

Talewar Jha Vs. Mool Chand

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Court : Allahabad

Decided On : Aug-19-1958

Reported in : AIR1959All96; 1959CriLJ123

Judge : M.C. Desai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 203, 204, 423, 423(1), 435, 517 and 520

Appeal No. : Criminal Revn. No. 362 of 1956

Appellant : Talewar Jha

Respondent : Mool Chand

Advocate for Def. : P.C. Chaturvedi, Adv.

Advocate for Pet/Ap. : Mohd. B. Usmani, Adv.

Judgement :
ORDER

M.C. Desai, J.

1. In this application an order passed by the Sessions Judge, Mainpuri, under Section 520 of the Code of Criminal Procedure is challenged. Mool Chand, opposite party, and others were prosecuted before an Assistant Sessions Judge

for the offence of Section 380, I. P. C. It was alleged that they committed theft in the cloth shop of the applicant Talawar Jha and stole pieces of cloth. During the trial some pieces of cloth admittedly recovered from the houses of Mool Chand and others were produced before the court.

Mool Chand admitted that the cloth was recovered from his possession but claimed that it belonged to him. Others denied the recovery from their possession and did not lay any claim to the cloths said to have been recovered from their possession. The learned Assistant Sessions Judge convicted some of the accused and acquitted the others including Mool Chand. He ordered under Section 517 of the Code that the pieces of cloth which bore the seal or signature of Talawar be delivered to him and that the other pieces which bore neither his seal nor his signature be returned to Mool Chand.

Mool Chand filed an application under Section 520 against the order delivering some pieces of cloth to Talewar, in the court of the Sessions Judge. No appeal or revision against the principal order of the learned Assistant Sessions Judge convicting some accused and acquitting the others was filed in the sessions court and none was pending before the learned Sessions Judge, in whose court the application under Section 520 was presented. The dispute in the proceeding under Section 520 was whether the cloth bearing the seal or signature of Talawar belonged to him or to Mool Chand.

The learned Assistant Sessions Judge had been satisfied about the genuineness of Talewar's seal or signature on it and, therefore, had ordered its delivery to him, though he was not satisfied that Mool Chand had stolen it. The learned Sessions Judge came to the conclusion that the seals and signatures could not be accepted as genuine; he, therefore was not satisfied that the cloth belonged to Talawar. He was also not satisfied that it belonged to Mool Chand.

Therefore, he set aside the order of the learned Assistant Sessions Judge about its delivery to Talewar and directed that it should remain in police custody for one month and that if in this period no order from a civil court was received about its disposal, it should be returned to Mool Chand, from whose possession it had been recovered, on the expiry of the period. This is the order challenged by

Talewar before me.

2. Two questions, and both important, arise in this case. One is whether Section 520 confers the right upon a party to move an application before a court of appeal, confirmation etc. for modification, alternation, etc., of an order passed under Section 517 or merely confers a power upon a court exercising appellate, confirmatory etc., jurisdiction in the case to pass such an order. In other words the question is whether the power of Section 520 can be exercised by any court to which an appeal may lie or which may exercise the power of confirmation etc. or only by that the court which has already been seized of the matter in exercise of its appellate, confirmatory etc. jurisdiction.

The second question which will arise only if it is held that the power of Section 520 can be exercised by any Court to which an appeal may lie or which may exercise the power of confirmation etc., is whether the court has jurisdiction to question the principal order of the inferior court and to modify, alter etc., an order under Section 517 even though it was just and proper according to the principal order.

3. Section 520 reads as follows:

'Any court of appeal, confirmation, reference or revision may direct any order under Section 517 passed by a court subordinate thereto, to be stayed pending consideration by the former court and may modify, alter or annul such order and make any further orders that may be just.'

My view is that this provision simply confers power upon a court exercising appellate, confirmatory etc. jurisdiction over the principal order passed by a subordinate court to modify, alter etc., an order passed by it under Section 517 and does not confer a right upon a party aggrieved by the order to make an application to any court which may have the power of exercising appellate, confirmatory etc., jurisdiction to modify, alter etc., the order even though it has not assumed appellate, confirmatory etc., jurisdiction over the case.

The weight of authority is against the view that I am disposed to take. One of the earliest cases taking the opposite view is *Empress v. Joggesur Mochi*, ILR 3 Cal

379 'A), in which it was held that the words 'court of appeal' do not necessarily mean the court in which an appeal is pending. It was observed that a person who is convicted may not be interested in the order passed under Section 517 and may not file an appeal against his conviction and that it would be unreasonable to put such a construction on Section 419 as shall make the power of the Judge to modify, alter or annul a Magistrate's order convicting one, contingent on the accident whether another person has or has not chosen to appeal' (p. 381). (Reference to Section 419 is to the Section of the old Criminal Procedure Code.)

