Fatma Bibi Ahmed Patel Vs State of Gujarat and Another

Court: Supreme Court of India

Date of Decision: May 13, 2008

Acts Referred: Constitution of India, 1950 â€" Article 21
Criminal Procedure Code, 1973 (CrPC) â€" Section 188
Penal Code, 1860 (IPC) â€" Section 120B, 4, 498A, 506(2)

Citation: (2008) 3 ACR 2871 : AIR 2008 SC 2392 : (2008) AIRSCW 3962 : (2008) 2 ALD(Cri) 381 : (2008) 2 ALT(Cri) 350 : (2008) CriLJ 3065 : (2008) 3 GLR 2468 : (2008) 2 KLT 907 : (2008) 40 OCR 657 : (2008) 4 PLJR 264 : (2008) 2 RLW 1664 : (2008) 7 SCALE 519 : (2008)

Hon'ble Judges: S. B. Sinha, J; Lokeshwar Singh Panta, J

Bench: Division Bench

Advocate: Sundershan Rajan and J. Verghese, for Jyoti Mendiratta, for the Appellant; Pawan Kumar Bahl, Raj Pal Singh, Anil Chandaulal Chrishan, Goodwill Indeever, Pinky, Sangeeta Singh, Jasal and Hemantika Wahi, for the Respondent

Final Decision: Dismissed

Judgement

S.B. Sinha, J.
Leave granted.

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.

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.

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.

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.

An application was filed by her stating that the complaint petition filed without obtaining the requisite sanction u/s 188 of the Code of Criminal

Procedure was bad in law. The same was dismissed.

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application with her son was thereafter filed by the appellant for quashing of the entire complaint petition which was withdrawn.

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 280189 .

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;

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

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 he found.

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

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

(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,

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:

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.

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 extra territorial application but the same must be applied subject to

fulfillment of the requirements contained therein.

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.

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.

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.

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

The learned Attorney-General contended that Ram Narain was at the time when sanction for his prosecution was given by the East Punjabn

Government, a citizen of India residing in Hodel and that being so, he could be tried in 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.

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.

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:

(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.

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.

Strong reliance has been placed by the learned Counsel appearing on behalf of the respondents on 285203 . 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 u/s 120B 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 120A 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 120B 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 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. Leathem 1901

AC 495 at 528 as under:

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or 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 no sanction would be required.

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

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 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 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 291829 , 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.

[See also 269701

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.

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).