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Sukedeb Barik Vs. Panchan Barik

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Court : Orissa

Decided On : Nov-18-1965

Reported in : AIR1967Ori11; 1967CriLJ228

Judge : G.K. Misra, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 439(1) and 439(5); Limitation Act, 1963 - Sections 5; Indian Penal Code (IPC), 1860 - Sections 420

Appeal No. : Criminal Revn. No. 116 of 1965

Appellant : Sukedeb Barik

Respondent : Panchan Barik

Advocate for Def. : Asok Das, ;L. Rath and ;G.K. Das, Advs.

Advocate for Pet/Ap. : P. Kar and ;B.B. Sahoo, Advs.

Disposition : Petition allowed

Judgement :
ORDER

G.K. Misra, J.

1. The petitioner has been convicted under Section 420, I. P. C., and sentenced to undergo R. I. for 3 months and to pay a fine of Rs. 100, in default to R. I. for 2

months. Petitioner Sukadeb Barik and the complainant-opposite party Panchanan Barik are residents of village Andola. Prosecution case is that the petitioner contracted to sell 5 decimals of his Gharabari (homstead) to the opposite party for Rs. 376. The entire consideration was paid on 21-6-64. Next day the petitioner executed the sale-deed (Ex. 1) and presented it for registration before the Sub-registrar at Chandhali.

Registration was effected. Without handing over the registration ticket to the complainant for taking delivery of the sale-deed, the petitioner left the place surreptitiously. Later on in the village the petitioner declared that the properly, covered by Ex. 1, belongs to his wife. Prosecution case is that the petitioner deceived the opposite party by fraudulently inducing him to pay Rs. 376. Though the property converted does not belong to him (the petitioner) but belongs to his wife and an offence under Section 420, I. P. C., was thereby committed.

The defence is that there was an agreement that the petitioner would give one decimal of his homstead for six decimals of wet land, to be given by Panchanan, by way of exchange. Taking advantage of the illiteracy of the petitioner , the complainant with the help of his henchmen and stooges got the sale-deed (Ex. 1) executed. No consideration was paid on the previous day. The petitioner came to know of the fraud perpetrated by the complainant after registration and accordingly he did not hand over the registration ticket. The sale-deed was not rend over and explained to him.

2. The learned Magistrate accepted the prosecution case. The learned Sessions Judge held that the prosecution failed to establish its case beyond reasonable doubt and that no offence had been committed. He however, dismissed the appeal on the finding that it was barred by limitation. Against the order of the learned Sessions Judge confirming the order of conviction, the criminal Revision has been filed.

3. The learned Sessions Judge disbelieved the prosecution case that Rs. 375 had been paid on a day prior to the registration of the sale-deed Ex. 1. Mr. Asok Das challenged the finding. After going through the evidence and reasonings of the learned Sessions Judge I am satisfied that he came to the correct conclusion. It is

somewhat surprising that Rs. 375 was paid without a receipt being taken in token of payment. There was no necessity to pay the entire sum a day before. If cash was available, the entire amount could have been paid before the sub-registrar. Panchanan seems to be a man of no substance. He had sold away his entire homestead with other agricultural land only a year before. He works in Calcutta major part of the year. Whenever he comes to the village, he works as a day labourer. For all these reasons, the finding that consideration had not been paid appears to be sound.

Admittedly the disputed land stands in the name of the wife of the petitioner. It is somewhat suprising that the complainant was anxious to purchase the land without making any investigation into the title of the petitioner. The petitioner is an illiterate person.

The sale-deed (Ex. 1) shows that he put his thumb impression on the sale-deed. In the circumstances, heavy onus lies on the prosecution to prove that the document was read over and explained to the executant. Taking all these circumstances into consideration, the case appears to be one of- civil nature and the learned Sessions Judge rightly observed that the defence version that the agreement was that the petitioner would give one decimal of his homestead for some agricultural land of the opposite party may be true. The complainant should have been well advised to file a civil suit for declaration of his title and recovery of possession, if in fact title passed to him.

For reasons given above, I am of opinion that the learned Sessions Judge came to the correct conclusion that no offence under section 420, I.P.C. was made out.