The observation quoted above sounds more like judicial legislation than like judicial interpretation; the question is not what should be the right law but what is the actual law. The Legislature had the power not to provide for an appeal against an order passed under Section 517 and if it chose not to make it appealable, it is not given to a court to treat it as appealable. The party aggrieved by a wrong order under Section 517 is not without his remedy; the doors of civil courts are open.

Further he can always apply in revision against the order; all orders passed by inferior criminal courts are revisable by the High Court, vide Section 435 read with Section 439 of the Code. It is also not correct to say that the Legislature has made the power of modifying, altering etc., an order under Section 517 contingent on the accident whether another person has or has not filed an appeal from the principal order; according to the interpretation that I place upon the provision it has added to the powers of a court exercising appellate, confirmatory etc. jurisdiction against the principal order.

Finally I may point out that the High Court actually did not interfere with the order of the Magistrate. In *Queen Empress v. Ahmed*, ILR 9 Mad 448 (B), it was observed that 'any court of appeal' does not mean a court of appeal before which an appeal is pending but a court to which an appeal would ordinarily lie. No reasons are given for the interpretation. Another old case is *U. Po Hla v. Ko Po Shein*, 30 Cri LJ 540: (AIR1929 Rang 97) (FB) (C), decided by a Full Bench of the Rangoon High Court; it followed the case of *Joggessur (A)* (*supra*).

One reason which weighed with the Full Bench was that a court which has already assumed appellate jurisdiction has power to modify an order passed under Section

517 and there would have been no necessity of enacting Section 520. The 'powers of an appellate court are detailed in Section 423. It may dismiss the appeal if it considers that there is no sufficient ground for interference or may pass any of the orders mentioned in Clauses (a), (b), (c) and (d) of Sub-section (1). The order mentioned in clause (d) is 'make any amendment or any consequential or incidental order that may be just or proper'.

It is on account of this provision that it was observed by the Full Bench that an appellate court had already been invested with the power of modifying an order under Section 517 and no provision was necessary to confer this power upon it. With great respect I disagree. The power conferred by Section 520 is in terms different from that conferred by Section 423 (1)(d). The power conferred by Section 423(1)(d) is to be exercised only if the appellate court does not dismiss the appeal; if it dismisses the appeal, it cannot exercise that power.

There may be cases in which though the appellate court dismisses the appeal from the main order it would find justification for modifying, altering, etc. an order passed by the trial court under Section 517. Then the words 'make any amendment or any consequential or incidental order that may be just or proper' may not be said to mean 'modify alter or annul a consequential or incidental order already passed by the trial court'. The words 'make any amendment' may be interpreted to mean any amendment made in the order under' appeal, and the words 'any consequential or incidental order' may be interpreted to mean any order that arises out of the appellate order or is incidental to it.

Consequently it can be argued with some show of reason that Section 423 (1)(d) does not authorise an appellate court to modify or alter or annul an order passed by the trial court under Section 517. Moreover the Section does not deal with the powers of a court of confirmation or reference and it is not correct to say that Section 520 as interpreted before would serve the same purpose as Section 423 (1) (d). In any case Section 520 might have been enacted by way of abundant caution to remove the doubts mentioned above.

The real controversy before the Full Bench was whether the words any court of appeal' mean any court to which an appeal ordinarily lies or any court to which an

appeal lies in the particular case and not whether they mean only a court to which an appeal has actually been filed. Strictly speaking it was, therefore, not called upon to lay down that the words should not be given the restricted meaning of a court in which an appeal has already been filed. *Empress of India v. Nilambar Babu*, ILR 2 All 276 (D), decided under Act No. X of 1872, was relied upon in the case of *Ahmed (B)*, but it did not lay down that an order under Section 520 can be passed by a superior court without there being an appeal from the principal order.

In that case an application was made to the High Court to revise an order under Section 517; the High Court had the power to revise it under Section 517; the High Court had the power to revise it under Section 439, Cr. P. C., and there did not arise my question of applying the provision of Section 520. In *Sabhapati v. Ram Kissen* : AIR1936 Cal185 ,the words 'any court of appeal' were held to mean a court to which an appeal would ordinarily lie and not necessarily a court to which an appeal has been presented; the court relied upon some of the cases discussed above and did not give any reason for its view that there was no justification for the restricted interpretation sought to be put upon the words.

