Desh Raj Vs. the State

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Court : Allahabad

Decided On : Mar-29-1973

Reported in : 1973CriLJ1415

Judge : K.B. Srivastava, J.

Appellant : Desh Raj

Respondent : The State

Judgement :
ORDER

K.B. Srivastava, J.

1. The petitioners in these five revisions were prosecuted separately for applying false trade marks, trade descriptions and for selling goods to which a false trade mark or false trade description had been applied, that is to say. for offences punishable under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958. They pleaded that their prosecutions were barred by limitation under Section 92 of that Act. The learned Additional City Magistrate, Lucknow, who held the trials accepted that plea and consequently ordered their acquittal. The State filed Criminal Appeals Nos. 60, 61, 62, 63 and 64 of 1967 against those orders of acquittal. The said five appeals were allowed by this Court and the cases were remanded for decision according to law. While doing so. this Court made the following observation :

I am. therefore, of the opinion ijhat in any view of the matter the prosecution was not barred by limitation and the Magistrate was in error in coming to a contrary conclusion. In the concluding paragraph of his judgment, the Magistrate had further observed that no independent witness had been examined by the prosecution to show that any customer was ever deceived and confused while making purchase of the genuine 'Shiv 151 Special' soap and the soap purchased by him was counterfeit. Here the Magistrate entered into wholly irrelevant consideration. Without entering into the merits of the evidence regarding discovery whether the offence charged had been made out against the respondents, he held that the case was not proved against the accused and that they were entitled to acquittal. It is clear that the Magistrate did not discuss the evidence nor base his conclusion regarding proof of the charge framed against the respondents.

In view of my conclusion that there was no bar of limitation and also in view of the above circumstances, the case appears to be a fit one for remand to the Magistrate for its decision according to law. Accordingly the appeals are allowed and the order of acquittal passed by the Magistrate... is set aside. The record of the case will be sent to the District Magistrate who shall transfer the case for disposal according to law to any competent Magistrate.

2. After the receipt of the five cases on remand, the successor Additional City Magistrate passed an order On December 26. 1969 for the cases to be listed on January 8, 1970 for the recording of the statements of the petitioners in their separate cases and for the framing of the charges. The cases did not come up for disposal on January 8 but instead on January 20, on which later date, the Public Prosecutor made an application for the decision of the cases on the basis of the evidence already on the record and on the basis of such other evidencs, as the prosecution might like to adduce. This application was opposed by the petitioners. The learned Magistrate heard arguments and ordered on February 19. 1970 that there was no occasion for recording the statements of the petitioners afresh or for framing of fresh charges and fixed February 24 for arguments.

3. Feeling aggrieved by that order, the petitioners filed five revisions before the Sessions Judge. Lucknow, praying for making references to this Court for

quashing that order. However, the Sessions Judge dismissed these revisions, giving rise to these revisions in this Court.

4. The first contention of the learned Counsel for the petitioners is that it is a universal principle of law that, when a matter has been finally disposed of by a Court, the Court is. in the absence of a direct statutory provision, functus officio and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. This principle, he enunciated by, resort to the provisions contained in Section 369, Code of Criminal Procedure, and argued that once the learned Additional City Magistrate had taken a decision on December 26. 1969. that he would record the statements of the petitioners and frame charges, finality attached to this order, and he had no power left to revise, or review, or substitute this order by another one which he subsequently passed on January 20. 1970 impliedly reversing the previous order and listing the cases for arguments only.

5. The argument has (proceeded on wrong premises. Finality attaches to a 'judgment' under Section 369. A 'judgment' must be clearly distinguished from an interlocutory order. This was so held by the Federal Court in Dr. Hori Ram Singh v. Emperor. . Wherein Sulaiman. J. held as follows:-

In England judgment is equivalent to a judgment of conviction or acquittal and is distinct from other orders in a criminal case. This will appear from an examination of paragraphs 260-4 in Vol. 9, Halsbury's Laws of England (Hail-sham Edition). In the Indian Code of Criminal Procedure, judgment is not defined, but various sections suggest that it means... Thus, judgment in the Code means judgment of conviction or acquittal.

