

10.5.2023
9,10,11,12
Ct. no. 3
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CALCUTTA HIGH COURT
In the Circuit Bench at Jalpaiguri
Appellate Jurisdiction

CRR 183 of 2022
With
CRAN 1 of 2022
With
CRR 194 of 2022
With
CRAN 1 of 2022
With
CRR 246 of 2022
With
CRR 280 of 2022

In the matter of : Sri Jiwan Lal Agarwal & Anr.
...petitioners

Mr. Subhra Ghosh
Mr. Mayank Roy
Mr. Somraj Paul

...for the Petitioners

Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Abhijit Sarkar ... for the State in item no. 9

Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Nilay Chakraborty ... for the State in item
no.10 &11

Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Aniruddha Biswas ... for the State in item no. 12

Affidavits of service filed by the petitioner are taken on record. Since issue involved in all the four applications filed under section 482 of the Code of Criminal Procedure, being CRR 183 of 2022, CRR 194 of 2022 CRR 246 of 2022 and CRR 280 of 2022 is the same, all the aforesaid four applications are taken up together and disposed of by this common order.

CRR 183 of 2022 has been preferred by petitioner herein Sri Jiwanlal Agarwala and two others praying quashing of proceeding being Matigara P.S. case No. 988 of 2021, dated 06.09.2021 under section 447/188/34 of the Indian Penal Code (in short IPC), being GR Case No. 4167 of 2021. CRR 194 of 2022 has also been preferred by self-same petitioners with a prayer to quash Matigara P.S. Case No. 262 of 2021 dated 12.04.2021 under sections 447/188/506/34 IPC being G.R. Case No. 12090 of 2021. Similarly challenging Matigara police Station Case No. 198 of 2021 dated 21.03.2021 under sections 447/188/34 of IPC, same petitioners have sought for quashing the said proceeding also which is registered as G.R. Case No. 1015 of 2021. CRR 280 of 2022 has been preferred by the self-same petitioner being aggrieved by the proceeding being Matigara P.S. case No. 411 of 2021 dated 275 of 2021 under sections 447/188/506/34 IPC corresponding to GR Case No. 1935 of 2021, wherein also self-same petitioners have sought for quashing the proceeding.

All the aforesaid four proceedings have arisen due to four separate first information report (FIR) lodged by self-same private complainant namely chandmoni uttorayan welfare society and bone contention of all the aforesaid four FIRs which were lodged only in different times is that in violation of order of Hon'ble State Consumer Redressal Commission, Siliguri Circuit Bench, petitioners herein have

started pucca construction over the land meant for construction of community centre.

The moot point raised herein by the petitioners in support of their prayer for quashing the aforesaid four criminal proceedings are:-

- i) Whether the learned court below could have taken cognizance of an offence under Section 188 of the Indian Penal Code 1860 in absence of any compliance of the mandate prescribed under Section 195 of the Code of Criminal Procedure, 1973.
- ii) Whether offences under Sections 447, 506 and 34 allegedly arising out of same transaction can be dealt with separately from Section 188 of IPC where section 188 has been tagged violating the provisions of Section 195 of the Code.
- iii) Whether the materials collected during investigation prima facie discloses any offences under Sections 447 or 188 or 506 of the IPC or not.

The allegations have been made in the first information reports in a nutshell is that the petitioners in association with the agents and representatives of Luxmi Towaship and Holdings Limited are actively engaged in construction in and over the adjacent land illegally and wrongfully and also in violation and wilful disobedience of orders passed in the

proceedings in different times by the Hon'ble State Consumer Dispute Redressal Commission, West Bengal at Siliguri and by this Hon'ble Court.

The petitioners state that consequent to a transfer deed, the names of the petitioners and also family members have been mutated in the record of rights and the construction in and over the said land has been initiated in view of the sanctioned plan obtained from the competent authority. The petitioners further submit that numerous civil litigations and writ proceedings are pending with regard to their aforesaid acquired land and the petitioners are enjoying the order of injunction against Chandmoni Uttorayon Welfare Society (opposite party no. 2) from the court of learned Civil Judge (Junior Division) at Siliguri vide its order dated 17.11.2021 passed in Title Suit no. 241 of 2021.