In *Walchand v. Hari Anant* AIR 1932 Bom 534 (F), a Full Bench of the Bombay High Court followed the view of the Rangoon High Court expressed in the case of *U Po Hla (C)* (Supra). The real controversy before this Full Bench also was whether the power under Section 520 could be exercised by a court to which an appeal would ordinarily lie or by a court to which an appeal would lie from the principal order actually passed in the case.

The facts were that a Magistrate of the first class acquitted the accused of the charge of theft and ordered the property said to have been stolen and recovered from his possession to be delivered to the complainant. The accused applied to the High Court for revision of the order passed under Section 517. The High Court could revise the order under Section 439 and did not have to rely upon the provision of Section 520. The Full Bench said nothing more than the Full Bench of the Rangoon High Court in support of the view taken by them. In *re Khima Rukhad*, ILR 42 Bom 664 : (AIR 1918 Bom 186) (G), it was observed that it is not essential that an appeal should have been preferred to the court of appeal from

the principal order.

It, however, held that the words 'any court of appeal' mean any court to which the appeal would lie against the principal order passed in the particular case. This latter view was disapproved; by the Full Bench in the above case of Walchand (F). In *Cheranji Lal v. Jabar Chand*, AIR 1953 Madh-B. 149 (H), Dixit J. followed the case of Walchand (F) (supra) and held that it is not necessary that an appeal should have been preferred from the principal order before the appellate court could modify, alter etc., a trial court's order under Section 517.

In *Emperor v. Debi Ram*, ILR 46 All 623 : (AIR 1924 All 675 (2)) (I), Daniels J. set aside a District Magistrate's order modifying a Magistrate's order under Section 517 on the ground that the District Magistrate was not a court of revision. He did so in the course of a revision pending before him against the principal order of acquittal and therefore, the question whether Section 520 confers a power upon a party to approach a court of appeal, confirmation etc. or empowers a court that has already assumed jurisdiction as a court of appeal, confirmation etc. to modify an order under Section 517 did not arise in the case.

The principal order was impugned before the District Magistrate, but since he was held to be not a court of appeal, confirmation, reference or revision, he was held not to have the power of modifying, altering etc. an order under Section 517. In *Mst Nabban Tawaif v. Shyam Lal*, Cri Revn No. 695 of 1932 (J) it was held by a Bench disagreeing with Daniels J. that an order under Section 520 can be made by any court to which an appeal would ordinarily lie from the principal order and the Bench decision was followed by Hamilton J. in *Ram Dihal v. Badri* : AIR 1941 All 143 .

The point decided in the cases of *Ram Dihal* (K) and *Mt. Nabban Tawaif* (J) was that 'any court of appeal' means any court to which an appeal would ordinarily lie and not any court to which an appeal would lie from the particular principal order passed in the case and not whether it means a court that has already assumed appellate jurisdiction over the principal order.

The question decided by Soni J. in *Mahanta Singh v. Het Ram*, also was different, it being whether a District Magistrate, who was seized of an application for revision of a Magistrate's order of acquittal, could revise his order passed under Section 517 or not. The court revising the order under Section 520 had already assumed jurisdiction as a court of revision against the principal order and, therefore, the question under consideration did not arise there.

4. In *Ghulam Ali v. Emperor*, AIR 1945 Lah 47 (M) Blacker J. decided that there is no ad hoc right of appeal or revision to the Sessions Judge and that all that he can do is to substitute his own order for that passed by the trial court if the substantive case comes before him as a court of appeal or a court of revision. The same view was taken by Bose J. in *Ibrahim v. Emperor* AIR 1947 Nag 33 (N); he held that Section 520 does not confer a right of appeal upon anybody, that no appeal lies from an order under Section 517 and that Section 520 only confers a power upon a court exercising appellate or revisional jurisdiction to modify, alter etc. the trial court's order regarding disposal of property.

I respectfully agree with these decisions. No appeal can lie from any judgment or order of a criminal court except as provided by the Code; see Section 404. Sections 405, 406, 476-B etc. are the provisions in the Code which allow appeals from certain orders but no appeal has been expressly allowed from an order passed under Section 517. The language used in Section 520 is not appropriate to the creation of a right of appeal.

It no more creates a right of appeal than it creates a right of revision or a right to approach a court of confirmation or a right to approach a court of reference. If it created a right of appeal, there would have been no necessity for creating a right of revision also a right of approaching a court of confirmation and a court of reference. There would have been no sense in giving a party a choice of several courts to which he could approach with a petition for modification, alteration or annulment of an order regarding disposal of property; the creation of a right of appeal would have been quite enough.

