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Court : Allahabad

Decided On : Aug-29-1959

Reported in : AIR1960All436; 1960CriLJ879

Judge : B.R. James, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 139A(1), 423 and 439

Appeal No. : Criminal Ref. No. 29 of 1959

Appellant : Gulab Singh

Respondent : State

Judgement :
ORDER

B.R. James, J.

1. This Reference under Section 438, Cr. P. C. by the Sessions Judge of Oral illustrates the danger, of technical legalism perpetuating an injustice, in the instant case allowing a rank trespasser to make wrongful gain at the expense of the users of a State highway. Normally I would have disposed of it in a few lines, but since, despite the dictum of Bose, J. in State of U. P. v. Mohd. Nooh AIR 1958 SC 86 that :

'Justice should be administered in our Courts in a common sense liberal way and should be broad-based on human values rather than on narrow and restricted considerations hedged round with hairsplitting technicalities,'

this Court is coming across an increasing number of References which rest on pure technicalities unrelated to the equities of the cases, I think it desirable to consider the present Reference in some detail so as to exlpain the principles which subordinate Courts should follow in dealing with cases under Ch. XXXII of the Code.

2. The facts as recited in the Sessions Judge's Order of Reference are these: The P.W.D. District Engineer made a report to the Magistrate that one Gulab Singh had made an encroachment to the extent of nine feet by nine feet on the Lucknow-Jhansi pucca road in the town of Orai by constructing a shop on it. The learned Magistrate made a conditional order under Clause (1), of Section 133 Cr. P. C. requiring Gulab Singh to remove the said encroachment within fifteen days or to show cause why the order should not be enforced.

On the date fixed for hearing Gulab Singh moved an application in which he neither admitted nor denied that his shop stood on the highway; he only prayed for a local inspection. The learned Magistrate recorded the statements of the local Lekhpal and the P.W.D. Overseer. The former filed a map and stated that the shop stood on land forming part of the highway. The Overseer corroborated him. Gulab Singh adduced no evidence in rebuttal.

The learned Magistrate thereupon made his earlier order absolute. Gulab Singh went up in revision to the Sessions Judge The main point he urged before the latter was that a breach of Clause (1)of Section 139A had been committed inasmuch as the Magistrate on Gulab Singh's appearance bad omitted to 'question him as to whether he denies the existence of any public right in respect of the way'. The argument found favour with the learned Judge, who thereupon proceeded to make the present Reference.

3. The learned Judge has fallen into more error than one. In the first place, the Magistrate had a right to assume that whatever Gulab Singh's defence Was he

had embodied it in his written application, and in this application there was no denial of the encroached land being part of the highway. Hence no useful purpose would have been served by putting oral questions on the same subject. By the omission to put questions under Section 139A(1) no prejudice was caused to Gulab Singh. In the analogous case of the application of Section 342 Cr. P. C, the Supreme Court in Moseb Kaka v. State of West Bengal : 1956 CriLJ940 held :

'It is well recognised that a judgment is not to be set aside merely by reason of inadequate compliance with Section 342 Cr. P. C. It is settled that clear prejudice must be shown... it is up to the accused or his counsel in such c-ases to satisfy the Court that such inadequate examination has resulted in miscarriage of justice ..... if the counsel was unableto say that his client had in fact been prejudiced and if all that he could urge was that there was a possibility of prejudice, that was not enough'.

The same principles must apply in the case of Section 139A (1) also; that is to say, unless prejudice can be clearly demonstrated, the non-questioning of the person concerned cannot be deemed to vitiate the' Magistrate's order.

Secondly, the provision regarding questioning in Section 139A (1) is not mandatory, but merely directory. In Pratap Singh v. Shri Krishna Gupta : [1955]2SCR1029 , the Supreme Court, approving the principle enunciated by the Privy Council in Punjab Co-operative Bank Ltd. v. Commr. of Income Tax, Lahore that as general rule an absolute enactment must be obeyed or fulfilled exactly but it was sufficient if a directory enactment be obeyed or fulfilled substantially, observed :

'We deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vita! and go to the root of the matter : they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad-based, commonsense lines.'.

The provision in Section 139A (1) being only directory, and the Magistrate having substantially complied with the law and no prejudice having been caused to Gulab Singh, the Magistrate's final order cannot be impugned.