See also Shaukat All Khan v. The State of Punjab . which lays down thflTftn' order refusing exemption to an accused from appearance in Court is not a judgment and can be recalled without involving any considerations relating to review of judgment in criminal cases; and Mirza Mohd. Afzal Beg v. State of Jammu and Kashmir. AIR 1960 J & K 1 (1960 Cri LJ 62), which holds that it is not valid to contend that the Magistrate is absolutely bound by an order on an interlocutory matter and has no right to pass a different order unless his earlier order was set aside by ,a superior

court in appropriate (proceedings. The principle applicable to judgment does not apply to interlocutory orders and a Magistrate is entitled to pass a different order at a later stage. The view propounded by the Federal Court is binding on this Court. Besides, it is obvious that Section 369 only precludes alteration of a final judgment and keeps intact the power of a Court to ipass different orders from stage to stage in so far as an interim or interlocutory matter is concerned. Bail may be refused once and granted a second time. A charge may be framed and modified. A warrant may be issued for arrest and may be recalled before it is executed. There is no use multiplying illustrations. Indeed. were it not so the smooth functioning of a Criminal Court would be partially, if not completely, retarded.

6. The next contention of the learned Counsel for the petitioners is that once a case is remanded for retrial, it can only mean a de novo trial and not a trial from an intermediate stage and, therefore, the learned Magistrate erred in ordering that he would hear only arguments on the basis of the material on the record and write out a fresh judgment. He has placed reliance for that on Pot Ram v. Emperor. 36 Cr. LJ 740 (Nag-). In that case, it was conceded that there was no power to order a retrial with the condition that the evidence already on record should be taken into consideration. It was further conceded that if there is to be a retrial the accused is entitled to demand that there shall be a de novo trial. There was, therefore, virtually no decision as the judgment proceeded on the basis of the concession made at the bar. The law to the contrary has been laid down in Motan Khan v. Emperor AIR 1927 Sind 175 (28 Cri LJ 417). Dibakanta Chat-terjee v. Gour Gopal Mukharjee AIR 1922 Cal 727 : 25 Cri LJ 27. Virumal Seoomal v. Emperor AIR 1941 Sind 144 - 42 Cri LJ 837 Nirmal Prasad Barua v. The State. AIR 1952 Assam 2 - 1952 Cri LJ 110. Dara Singh v. The State . State v. Ranganagouda AIR 1961 Mys 69 : (1961) 1 Cri LJ 398 and Ma-riyam v. State of Kerala, (1961) 2 Cri. LJ 97 (Ker). The majority of the High Courts, therefore, are of the view that a retrial as a result of an order of remand, may be from the stage of illegality and not necessarily from the very beginning. Section 423(1)(a). Cr.PC authorises the appellate Court in an apr peal from an order of acquittal, to reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence son him according to law, The word 'retried' occurring in Clause (a) is of wide amplitude and gives a

discretion to the appellate Court either to order a de novo trial, if the exigency of the situation so demands, or from the particular stage where the illegality was committed, or serious irregularity materially prejudicing an accused occurred, and it does not fetter the Court's discretion in any manner. The object is to subserve the ends of justice and how that object will be achieved, will be dependent upon the peculiarity of each case. That being so, there is no substance in this contention also of the learned Counsel that the retrial must commence from the very start. The stage from which it should start will invariably be indicated in the appellate judgment itself. It is true that the judgment of this Court is ,silent about it However, the trend appears in clear pictures. Only two points were argued, namely, that the cases were not barred by limitation and that, on the evidence on record, a conviction should have been recorded. This Court decided the first point and held that the cases were not barred by limitation. With regard to the second (point, it observed that the learned Magistrate had not disJ cussed the evidence threadbare in arriving at the conclusion that no offence had been committed and it is for that purpose that the cases were remanded. I am, therefore, clear in my mind that the intention was that the learned Magistrate should consider the entire evidence and write out his judgment on that basis.

7. Altogether, therefore, these revisions have no substance and are dismissed. The stay orders earlier passed are vacated. The record shall be sent back to the Magistrate concerned so that the trials are not further delayed.