

Chandrika Vs. Rex

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Court : Allahabad

Decided On : Sep-06-1948

Reported in : AIR1949All176; 1949CriLJ228

Judge : Seth, J.

Appellant : Chandrika

Respondent : Rex

Advocate for Pet/Ap. : Mr. Rai Rajeshwari Prasad

Judgement :

ORDER

Seth, J.

1. This is an application for the re-hearing of an appeal which was decided and dismissed on 26th June 1948, under the following circumstances.

2. On an application being made, a date was fixed for the hearing of the appeal. That date happened to be 5th July 1948, By a mistake of the office, however, the case was listed for hearing earlier and was heard and disposed of on 25th June 1948, ten days before the date fixed for its hearing. Mr. Rai Rajeshwari Prasad, learned Counsel for the appellant, under the belief that the case could not be taken up before 5th July 1948, was not at Allahabad and, therefore, no

appearance was made on behalf of the appellant when the case was heard. The appellant was, thus, deprived of an opportunity of being heard before the case was decided against him. There cannot be the least doubt that these facts constitute a sufficient cause for setting aside the proceedings, starting with the hearing of the appeal and terminating with judgment, inasmuch as by a mistake on the part of some clerks of this Court great injustice has been done to the appellant, as he was deprived of an opportunity of being heard. The hearing of the appeal, under the circumstances indicated above, amounted to an abuse of the process of the Court, although it was not deliberate and only inadvertent.

3. learned Counsel, appearing for the Crown, has not contested that sufficient cause has been made out for the re-hearing of the appeal. His contention, however, is that the Court has no jurisdiction to grant a rehearing. He has relied upon Section 569, Criminal P. C. which reads as follows:

Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

The contention is that this Court has got no jurisdiction to review a judgment in a criminal case. The learned Counsel has also relied upon Section 480, Criminal P. C, which runs as follows:

Judgment and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chap. XXXII.

It will be convenient to dispose of the latter objection first, namely, the objection based upon B. 430, Criminal P. C. The expression 'judgment shall be final' or expressions to the similar effect are also to be found in statutes other than the Criminal Procedure Code and they have come up for interpretation before this Court in several cases. It has been consistently held by this Court that all that such expressions mean, is that the judgment shall not be open to any further appeal and that the powers of High Court to interfere with it otherwise than in appeal are not taken away : vide *Shah Chaturbhuj v. Shah Matiji Bam* : AIR1938 All456 and

Ashraf v. Saith Mai : AIR1938 All47 . There is, thus, no force in the contention that Section 430, Criminal P. O. is a bar to the granting of this application.

4. So far as the provisions of Section 369, Criminal P. C. are concerned, the first thing to notice is that by the terms of the section itself, they have been subjected to the other provisions of the Code, It may be noticed that the section opens with the words 'save as otherwise provided by this Code,' It is, thus, obvious that Section 369, Criminal P. C. has been subjected, inter alia, to the provisions of Section 561A, Criminal P. C. The real question for consideration, therefore, is not whether Section 369, Criminal P. C. creates a bar but whether this Court possesses an inherent power to rehear the appeal under the circumstances of this case.

5. It has been held over and over again by various High Courts, including this Court, that a High Court does not possess any general power to review its own decisions or judgments in criminal cases. This was so held even before the amendment of Section 369, Criminal P. C. in the year 1923. It may be noticed that the amendment made in 1923 is more in favour of denying the right of review rather than in favour of supporting such right. It is not necessary to mention the decisions of the other Courts. It will be enough to point out that *Kunjilal v. Emperor* : AIR1935 All60 , is one SUCH decision of this Court. It seems to me, however, that these decisions have no bearing upon the decisions of the present application because, in my opinion, the present application is not an application for a review of the judgment dated 26th June 1948, nor an application praying that that judgment be altered. I take this application to be an application for setting aside the proceedings starting with the hearing of the appeal and terminating with the judgment in the appeal, although the judgment dated 25th June 1948, will stand vacated if those proceedings are set aside.

