SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

In Re: B.N. Murthy

In Re: B.N. Murthy

SooperKanoon Citation : sooperkanoon.com/428368

Court : Andhra Pradesh

Decided On : Feb-13-1962

Reported in : 1963CriLJ650

Judge : Anantanarayana Ayyar, J.

Appellant : In Re: B.N. Murthy

Judgement :

Anantanarayana Ayyar, J.

1. These two appeals are against the judgment of the Special Judge, S.P.E. Cases, at Secunderabad in C.C.No. 19 of 1959 on his file. There were three accused in that case namely B.N. Murthy, the appellant in C.A. No. 394 of 1960, who was A-1; C. Narayana, the appellant in C.A. No. 397 of 1960, who was A-2 and D.K. Chandraiah, who was A-3. A-3 was acquitted by the lower Court and we are not concerned with A-3 in these proceedings since there is no appeal relating to him.

2. Six charges were framed against the accused as follows:

Charge No. Accused Section

1. A1 to A3 Under Section 120-B, I.P.C

alleging that the three ac-

cused conspired together

with the object of depriv-

ing the Central Govern-

ment of its legitimate re-

venue by A-1 issuing bogus

permits and making illegal

transport of tobacco and

with the object of cheating

one Bhupathi Chetty of

Madras by making him

part with monies

2. A-l. Under Section 5(2) read with Section 5

(I) (d) of the Prevention of

Corruption Act (Central Act II of 1947)

for having issued permits (Ex. P-3 and

Ex. P-4) in T.P. 1 form to A-2 and

thereby committing criminal miscon-

duct.

3. A-1. Under Section 109 read with Section 420,

I.P.C. for abetment of the main

offence which is concerned in Charge

No. 4.

4. A-2. For cheating Bhupathi Chetty of Mad-

ras, whose clerk is P.W. 13, by

fraudulently selling to him non-duty

paid tobacco under T.P. 1 permit

(Ex. P-3) and on the foot of it obtain-

ing a fresh permit (Ex. P-13) and trans-

porting tobacco and making Bhupathi

Chetty pay a sum of Rs. 1,017-9-6.

5. A-2. Under Section 109 read with Section 5(2)

and Section 5(l)(d) of the Prevention

of Corruption Act (Central Act II

of 1947) namely, abetment of the main

offence which is concerned in charge

No. 2.

6. A-3. Under Section 420, I.P.C. for cheating

Bhupathi Chetty of Madras and selling

to him non-duty paid tobacco by

making false representation that it was

duty-paid tobacco and thereby obtain-

ing from him a sum of Rs. 943-1-8.

The learned Special Judge convicted A-1 of Charge No. 2 and sentenced him to rigorous imprisonment for six months and a fine of Rs. 50/- and in default to rigorous imprisonment for 15 days. He convicted A-2 of charge No. 5 and awarded him a similar sentence. He acquitted A-1 to A-3 of Charge No. 3 relying on the decision of this Court in Kandim-malla Subbaiah In re 1958-2 Mad LJ (Cri) 682 : 1958-2 Andh WR 523. The correctness of that decision was doubted by Jaganmohanreddy, J. in G.R. Macfarland In re : AIR 1961 AP3 . Subsequently, that decision was set aside by the Supreme Court in State of Andhra v. Kandimalla Subbaiah : 1961 CriLJ302 . The learned Special Judge, relying on the same decision of this Court in 1958-2 Mad LJ (Cri) 882 : 1958-2 Andh WR 523 returned the complaint by an order in para 50 of his judgment as follows:

So far as it relates to charge No. 3 against A-1 Charge No. 4 against A 12 and ChargeNo. 6 against A-3. the complaint will be returned to the S.P.E. Hyderabad who filed the charge-sheet in this case.' A-1 has filed C.A. No. 394 of 1960 and A-2 has filed C.A. No. 397, of 1960 against the respective conviction and sentence.

