Pramod Gupta (D) by LRs and Ors.*, (2005) 12 SCC 1 – relied on.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 873 of 2008

From the final Judgment & Order dated 12.4.2006 of the High Court of Gujarat at Ahmedabad in Crl. Revision Application No. 358 of 2005

Sudershan Rajan and J. Verghese (for Ms. Jyoti Mendiratta) for the Appellant.

Pawan Kumar Bahl, Raj Pal Singh, Anil Chandulal Chrishan, Goodwill Indeever, Pinky, Sangeeta Singh, Jasal and Hemantika Wahi for the Respondents.

A The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

B 2. Interpretation of Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure fall for our consideration in this appeal which arises out of a judgment and order dated 12.04.2006 passed by the High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 358 of 2005 dismissing the Criminal Revision filed by the appellant herein.

C 3. Son of the appellant Hanif Ahmed Patel was married to the complainant – respondent on 22.4.2002. Appellant indisputably is a citizen of Mauritius. Her son and daughter-in-law at all material times were residing at Kuwait.

D A Complaint Petition, however, was filed before the Chief Judicial Magistrate, Navsari by the said respondent alleging physical and mental torture by her husband (the first accused). Allegations primarily against the appellant therein were that the first accused used to consult her and she used to instigate him.

E As the couple was residing at Kuwait, indisputably the entire cause of action arose at Kuwait. The learned Chief Judicial Magistrate, Navsari, however, took cognizance of the aforesaid offences and directed issuance of summons to the appellant by an order dated 30.5.2003.

F An application was filed by her stating that the complaint petition filed without obtaining the requisite sanction under Section 188 of the Code of Criminal Procedure was bad in law. The same was dismissed.

G A joint application with her son was thereafter filed by the appellant for quashing of the entire complaint petition which was withdrawn.

H Appellant, however, filed a fresh application on or about 6.12.2004 raising a contention that as she is a citizen of

Mauritius and as the entire cause of action took place at Kuwait, the order taking cognizance is bad in law. Whereas the learned trial judge rejected the said plea, the Revisional Court on a revision application filed by the appellant thereagainst, allowed the same.

Respondent No. 2 moved the High Court of Gujarat aggrieved thereby which by reason of the impugned order has been allowed.

4. Mr. Sudarshan Rajan, learned counsel appearing on behalf of the appellant, submitted that having regard to the provisions contained in Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure, the order taking cognizance as against the appellant was bad in law. Reliance in this behalf has been placed on *Central Bank of India Ltd. vs. Ram Narain* [AIR 1955 SC 36].

5. Mr. Pawan Kumar Bahl, learned counsel appearing on behalf of the respondent, on the other hand, urged that having regard to the fact that the appellant having filed an application for quashing earlier on the ground of non-compliance of the provisions of Section 188 of the Code of Criminal Procedure as also having filed a quashing application which stood withdrawn, the said application was not maintainable.

Offences said to have been committed by the appellant in the complaint petition were under Sections 498A and 506(2) of the Indian Penal Code. Provisions of the Indian Penal Code and the Code of Criminal Procedure would, therefore, indisputably apply.

Section 4 of the Indian Penal Code reads as under:-

“4. Extension of Code to extra-territorial offences.- The provisions of this Code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India;

A (2) any person on any ship or aircraft registered in India wherever it may be.

B Explanation.- In this section the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code.

Illustration

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found."

C Section 188 of the Code of Criminal Procedure reads as under:

"Section 188 - **Offence committed outside India.** -When an offence is committed outside India—

- D
- (a) by a citizen of India, whether on the high seas or elsewhere; or
 - (b) by a person, not being such citizen, on any ship or aircraft registered in India,

E he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

F Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

G In our constitutional scheme, all laws made by Parliament primarily are applicable only within the country. Ordinarily, therefore, all persons who commit a crime in India can be tried in any place where the offence is committed. Section 41 of the Indian Penal Code, however, extends the scope of applicability of the territorial jurisdiction of the court of India to try a case, the cause of action of which took place outside the geographical limits. Parliament indisputably may enact a legislation having

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extra territorial application but the same must be applied subject to fulfillment of the requirements contained therein. A

There are materials before us to show that the appellant is a citizen of Mauritius. She has been visiting India on Visas issued by India. She, thus, indisputably is not a citizen of India. She might have been staying in India with her relatives as has been contended by the complainant, but it has not been denied and disputed that she is not a citizen of India. If she is not a citizen of India having regard to the provisions contained in Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure, the order taking cognizance must be held to be illegal. B C

In terms of Section 4 of the Indian Penal Code, the Indian courts will have jurisdiction to try an accused only if the accused is a citizen of India even if the offence was committed outside India or by any person on any ship or aircraft registered in India wherever it may be. Neither of the aforementioned contingencies is attracted in the instant case. Section 188 of the Code of Criminal Procedure also deals with offences committed outside India. Clause (a) brings within its sweep a citizen of India, whether on the high seas or elsewhere, or by a person, although not citizen of India when the offence is committed on any ship or aircraft registered in India. D E

In view of the fact that the offence is said to have been committed in Kuwait, the provisions of the Indian Penal Code or the Code of Criminal Procedure cannot be said to have any application. F

This aspect of the matter has been considered by this Court in *Central Bank of India Ltd. vs. Ram Narain* [supra], wherein it was clearly held: G

“The learned Attorney-General contended that Ram Narain was at the time when sanction for his prosecution was given by the East Punjab Government, a citizen of India residing in Hodel and that being so, he could be tried in H

A India being a citizen of India at that moment, and having committed offences outside India, and that the provisions of Section 4 I.P.C. and Section 188, Cr. P.C. were fully attracted to the case.