The petitioners' further case is that pursuant to the first information report, the authorities have caused the investigation and submitted charge-sheet under Sections 188/447/34 of the IPC in two cases and charge sheet under sections 188/447/506/34 of IPC have been submitted in other two cases. The petitioners contended that the court below ought not to have taken cognizance of the allegations of the offence that has been mentioned in the first information report on the basis of a private complaint with allegations of Section 188 of the code which is not maintainable and wholly

unwarranted in the eyes of law. He further submits that on a bare perusal of the charge-sheet, it appears that no offence under Sections 447,188/ 34 of the IPC has been made out against the petitioners. The petitioners contended that they are the absolute and exclusive owner of land and the opposite party no. 2 at any point of time, did not have any right title or interest in the suit property. Petitioners further submit that the dispute is entirely civil in nature and clubbing of offence under Sections 447 or 506 of the IPC along with the offence under Section 188 of the Code with a clear intention to evade the provision of Section 195 of the Code of Criminal Procedure is not permissible under the law. Accordingly, the petitioners have prayed for quashing of the said proceedings.

In spite of service of notice, opposite party no. 2 is not represented.

Learned counsel for the State submits that the complaint has been made by a private Society (opposite party no. 2) in connection with the offence alleged under Section 188 of the Indian Penal Code. He further submits that even if there is any non-compliance of the provision of Section 195 of the Code of Criminal Procedure in connection with alleged offence punishable under Section 188 of the IPC even then offence under Sections 506/ 447/34 of the IPC, can very well be established against the accused in respect of the proceeding and the court below has not committed any wrong in taking

cognizance of the offence under Sections 447/34 or 506/447/34 of the Indian Penal Code. However, learned counsel for the State leaves the prayer made by the petitioners to the discretion of the court.

I have considered the submissions made by both the parties. It is not in dispute in the present case that the complaint has been made by a private society namely, Chandmoni Uttorayon Welfare Society and as such, learned counsel for the State has not disputed that Section 195 of the Code of Criminal Procedure has not been complied in the present context in lodging complaint for the offence punishable under Section 188 of the Code.

Now as regards, the offence punishable under Section 447/34 of the Indian Penal Code. Learned counsel for the petitioners submit that they are the owners and are in possession of the property in question all along and they are also enjoying injunction order passed by the competent civil court of law and the order of injunction is still continuing. The opposite party no. 2 has no iota of possession in connection with the suit property and as such Section 447 of the IPC has got no manner of application in the present context. In this context, he relied upon a judgment of Karnataka High Court in ***Sri Shivaswamy and others Vs. The State of Karnataka***, (Criminal petition No. 2776 of 2022) in support of his contention that in order to attract Section 447 of IPC most

relevant factor would be exclusive possession of the property on which the accused persons are alleged to have trespassed. It has further been held that if the possession of the property itself is in doubt, driving home the offences beyond all reasonable doubt, would without doubt become doubtful. It was held in the said judgment that on such premises if further proceedings are permitted to continue against the petitioners notwithstanding the fact that charge-sheet has been filed by the police, would become an abuse of the process of law and result in miscarriage of justice. In the present case, the opposite party no. 2 in spite of service has not appeared to substantiate his claim that at any point of time he was in possession of the property in question.

Similarly I do not find materials in the record which can satisfy the essentials to attract criminal intimidation. Mere words of complainant that when the accused persons were asked to stop construction they became furious and abused them with filthy languages does not constitute offence under section 506 of IPC.

Now in order to deal with the question as to whether clubbing of offence under Sections 447/34 or 506/34 of the IPC with that of Section 188 of the IPC would be permissible under law when it is not in dispute that for the offence alleged under Section 188 of the Code, the provision of Section 195 of the Code has not been complied with and when the allegations

of Section 447/34 and section 506/34 of the IPC has been alleged in course of same transaction.