3. At the outset, the learned Public Prosecutor raised a preliminary contention to the effect that the entire trial by the Special Judge, Secunderabad was void and that his judgment was illegal in view of the fact that the Special Judge, Secunderabad based his judgment purely on the evidence which had been recorded by his predecessor the Special Judge, Chittoor, which it was not competent for him to do so. He argues that the only course open to this Court is to order a re-trial. In order to appreciate this contention, a few facts appear necessary to be mentioned. In the present case, A-1 issued the permits (Exs. P-3 and P-4) in the year 1952. The transport of the tobacco was also made in the year 1952 and the offences concerned are said to have been committed in 1952. The police filed the charge sheet on 23-9-1956 before the Special Judge, Chittoor. On 18-10-1957, the Special Judge, Chittor framed charges against the accused and recorded their plea of 'Not Guilty'. He adjourned the case for trial to December, 1957 and recorded the entire evidence. On 15-4-1959, the case was made over to

the file of the Special Judge, Secunderabad by proceedings of the High Court dated 31-3-1959. The case of both sides is that the entire evidence was recorded by the Special Judge, Chittoor and that, after the case came to the file of the Special Judge, Secunderabad, the latter asked the prosecution and the accused as to whether they wanted a de novo trial or whether he could proceed to decide the case on the evidence which had already been recorded by the Special Judge, Chittoor and that both sides agreed to the case being decided on the evidence already on record and that accordingly, the Special Judge, Secunderabad, heard the arguments of both sides and pronounced judgment on 23-6-1960.

4. The following dates are also important with reference to the law in force. By Section 8 of the Criminal Law Amendment Act 1952 (Central Act XLVI of 1952), Special Judges were created for trying corruption cases. On 27-2-1958, Criminal Law Amendment Act, 1958 (Central Act II of 1958) (hereinafter referred to as 'the Act') came into force. Section 4 of that Act introduced a new Sub-section 3(A) in Section 8 of Act XLVI of 1952. The new sub-section is in the following terms:

In particular, and without prejudice to the generality of the provisions contained in Sub-section (3), the provisions of Section 350 of the Code of Criminal Procedure, 1898 shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions, a Special Judge shall be deemed to be a Magistrate.' Thus, Sub-section 3-A of the Act came into effect on a date which was during the pendency of the trial of the case before the Special Judge, Chittoor, which had commenced on 18-10-1957. Sub-section 3-A of the Act was not in existence when the Special Judge, Chittoor recorded the plea of the accused and the evidence. But, that section had come into force even before the case was transferred to the Special Judge, Secunderabad and was in operation during the proceedings held by the latter.

5. The learned Public Prosecutor contends that Sub-section 3-A of the Act had no retrospective effect; that it did not apply to a pending case and was not available for use by the Special Judge, Secunderabad in the trial of the case as the trial had already begun before that Sub-section (3-A) came into force. On the other hand, Sri A. Gangadhara Rao for A-1 contends that Sub-section (3-A) of the Act could be

availed of by the Special Judge, Secunderabad as it was in force when the latter started his proceedings and that, therefore, the entire trial was not vitiated by that sub-section being made use of. In effect, the contention of the learned Public Prosecutor is that Sub-section (3-A) of the Act did not apply to pending cases, that is, cases which were pending on the date on which it came into force and effect and that once the trial had started on 18-10-1957, the law which had to be followed throughout the trial was the law in force on 18-10-1957, the date on which the trial was commenced.

6. In Payare Lal v. State of Punjab (Unreported Judgment of the Supreme Court) in Cri.A. No. 240 of 1960, D/- 30-8-1961 (since reported : (1962)ILLJ637SC), the relevant facts were as follows. The trial of two accused, Payare Lal and Bishan Chand was commenced before the Special Judge, Patiala, S. Narinder Singh. Before he could deliver judgment, he proceeded on transfer and was succeeded by S. Jagjit Singh. The latter did not re-call the witnesses and hear the evidence over again But proceeded with the trial, without any objection from either side, from the stage at which, S. Narinder Singh had left it. He heard the arguments and delivered the judgment convicting both the accused. The two accused appealed against their convictions. The High Court upheld the conviction of PayareLal but reduced the sentence passed on him. The High Court also acquitted the other accused, Bishen Chand. Payare Lal filed an appeal (C.A. No. 240 of 1960) before the Supreme Court. In that case, the entire trial had been held and the judgment had been delivered even before the new Sub-section 3-A of Section 8 of the Act came into force on 27-2-1958. Their Lordships of the Supreme Court made the following observations, which are relevant and useful for the decision of the present case:

There is no controversy that the general principle of law is that a Judge or a Magistrate can decide a case only on evidence taken by him. Section 350 of Code is a statutory departure from this principle. It is only if this provision was available to S. Jagjit Singh that the course taken by) him can be supported.

Their Lordships also stated thus:

There is no controversy that Section 350 of the Code is applicable only to Magistrates and not to a Court of Session and cannot therefore bo applied to a special Judge under Sub-section (3) as it makes only those provisions of the Code applicable to him which would apply to a Court of Session. They only controversy is whether that Section is applicable to a special Judge under Sub-section (1) of Section 8 of the Act. If it is so applicable, it must be applied though under Sub-section (3) it is not applicable, for this sub-section is to have effect 'Save as provided in Sub-section (1)'.