4. Facts leading to limitation may he stated in brief. Under Article 115 (b) (ii) of the Limitation Act, 1963 (hereinafter referred to as the New Act), the appeal was to be filed within 30 days of the date of order. In this case, limitation expired on 29-7-64. The appeal before the learned Sessions Judge was filed on 8-8-64. Thus the appeal was filed 10 days after the expiry of the period of limitation. The petitioner filed an application under Section 5 of the Act with an affidavit and medical certificate for condonation of delay. The ground made out in the application was that from 15-7-1964 he was suffering from blood dysentery and fever and he could

not come to Balasore. The doctor's certificate is dated 3-8-64, and shows that the doctor advised complete rest with restricted diet, for 15 days. By 3-8-64 the petitioner had come round. The learned Sessions Judge observed :

'Therefore, by 31-1-1964 or 1-8-64, the appellant ought to have preferred the appeal. No sufficient cause, therefore, has been shown for condoning this delay between 81-7-64 till 8-8-64 when the appeal was filed.

5. Mr. Kar raised two contentions: (1) Though the appeal before the Sessions Judge might be barred by limitation under Section 439, Cr. P. C., the revisional jurisdiction of the High Court is very wide and it should be exercised in favour of the petitioner even though the matter has come to the notice of the High Court at the instance of the petitioner and not otherwise and (ii) In the facts and circumstances of this case, the learned Sessions Judge should have condoned the delay, if any.

6. The first contention requires careful examination. Mr. Kar placed reliance on AIR 1954 Madh B 8 and AIR 1959 Mys 54 These two decisions fully support his contention. AIR 1959 Mys 54 has dissented from a decision of this Court in AIR 1958 Orissa 201. AIR 1954 Madh B 8 does not refer to any authority and merely expresses a bald view.

7. Section 439 (1), Cr. P. C. lays down that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in its discretion, exercise any of the powers conferred on a Court of appeal by different sections enumerated in the sub-section. Thus very wide powers are conferred on the High Court in the exercise of its revisional jurisdiction. It might interfere in revision at the instance of the aggrieved party, or when a third party brings the matter to its notice even though the aggrieved party has not taken any steps, or when the matter comes to its notice in course of inspection. It can exercise its revisional jurisdiction on a reference made to it by the Sessions Judge or the District Magistrate. Thus there is no restriction on the powers of the High Court for interference in revision. It matters little as to in what manner the case comes to the notice of the High Court.

To this wide power, there is one restriction as prescribed in Sub-section (5) of Section 439. It says that where under the Criminal Procedure Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The conflict of authority relates to the construction of this sub-section. It is agreed on all hands that by virtue of Sub-section (5) of Section 439, an aggrieved party cannot ask the High Court to exercise its revisional jurisdiction if no appeal was filed where an appeal lay. It is, however, contended that Sub-section (5) puts no restriction on the power of the High Court in interfering in revision even though the matter is brought to its notice by the aggrieved party by filing a revision. AIR 1954 Madh B 8 and AIR 1959 Mys 54 adopt this view.

The best exposition of law on this topic is found in AIR 1933 All 678 (FB), Sallabala Devi v. Emperor. The Full Bench expressed the unanimous view that the High Court is precluded to interfere at the instance of the convicted man himself; but there is no bar to the High Court acting under its own information or when information was supplied by a person other than the accused person. AIR 1959 Mys 54 made reference to this Full Bench decision but overlooked its ultimate conclusion. The Mysore decision extracted certain observations from the Full Bench case which have no relevance to the point in issue. Those observations were made in connection with discussion whether the revision petition would he entertained at the instance of the third party which in that particular case was not at the instance of the accused but his mother. Their Lordships clearly held that there was no bar in Section 439 to entertain a revisional application at the instance of a stranger or a third party and Sub-section (5) was not devised to punish the convicted person who did not appeal. AIR 1959 Mys 54, though purports to follow the Full Bench decision, overlooked the essential conclusion. With respect I must say that Madhya Bharat and Mysore cases, referred to above, have been wrongly decided.

In AIR 1958 Orissa 204 a full discussion of the question has been made and I am in respectful agreement with his Lordship that entertainment of a criminal revision at the instance of the aggrieved parly, where he failed to file an appeal having a right of appeal, would make Sub-section (5) of Section 439 a dead letter for all

purposes. This view is supported by two decisions of the Allahabad High Court in AIR 1959 All 413 and AIR 1959 All 751. His Lordship observed in the latter case that filing an appeal, which is barred by time, is as good as not filing any appeal. To such a case Section 439 (5) will apply and revision against the order is barred. In AIR 1959 All 413 his Lordship observed :

'It would be circumventing the provisions of Sub-section (5) if one were to treat the application as information and act on it; it would have been useless for the Legislature to lay down that no order of an inferior criminal Court should be revised at the instance of a party that could have appealed but did not, if the Court were to act suo motu. The exercise of revisional jurisdiction is in any case discretionary. It is discretional in the sense that after entertaining the application for revision and finding that the impugned order is Illegal or improper the Court is not bound to interfere with it.

