

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.666 OF 2016

Bharatkumar S. Gupta
Age 35 years, Occ. Service,
Residing at Plot No.224, Sector 5,
Ghansoli, Koparkhairne,
Navi Mumbai – 400 701. Applicant

V/s

- 1 The State of Maharashtra**
through the Senior Police Inspector
Koparkhairane Police Station
Koparkhairane, Navi Mumbai.
- 2 Upendrakumar Chattu Gupta**
Age 27 years, Occ. Nil.
Row house, Plot No.204, Sector 5,
Ghansoli, Navi Mumbai – 400 701. Respondents

Mr. Nitesh Bhutekar a/w Mr. Manoj Shirsat, Mr. Vijay Dighe, Mr. Ayodhya Patki for the Applicant.

Dr. F.R. Shaikh, APP for the Respondent No.1/State.

Mr. Sachin Chandan for the Respondent No.2.

CORAM : A.S. OKA &
A.A. SAYED, JJ.

DATED : 29 JUNE 2016

ORAL JUDGMENT (PER A.S. OKA, J.):

1 Heard the learned Counsel appearing for the Applicant and the learned Counsel appearing for the second Respondent. This Application was argued yesterday. To enable the learned Counsel appearing for the Applicant to make further submissions, the Application was kept back till

the afternoon session yesterday. On the request made by the learned Counsel appearing for the parties, we again granted time till today. We have heard further submissions.

2 The prayer in this Application is for quashing the criminal case on the basis of the First Information Report registered at the instance of the second Respondent for the offence punishable under section 377 and other sections of the Indian Penal Code. It is not in dispute that on completion of the investigation, charge-sheet has been filed by the police for various offences including the offence punishable under section 377 of the Indian Penal Code. It is also not in dispute that the present Applicant filed Criminal Writ Petition No.3858 of 2013 in this Court for quashing the proceedings of the impugned First Information Report and on 17 December 2013, the Petition was withdrawn with liberty to raise all contentions before the Competent Court at appropriate stage.

3 This is an Application filed invoking powers of this Court under section 482 of the Code of Criminal Procedure, 1973 (for short "CrPC"). From the averments made in the Application and from the submissions made across the bar, the contention of the Applicant is that now there is a settlement between the Applicant and the first informant which is reflected from the Affidavit dated 14 June 2016 filed by the second

Respondent. The learned Counsel appearing for the Applicant relies upon a decision of a learned Single Judge of Uttarakhand High Court in the case of **Vijay Gupta and others vs. State of Uttarakhand and others**¹. Today, the learned Counsel appearing for the Applicant tenders across the bar a draft amendment by which he seeks to incorporate a prayer for declaring section 377 of the Indian Penal Code as unconstitutional being violative of Article 20 of the Constitution of India. The draft amendment is taken on record and marked "X" for identification.

4 Today, the submission of the learned Counsel appearing for the Applicant and the learned Counsel appearing for the second Respondent is that if there is no real possibility of conviction, only on that ground, this Court should exercise the power under section 482 of CrPC of quashing the offences.

5 Firstly, we deal with the draft amendment tendered across the bar. A Division Bench of Delhi High Court by judgment and order dated 2 July 2009 declared section 377 of the Indian Penal Code to be violative of Articles 14, 15 and 21 of the Constitution of India. The said decision was subject matter of challenge before the Apex Court in the case of **Suresh**

1 Criminal Writ Petition No.516 of 2014 decided on 13 May 2014

Kumar Koushal and another vs. NAZ Foundation and others². The Apex Court by its decision proceeded to set aside the decision of the Delhi High Court. Paragraph 56 of the said decision reads thus:

“56. While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.”

(underline supplied)

6 Therefore, in so many words, the Apex Court has held that section 377 of the Indian Penal Code does not suffer from any constitutional infirmity. So long as the said binding precedent of the Apex Court stands, it is not open for any litigant to agitate before this Court that section 377 of the Indian Penal Code is unconstitutional because a particular submission or a particular contention was not considered by the Apex Court. Therefore, we cannot permit the Applicant to amend this Application for incorporating a challenge to the constitutional validity of section 377 of the Indian Penal Code. There is a binding decision of the Apex Court which holds that the section does not suffer from any constitutional infirmity.

² AIR 2014 SC 563

7 As far as the powers of this Court under section 482 of CrPC to quash offences in cases which are non-compoundable on the ground of mutual settlement is concerned, the law is laid down by the Apex Court in the case of **Gian Singh vs. State of Punjab & Another**³. The Apex Court in so many words has held that this Court in exercise of its extraordinary jurisdiction under section 482 of CrPC can quash First Information Report or criminal proceedings in non-compoundable cases on the basis of settlement between the victim of the offence and the alleged offender. The Apex Court held that the powers under section 320 of CrPC and section 482 of CrPC are distinct and separate though the ultimate consequence may be the same. What is material is paragraph 61 of the said decision which reads thus:

“61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of

3 (2012) 10 SCC 203

each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with

the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.”