The real question is, what is meant by the words 'the procedure prescribed by the Code for the trial of warrant cases by magistrates' in Section 8(1) of the Act? Does Section 350 of the Code prescribe one of the rules of such procedure?

7. In Re Vaidyanatha Iyer : AIR1954 Mad350 a division Bench of the Madras High Court held that the Court of a Special Judge was not a Court of Session and that, by reason of Section 8(1) of the Criminal Law Amendment Act, 1952 (Act XLVI of 1952), the procedure prescribed by the Cri.P.C. for the trial of warrant cases by Magistrates, which procedure comprehended Section 350, Cri.P.C. as well, was applicable to the trials before a Special Judge. But, this decision was overruled by a Full Bench of the Madras High Court In re T- A. Fernandez AIR 1958 Mad 571 (FB) which held that Section 350 of the Code was not applicable to a Special Judge. Subsequent to the above decision, the Criminal Law Amendment Act II of 1958 came into force on 21-2-1958 introducing the new Sub-section 3-A in Section 8 of Act XLVI of 1952. Under the provisions of Act II of 1958, the Central Act XLVI of 1952 had (been amended and Section 350, Cri.P.C. was made applicable to special Judges. In view of this amendment, the opinion of the Full Bench in FERNANDEZ'S CASE AIR 1958 Mad 571 (FB), had been superseded by legislation.

8. Their Lordships of the Supreme Court in (Unreported judgment of the Supreme Court) in Cri.A. No. 240 of 1960, D/- 30-8-1961, (since reported in : (1962)ILLJ637SC) referred to the above decisions of the Madras High Court and observed, as follows:

It is true that Section 350 of the Code is a provision applying to all magistrates and therefore, also to a magistrate trying a warrant case. That however does not in our opinion decide the question it is the right of an accused person that his case should be decided by a judge who has heard the whole of it and we agree with the view expressed in Fernandez's case AIR 1958 Madras page 571 that very clear words would be necessary to take away such an important and well-established right. We find no such clear words here'. Their Lordships of the Supreme Court referring to the words used in Sub-section (1) of Section 8 observed thus:.When Sub-section (1) of Section 8 of the Act talks of a procedure prescribed by the Code for the trial of warrant cases by magistrates, it is reasonable to think that it has the provisions and the language of the Code in view. The Code, therefore, expressly refers to Sections 251-259 as containing the procedure specified for the trial of warrant cases by magistrates; this then, is the procedure it prescribes for the trial of such cases. It would be legitimate, therefore, to think that the Act in using the words 'Procedure prescribed by the Code for the trial of warrant cases by magistrates' also meant only these sections of the Code and did not contemplate Section 350 of the Code as a procedure so prescribed, though that section is applicable to the proceedings before a magistrate trying a warrant case. It does not seem to us that the words 'the procedure prescribed by the Code for the trial of warrant cases by magistrates' meant 'a procedure which may be followed by magistrates' in all cases. Furthermore, Section 350 occurs in a chapter of the Code which deals with general provisions relating to enquiries and trials and is not a provision which has been specifically prescribed by the Code for application to the trial of warrant cases by magistrate as are Sections 251 - 259...

Again Section 350 of the Code cannot be applied to the proceed'ngs before a special judge Now the section can be applied only when one Magistrate succeeds another.

Their Lordships of the Supreme Court, alter stating that a predecessor Special Judge is not a Magistrate for the purpose of the Act, observed as follows:.the Act could not, in our view, have intended that Section 350 of the Code would be available to a special Judge as a rule of procedure prescribed for the trial of warrant cases. We think that under the Act, as it stood before its amendment.

Section 350 of the Code was not available when one special Judge succeeded another. We hold that S. Jagjit Singh had no authority under the law to proceed with the trial of the case from the stage at which S. Narinder Singh left it. The conviction by S. Jagjit Singh of the appellant cannot be supported as he had not heard the evidence in the case himself. The proceedings before him were clearly incompetent.

Their Lordships lastly dealt with the amendment of the Act expressly making Section 350 of the Code applicable to the proceedings before a special judge and observed thus:

That amendment came long after the decision of the case by S. Jagjit Singh and had not expressly been made retrospective. It was said on behalf of the respondent, the prosecutor, that the amendment being in a procedural provision was necesarily retrospective, and, therefore, no exception can now be taken to the action taken by S. Jagjit Singh. Assuming that the rule contained in Section 350 of the Code is only a rule of procedure, all that would follow would be that it would be presumed to apply to all actions pending as well as future: Kimbray v. Draper (1868) 3 QR 160.