5. Thirdly, when Gulab Singh himself never denied the encroachment upon the highway and when he took no steps to rebutt the unambiguous testimony of the Lekhpal and the Overseer, it should have been perfectly clear to the Sessions Judge where the equities of the case lay. It does not appear to have occurred to him that the sole object of Gulab Singh in coming to him in revision was to retain his shop on a part of the highway for as long as possible and thereby continue to make wrongful gain, the only persons to suffer being members of the public who use the highway.

The best this man could do was to advance the purely technical argument of non-questioning underS. 139A(1). He was Jucky enough to entangle the learned Judge in the technicality. I have already shown how the Supreme Court deprecate technicality. Subordinate Courts are bound to obey that august Court. The Magistrate's order in the present case is a just one and cannot be challenged on the ground set out by the Sessions Judge.

6. Finally, there is the law which governs cases under Ch. XXXII of the Code. Experience shows that many District Magistrates and Sessions Judges have got into the habit of dealing with a criminal revision as if it were an appeal. This is incorrect, for there is a real and substantial distinction between a revision and an appeal and the two must be dealt with on different principles.

As observed by Allsop, J. in Emperor v. Jafer Khan : AIR1935 All814 , with whom I respectfully agree, in an appeal the appellant is given a statutory right to demand adjudication upon a question of law or on a question of fact or on both; but when a matter comes up in revisional jurisdiction the applicant has no right whatsoever beyond the right of bringing his case to the notice of the Court, and it is then for the Court to interfere in exceptional cases where it seems to it that some real and substantial injustice has been done.

In an appeal, the appellant has to be heard as a matter of right; but in a revision the applicant, as is clearly enacted in Section 440 Cr. P. C., has no such right unless his case falls under Section 436 or Clause (2) of Section 439. The fact of the matter is that Ch. XXXII confers certain powers on the superior Court to ensure justice, but, unlike Ch. XXXI (which deals with appeals), none on the aggrieved person. It has been laid down in many rulings, e.g., Balgovind v. Em-peror, AIR 1926 Pat 393, Hanuman Prasad v. Mathura Prasad, 35 Cr. LJ 118 : (AIR 1933 Oudh 421), Kewal Singh v. Emperor, 37 Cr. LJ 1022 (All), Giani v. Emperor, 38 Cr. LJ 123 : (AIR 1936 Lah 1015), Alimahomed Joosab v. Kasturchand Ralabhai, 40 Cr. LJ 346 : (AIR 1939 Bom 89) and Jagdish Singh v. Emperor, 48 Cr. LJ 950: (AIR 1948 Pat 29), that where no prejudice has been caused to the aggrieved person a technical failure to comply strictly with the legal provisions should not be deemed to be an infirmity.

In the very recent case of Ram Deo Singh v. State : AIR1959 All511 Desai, J., with whom I entirely agree, has ruled that the revisional jurisdiction is discretionary and that it justice has been done it should not be exercised merely on the ground that a provision of law has been ignored or infringed. Indeed, a Full Bench of this Court in Shivkali Goswami v. Emperor : AIR1944 All257 has held tbat the High Court in the exercise of its revisional jurisdiction usually accepts the findings on questions of fact recorded by a subordinate tribunal unless the finding is manifestly perverse or patently erroneous, and that although the revisional powers of the High Court are wide they are discretionary and cart be exercised not as a matter of course but only where it is demanded in the interest of public justice.

In actual practice this High Court while sitting in the exorcise of its revisional jurisdiction accepts findings of fact of the Courts below except in very rare instances. It follows that Sessions Judges and District Magistrates in dealing with revisions should not interfere unless they are convinced that some real and substantial injustice has been caused; orders based on pure technicalities should be sedulously avoided.

7. For the reasons given above I can find no fault with the Magistrate's order directing the removal of Gulab Singh's shop from the highway. His order is hereby

confirmed and the Sessions Judge's Reference, which is a misconceived one, rejected. The offending shop shall be removed forthwith. Itis to be hoped that in future Sessions Judge and District Magistrate will take care to deal with revisions in a commonsense liberal way and in making References to this Court will avoid narrow and restricted considerations based on hair-splitting technicalities.