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Court : Karnataka

Decided On : Sep-18-1964

Reported in : 1965CriLJ372

Judge : T.K. Tukol, J.

Appellant : Dasappa and anr.

Respondent : State of Mysore

Judgement :

T.K. Tukol, J.

1. This is a petition under Section 561A of the Code of Criminal Procedure made under the following circumstances : The two petitioners were respectively Accused Nos, 1 and 3 in C. C. No. 1789 of 1962 on the file of the Second Magistrate, Bangalore, in which they were tried along with one Venkatappa (Accused No, 2) for offences punishable under Sections 437 and 380, I. P. C. All of them were convicted of both the offences and sentenced to suffer Rigorous Imprisonment for six months on each count, the sentences being made to run concurrently. The petitioners and Venkatappa filed Criminal Appeal No. 191 of 1963 in the Court of the Sessions Judge, Bangalore. The appeal was heard by the fourth Additional Sessions Judge who acquitted Venkatappa of both the charges and the petitioners of the offence under Section 457 of the Indian Penal Code. He confirmed the conviction of the petitioners under Section 380 of the Indian Penal Code and

reduced the sentence to one of Rigorous Imprisonment for four months.

Against this order of conviction and sentence, the petitioners filed Criminal Revision Petition No. 85 of 1964 which came up before me for admission on 18th February 1964. I heard Mr. Kanakasabhapathi the learned Advocate for the petitioners and passed the following order:

Heard the Advocate for the petitioners. There is no substance in the points urged. Petition is rejected.

On March 18, 1964 the petitioners filed the present petition stating that the petitioners were respectively aged 32 years and 17 years, that they had clear antecedents and hailed from respectable families and that they should be given the benefit of the provisions of the Probation of Offenders Act, 1958 (hereinafter called the Act).

2. Mr. Kanakasabhapathi has appeared for the petitioners. He submitted that it was through oversight that he could not make his submissions on the question of sentence in the light of the provisions of the Act at the time when he argued the revision petition and that the Court should consider this new point to secure the ends of justice under the inherent powers conferred by Section 561A of the Code, Mr. Shirgurkar the learned Government Pleader urged that the order dismissing the revision petition after hearing the Advocate for the petitioners was a final order in the matter and that this Court had no jurisdiction to review that order. Both the Advocates have relied upon certain decisions in support of their respective arguments,

3. Section 561A of the Code reads thus:

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may he necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

I had occasion to consider the scope of this section in Madiah v. State of Mysore AIR 1963 Mys 191. In doing so, I referred to the decisions of the Supreme Court in

Talab Haji Hussain v. Madhukar Purshottam Mondkar : 1958 CriLJ701 and R. P. Kapur v. State of Punjab : 1960 CriLJ1239 and concluded-

The legal position that emerges from the aforesaid discussion is that subject to the provisions contained in the Code of Criminal Procedure and the Act constituting the High Court, a judgment delivered or an order passed on merits is final alter it is duly signed by the Court. The inherent power of a High Court cannot be exercised in matters specifically covered by the provisions of the Code. Where the Code is silent about the power of the High Court in respect of any matter arising before it, it can pass suitable orders in exercise of its inherent powers to give effect to any order passed under the Code, or to prevent the abuse of the process of any Court or to secure the ends of justice. This power can also be exercised to reconsider orders of dismissal or an appeal or application passed without jurisdiction or in default of appearance, where re-consideration is necessary to secure the ends of justice.

In that case the revision petition had been dismissed for default of appearance of the Advocate and for his failure to pay deficit court-fee, A Division Bench of this Court considered the scope of this Section in In re, Biyamma A.I.R. 1963 Mys. 326 wherein, after referring to Sections 369 and 430 of the Code, it was laid down that Section 561A does not come into operation if a given case is governed by any other provision of law. Mr. Justice Hegde delivering the judgment, referred to the inherent powers of a Criminal Court under Section 561-A and observed:

. . It is a residuary power. Hence if the finality provided in Section 430 is held to prohibit the Court from altering or reviewing the judgments passed then Section 561-A can be of no assistance.