Nor do we think it an argument against sending the case back for retrial that the Special Judge now hearing the case would be entitled to proceed on the evidence recorded by S. Narinder Singh in view of the amendment. Whether he would be entitled to do so or not would depend on whether the amended Act would apply to proceedings commenced before the amendment. It has to be noted that the impugned part of the proceeding was concluded before the amendment. On this question, we do not propose to express any opinion. In any event, under Section 350 as it now stands a succeeding magistrate has power to resummon and examine a witness further. We cannot speculate what the Special Judge who tries the case afresh will think fit to do if Section 350 of the Code is now applicable to the proceedings before him.

Their Lordships left open the question as to whether the new Sub-section 3-A to Section 8 of the Act would apply to a case like the present one which was pending and part-heard on the day on which that Sub-section 3-A of the Act came into

force; for, in that case, the entire proceedings had been concluded before the amendment. But, their Lordships have indicated that the answer to this question would depend on whether Section 350 was a rule of procedure and that, if it was a rule of procedure, it would be presumed to apply to a case like the one which was pending and part-heard.

9. In this case, the procedure followed by the learned Special Judge, Secunderabad would be valid only if Sub-section 3-A of Section 8 of the Act had retrospective effect. That sub-section would have retrospective effect only if the rule contained in Section 350 is a rule of procedure. Therefore, the crucial question is as to whether Section 350 is only a section regulating procedure. In the judgment of the Supreme Court in : (1962)ILLJ637SC (supra) a distinction had been drawn between the procedure prescribed by the Code for trial of warrant cases and procedure to be followed by Magistrates in all cases. It is indicated that whereas Sections 251 - 259, Cri.P.C come in Chapter XXI, Cri.P.C. which gives only the procedure prescribed for trial of warrant cases by Magistrates, Section 350 comes in another Chapter, namely, Chapter XXIV which contains general provisions as to trials and enquiries and as to the procedure to be followed by Magistrates in all cases. Obviously, their Lordships construed Section 350, Cri.P.C. as relating to the procedure to be followed by Magistrates though they treated it as procedure to be followed in all eases and not merely in the trial of warrant cases.

10. In Craies on Statute Law (1952 Edition) it has been observed as follows:

At pages 370-371:.there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied.... A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits commenced before its passing'. In other words, if a statute deals merely with procedure in an action, and does not affect the rights of the parties, 'it will be held to apply prima facie to all actions pending as well as future.

The same view has been expressed in Maxwell's Interpretation of Statutes (10th Edition) as follows:

At page 221:

In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action war, begun, unless the new statute shows a clear intention to vary such rights.

At page 226:

The general principle, however, seems to be that alterations in procedure are retrospective, unless unless be some good reasons against it.

At page 227:

But a new procedure would be presumably inapplicable where its application would prejudice rights established under the old.

At pace 228:

Where rights and procedure are dealt with together, the intention of (he legislature may well be that the old rights are to be determined by the old procedure, and that only the new rights under the substituted section arc to be dealt with by the new procedure.

In Salmond on Jurisprudence (1957 Edition), it is mentioned as follows:

At page 503:.The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions jus quoded actiones pertinetusing the term 'action in a wide sense to include all legal proceedings, civil or criminal.

At page 504:

Procedural law deals with the means and instruments by which those ends of the administration of justice are to be attained. The latter regulates the conduct and relations of Courts and litigants in respect of the litigation itself.

At page 506:

The normal elements of judicial procedure are five in number, namely, Summons, Pleading, Proof, Judgment and Execution.'. Proof is the process by which the parties supply the Court with the data necessary for the decision of those questions.

It is obvious that Section 350 is concerned with the question of proof and the question as to evidence on which the judgment in the case is to be based. Section 350 indicates as to how the Magistrate is to proceed further, when he receives a case which has been heard by another Magistrate, and is part-heard and how he is to proceed to deal with and utilise the data consisting of the evidence which had been recorded by his predecesor. Thus, Section 350 is essentially a rule of procedure.

11. In Anant Gopal Sheorey v. State of Bombay : 1958 CriLJ1429 , the Supreme Court observed as follows:

At page 917:

The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See Maxwell On the Interpretation of Statutes page 225 : Colonial Sugar Refining Co. Ltd. v. Irving 1905 AC 369. In other words, a change-in the law of procedure operates retrospectively and unlike the law. relating to vested right is not only prospective.

