Enumula Subbarao and ors. Vs. the State

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Court : Andhra Pradesh

Decided On : Jul-04-1978

Reported in : 1979CriLJ258

Judge : Narasinga Rao, J.

Appellant : Enumula Subbarao and ors.

Respondent : The State

Judgement :
ORDER

Narasinga Rao, J.

1. This petition by the sixteen accused is laid for quashing the further charge framed against them under Section 228 (1) of the Code of Criminal Procedure, for an offence under Section 149, I. P. C. by the Assistant Sessions Judge, Chirala.

2. The facts necessary for the disposal of this petition briefly stated are these: An F.I.R. was registered against the 16 accused on 8-9-1977 by the Sub-Inspector of Police, Vetapalem, for the offences under Sections 147, 148, 149, 448, 324 and 326, I. P. C. alleged to have been committed by them on 7-9-1977. After investigation, a charge-sheet was laid by the Sub-Inspector on 3011-77 for the offence under Sections 148, 324, 326, 307 and 149 I. P. C. The Judicial Second Class Magistrate, Chirala, committed the accused to Sessions, as one of the

offences i. e., the offence under Section 307 I. P. C. was exclusively triable by the Sessions Court. On receipt of the committal order, the Sessions Judge, Ongole, made over the case to the Assistant Sessions Judge for trial and disposal. The Asst. Sessions Judge on a consideration of the record and the documents and on hearing the accused and the prosecution, framed charges for the offences under Sections 148, 307 and 448 I. P. C. At that stage, he did not frame any charges for the offences under Sections 324, 326 and 149 I.P.C. The trial proceeded. Final arguments were heard on 21-3-1978. The case was posted for judgment on 28-3-1978. At that stage, the Assistant Sessions Judge felt that there ought to have been a further charge for the offence under Section 149 I. P. C. and accordingly framed a further charge for this offence under Section 228 (1), Cr.P.C. The framing of the further charge was sought to be challenged by the accused by filing Crl. M. P. No. 9 of 1978 on the file of the Sessions Judge, Ongole, who declined to interfere. On the same ground of framing of e further charge at the end of the trial, it was also contended that the Asst. Sessions Judge, had made up his mind to convict the accused and thus they also sought a transfer of the case. The Sessions Judge did not accede to this request of the accused. Hence this Crl. M. P. is laid before the High Court for quashing the further charge.

3. It was contended by the learned Counsel for the petitioners that when once the Asst. Sessions Judge, on the material and the documents including statements recorded under Section 161, Cr.P.C. did not think it proper to frame a charge under Section 149 I. P. C. it must be deemed that he has discharged the accused of the offence under Section 1491.P.C. The further contention is that Section 216, Cr.P.C. would only cover cases where a new offence is disclosed by the evidence during the trial and not a case for which there was some material initially either by way of charge-sheet or the un-cross-examined statements of the prosecution witnesses recorded under Section 161 Cr.P.C. The other contention was that the learned Asst. Sessions Judge also did not resort to Section 216, Cr.P.C. but only framed a charge under Section 228 (1) Cr.P.C. which power he had already exhausted. The further contention is that by framing an additional charge for the same offence with regard to which there was already a discharge, the Court proceeded to review its earlier order and such a power of review is not vested in a Criminal Court. It was also contended that there are no inherent powers in the

Subordinate Court to recall or review its own orders. Thus, it is contended that the framing of the further charge is illegal and without jurisdiction and therefore liable to be quashed.

4. Before adverting to the contentions raised by the learned Counsel, it is, however, necessary to note that the learned Public Prosecutor raised an objection as to the maintainability of this petition as a revision. His contention was that the order passed by the Assistant Sessions Judge framing a further charge is an interlocutory order and that a revision has already been preferred to Sessions Court. Having exhausted that remedy, a further revision petition does not lie to the High Court and the same is barred under the provisions of Section 397(3), Cr.P.C

