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Court : Allahabad

Decided On : Jan-19-1966

Reported in : AIR1969All557; 1969CriLJ1338

Judge : S.D. Singh, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 405, 406, 406A, 423, 423(1), 486, 514, 515 and 561A

Appeal No. : Criminal Revn. No. 1739 of 1966

Appellant : Malkhan Singh

Respondent : State

Advocate for Pet/Ap. : S.P. Gupta, Adv.

Disposition : Petition allowed

Judgement :
ORDER

S.D. Singh, J.

1. This is an application in revision arising out of proceedings under section 514 of the Code of Criminal Procedure. The present applicant Malkhan Singh and one other person Gairamji had stood surety for Phula alias Phool Singh against whom

was pending a case under Sections 380 and 411 of the Indian Penal Code. Phoola appeared in Court upto 23rd February, 1966, but not thereafter. Proceedings under Section 514 of the Code of Criminal Procedure were thereafter taken up by the Magistrate. The personal and surety bonds were forfeited. Though show cause notices were directed to be issued, they were in fact not. The ultimate order passed by the Magistrate required the sureties to produce the accused by a certain date and they were also told that if they failed to do so, action would be taken against them.

It was reported ultimately that the accused had been shot dead in some encounter with the police. Proceedings against the sureties, however, continued and they deposited the amount of their bonds in cash when distress warrants were issued against them. The applicant and the other surety Chiranji went up In appeal to the Sessions Judge under Section 515 of the Code and challenged the correctness of the order made against them. The Sessions Judge has found that the Magistrate had not followed the procedure prescribed under Section 514 of the Code and consequently held that the order regarding the recovery of the amount from the sureties was illegal. He, therefore, allowed the appeals, set aside the order passed by the Magistrate, but thereafter gave the direction that :--

'The files are sent back to the Court below with the direction to dispose of the cases in accordance with the observations made above'.

2. Malkhan Singh has come up in revision against this order and what was urged on behalf of the applicant is that the Sessions Judge had no jurisdiction to give any such direction to the Magistrate, meaning thereby that all what the Sessions Judge could do was either to allow the appeal or dismiss the appeal, but he could not direct the Magistrate to proceed against the applicant afresh in accordance with the observations made by him in the body of the judgment, which means that he could not remand the case for rehearing.

3. The point raised on behalf of the applicant is beset with some difficulty and there appears to be no direct decision on this point.

4. Section 515 of the Code of Criminal Procedure merely provides for appeal being filed against an order passed under Section 514 and does not say anything as to how the appeal has to be disposed of, and the question naturally, therefore, arises whether the provisions of Chapter XXXI of the Code could be made applicable to the hearing of the appeal under Section 515. If the provisions of Chapter XXXI do apply to the hearing of an appeal under Section 515, then in that case a question will arise whether Section 423 of the Code can be interpreted as to give to the appellate court power to remand the case.

There has been some difference of opinion even in respect of the interpretation of Clauses (c) and (d) of Sub-section (1) of Section 423 as to whether these clauses give jurisdiction to the appellate court to remand the case. This is the view which has been taken by a Division Bench of this Court in Bhagwat Singh v. Emperor : AIR1926 All403 . The appeal in that case was under Section 406 of the Code. The question involved for decision was whether in proceedings under Section 107 of the Code, the Sessions Judge could order a retrial and Walsh and Dalai, JJ. held that an order for retrial was an incidental order within the meaning of Clause (d) of Sub-section (1) of Section 423 of the Code, and the same view has been taken in two subsequent Single Judge cases, Ram Sarup v. State, 1956 All LJ 649 and Murari v. State, 1957 All LJ 648.

5. The same question came up for consideration before a Full Bench in Mannilal v. Emperor : AIR1937 All305 . Sulaiman, C. J. (as he then was) held that neither Clause (c) nor Clause (d) aforesaid entitles the court to pass an order of remand. Under Clause (c) the Court might only alter or reverse the order appealed against and under Clause (d) make any amendment or any consequential or incidental order that may be considered just or proper; and it was held that ordering a fresh enquiry or taking fresh evidence did not amount either to amendment of any order or any consequential or incidental order. Niamatullah J. with whom Bennet J. concurred did not express any clear opinion in this respect, but appears to have been of the same opinion. He observed at page 313;

'It is suggested that Section 423, Clauses (c) and (d). Criminal Procedure Code, are wide enough to enable the appellate court to reverse the order of the

subordinate court refusing to make a complaint and, as a result of such order, pass the consequential order remanding the case to the subordinate court for fresh proceedings. This view is based on two assumptions neither of which holds good.'