12. In The King v. Chandra Dharma (1905) 2 KB 335, Lord Alverstone, C.J. observed (at p. 338) as follows:

The Rule is clearly established that apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective.

In that cast, Channell, J. also observed thus:

At page 339:

I wish to say that in my view a statute dealing only with procedure applies to past events as well as to future events, and to hold this is not to make the statute retrospective. The object of the statute, is only to affect the procedure, and it matters not whether the events in respect of which the proceedings are taken happened before or after the passing of the Act.

13. In Gardner v. Lucas (1878) 3 AC 582 at p. 603 it was observed as follows:

At page 603:

It is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be used for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

14. In Re Joseph Suche and Co. Ltd. (1675) 1 Ch D 48, it was observed as follows:

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule namely, that where enactments merely affect procedure, and do not extend to rights of action, they have been held to apply to existing rights.

15. In Nataraja v. Rangaswamy AIR 1924 Mad 657 an application was made to grant sanction under Section 195, Cr.P.C. which had been amended by Act XVIII of 1923. The old section allowed an application to be made by a private party. This had been abolished by the amended section. No appeal was provided for in the Code under Section 195 Cr.P. C. The question arose whether sanction proceedings could be entertained under the Cr.P.C. as amended. It was held by

Odgers and Wallace, JJ. that the application to grant sanction under Section 195 Clause (6) was not in the nature of an appeal to the appellate Court against the order of the lower Court but was an application for the exercise of a special power conferred on the appellate Court and was part of the procedural law and that such an application, could not, after the Amending Act of 1923, be entertained or heard as it was, in its nature, an application for grant of sanction for prosecution by a private party and that the Amending Act XVIII of 1923 made amendments affecting procedure only.

16. It Rajub Lochan Dhar v. Jogesh Chandra Das AIR 1924 Cal 983 the question arose whether an offence under Section 477-A which was exclusively triable by a Sessions Court at the commencement of the trial could be tried only by the Court of Session or by the Magistrate of the First Class. By virtue of an amendment in Cr.P.C. Schedule 11 regarding the trial of an offence under Section 477-A coming into force (after the trial had commenced) the concerned offence under Section 477-A was triable by a First Class Magistrate. A Bench of the Calcutta High Court held that the case could be tried by a First Class Magistrate and that the amendment to the Procedure Code in the matter had retrospective effect as it related to procedure only.

17. In Nalesan Servai v. State : AIR1951 Mad529 the relevant facts were as follows. When the proceedings had reached the stage of inquiry or trial, the S.D.M. Mayuram began trial of a case by warrant procedure, framed charges against the accused and then transferred the case for trial to the Stationary Sub Magistrate, Sirkali under Section 192(1) Cr.P.C as the trial of these charges could be held by a Second Class Magistrate. The latter continued the trial and convicted the accused. In aprieal, the Sub Divisional Magistrate confirmed the conviction and the sentence. The appellant filed a revsion before the High Court, Govinda Menon and Bashcer Ahmed Sayeed, JJ, had taken the view that the conviction-was illegal since it was based on the evidence partly recorded by one Magistrate and partly by another Magistrate to whom the case had been transferred, which transfer was illegal. They referred to the fact that Section 192(1) and Section 528(2) Cr.P.C. contemplated transfer 'for inquiry or trial' and held that, when once the proceedings had reached the stage of inquiry or trial, Section 192(1) Cr.P.C. could

not be availed of. They observed that if a transfer was effected under the provisions of Section 528(2) Cr.P.C. the Magistrate to whom it was transferred must examine the witnesses denovo. They followed the ruling in Tota Venkanna In re. (1900) 2 Weir 152. wherein it was held that a Migistrate who had taken cognizance of a case having tried it partly, found that an offence which a subordinate Magistrate was competent to try had been committed, he had no power to transfer the case to a Subordinate Magistrate but he himself must dispose of it. They also observed that the provision in Sub-section (3) to Section 350 did not make any difference in the law relating to transfer under Section 192(1) Cr.P.C. The above decision was followed by so masundaram, J. in Ganesa Pillai In Re : AIR1961 Mad342 wherein the learned Judge held that when a case was transferred for trial or inquiry, whether it be under Section 192(1) Cr.P.C. or under Section 528(2) Cri.P.C. if some of the witnesses had already been examined by the Special First Class Magistrate, the Sub Divisional Magistrate to whom it was transferred must examine the witnesses afresh and dispose of the case and not proceed to examine the remaining witnesses and record a conviction. The learned Judge held that there must be a fresh trial when a case was transferred as the expression used 'for inquiry or trial' meant full trial and not a partial trial based on the evidence partly recorded by one Magistrate and partly by the other Magistrate from whose file the case was transferred. The above two decisions do not apply to the present case. For, in this case, the transfer was made by the High Court under Section 526 Cr.P.C. Section 526(1)(e)(ii) runs as follows:

Section 526(1). Whenever it is made to appear to the High Court:

(e) that such an order (under this section) is expedient for the ends of justice... it may order:

(ii) that, any particular case or appeal, or class of cases or appeals be transferred from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction.' In this provision, it is not mentioned that transfer is to be made for 'inquiry or trial'.