An order passed under Section 517 can be revised by the High Court under Section 435 read with Section 439 and there would have been no sense in

enacting Section 520 for creating the same right. The very fact that the Section empowers a court of revision to modify, alter or annul an order regarding disposal of property shows that it is a power to be exercised by a court which has assumed jurisdiction over the case; that is, over the principal order passed in the case.

If the Section created a right of appeal, it would have also mentioned to which court the appeal would lie but has not done so. No right of appeal can be created unless the court to which an appeal can be filed is designated. If the Section is held to create a right of appeal, it must also be held to create a right of confirmation and a right of reference; but it would be meaningless to talk of applying to a court for confirmation of an order under Section 517 because the order does not require confirmation at all and there can be nothing like a right of reference in respect to an order passed under Section 517.

Nobody can contend for a moment that the words 'any court of confirmation' and 'any court of reference' confer any right upon a party to approach a court for confirmation or for reference in the same manner the words 'any court of appeal' and 'any court of revision' also do not confer a right upon any party to approach any court by way of appeal or revision.

5. The words 'any court of appeal' mean any court which has assumed appellate jurisdiction; they are not appropriate to signify any court to which an appeal would lie. No court can be designated as a court of appeal unless it has assumed appellate jurisdiction. So long as no appeal has been filed, one cannot say definitely which is a court of appeal because the forum of appeal depends upon who is the aggrieved party and the order appealed from. A trial court may pass two principal orders, one of which is appealable to one court and the other to another court.

In such a case the question will arise which is the court of appeal within the meaning of Section 520. The question whether the words mean any court to which an appeal would ordinarily lie or any court to which an appeal would lie from the particular principal order arises frequently and is answered differently by different courts. Surely the Legislature would not have left such vagueness in the provision if it intended to create the right of appeal or of revision.

The questions that have arisen before the various High Courts and to which reference has been made above have arisen out of the erroneous interpretations placed upon the words 'any court of appeal revision'; no such questions would arise if they are interpreted to mean any court that has assumed jurisdiction as a 'court of appeal..... . .revision'. Had the legislature intended to create a right of appeal to a court to which an appeal ordinarily lies, they would have used some such words in Section 520 just as they have used them in Section 195 (3).

The words 'court of revision' are also ambiguous; the High Court is undoubtedly a court of revision but a Sessions Judge and a District Magistrate also have revisional jurisdiction over certain matters, such as an order dismissing a complaint under Section 203 or under Section 204 (3) or discharge of a person accused of an offence. In respect of other orders a Sessions Judge, a District Magistrate and even a specially empowered sub-divisional magistrate have the power to send for a record and examine the correctness, legality or propriety of any offence, sentence, or order and make a report to the High Court; some authorities call them courts of revision and others do not. It cannot be contemplated that the Legislature created rights of appeal and revision in such ambiguous and confusing language.

6. On a plain reading, Section 520 confers certain powers upon certain courts. Any court of appeal may modify an order under Section 517 means that it is the power of a court of appeal to modify such an order. A court must exist as a court of appeal before it could assume power to modify it, i.e. it must have assumed appellate jurisdiction before being asked to modify the order. The language is similar to the language used in Section 423.

There is no distinction between a court of appeal and an appellate court. Undisputedly, Section 423 mentions the powers of a court of appeal; it lays down that an appellate court may reverse an order of acquittal or the finding of guilty or alter or reverse an order. The language of Section 520 is quite similar. One can speak of a court of confirmation or a court of reference but one cannot ask a court to assume jurisdiction as a court of confirmation or reference by making an application under Section 520.

A court of confirmation or reference must exist, i.e., must have assumed jurisdiction as such before it can be asked to modify, alter etc. an order under Section 517. Unless a reference has been made or a record has been actually submitted for confirmation, it is impossible to speak of a court as a court of reference or confirmation. The phrases 'any Court of appeal', 'any court of revision', 'any court of confirmation' and 'any court of reference' are used in the same way; if the last two phrases mean a court that has assumed jurisdiction as such, the first two phrases also must mean the same.

7. I am convinced that Section 520 does not empower a court to assume jurisdiction as a court of appeal etc. but empowers the court that has assumed jurisdiction as a court of appeal etc. to modify, alter or annul an order regarding disposal of property. It assumes jurisdiction as a court of appeal etc. over the principal order passed by the trial court and in the course of the exercise of that power it is empowered to modify, alter or annul a consequential order or incidental order passed by the trial court under Section 517.