B In our opinion, this contention is not well founded. The language of the sections plainly means that if at the time of the commission of the offence, the person committing it is a citizen of India, then even if the offence is committed outside India he is subject to the jurisdiction of the courts in India. The rule enunciated in the sections is based on the principle that qua citizens the jurisdiction of courts is not lost by reason of the venue of the offence. *If, however, at the time of the commission of the offence the accused person is not a citizen of India, then the provisions of these sections have no application whatsoever*

D A foreigner was not liable to be dealt with in British India for an offence committed and completed outside British India under the provisions of the sections as they stood before the adaptations made in them after the partition of India. Illustration (a) to Section 4, I.P.C. delimits the scope of the section. It indicates the extent and the ambit of this section. It runs as follows:

F (a) A, a coolie, who is a Native Indian subject commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found "

G In the illustration, if (A) was not a Native Indian subject at the time of the commission of the murder the provisions of Section 4, I.P.C. could not apply to his case. The circumstance that after the commission of the offence a person becomes domiciled in another country, or acquires citizenship of that State, cannot confer jurisdiction on the courts of that territory retrospectively for trying offences committed and completed at a time when that person was neither the national of that country nor was he domiciled there."

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Strong reliance has been placed by the learned counsel appearing on behalf of the respondents on *Ajay Agarwal vs. Union of India* [AIR 1993 SC 1637]. The question which arose for consideration therein was that as to whether a sanction of Central Government for prosecution in terms of Section 188 of the Code of Criminal Procedure was necessary. The said question was answered in the negative stating:

“8. The question is whether prior sanction of the Central Govt. is necessary for the offence of conspiracy under proviso to Section 188 of the Code to take cognizance of an offence punishable under Section 120-B etc. I.P.C. or to proceed with trial In Chapter VA, conspiracy was brought on statute by the Amendment Act, 1913 (8 of 1913). Section 120-A of the I.P.C. defines ‘conspiracy’ to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated as “criminal conspiracy. No agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. Section 120-B of the I.P.C. prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of ‘criminal conspiracy’ was stated first by Lord Denman in Jones’ case (1832 B & AD 345) that an indictment for conspiracy must “charge a conspiracy to do an unlawful act by unlawful

A means” and was elaborated by Willies, J. on behalf of the Judges while referring the question to the House of Lords in *Mulcahy v. Reg* (1868) L.R. 3 H.L. 306 and the House of Lords in unanimous decision reiterated in *Quinn v. Leatham* 1901 AC 495 at 528 as under:

B “A conspiracy consists not merely in the intention
C of two or more, but in the agreement of two or
D more to do an unlawful act, or to do a lawful act
by unlawful means. So long as such a design
rests in intention only it is not indictable. When
two agree to carry it into effect, the very plot is
an act in itself, and the act of each of the parties,
promise against promise, *actus contra actum*,
capable of being enforced, if lawful, punishable
of for a criminal object or for the use of criminal
means.

(emphasis supplied)”

The court therein was concerned with a charge of conspiracy. It was in the aforementioned context opined that
E no sanction would be required.

R. M. Sahai, J. in his concurring judgment stated:

F “Language of the section is plain and simple. It operates
where an offence is committed by a citizen of India outside
the country. Requirements are, therefore, one - commission
of an offence; second - by an Indian citizen; and third - that
it should have been committed outside the country. Out of
the three there is no dispute that the appellant is an Indian
citizen. But so far the other two are that the conspiracy to
G forge and cheat the bank was hatched by the appellant
and others in India. Whether it was so or not, cannot be
gone into at this stage.”

The learned counsel submitted that as in the earlier
application, the appellant merely complained of the absence
H of any sanction, this application should not be entertained.

We do not agree. Principles analogous to res judicata have no application with regard to criminal cases. An accused has a fundamental right in terms of Article 21 of the Constitution of India to be proceeded against only in accordance with law. The law which would apply in India subject of course to the provisions of Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure is that the offence must be committed within the territory of India. If admittedly, the offence has not been committed within the territorial limits of India, the provisions of the Indian Penal Code as also the Code of Criminal Procedure would not apply. If the provisions of said Acts have no application as against the appellant, the order taking cognizance must be held to be wholly illegal and without jurisdiction. The jurisdictional issue has been raised by the appellant herein. Only because on a mistaken legal advise, another application was filed, which was dismissed, the same by itself, in our opinion, will not come in the way of the appellant to file an appropriate application before the High Court particularly when by reason thereof her fundamental right has been infringed.

This Court, in a matter like the present one where the jurisdictional issue goes to the root of the matter, would not allow injustice to be done to a party. The entire proceedings having been initiated illegally and without jurisdiction, all actions taken by the court were without jurisdiction, and thus are nullities. In such a case even the principle of res judicata (wherever applicable) would not apply.

In *Chief Justice Of Andhra Pradesh And Others v. L. V. A. Dixitulu And Others* [AIR 1979 SC 193 at 198], this Court held:

“If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in this case.”

A [See also *Union of India v. Pramod Gupta (D) by LRs and Ors.*, (2005) 12 SCC 1]

Where a jurisdictional issue is raised, save and except for certain categories of the cases, the same may be permitted to be raised at any stage of the proceedings.

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6. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed with costs. Counsel's fee assessed at Rs.25,000/- (Rupees twenty five thousand only).

S.K.S.

Appeal allowed.