18. In Balmakund v. Firm Pirlhiraj Ganesh Das : AIR1951 Pat333 , the Patna High Court observed that in enacting sub-rule (3) in Order 21, Rule 22 C.P.C. the Legislature contemplated to explain their intention with regard to the provisions confined in Order 21 Rule 22 which had been the Subject-matter of interpretation in various cases decided by the High Courts and -also by the Judicial Committee and consequently the sub-rule was retrospective They referred to the decision of the Privy Council in Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr., Delhi. AIR 1927

P.C. 242 wherein it was held that the provisions of a statute dealing merely with matters of procedure rnay properly, unless that construction be textually inadmissible, have retrospective effect attributed to them.

19. In Shiv Bhagwan v. Onkarmal : AIR1952 Bom365 the District Judge had no jurisdiction to hear the appeal at the time when the appeal was filed but had such jurisdiction when the appeal came on for hearing. A single Judge of the Bombay High Court held that the District Judge could hear the appeal. That view was confirmed by the learned Judges in the Letters Patent Appeal filed against that decision. The learned Judges observed as follows:

At page 373..defendants have no vested right in any particular forum. This Court was bound to take notice of the change in the law and was bound to administer the law as it was when the suit came on for hearing. Therefore, if the Court had jurisdiction to try the suit when it came on for disposal, it could not refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted.

The learned Judge held that all procedural laws were retrospective unless the legislature expressly stated to the contrary and that procedural laws in force must be applied at the date when a suit or proceeding came on for trial or disposal.

20. In : 1958 CriLJ1429 the facts were as follows. A Special Magistrate commenced the recording of evidence on 4-7-1955. On 2-1-1956, the Criminal Procedure Code Amendment Act (Central Act XXVI of 1955) came into force. By this amendment, a new section, viz., Section 342-A Cr.P.C. was inserted in the

Code under which a person, who was an accused in a case, was competent to, give evidence on oath as a defence witness in the same case. On 14-1-1956, the accused put in an application to the Special Magistrate seeking the benefit or. Section 342-A of the amended Code to depose as a defence witness 'in disproof of the charges made against him'. He claimed this right on the ground that, the Amending Act having come into force during the pendency of the case, he was entitled to take advantage of it. This application was dismissed by the trial Court as well as by the Sessions Judge and the High Court of Bombay. The view taken was that, in view of Section 116 of the Amending Act, no advantage of Section 342-A could be available to the accused in that case and that the Special Magistrate had to conduct proceedings according to the procedure laid down in the unamended Code and that the accused, could not, therefore, appear as a witness under Section 342-A of the amended Code. The accused took the matter on appeal to the Supreme Court. Their Lordships of the Supreme Court, disagreeing with the decision of the High Court, laid down that the correct interpretation of Section 116 of the Amending Act was that all the provisions of the amended Cr.P.C. were applicable to all cases which were pending on the date on which the Amending Act came into force except those referred to in Clause (c) and those specifically mentioned in clauses (a),(b) and (d) of Section 116. They held that the accused could take advantage of Section 342-A in spite of the fact that his case was pending from, before the date of the commencement of the Amending Act and some evidence too had been recorded in it. Their Lordships held that Section 61 of the Amending Act (XXVI of 1955), which introduced the new Section 342-A, having retrospective effect, was in accordance with the general principles applicable to amendments in procedural law.

21. Section 64 of Act XXVI of 1955 introduced an amendment in Section 350 Cr.P.C. by adding a new proviso which runs as follows:

Provided that if the succeeding Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may resummon any such witness and after such further examination, cross-examination and re-examination, if any, as he may permit, the witnesses shall be discharged.