6. An application for review of a judgment means an application praying that that judgment be reconsidered. An application for the alteration of a judgment means that changes be made in that judgment. This is not what the applicant prays for in this case. His prayer, in substance, is that the entire proceedings be set aside, that the appeal be reheard and then a fresh judgment delivered. He desires the previous judgment to be entirely ignored. This is quite different from its being

reconsidered or altered. A judgment can be reconsidered or altered only if it is taken into Consideration. The prayer in the present application seems to me to be just the opposite of it, being that the judgment be totally ignored from consideration and afresh judgment be arrived at. It is not necessary for the applicant to refer to that judgment at all for the purpose of succeeding in this application. The applicant has to refer to the proceedings only and not to the judgment to substantiate his claim to the relief prayed for.

7. Section 561A, Criminal P. O. expressly provide a that nothing in the Code

shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

It does not need any argument to make out that in the present case an order directing a rehearing of the appeal is necessary to secure the ends of justice. It is a cardinal principle of the administration of justice that an act of the Court shall not prejudice any party. It is embodied in the well known maxim 'actus curies neminem gravabit.' I do not find any provision in the Code of Criminal Procedure prohibiting the High Court from giving effect to this cardinal rule.

8. learned Counsel appearing on behalf of the Crown has invited my attention to two decisions of their Lordships of the Privy Council, both reported in the Allahabad Law Journal for the year 1945. In both these cases it has been laid down by their Lordships of the Privy Council that Section 561A, Criminal P. C. does not confer any new powers on the High Court, and that it only provides that inherent powers already possessed by the High Courts shall be preserved to them. The first of these decisions is *The King-Emperor v. Khwaja Nazir Ahmad*, in which it was held that a High Court has no inherent power to interfere with the police investigation where no charge is preferred before the Court. The second case is *Jairam Das v. The King-Emperor*, where it has been held that the powers of a High Court to grant bail are confined within the limits prescribed by Chap. XXXIX of the Code of Criminal Procedure and Section 426, Criminal P. C., and that a High Court does not possess any inherent power to grant bail outside the limits

of these sections. In my opinion, none of these rulings affect the question which has to be decided in this case. That a High Court does not possess inherent powers to make such orders, as were the subject of consideration by their Lordships of the Privy Council in these two cases, does not mean, that a High Court does not possess inherent power to make other kind of orders also. These cases do not define the inherent powers. These decisions negative only this, that the power does not extend to the making of certain orders. They do not lay down anything more. Whether orders of a different class are within the scope of the inherent powers is a matter not covered by these decisions. It is not the case of the applicant that the power to rehear an appeal under the present circumstances has been newly conferred upon a High Court by Section 561A, Criminal P. C. The contention of the applicant is that the High Court always had, and even now has, an inherent power to rectify such lamentable mistake and to rehear an appeal under circumstances such as present.

9. The power of a High Court to rehear an Appeal or revision a3 distinguished from the general power to review or alter its own decision in criminal cases has been specifically considered in certain cases and the preponderance of opinion seems to be in favour of the proposition that a High Court has got such a power.

10. There is authority of a Division Bench of that Court in *Motilal v. Emperor* 0043/1947 : AIR1948 All106 holding that where after an application in revision has been decided by the High Court, it is found that a mandatory provision of law has been overlooked, the High Court has power to correct an obvious error under Section 661A, Criminal P. C. This authority is binding upon me, sitting as a single Judge. The present case is stronger than *Motilal's* case. 0043/1947 : AIR1948 All106 , for in *Motilal's* case 0043/1947 : AIR1948 All106 the obvious error could be pointed out to the learned Judges, with the exercise of due diligence, whereas in the present case the applicant could do nothing. In these circumstances, ordinarily, it would not have been necessary to consider other authorities, but the learned Crown counsel has urged that *Motilal's* case 0043/1947 : AIR1948 All106 has not been correctly decided, that no authorities have been considered or discussed in that case and that I should refer this case to a larger Bench for the reconsideration of *Motilal's* case 0043/1947 : AIR1948 All106 - It has, therefore,

become necessary for me to consider the authorities and to set out the reasons why I consider that a reference to a larger Bench is not called for in this case.

11. Referring to a Full Bench decision of their own Court In the matter of the Pephon of F. W, Dibbons, 14 Cal. 42 (P.E.) in which it was held that a High Court had no power to re. view its orders in criminal cases, a Division Bench of the Calcutta High Court observed as follows in Rajah Ali v. Emperor 46 Cal. 60 (A.I.R. (6) 1919 Cal, 409: 20 Cr. L. J, 265):

The result of the decisions of this Court subsequent to the Full Bench case seems to be this: that where a case is disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake, or inadvertence no opportunity baa been given to him to be beard in his defence such an order is not one to which the ruling In the Fall Beech case applies.