If a superior court whether acting in appeal or in revision or on reference modifies, alters or annuls the principal order, it must have the power to modify, alter or annul every consequential order or incidental order connected with the principal order. In this case the learned Sessions Judge had not assumed jurisdiction as a court of appeal, confirmation, reference or revision and, therefore, there was no question of his modifying under Section 520, the learned Assistant Sessions Judge's order regarding disposal of property.

8. Sri P. C. Chaturvedi contended in the alternative that an application under Section 435 for revision of the learned Assistant Sessions Judge's order could be made to the learned Sessions Judge and that the learned Sessions Judge after assuming jurisdiction as a court of revision could exercise the power conferred upon it as such under Section 520. I do not agree that the learned Sessions Judge becomes a court of revision merely because an application under Section 435, Cr. P. C. had been made to him and he had sent for the record.

He did not have the jurisdiction to pass final orders on the application. Only the High Court is the court of revision; a Sessions Judge is not a Court of revision even

though he has the power to call for the record, examine it and report the result to the High Court and to set aside an order of dismissal of a complaint under Section 203 or 204 or of discharge of an accused. In the case of Debi Ram (I), it was held by Daniels J., that the High Court is the only court of reference or revision.

The court of revision within the meaning of Section 520 is the court assuming revisional jurisdiction over the principal order passed in the case and not the court exercising revisional jurisdiction over the consequential order under Section 517. Since Section 520 does not confer a right of revision against an order passed under Section 517, a court to which an application for revision against such an order is made is a court exercising jurisdiction under Section 435, Criminal P. C., and not as a court of revision.

If a Sessions Judge assumes jurisdiction under Section 435 over dismissal of a complaint under Section 203 or 204 or discharge of an accused, he may exercise the power conferred under Section 520 and modify an order regarding disposal of property passed by the trial court but he cannot modify such an order in any other case. The provision that he cannot himself pass final orders but must refer the case to the High Court for revision of the principal order pass-ed by the trial. Court would be repugnant to the provision that while reporting the principal order to the High Court for final orders he can himself modify the consequential order.

The consequential order must follow the principal order and if he cannot modify the principal order in revision, he certainly cannot modify the consequential order also. So the court that can finally dispose of an application for revision against the principal order is the court of revision. The learned Sessions Judge was not such a court and he could not revise the order of the learned Assistant Sessions Judge.

9. Coming to the second question, I am of the view that even if the learned Sessions Judge had the jurisdiction to pass an order under Section 520, he had no jurisdiction to upset the principal finding of the learned Assistant Sessions Judge. He was not exercising appellate jurisdiction against the principal order and had no right to question its correctness or legality. He had therefore, to take it as correct and then see whether the consequential order under Section 517 was just and proper according to it or not.

A consequential order may be just and proper according to the principal order, however wrong the latter may be; if a superior court has no jurisdiction to interfere with the principal order it cannot interfere with the consequential order. I do not agree with the arguments of Sri P. C. Chaturvedi that though the superior court cannot substitute its own order in place of the principal order passed by the inferior court, it can examine its correctness for the limited purpose of seeing whether the consequential order is correct or not.

Such a course would be inconsistent with the unassailability of the principal order. I think it is a sound principle that if no appeal is provided against a principal order, the correctness of a consequential order must be judged on the assumption that the principal order is correct. It would be useless to make the principal order non-assailable if it could be disregarded when dealing with the consequential order. There must be a rational connection between the principal order and the consequential order.

The superior court cannot modify a consequential order which is in consonance with the principal order even though it thinks that the principal order itself is incorrect. If it were to substitute another consequential order in consonance with what it thought to be the correct principal order, there would result repugnancy between the principal order and the consequential order. The power of Section 520 has been conferred upon a superior court in order to make the consequential order in conformity with the final principal order.

If it modifies the trial court's principal order, it must have the power to modify the trial court's consequential order in order to make it in consonance with the principal order finally passed by it. The power is not meant to be exercised in any other case. Without interfering with the principal order passed by the inferior court it can interfere with its consequential order but only on the ground that it was not in conformity with the principal order.

The learned Sessions Judge not having jurisdiction over the principal order had no right to examine its correctness and could not set aside the consequential order which was quite in conformity with the principal order. This application must, therefore, be allowed.

10. The order of the learned Sessions Judge is set aside and that of the learned Assistant Sessions Judge is restored.

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