

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1616 OF 2015

- 1) Syed Salman @ Wajid s/o Syed Gafoor
Age 23 years, Occ. Labour
R/o. Zamzam Colony, Jintur
Tq. Jintur, District Parbhani
 2. Shaikh Shahed s/o Shaikh Rashid
Age 22 years, Occ. Labour
R/o. Bamni Plot, Jintur
Tq. Jintur, District Parbhani
 3. Shaikh Mobin @ Chandan s/o Shaikh Rashid
Age 23 years, Occ. Labour
R/o. Zamzam Colony, Jintur
Tq. Jintur, District Parbhani
 4. Shahed Khan s/o Sadeq Khan
Age 21 years, Occ. Labour
R/o. Chetan Colony, Balsa Road,
Jintur, Tq. Jintur, Dist. Parbhani
 5. Syed Hujoor s/o Syed Samandar
Age 22 years, Occ. Labour
R/o. Maulana Azad Colony,
Jintur, Tq. Jintur, Dist. Parbhani
- ...Petitioners

versus

1. The State of Maharashtra
through Police Station, Jintur
(Copy to be served on Public
Prosecutor the High Court of
Judicature of Bombay, Bench
at Aurangabad)
 2. Chandrakant s/o Bapurao Mule
Age 45 years, Occ. Labour
R/o. Nemgiri Road, Bhim Nagar,
Jintur, Tq. Jintur,
District Parbhani
- ...Respondents

.....
Mr. H.I. Pathan, advocate for the petitioners
Ms. R.P. Gour, A.P.P. for respondent-State
Mr. S.B. Deshapande, Assistant Solicitor General
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CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 29.08.2016**

**Date of pronouncing
the Order: 15.09.2016**

PER COURT :-

1. Being aggrieved by the order passed below Exh.42 dated 23.11.2015 in Special (Atrocity) Case No. 53 of 2014 by the learned Additional Sessions Judge, Parbhani, the original accused persons have preferred this writ petition.

2. Brief facts giving rise to the present writ petition are as follows:-

a) On the basis of complaint lodged by Chandrakant Bapurao Mule, R/o. Jintur, crime No. 188 of 2014 for the offences punishable under Sections 363, 505 (2), 147, 148, 149 of I.P.C., Section 66-A of Information Technology Act and Sections 3(1) (e) and 3 (2) (va) of the Scheduled Caste and Scheduled Tribes (Ordinance 2014) (hereinafter for the sake of brevity referred to as the "Ordinance

2014”) came to be registered. It has alleged in the complaint that the accused persons, in furtherance of their common unlawful object, kidnapped the son of complainant viz. Sagar and further spread rumors or alarming news with intention to create tension on the ground of religion, feelings of enmity, hatred or ill will between two religions. During the course of investigation, it was also revealed that said Sagar, who is member of Scheduled Caste subjected to certain acts, which are derogatory to human dignity. Thus, after due investigation, charge sheet came to be submitted against the petitioners-accused. The petitioners accused persons filed an application Exh.42 seeking discharge for all offences alleged against them. The learned Additional Sessions Judge, Parbhani by its impugned order dated 23.11.2015 partly allowed the said application Exh.42 in view of authoritative pronouncement of the Apex Court in the case of ***Shreya Singhal vs. Union of India, reported in (2015) 5 SCC 1*** and discharged the accused for the offences punishable under Section 66-A of the Information Technology Act. However, the petitioners’ application seeking discharge for other offences came to be rejected. Hence, this writ petition.

3. Learned counsel for the petitioners submits that Ordinance 2014 was promulgated by the President of India on 4.3.2014 to amend the Scheduled Caste and Scheduled Tribes (Prevention of

Atrocities) Act 1989 (hereinafter for the sake of brevity referred to as the "Atrocities Act"). In view of Article 123 of the Constitution of India, the said Ordinance shall be laid before both the Houses of Parliament and shall cease to operate at the expiration of six weeks from reassembly of Parliament. In the instant case, the Parliament came to be reassembled on 4.6.2014 and admittedly, the said Ordinance has not been laid before the parliament within six weeks as prescribed under Article 123 of the Constitution of India. Thus, on 16.7.2014, the said Ordinance has been lapsed, therefore, the said Ordinance is having no force of law or cannot be made applicable in any case. Learned counsel submits that the complaint in this case came to be lodged on 25.8.2014 i.e. after the said Ordinance of 2014 came to be lapsed on 16.7.2014. Thus, the penal provisions of Ordinance 2014 cannot be made applicable in the present case. The Ordinance itself was not in existence by operation of Article 123 of the Constitution of India. Thus, levelling the charges under the lapsed Ordinance itself are not sustainable.

Learned counsel for the petitioners submits that the benefit of provisions of Section 6 of General Clauses Act 1897 cannot be made applicable to the facts of the present case. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Amendment Act 2015 (hereinafter for the sake of brevity referred to as the "Amendment Act

2015”) came into force on 1.1.2016. The repealing and saving provisions of the Amendment Act 2015 are not helpful to apply to the action taken under the lapsed Ordinance 2014. As such, the provisions of Sub-section (2) of Section 14 of the Amendment Act 2015 cannot be made applicable since the Ordinance 2014 has been lapsed on 16.7.2014 i.e. much prior to filing of complaint on 25.8.2014 and much prior to coming into force the Amendment Act 2015. Learned counsel also submits that in the given set of allegations, the other offences alleged against the petitioners are also not attracted. Thus, the petitioners are entitled for discharge.