It is true that in Rajab Alt's case, 46 Cal. 60 : A,I.E. (6) 1919 Cal. 409:20 Cr.L.J. 265) an appeal had been dismissed for default of appearance, without a decision upon merits and therefore, this ruling is distinguishable from the present case on facts, but the rule actually laid down in the case covers the present case also. The rule laid down. in the case is not confined to a case which has been disposed of merely for default of appearance.

12. It has been held in In re Tadi Sotna Naidu and Anr., 47 Mad. 428 : A.I.R. (II) 1924 Mad. 640: 26 Cr. L. J. 370), that

an order to the prejudice of an accused, without affording him an opportunity of being heard as, fox instance, where by mistake a case was posted on a day anterior to that fixed in the notice to the accused and the sentence was enhanced in his absence, is null and void ab initio, as being one passed without jurisdiction and that the proper course in such a case is to proceed with the matter afresh after proper notice to the accused.

While I find it difficult to go to the length of agreeing with the learned Judges that an order passed under such circumstances is null and void ab initio, as being one passed without jurisdiction, I agree with the view that the proper course is to

proceed with the matter afresh. Want of jurisdiction and irregular exercise of that jurisdiction are two different things and result in different consequences. Jurisdiction denotes the competence and power to entertain and decide a case. Irregular exercise of jurisdiction comes into existence only after cognizance has been taken by a Court of competent jurisdiction. An irregular exercise of jurisdiction presupposes the existence of jurisdiction. Want of jurisdiction renders all proceedings null and void. Irregular exercise of jurisdiction only renders the proceedings liable to be avoided in certain cases. It is not possible to hold that a Court hearing a case on date earlier than the date fixed for hearing has no jurisdiction to hear it although in doing so it exercises its jurisdiction in an irregular manner. I, however, entirely agree with the view expressed by the learned Judges that the setting aside of the order previously passed in such cases does not amount to reviewing a previous judgment. I would prefer to found the jurisdiction of a High Court to vacate the previous order on the basis of the inherent jurisdiction preserved to it under 8, 561A, Criminal P. C., rather than on the basis that the previous judgment is void ab initio.

13. The Lahore High Court has taken the same view as the Madras High Court in Muhammad Sadiq v. The Crown A.I.R. (12) 1925 Lah. 855:(26 cr.L. J. 1169). The decision of the Court is summarised in the head-note which runs as follows:

Where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court has an inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same.

As 'already stated, I am unable to share the view that an order dismissing an appeal under such circumstances can be described to be an order passed without jurisdiction, while I entirely agree with the view that under 3. 561A, Criminal P. O., the Court has inherent powers to make an order that the appeal be reheard.

14. learned Counsel appearing for the Crown has relied upon a decision of the Calcutta High Court in Dahu Baut v. Emperor : AIR1933 Cal870 . There are to be

found observations in this case which are inconsistent with the observations to be found in Rajab Ali v. Emperor 46 cal. 60 : A.I.R. (6) 1919 cal. 409: 20 Cr. L. J. 265) and in In re Tadi Soma Naidu and Anr., 47 Mad. 428 : A.I.R. (11) 1924 Mad. 640: 26 Cr.L.J. 870) referred to above. With great respect to the learned Judges who had decided this case, I am unable to share the view that a High Court has no inherent power to rehear an appeal under the circumstances of the present case. I am in respectful agreement with the decisions in Rajab Ali v. Emperor 46 cal. 60:(A.I.R. (6) 1919 cal. 40D: 20 Cr. L. J. 265) in In re Tadi Soma Naidu and Anr., 47 Mad. 428; (A.I.R. (II) 1924 Mad. 610: 26 or. ii. J. 870) and in Muhammad Sadiq v. The Crown A.I.R. (12) 1925 Lah. 355 : 26 cr.L.J. 1169), recognizing the inherent power.

15. Accordingly, I direct that my order dismissing the appeal on 25th June 1948, be set aside and this application for the rehearing of the appeal be allowed.

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