In this context, the Apex court in a judgment ***Durgacharan Naik and others vs. State of Orissa*** reported in **AIR 1966 SC 1775** was pleased to hold in paragraph 8 as follows:

“8. we have expressed the view that Section 195 of the Criminal Procedure Code does not bar the trial of an accused person for a distinct offence disclosed by the same or slightly different set of facts and which is not included within the ambit of the section, but we must point out that the provisions of Section 195 cannot be evaded by resorting to devices or camouflage. For instance, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of the Indian Penal Code, though in truth and substance the offence falls in the category of sections mentioned in Section 195 of the Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it. On behalf of the appellants Mr. Garg suggested that the prosecution of the appellants under Section 353 of the Indian Penal Code was by way of evasion of the requirements of Section 195 of the Criminal Procedure Code. But we are satisfied that there is no substance in this argument and there is no camouflage or evasion in the present case.”

Following the said observation, ***Madras High Court in Murugesan and others vs. State of Tamil Nadu*** reported in **1988 SCC Online Mad 271** was pleased to hold that the provision of Section 195 of the Code of Criminal Procedure cannot be evaded by resorting to device or camouflage. One cannot resort to device or camouflage of clubbing over cognizable offence actually not made out along with offence

under Section 188 of the Indian Penal Code so as to evade the mandatory provision of Section 195 of the Code of Criminal Procedure requiring a specific complaint to be given by a public servant concerned. In the present case, admittedly the complaint has been lodged by a private individual. In another judgment Karnataka High Court expressed the same view in the case of ***Basappa vs. State of Karnataka*** reported in **1997 (2) CRIMES 575** that since the offence under Section 188 of the IPC has been included in the first information report, the procedure that ought to have been followed, ought to be in conformity with the Section 195 read with Section 340 of the Code of Criminal Procedure and clubbing of other cognizable offences is not permissible to evade the provision of Section 195 of the Code.

Coming to the present context I find that prosecution against present petitioner under section 188 of IPC is barred under section 195 of the code of criminal procedure, since it has been lodged by a private society. The allegation of criminal trespass with a motive to commit offence as well as allegation of criminal intimidation though levelled separately but are essentially an offence covered by the provisions of section 195 of the code of criminal procedure and section 195 cannot be evaded and cognizance cannot be taken upon the offence by misdescribing the offences or by putting a wrong level on the offence by adding two more sections. In fact section 506 or 447

of the IPC has been added in the proceeding in order to create a camouflage to evade the provision of section 195 of the code of criminal procedure and court below ought to have noticed that the offences under section 506 or 447 which have been clubbed with section 188, has actually not made out with the offence under section 188 of IPC and this has been done in order to evade mandatory provision of section 195 of the code of criminal procedure which required a specific complaint to be given by a public servant concerned.

In view of the aforesaid discussion, it is quite clear that the court below has erred in taking cognizance in the alleged offence under Section 188 or under Section 447/34 or under 506/34 of the IPC and as such the proceedings being G.R. case no. 4167 of 2021 in CRR 183 of 2022, G.R. case no. 1290 of 2021 in CRR 194 of 2022, G.R. case no. 1015 of 2021 in CRR 246 of 2022 and G.R. case no 1935 of 2021 in CRR 280 of 2022 are liable to be quashed.

In view of above, all the four applications filed under section 482 of the code of criminal procedure being no. CRR 183 of 2022, CRR 194 of 2022, CRR 246 of 2022, CRR 280 of 2022 are allowed. Pending applications, if any, also stand disposed of. Proceeding being GR. Case No. 4167 of 2021 in CRR 183 of 2022, G.R. case no. 1290 of 2021 in CRR 194 of 2022, G.R. case no. 1015 of 2021 in CRR 246 of 2022 and G.R.

case no. 1935 of 2021 in CRR 280 of 2022 are accordingly quashed.

Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)