In that case their Lordships had set aside the order of conviction of the appellant and ordered retrial 'under a total misapprehension of facts', as the Court and the Advocates 'proceeded on the basis that there had been an infringement of 'natural justice'. The appeal had not been beard on merits and on an application being made by the State to set aside the order and hear the appeal on merits, their Lordships were of the view that an erroneous act of the Court should not prejudice any party and that every court whether civil or criminal, must, in the absence of

express provision to the contrary, be deemed to possess as inherent in its very constitution all such powers as are necessary to do the right and undo a wrong in the course of administration, Mr. Kanakasabhapati for the petitioners strongly relied upon the ratio of this case and contended that the ends of justice require a review of the order of sentence passed by the Sessions Judge and concurred in by this Court while dismissing the revision petition. It may at once be stated that the decision in A.I.R. 1963 Mys 326 cannot be of assistance to the petitioners. There, the Court and the Advocates had all proceeded on a total misapprehension of facts and it was therefore thought necessary to review the judgment on the ground that an erroneous act of the Court should not prejudice any party.

In this case it has been conceded on behalf of the petitioners that the point now urged was neither urged by the petitioners in any of the Courts below nor before this Court when the revision petition was heard. When this aspect was brought to the notice of the learned Advocate, he submitted that it was the duty of the Courts to have considered the provisions of the Act which were mandatory. He cited the decision in Thangjam Ibabot Singh v. State 1961 (2) Cri. L. J. 583 (Manipur). What has been decided in that case is that, if the Court finds interference under Section 561A necessary in order to secure the ends of justice, it cannot allow delay or failure to file an appeal in time to stand in the way of exercise of inherent jurisdiction of the Court. The facts of that case were somewhat peculiar. The revision-petitioner was convicted along with six others for certain offences. After his conviction by the Court in Manipur State, the petitioner had been transferred to Nowgong jail in Assam, while the other convicted accused were retained in Manipur itself. The latter appealed to the Court of Session and the Sessions Judge set aside their conviction and sentence and acquitted them. The petitioner filed his revision petition on 14-9-1960 and was met with the preliminary objection on behalf of the State, that there had been considerable delay in the presentation of the revision petition as the judgment of the Magistrate had been pronounced on 8-6-1960. It was under these circumstances that the learned Judicial Commissioner exercised his powers to condone the delay. This decision does not lay down anything which can benefit the petitioners.

4. Mr. Kanakasabhapati placed reliance on a decision of the Allahabad High Court in Sri Ram v. Emperor : AIR1948 All106 . The petitioners before their Lordships had been tried by a First Class Magistrate for contravention of the provisions of Section 6 (1) of the Hoarding and Profiteering Prevention Ordinance (35 of 1943), convicted and sentenced to suffer rigorous imprisonment for 18 months and to pay a fine of Rs. l,000/- each. In a revision petition filed before the High Court, the sentence of imprisonment passed on Sri Ram was set aside and only the sentence of fine was maintained. The sentence of fine and of imprisonment passed against Moti Lal was maintained by the Court. Subsequently the accused made an application under Section 561A of the Code and Section 205 of the Government of India Act, contending that the Magistrate had no jurisdiction to try the case in the ordinary way as he was not specifically directed to do so by the District Magistrate as required by the Ordinance.

It was urged that by Ordinance No. 53 of 1944, Section 14A which laid down that a Magistrate empowered to act under Chap. 22 of the Code of Criminal Procedure may try any offence punishable under the Ordinance in a summary way under the provisions of that Chapter unless the District Magistrate directed that the case should not be so tried, had been amended by Ordinance 53 of 1944 by substituting the word 'shall' for 'may' with the result that a Magistrate having summary powers had to try a case under the summary jurisdiction unless the District Magistrate directed otherwise. In that case the petitioners had been tried summarily and there was no direction by the District Magistrate to try the case in the ordinary way. It was therefore contended that the Magistrate who had tried the case summarily could not have passed a sentence of imprisonment exceeding three months and that the order of sentence of imprisonment passed against the petitioner was without jurisdiction. Their Lordships held that by reason of the fact that the mandatory provisions of law had been overlooked, they were satisfied that a case had been made out to secure the ends of justice for exercising the powers under Section 761A of the Code. I have, therefore, to see whether any mandatory provision of law bad been transgressed in this case so as to render the order of sentence as one without jurisdiction.