(underline supplied)

8 The Apex Court has held that in case of the first category of offences, the power to quash the offences under section 482 of CrPC should not be exercised even on the basis of a settlement. In the second category of cases, the Apex Court held that the power can be exercised after the Court is satisfied on following aspects:

- i) Because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak; and
- ii) Continuation of the criminal case would put the accused to great oppression as well as prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.

9 Therefore, firstly, there has to be a compromise between the offender and the victim. The High Court will have to satisfy itself that there is such a compromise. The nature of the compromise and

particulars thereof should be reflected on record. Mere statement that there is a compromise cannot be accepted by the Court. Only after the Court is satisfied that there is such a compromise in a case covered by the second category specified in paragraph 61, the Court will have to consider the other aspects namely, whether possibility of conviction is remote and bleak and whether continuation of criminal case would put the accused to great oppression. In a case where there is no settlement or where the settlement is in a case of heinous or serious crime, only on the ground that the first informant and witnesses are not willing to support the prosecution, and therefore, the possibility of conviction is remote and bleak, the power under section 482 of CrPC cannot be exercised. The power under section 482 of CrPC can be used very sparingly and in rare cases. If High Court quashes a case only on the ground that there is no possibility of conviction or the victim may not support prosecution, invoking power of this Court on this ground will be itself abuse of process of law.

10 Firstly, it is not possible for us to accept that the present case will fall in the second category. So long as the legislature does not step in, it is not possible to accept the contention that the offence governed by section 377 of the Indian Penal Code is not a serious offence and that it will not have any impact on the society. We must also note here that an offence under section 377 of the Indian Penal Code is

punishable with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years. Therefore, even in case of a genuine settlement, it will not be open for this Court to exercise the power under section 482 of CrPC in case of an offence punishable under section 377 of the Indian Penal Code only on the ground of settlement. In a given case, it can be done on merits.

11 Even assuming that the case will fall in the second category, it will have to be established before the Court that there is a complete settlement between the victim and offender. Therefore, the Court is entitled to know the particulars of the settlement. In the Affidavit of the second Respondent, there is only a bald statement that the dispute with the Applicant has been settled. Unless the Court is satisfied that there is a settlement within four corners of law between the offender and the victim, the law laid down by the Apex Court in the case of **Gian Singh vs. State of Punjab & Another** will not apply. Only on the basis of a bald statement of the first informant or victim that there is a settlement, the power under section 482 of CrPC cannot be exercised. This Court has to be satisfied that there is a settlement. If this Court starts accepting bald statements about the settlement of the dispute between the victim and the offender without satisfying itself about the genuineness of the settlement, in a case where charge-sheet is filed, virtually a choice will be available to the first informant to come to the High Court and seek

quashing of the offences as per his whims and convenience. What the Apex Court has held is that offences which are not serious offences and which are having pre-dominantly civil flavour or offences arising out of mercantile or matrimonial disputes can be quashed, provided there is a settlement between the offender and the victim. Only because at a certain stage the first informant feels that he does not want to prosecute the case, the power under section 482 of CrPC cannot be exercised. Even in case of offences arising out of matrimonial disputes, before exercising power of quashing on the ground of compromise, this Court has to satisfy itself that in fact there is such a complete compromise of matrimonial dispute. In the present case, we cannot take bald statement of the first informant for its face value in absence of any particulars of settlement.

12 Reliance placed by the learned Counsel appearing for the Applicant on the decision of the Uttarakhand High Court will not help him for more than one reason. Firstly, the dispute was between the husband and wife wherein offence was registered at the instance of wife alleging commission of offences punishable under sections 498-A and 377 of the Indian Penal Code. This was a case where there was a complete settlement of the matrimonial dispute and that is why the learned Judge of the Uttarakhand High Court followed the law laid down in the case of

Gian Singh vs. State of Punjab & Another. We must note here that even the subsequent decision of the Apex Court in the case of **Narinder Singh & Ors. vs. State of Punjab & Anr.**⁴ does not make a departure from the law laid down in the case of **Gian Singh vs. State of Punjab and Another.**

13 It is sought to be pointed out that the larger Bench of the Apex Court may reconsider its view in the case of **Suresh Kumar Koushal and another vs. NAZ Foundation and others.** In case of that eventuality of the Apex Court holding section 377 of the Indian Penal Code as unconstitutional, obviously the prosecution will not survive.

14 Lastly, after making the submissions, the learned Counsel appearing for the Applicant made an attempt to seek leave to withdraw the Application. We must note here that we have heard the submissions in some detail and at this stage, we cannot permit the Applicant to withdraw the Application.

15 Accordingly, there is no merit in the Application and the same is rejected. We, however, make it clear that no adjudication is made on the merits of the controversy and observations made by this Court regarding the nature of offence are only for the limited purposes of considering the

4 (2014) 6 SCC 466

prayer for quashing on the basis of alleged settlement. None of these observations shall be construed as any observation which will influence the trial Court during the trial.

(A.A. SAYED, J.)

(A.S. OKA, J.)

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