Learned counsel for the petitioners in order to substantiate his submissions places his reliance on the following cases:-

I) R.P. Jain and another vs. State of Bihar, reported in 1977 Cr.L.J. 1758,

II) Sri Chand Kasera and others vs. State of Bihar and Anr reported in (1998) 8 SCC 725.

4. This Court by order dated 17.2.2016 considering the challenge raised in the petition, issued notice to the Solicitor General of India and accordingly I have heard learned Assistant Solicitor General of India. Learned A.S.G. submits that the Hon'ble President

has legislative power under Article 123 to promulgate the Ordinance and this legislative power is coextensive with the power of the Parliament to make the law. In view of clause (2) of Article 123, the Ordinance promulgated under this Article shall have the same force and effects as an Act of Parliament. There is no qualitative difference between the Ordinance issued by the President and an Act passed by the Parliament, is also emphasized by clause (2) of Article 367, which provides that any reference in the Constitution to Acts or laws of, or made by, Parliament, shall be construed as including a reference to an Ordinance made by the President. Learned A.S.G. submits that whenever there is repeal of an enactment, the consequences laid down in Section 6 of General Clauses Act will follow, unless as Section itself says, different intention appears. In the instant case, the repeal is followed by the legislation on the same subject keeping alive entirely the old rights and liabilities, including the object behind the enactment i.e. to protect the members of the Scheduled Caste and Scheduled Tribes from the atrocities and the same is also evident from the saving clause in the form of sub-section (2) of Section 13 of the Amendment Act 2015.

Learned A.S.G. in order to substantiate his submissions, places reliance on the judgment in the following cases:-

- i) State of Punjab vs. Manohar Singh Pratap Singh, reported in 1955 AIR (SC) 84
- ii) R.K.Garg vs. Union of India, reported in 1981 (4) SCC 675
- iii) Himachal Pradesh State Electricity Regularoty Commission and Anr vs. Himachal Pradesh State Electricity Board, reported in 2014 (5) SCC 219.

5. Learned A.P.P. submits that even though the complaint came to be lodged on 25.8.2014, it has specifically alleged in the complaint that the son of the complainant viz. Sagar, some 11 months back was taken by the accused persons and he was subjected to the said acts for 6 to 7 days during Ramzan festival. Learned A.P.P. submits that victim Sagar, as alleged in the complaint, was subjected to atrocities prior to 16.7.2014 i.e. within the period when the Ordinance of 2014 was in force. Learned A.P.P. submits that the Additional Sessions Judge has rightly rejected the application for discharge so far as the offence under I.P.C. and Atrocities are concerned.

6. The Ordinance 2014 was issued by the President under Article 123 of the Constitution of India. Article 123 provides, *inter-alia*, as follows:-

“Article 123. Power of President to promulgate Ordinances during recess of Parliament; (1) If at any time, except when both

Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require,

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance,

(a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President

Explanation - Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause,

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

7. Under this Article the legislative power is conferred upon the President exercisable when both the houses of Parliament are not in Session. Article 123 confers powers on the President to promulgate the law by issuing an Ordinance to enable the executive to deal with

the emergent situation. This legislative power is co-extensive with the power of the Parliament to make the Laws. Even offences have been created by Ordinance issued by the President under Article 123 and such offences committed during the life of Ordinance have been held to be punishable despite expiry of the Ordinance. It is to be noted that clause (2) of Article 123 provides in clear terms that the ordinance promulgated under this Article shall have same force and effect as an Act of Parliament. There is no qualitative difference between the Ordinance issued by the President and an Act passed by the Parliament. Clause (2) of Article 367 also provides that any reference in the Constitution to Acts or laws made by Parliament shall be construed as including a reference to an Ordinance made by the President.

8. In the case of ***State of Punjab vs. Manohar Singh (supra)*** the Apex Court while dealing with Section 6 of General Clause Act and the effect of Ordinance followed by the Legislation, made the following observations:-

“Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But

when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore, subscribe to the broad proposition and section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.”

In the instant case, it appears that even by Amendment Act 2015, the amendment kept alive, the old rights and liabilities and it does not indicate any intention on the part of the legislature to destroy the old provision altogether. In view of the provisions of Section 6 of General Clauses Act 1897, the repeal of the Ordinance 2014 could not in any way affect the liability already incurred in respect of an offence as laid down in the provisions of Ordinance.

9. Section 13 of the Amendment Act 2015 is reproduced herein below:-

“13. (1) The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Ordinance, 2014 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the Principal Act, as amended by this Act.”

In view of the above repeal and saving clause, it is clear that notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the Ordinance 2014, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by the Act of 2015. It is manifest that the legislators never intended to destroy the old rights and liabilities brought into force solely with an object to protect the members of Scheduled Caste and Scheduled Tribes from the Atrocities committed on them.

10. In the case of ***R.P. Jain and another vs. State of Bihar*** (supra) relied upon by learned counsel for the petitioners, the repealed third Ordinance did not contain any clause validating things previously done or omitted to be done. It has also observed by

Patna High Court that repealing Ordinance did not save any action which had lapsed with repeal of Ordinance, action having not been taken during existence or repealed Ordinance. In the light of these observations, it is held that since Section 52 of third Ordinance had not been saved by any provision of repealing Ordinance, no punishment either could be imposed on accused persons. It thus appears that the facts of said case are altogether different and thus cannot be made applicable to the present case.

11. So far as the other offences alleged to have been committed by the accused persons are concerned, I am in agreement with the view taken by learned Sessions Judge.

12. In the light of above observations, I find no substance in the writ petition and the same is liable to be dismissed. The writ petition is accordingly dismissed.

(V. K. JADHAV, J.)

rlj/