Section 64 of the Amending Act is similar to Section 61 i of that Act in that it comes under the proviso at i the end of Section 116 of Central Act XXVI of 1955. The observations of the Supreme Court regarding i Section 61 of the Amending Act, that it would have ap-plication to pending proceedings and that it was also in accord with the general principles relating; to procedural law amendments, would equally ap-ply to Section 64 which relates to an amendment of Section 350 Cr.P.C. Section 350 comes in the same Chapter of Cr.P.C. as does Section 342-A viz., Chapter XXIV, which is the chapter containing general provisions as to enquiries and trials to be followed by Magis-trates in all cases. In effect, from the above deci- sions of the Supreme Court, it follows that Section 350 Cr.P.C. is only an item of procedural law.

22. In Raghunath Prasad v. State : AIR1959 All345 a Division Bench of the Allahabad High Court had to deal with the specific question whether Section 350 Cr.P.C. as amended by Central Act (XXVI of 1955) was applicable to a case which was pending. The learned Judges, relying on the decision of the Supreme Court in : 1958 CriLJ1429 held that the amended S 350 was applicable to the case and that the accused's contention that the unamended section applied Was not tenable. This decision is directly applicable to the present case.

23. In Chari v. State : AIR1959 All149 the trial of the appellants by the Additional Sessions Judge had already proceeded far beyond the stage of commencement by the time it could possibly be taken up by a Special Judge, so that the possibility of a retrospective application of the Criminal Law Amendment Act of 1952 had been irretrievably lost. In that case, a vested right was created in favour of the accused to be tried in accordance with the procedure in force at the commencement of that trial and in such circumstances it was held that the creation of that vested right would prevent the applicability of Section 7(1) of the Criminal Law Amendment Act of 1952 and was a bar to the accused being tried by a Special Judge in accordance with the special procedure prescribed in the Act. That decision relates to creation of a substantive right and does not deal with a rule of procedure like Section 350 Cr.P.C.

24. In Ajit Kumar v. State : AIR1961 Cal560 it has been explained as to how an amendment to procedure operates retrospectively. Therein it was observed as follows:

At page 566

The law therefore is not in doubt, that amended law relating to procedure operates retrospectively, but it is a very misunderstood branch of the law. It is necessary, therefore, to emphasise that it only means that pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but it does not mean that the part of the old procedure already applied and concluded before the amendment came into force, e.g. in this case cognizance taken in the manner permissible under the old Act, becomes bad or can be re-opened under the new procedure after the amendment. The amendment of the procedural law will apply from and after 1st February, 1961, when the amendment came into force and is retrospective only in the sense that even pending cases will be governed for future stages of the procedure by the amended procedure under the amended law.

25. Reference has been made to the decision in Sethu Raman v. Union of India : AIR 1960 AP151 . That decision has no application to the present case because therein, it was held that Section 350 Cr.P.C. was not applicable to the proceedings before a Special Judge since the entire trial including the conviction was over by 19-10-1957 even before Sub-section 3-A of Section 8 came into force on 27-24958.

26. Even in matters of procedure, parties can have rights. As already seen, by virtue of the amending Act (XXVI of 1955), Section 342-A was introduced which provides that a person accused of an offence before a Criminal Court shall be a competent witness for the defence. Before that amendment came into effect, the accused had no right to be a competent witness for his defence. Thus under Section 342-A the accused gets a right which he did not have before that section was introduced. He continues to have a right not to be compelled to be a witness against himself; for Article 20(3) of the Constitution says that 'no person accused of any offence shall be compelled to be a witness against himself. Thus, in the

matter of procedure of the accused letting in evidence by himself deposing as a witness, he has a right which was the subject matter of amendment of the Cri.P.C. The right under Section 342-A can be given up by an accused. On the other hand, there can be some rights which neither the accused, nor the prosecution can give up. Before Sub-section 3-A came into force, the accused had a right which is mentioned by the Supreme Court in : (1962)ILLJ637SC (supra) as follows:

The trial offends the cardinal principle of law (i.e. that a Judge or a Magistrate can decide a case only on evidence taken by him) earlier stated the acceptance of which by the Code is clearly manifest from the fact that the Code embodies an exception to that principle in Section 350.

The fact that Section 350 affects the right of an accused which he would otherwise have had but for the section namely, that a case should be decided by a 'Judge or a Magistrate only on the evidence taken by him, does not mean that Section 350 is not merely a rule of procedure but also a substantive law of a non-procedural type. In Maxwell's Interpretation of Statutes, it has been observed as follows:

At page 225.

In both of the above cases, the construction, though fatal to the enforcement of a vested right. seems to fall within the general principle that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. It matters not that the effect of a procedural alteration is to make a prosecution under a penal Act possible where formerly it had been impossible.