5. At the outset, the question of maintainability of the petition either as a revision or one invoking the inherent powers of the High Court under Section 482, Cr, P. C, has to be considered. What is contended by Mr. T. V. Sarma, the learned Counsel for the petitioners is that the revision petition before the Sessions Judge against this order was not in fact a revision petition in one sense, that though in certain cases the Court of Session is an appellate Court with regard to the judgments of the Assistant Sessions Judges, it is nevertheless a Sessions Case which was entertained by the Sessions Court itself initially and made over to the Assistant Sessions Judge. As such, the case continues to be a Sessions Case in which the Sessions Judge could not have entertained any revision. It can be seen that under Section 397(3) Cr.P.C., the Sessions Judge may call for and examine the record of any proceeding before an inferior court situate within his local jurisdiction. According to Section 10 of the Cr.P.C. all Assistant Sessions Judges are subordinate to the Sessions Judge in whose jurisdiction they exercise their functions. It can therefore be said that an Asst. Sessions Court is an inferior criminal court the record of which can be called for and examined by Sessions Judge for the purpose of exercising the revisional jurisdiction. That apart, the very accused have chosen to approach the Sessions Judge for exercising the revisional powers to correct an alleged error of the Asst. Sessions Judge. Under Sub-section (3) of Section 397(3), Cr.P.C. where an application had been made to the Sessions Judge, no further application by the same person shall be entertained by the High Court for exercising the revisional jurisdiction. Thus, under

Sub-section (3), a further revision by the same applicant to the High Court is barred. It was however, the contention of Mr. T. V. Sarma, the learned Counsel for the petitioners, that even though the order is an interlocutory one, if the same is challenged on the ground of want of jurisdiction, a revision would lie and that Sub-section (2) of Section 397(3), Cr.P.C. is no bar for invoking the revisional jurisdiction. Undoubtedly, the order in question is an, interlocutory one. But since it is now alleged that the same was passed by the Assistant Sessions Judge without jurisdiction, that it amounts to a review of the previous judicial order of discharge and therefore he had no jurisdiction, the revision can be said to be maintainable. It is held by the Rajasthan High Court in Guman Singh v. State of Rajasthan 1977 Cri LJ NOC 239.'1

It is, undoubtedly, true that an order framing charges does not terminate criminal proceedings against the accused, but, on the other hand, keeps them alive until the question of his guilt or innocence is finally decided by the trial Court, In this view of the matter, it cannot be safely held that the impugned order was a final order and the power of revision conferred on the High Court can be exercised in relation to it.

But where the order has been challenged on the ground of want of jurisdiction, the revision petition is not barred. An interlocutory order passed without jurisdiction can be interfered with in revision, because being e nullity it has no existence in the eye of law.

It can also be said that in order to prevent the abuse of the process of the Court or to secure the ends of justice, the bar contained in Section 397(3) Cr.P.C. would not be an impediment in invoking the inherent jurisdiction of the High Court under Section 482 Cr.P.C. As noted above, on the ground of the alleged illegality or of passing the order without jurisdiction a revision lies. That remedy has been exhausted by approaching the Sessions Judge. A further revision would not lie under the provisions of Section 397(3) Cr.P.C. to the High Court. But apart from the said two bars both under Section 397 (2) and (3) Cr.P.C. if it is necessary to secure the ends of justice and in order to prevent the abuse of the process of the Court, the inherent powers of the High Court under Section 482 Cr.P.C. can be

invoked, provided the order complained of is without jurisdiction or is manifestly unjust and beyond the powers of the Asst. Sessions Judge.

6. The circumstances in which a High Court can exercise its inherent power to quash an interlocutory order in spite of the bar contained in Section 397(3)Cr.P.C. are well laid down by the Supreme Court in Madhu Limaye v. State of Maharashtra : 1978 CriLJ165 . They are as follows (at p. 168 of Cri LJ):

(1) That the power is not to be resorted if there is a specific provision in the Code for the redress of the grievance of the aggrieved party.

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice.

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

In the light of the pronouncements of the Supreme Court, it is not necessary for me to refer to the rulings of the other High Courts but since they have been referred to and cited at the Bar, they have been referred to in passing. A single Judge of the Allahabad High Court in Sarjoo v. Baba Din 1975 Cri LJ 1562 (All) held that Sections 397(3) and 399 only bar the revisional jurisdiction of the High Court if that jurisdiction has already been invoked by a party before a Sessions Judge; but it does not and cannot bar any other jurisdiction of the High Court which is inherent and not revisional. It Is further held that these are two different jurisdictions and it cannot be said that the inherent jurisdiction is the same as the appellate or the revisional. It is held by the Orissa High Court in Bhima Naik v. State 1975 Cri LJ 1923 (Orissa) that an interlocutory order passed without jurisdiction which constitutes a nullity can be interfered with in revision under Section 401 or 482 Cr.P.C. In the above referred to Supreme Court ruling, it was further held that where the plea of the accused on a point when accepted will conclude a particular proceeding is rejected the order, would not be an interlocutory order within the meaning of Section 397(3), Cr.P.C. It is further held therein that the rejection of an application challenging the jurisdiction of the Court to proceed with the trial, even though it may not be final in one sense is surely not

interlocutory so as to attract the bar of Sub-section (2) or (3) of Section 397(3), Cr.P.C.