5. It is conceded that the petitioners were defended by a counsel in all the Courts and that none of them pleaded before any of the Courts that the benefit of the provisions of the Act should be extended to the accused or that petitioner No, 2 was 17 years old. It, however, appears from the judgment of the Sessions Judge that 'a submission was made that the first petitioner was a first offender. We have now to see whether under the circumstances and the facts of the case the order of sentence can be said to be without jurisdiction.

6. Section 4 of the Act which deals with the power of the Court to release certain offenders on probation of good conduct, reads as follows:

4. Power of Court to release certain offenders on probation of good conduct.

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct) then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under Sub-section (1), the Court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under Sub-section (1) is made, the Court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The Court making a supervision order under Sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the Court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The Court making a supervision order under Sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

It is obvious from the wording of Sub-section (1) that the power to release an accused on probation of good conduct is discretionary. The discretion has to be exercised with due regard to the circumstances, under which the offence was committed, the nature of the offence and the character of the offender. In taking the last factor into consideration the Court is bound to consider the report of the Probation Officer concerned, if any in relation to the accused. In the present case as the point was not raised, the trial Court did not call for any report of the Probation Officer, nor was any evidence adduced by the accused as regards his character and previous antecedents. No doubt, it is possible to gather from the judgment of the trial Court the circumstances, under which the offence was committed and the nature of the offence for which the accused was convicted. It is therefore manifest that it is only when the Court forms an opinion that the offender in a given case should be released on probation of good conduct that it has to act

as provided by Section 4 of the Act. It was for the accused to have placed all the necessary material before the Court which could have enabled it to consider that the first accused was an offender to whom the benefit of Section 4 could be extended.

Section 6 which deals with 'Restrictions on imprisonment of offenders under twenty-one years of age', reads thus-

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it should not be desirable to deal with him under Section 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in Sub-section (i), the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

As observed above, the fact that the second accused was below 21 years of age was not at all brought to the notice of any of the Courts. There is no evidence also as regards the character of this offender. The section does not prohibit the passing of an order of imprisonment against an accused found guilty of an offence, though under 21 years of age; all that it requires is that the Court has got to record its reasons for sentencing such an offender to imprisonment. The omission to record reasons would at the most be an irregularity and will not affect the jurisdiction of the Magistrate; neither the circumstance that the second petitioner was below 21 years of age nor his antecedents were brought on record in the trial Court, as the age mentioned in the charge-sheet seems to have been overlooked by everybody concerned.

7-9. In this connection, reference may be made to a decision of the Orissa High Court in Namdeo Sindhi v. State : AIR1958 Ori20 relied upon by the learned Government Pleader. There too, the High Court was considering a petition for review. The petition had been filed on the ground that the Advocate was not aware, when he filed the revision, petition on 28th September 1956, that the offence had been lawfully compounded prior to that date and that it was a good ground for review. Narasimham C. J. relied upon the decision of the Supreme Court in Chopra v. State of Bombay (S) : 1955 CriLJ1410 , and dismissed the petition holding that such a review, would be clearly against the principle of finality of orders of dismissal passed by the High Court and that the petitioners were to blame themselves for not having apprised their Advocate of all material facts. In dismissing the review petition his Lordship, however, observed that it was open to the State Government to remit a portion of the sentence if they were so advised. In the present case also petitioner No, 2 who claims to be below 21 years of age may still approach the State Government under Chapter XXIX of the Code, if he is so advised.

10. Before parting from this case I should like to indicate that the submissions made by the learned Advocate for the petitioners it accepted, would lead to astounding results. The substance of the contention is that if in any proceeding an Advocate fails to urge a certain question, whether of law or of mixed question of law and fact, either through oversight or otherwise, then the case will have to be reviewed under Section 561A if it is found that the accused would get some advantage had such question been raised at the proper time,

The acceptance of such a position would militate against the finality of a judgment in a case which has been disposed of according to law. The Court has got no inherent power to re-open a judgment is a case which has been disposed of in accordance with the provisions of law, unless any of the provisions in the Code of Criminal Procedure expressly empower the Court to review or revise the judgment. The case set up by the petitioners does not come under any of the provisions of the Code. I therefore hold that the present review petition is wholly misconceived. It is accordingly dismissed. The bail granted to the accused is cancelled and they shall surrender to suffer the unexpired portion of the sentence.

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