27. Thus, the position of law is as follows. Under the Criminal Procedure Code, as it stood before the Amending Act II of 1958, which introduced the new Sub-section 3-A by Section 4 of that Act on 21-2-1958, Section 350 Cr.P.C. was not available to one Special Judge when he succeeded another Special Judge. The question as to whether Section 350 Cr.P.C. was available to a Special Judge after Sub-section 3-A of the Act came into force depended upon the fact whether Section 350 Cr.P.C. was only a rule of procedure and, therefore had retrospective effect. It is

clear from all the decisions referred to supra, that Section 350 Cr.P.C. contains only a rule of procedure and this is unaffected by the fact that Section 350 Cr.P.C. affects valuable rights of an accused in the matter of the evidence recorded by one Special Judge being utilised by a succeeding Special Judge, for deciding the case, of the accused. In consequence, Section 350 Cr.P.C. was applicable to the stages of the trial which came after the amendment came into force on 21-2-1958.

28. In this case, it follows that Section 350 Cr.P.C. was available to the learned Special Judge, Secun-derabad and that his action in having acted on the evidence recorded by the Special Judge, Chittoor was valid in law and is not vitiated by any illegality or irregularity. I therefore, overrule the preliminary contention urged by the learned Public Prosecutor.

29. I proceed to deal with the case on the merits. After discussing the evidence (rest of paras 29, 30 to 52 and part of para 53), his Lordship proceeded.

Thus, on the whole the account-books (Ex. P.20 and Ex. P-27) are not very reliable. As these account books are not reliable, it does not appear safe to rely on the oral evidence of P. W. 14 and P. W. 12 to hold that Ex. P-3 and Ex. P-4 were not genuine permits obtained by these witnesses and that no transport of tobacco under those permits was done by P. W. 14 and P. W. 12 to A-2. Consequently, it is not possible to hold that the accused roust have committed the offences of which they have been convicted. The guilt of A-1 on charge No. 2 and the guilt of A-2 on charge No. 5 is not proved beyond reasonable doubt.

54. Sri A. Gangadhara Rao for A-1 contends that the conviction of A-1 on Charge No. 2 is also untenable as the prosecution was barred by limitation.

Charge No. 2 reads:

Secondly, that in pursuance of the said conspiracy, you 1st accused, being a public servant, to wit, an Inspector of Central Excise, Kalahasti Range, during 1952, and in discharge of your duties as public servant fraudulently and dishonestly issued T.P. 1 No. 159933, dated 8-1-1952, for 11225 lbs; and 15997 dated 8-2-1952 for 1228 lbs; and gave them to 2nd accused of you (G. Narayana)

by corrupt and illegal means or otherwise abused your position as a public servant and thereby committed criminal misconduct, punishable under Section 5(1) read with 5(1)(d) of the Prevention of Corruption Act (Act II of 1947) and within my cognizance(tm). The gist of the charge is that he did the act in the discharge of his duties as a public servant by issuing T. P. 1 permits and giving them to A-2 though they were in favour of other persons. The charge itself shows that the alleged acts of issuing of the permits committed by A-1 were in 1952. The Charge-sheet was filed on 23-9-1956 which means, many years after the alleged acts. Section 40(2) of the Central Excises and Salt Act (Central Act II of 1944) runs as follows:

No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

In this case, the prosecution was instituted much more than 6 months after the thing alleged to have been done by A-1. On substantially similar facts, 1 have held in The Public Prosecutor v. Abdul Hameed Khan, (Unreported Judgment of this Court) D/- 20-9-1960 in Cri.A. Nos. 509 to 513 of 1958 that the prosecution of an Inspector of Central Excise was barred on a similar charge. Therein, I observed as follows:

In each of the present cases, as the act concerned in the first object of the conspiracy is only by way of issue of permit it would come under the category of offences regarding which the sole act of the public servant concerned which constitutes the offence and every act which is necessary to constitute the offence cannot but be done by him in his official capacity or in discharge of his duties. Consequently, Section 40(2) would be applicable.

The same view was followed by me in C. A. No. 335 of 1957, D/- 17-7-1961 in Sriramulu v. State C.A. Nos. 86 and 96 of 1958, D/- 21-7-1961, and C. A No. 97 of 1958 D/- 21-7-1961. I, therefore, find that the prosecution of A-1 on charge No. 2 is barred by limitation. On this ground also, the conviction of A-1 on charge No. 2 is bad and untenable.

55. In the result, I allow both the appeals, set aside the conviction and sentence of A-1 on Charge No. 2 and of A-2 on Charge No. 5 and acquit each of them of the offences with which they were charged. The amounts of fine, if paid, will be refunded to each of A-1 and A-2.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com