7. In the light of the pronouncement of the Supreme Court, it can thus be said that if the contention of the petitioners that the order in question is without jurisdiction is found acceptable the fact that it is an interlocutory order or that a revision has already been preferred to the Sessions Judge, would not be a bar for invoking the inherent jurisdiction of the. High Court.

8. Thus, the sole question that now remains to be answered is whether the framing of the further charge by the Assistant Sessions Judge after the whole trial was over Is without jurisdiction end not warranted by the provisions of the Cr, P. C. The further charge purported to be framed under Section 228 (1), Cr.P.C. is made by the Assistant Sessions Judge after trial on commitment by the Magistrate. Needless to say that the procedure for commitment under the amended Cr, P. C of 1973 makes a departure from the earlier procedure under which a Magistrate while committing a case to the Sessions was required to frame a charge. But under the present Code, the Magistrate simply commits the case to the Sessions and the Sessions Court proceeds to frame the charges as if it is a Court of original jurisdiction. With regard to the power of the Sessions Court to add an unconnected (charge) or alter a charge prior to the amended Code when an accused is committed with charges framed by the committing Magistrate, there may be some conflict of opinion in the sense that the Sessions Court could or could not exercise any power to withdraw or drop altogether a charge framed by the committing Magistrate. But under the present Code, such a question would not arise as the committal proceedings are now abolished. Thus, the Sessions Court now acts as a Court of original jurisdiction. What Is contended by Mr. Sarma, the learned Counsel, is that under Section 227 of the new Criminal P. C. the Sessions Judge on considering the record and the documents and after hearing both sides has to discharge the accused if there are no sufficient grounds for proceeding against the accused and also give reasons therefor. Under Section 228 (1). Cr.P.C. on the material placed before him, if there are grounds for presuming that the accused committed the offence, he has to frame a charge or the charges. The contention is that in the instant case the police filed the charge-sheet including the offence

under Section 149, 1. P. C. There was initially material in the shape of un-cross-examined statements of the prosecution witnesses i.e., Section 161, Cr.P.C. statements before the Magistrate on the basis of which he could have framed a charge for the offence under Section 149, I. P. C. if he presumed that the accused have committed this offence. But such a charge was not framed. It is thus contended that there was an implied discharge of the accused of this offence. It Is in this context that the scope of Section 216, Cr, P, C. falls, for consideration. Section 216, Cr.P.C reads as follows i

Any Court may alter or add to any charge at any time before judgment is pronounced.

The expression 'before Judgment Is pronounced' occurring in this section is not devoid of significance and meaning. What Is contended by the learned Counsel for the petitioners is that on the same material when once the Assistant Sessions Judge presumes the accused not guilty, he cannot take advantage of this section to frame a further charge for the same offence with regard to which the accused stood impliedly discharged. His contention is that a harmonious construction must be placed and that Section 216 Cr.P.C. can be availed of to frame a further charge when a new offence not alleged in the charge-sheet not borne out by Section 161, Cr.P.C. statements at the Initial stage, is made out by evidence during the course of trial. I am afraid there is not much substance in this contention. Section 216, Cr.P.C. invests a comprehensive power to remedy the defects in the framing or non-framing of a charge, whether discovered at the initial stage of the trial or at any subsequent stage prior to judgment. Dealing with Sections 226 and 227 of Cr.P.C. prior to the present amendment, the Allahabad High Court in Dr. A. N. Mukherji v. State : AIR1969 All489 held the same. That was a case where the accused was committed to take his trial for an offence under Section 493, I. P. C. The complaint disclosed initially also an offence under Section 417, I. P. C. In that context, it was held (at p. 1211 of Cri LJ)j

The combined effect of Sections 226 and 227, Cr.P.C. is to invest the Court with a comprehensive power to remedy the defects in framing or non-framing of the charge whether discovered at the inception of a trial or at any subsequent stage

prior to judgment.

Thus, the application of Section 216, Cr.P.C. cannot be limited for altering or amending a charge only to an offence disclosed by the evidence during trial. On the other hand, even if there Is an omission to frame a proper charge at the commencement of the trial which omission is discovered subsequently, the same can be remedied by framing appropriate charge at any time before judgment is pronounced.