6. It appears, therefore that according to the view taken in this Full Bench decision the appellate court does not have jurisdiction to remand a case, either under Clause (c) or Clause (d) of Sub-section (1) of Section 423. To what extent the three cases referred to by me earlier go counter to this Full Bench decision is not necessary for me to consider in this revision.

7. The question whether an appeal under Section 515 of the Criminal Procedure Code would be governed by the provisions of Chapter XXXI of the Code may also be considered, though if Section 423 does not give jurisdiction to the court to remand a case in cases other than those covered by Clauses (a) and (b) of Sub-section (1) of that Section, it would not be necessary to decide that question. But even so, it is the Full Bench decision in : AIR1937 All305 which may again be referred to. Niamatullah J. points out on page 313 of the report that the whole scheme of Chapter XXXI in which Section 423 occurs disclosed that it only applied to appeals (a) against convictions (Sections 407, 408, 410 and 411), (b) against acquittals (Section 417) and (c) certain orders (Sections 405, 406 and 406-A).

8. It would thus appear that according to the view taken in the Full Bench decision the provisions of Chapter XXXI apply to appeals against orders (other than those relating to convictions and acquittals) which are referred to in Sections 405, 406, 406-A and if that is so then Section 514 which is not to be found referred to in any of these sections gets excluded from the purview of Chapter XXXI.

9. Reference in this connection may also be made to section 486 which occurs in Chapter XXXV. Sub-section (1) provides for appeals in certain cases and then Sub-section (2) of that section specifically provides that the provisions of Chapter XXXI so far as they are applicable apply to appeals under that section. The inference is obvious that but for the provisions of Sub-section (2) the provisions of Chapter XXXI relating to appeals would not have been applicable to an appeal under Sub-section (1) of Section 486.

10. It is thus clear that the provisions of Chapter XXXI of the Code do not, in the first place, apply to an appeal under Section 515 and even if they do Section 423(1), Clauses (c) and (d), would not, in view of the Full Bench decision in : AIR1937 All305 , permit the appellate court to pass an order remanding the case for reinvestigation.

11. The question then arises whether the appellate Court has any inherent jurisdiction to remand the cases and if there is no such jurisdiction, what could be the order which alone could be passed by the appellate court when the order passed by the Magistrate under Section 514 was found to have been made without following the proper procedure.

12. So far as inherent jurisdiction of the court is concerned we have again the Full Bench decision referred to above in which Sulaiman, C. J. observed:

'I do not think that an appellate court can invoke the aid of its inherent jurisdiction in ordering a subordinate court to do something in a case. In the first place new categories of inherent jurisdiction should not be invented; particularly if prior to 1923 no appeal was at all permissible. In the second place inherent jurisdiction is generally confined to proceedings before the appellate court and does not include authority to issue orders to the court below directing it to be something in the case. If such inherent powers were invoked, then provisions of the Code would become quite unnecessary.'

13. In this view of the jurisdiction of an appellate court to pass an order in appeal, all that the Sessions Judge could do was to dismiss the appeal if it was satisfied that the order passed against the applicant was passed after due observance of the procedure prescribed under the law and was otherwise justified. If the Sessions Judge found that the proper precedure had not been followed by the Magistrate and the order passed against the applicant could not be upheld on that account, it would have been enough for him to set aside his order and conclude his judgment without giving any specific direction to the Magistrate to proceed against the applicant afresh, i.e. without saying anything as to whether or not any further proceedings were to be taken against him by the Magistrate.

In this view I am supported by a decision of the Supreme Court in Ghulam Mehdi v. State of Rajasthan : AIR 1960 SC1185 . In that case also the proceedings before the Magistrate were under Section 514 of the Code and the order was passed by the Magistrate without giving show cause notice to the sureties. Their Lordships, therefore, held that the Magistrate could not proceed to attach the property of the appellant before him unless a proper notice was given to him and he was given a proper opportunity to show cause why he should not pay the amount of the bond. Their Lordships, therefore, allowed the appeal and set aside the order of attachment but did not proceed further to say anything as to whether or not the Magistrate were to take any further steps against the sureties. The order of the Sessions Judge even in this case might have just stopped after saying that the order passed against the applicant was quashed,

14. This revision, is therefore, allowed. To the extent it concerns the presentapplicant Malkhan Singh, so much of theoperative portion of the order of the Sessions Judge which reads 'The appealsare therefore allowed and the order ofthe court below is set aside' will stand.The rest of the order is quashed.