A Court of revision may be bound to entertain an application for revision and to consider it on its merits but it is not bound to grant the relief asked for merely because the impugned order is found to be illegal or improper. This is the distinction between a revision and an appeal. When the exercise of revisional jurisdiction is discretionary even when a revisional application is validly made by the aggrieved party, it would be futile to say that the Court has discretion to treat a revision application that does not lie as information and act suo motu.'

I am in respectful agreement with the aforesaid observations.

In my view, AIR 1958 Orissa 204 was correctly decided. The substance of the matter, therefore, is that if the accused does not file an appeal, where he has a right of appeal, no proceeding by way of revision shall be entertained at his instance. This statutory bar cannot be circumvented by the High Court saying that it can treat revisional application at the instance of the party as an information or knowledge otherwise coming to the notice of the High Court for exercising its revisional jurisdiction under Section 439 (1). Sub-section (5) of S. 439 is the only exception to the wide revisional powers of the High Court under Sub-section (1) of Section 439. Mr. Kar's first contention must be rejected.

8. Mr. Asok Das placed reliance under Section 404, Cr. P. C., which lays down that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Criminal Procedure Code or by any other law for the time being in force. He contends that Article 116 (b) (ii) of the Limitation Act makes an appeal as being barred by time if filed after 30 days from the date of the order. No appeal lies under the Limitation Act. Section 404 does not at all refer to the Limitation Act. It merely refers to right of appeal conferred under the Criminal P. Code or under various special statutes under which a right of appeal is conferred. Limitation Act is not a law which confers a right of appeal. It merely bars the remedy of a party having substantive right of appeal. Rights of appeal have been provided under Cattle Trespass Act, Bengal Excise Act and many other such special statutes. Section 404 refers only to those statutes and not to the Limitation Act. Mr. Das's contention has no force.

9. The second contention of Mr. Kar is that in the facts and circumstances of this case, the delay of 10 days should have been condoned by the learned Sessions Judge. It is to be noted that no counter-affidavit was filed by Panchanan Barik before the learned Sessions Judge in the criminal appeal challenging the statement made by Sukadeb Barik. The medical certificate dated 3-8-1964 is to the following effect :

'I am to certify that Shri Sukadeb Barik of Andola village under Basudebpur P.S. Balasore, was suffering from acute amoebic dysentery with fever and was undergoing my treatment from 18-7-64. He was advised to take complete rest with proper medical treatment along with restricted diet for 'at least' 15 days. But now he is fully cured'.

The learned Sessions Judge has overlooked the underlined (here into ' ') expression 'at least'. He took it for 15 days only. He has accepted the medical certificate as representing the true state of affairs. On the basis of the medical certificate it can safely be concluded that the petitioner came round on 3-8-64. The doctor does not say that he was cured earlier than that date He advised him rest at least for 15 days and not to the maximum limit of 15 days. Thus till 3-8-1964 the petitioner had sufficient pause for not filing the appeal. It appears from the certified

copy of the judgment of the sub-divisional Magistrate, Bhadrak filed before the learned Sessions Judge in appeal, that an urgent copy was applied for 6-3-1964 and was delivered on 6-8-64, After having come round on 3-8-64, the petitioner appears to have come to Balasore on 4th, applied for urgent copy of the judgment on the 5th and got it on 6th. Grounds of appeal must have been prepared on the 7th and the appeal was filed at earliest point of time on 8-8-64. Thus after recovery the petitioner was very diligent and lost no time in filing the appeal.

The learned Sessions Judge did not notice these facts and missed the point on the wrong impression that the petitioner was to take rest only for 15 days and thereafter he was negligent in not filing the appeal in time. I am satisfied that the petitioner had sufficient cause for not filing the appeal in time and that the delay should have been condoned. The learned Sessions Judge exercised his jurisdiction with material irregularity in overlooking that the patent facts on record which made out sufficient cause for the delay. The delay is accordingly condoned and the appeal before the learned Sessions Judge is held to have been filed in time.

10. On the arguments advanced by the parties my conclusions are : (i) the prosecution has failed to make out an offence under Section 420, I. P. C.; (ii) the appeal before the learned Sessions Judge was in time and it should not have been dismissed as being time barred : and (iii) if the appeal had been time barred, it would have been as if no appeal had been filed. Revision at the instance of the aggrieved party is not maintainable and the High Court could not have interfered with the order on the footing that it got information otherwise even though the information was through the aggrieved party.

11. In the result, the judgment of the learned Sessions Judge is set aside and the petitioner is acquitted.

The revision is allowed.

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