9. In Jayantilal v. State : AIR1968 Guj218 , it is held (at p. 1175 of Cri LJ):

A mere plain reading of Section 227 indicates that at any stage before the judgment is pronounced, a Magistrate is empowered to alter or add to any charge. It is a comprehensive section and includes not only the correction of an error in framing the charge but will also include non-framing of a charge. Hence even though the complaint was sent for offences under Sections 323 and 325 of the Penal Code and at initial stage, the charge was framed only under Section 323, the Magistrate has jurisdiction or power to alter that charge and frame a new charge under Section 325, I. P. C.

In that case also, there was initially a complaint under Section 325, I. P. C. There was also complainant's statements disclosing prima facie an offence under Section 325, I. P. C. But there was an omission of not framing a charge under Section 325, I. P. C. initially and such an omission was discovered during the course of the trial by the same Court. The Magistrate trying the case was held to have the power to correct the omission. From the above two rulings, it would also emerge that merely because there was some omission, it cannot be said that there was an implied discharge or that there was a final order of discharge, in order to clothe an order of discharge with finality, it is equally necessary to note that Section 227 of the present Code also enjoins some reasons. Thus, with regard to any implied discharge at the initial stage of framing a charge under Section 228 (1), Cr.P.C. there is no finality attached. It cannot therefore be said that by discovering the error or omission at a subsequent stage any final order of discharge was being reviewed by the same Court. It is true that the further charge was purported to be framed under Section 228 (1), Cr.P.C. only. The Assistant

Sessions Judge did not specifically refer to Section 216, Cr.P.C. But even where the powers are exercisable under Section 216, Cr.P.C. the charge that can be framed on account of alteration or addition is only under Section 228 (1), Cr.P.C. The mere non-mention of Section 216, Cr.P.C. is certainly not fatal. It is true that criminal Courts have no power to review final orders. But, as noted above, there is no final order of discharge. It cannot therefore be said that the Asstt. Sessions Judge was reviewing his own order. The ruling reported in Bindeshwari Prasad v. Kali Singh : 1978 CriLJ187 holding that there is no power under the Cr, P. C. to review or recall a judicial order has thus no application to the facts of this case. That was a case where the Supreme Court held that the Magistrate has no power or in herent power to recall a judicial order by which he disposed of or dismissed a criminal complaint under Section 203 of the Cr. P, C. In the instant case, it can be said that even if it is a review of an implied order, such a correction of a charge is permitted by Section 216, Cr.P.C. The correction or the omission to frame a charge being permitted by Section 216, Cr.P.C. it cannot be said that the Assistant Sessions Judge acted without jurisdiction in framing the further charge. The order of framing the further charge therefore does not warrant any interference either by the exercise of inherent jurisdiction or the revisional jurisdiction.

10. The learned Counsel appearing for the Public Prosecutor has relied upon two rulings of the Supreme Court reported in W. Slaney v. State of M. P. : 1956 CriLJ291 and Bhoor Singh v. State of Punjab : 1974 CriLJ929 . They are cases which deal with the absence of prejudice to the accused, as there was no specific charge under Section 34 or under Section 149, I. P. C. The question now raised was not for consideration before their Lordships of the Supreme Court in these two rulings. Those two rulings are thus not of much help for the purpose of determining the question now raised by the revision petitioners.

11. In the light of the aforeasaid discussion, there are no grounds for quashing the further charges framed by the Assistant Sessions Judge.

12. It was lastly urged by the learned Counsel for the petitioners that as the additional charge was framed by the Assistant Sessions Judge after the evidence was recorded, it must be deemed that the Assistant Sessions Judge had come to

a conclusion and made up his mind to convict the accused and that this is a fit case to be transferred from his file. This request was not accepted by the learned Sessions Judge. It is however, seen that after recording the evidence, the learned Asst. Sessions Judge felt the need for framing a further charge. It is equally probable that on the evidence he felt that there was a case for the offence under Section 149, I. P. C. Though by this itself it cannot be said that the learned Judge had made up his mind to convict the accused, yet it appears to be reasonable that the case is tried in the above circumstances by some other Judge. In the circumstances, the case is transferred to the Assistant Sessions Judge, Ongole who would proceed according to law.

13. In the result, the petition for quashing the additional charge is dismissed with the above observations regarding the transfer of the case to the file of the Assistant Sessions Judge, Ongole. Petition dismissed.