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Court : Orissa

Decided On : Nov-19-1951

Reported in : AIR1952Ori237; 18(1952)CLT818

Judge : Panigrahi, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 350 and 561A

Appeal No. : Criminal Misc. Case Nos. 83 and 84 of 1951

Appellant : Arjun Padhi

Respondent : State

Advocate for Def. : B.M. Patnaik, Adv.

Advocate for Pet/Ap. : H. Mohapatra and ;R.N. Misra, Advs.

Judgement :

Panigrahi, J.

1. These are two petitions filed under Section 561-A of the Criminal Procedure Code by one Arjun Padhi who stands charged along with certain others for an offence alleged to have been committed under Sections 406/34 and 409/34, I. P. C. The case against the petitioner was started on First Information (No. 54 dated 6-5-48) and the charge sheet was filed against him and two others on 12-4-49.

The trial was taken up on 7-6-49 and charge was framed on 22-12-49 by the Subdivisional Magistrate of Boudh. After framing of charge witnesses for the prosecution were cross-examined and the case was posted to 11-1-51 lor adducing defence evidence. On 26-12-50 the record almirah of the Court was burnt and all the records relating to this case were destroyed. On the next day the house of the petitioner was searched and certified copies of the depositions of the witnesses, F. I. R. charge-sheet and some other papers were recovered and seized by the police. On 27-4-51 the accused filed a petition praying that the case should be taken up from the stage which had been reached before the records had been destroyed and also praying that the certified copies seized from his house may be returned. The magistrate rejected both the prayers and directed that a de novo trial should be started. The prosecution witnesses were examined but the case was not taken up due to the absence of the Circle Inspector and the Public Prosecutor until 28-6-51. The petitioner has thereafter moved this Court on the 10th July 1951 praying that the proceedings may be quashed and the order of the Magistrate directing a de novo trial should be set aside.

2. The petitioners' contention is that the Magistrate who took cognizance is still in seizin of the case and that the trial has not been interrupted by the transfer of the Magistrate or succession of one magistrate by another. Section 350 of the Criminal Procedure Code does not apply to a case like the present where the records of the Court have been lost. In terms, that section applies to a case where one Magistrate has ceased to exercise jurisdiction after having recorded evidence in a case and is succeeded by another Magistrate who exercises such jurisdiction. The succeeding Magistrate may act on the evidence recorded by his predecessor and proceed with the trial, or he may re-examine the witnesses and re-commence the inquiry or trial. Section 350, therefore, cannot be invoked to justify the order of the Magistrate directing a de novo trial. The question, then, is -- does the trial automatically come to an end when the Magistrate makes such a direction? If it does, as is contended by the petitioner, the charge already framed against him must be wiped put by an order of the Court quashing the proceedings on the ground of loss of records. If this were the true position in law loss or destruction of records, in courts, would not be infrequent and would encourage unscrupulous persons to see to their destruction. I have not been shown any authority that the

High Court can, in such circumstances, quash the proceedings and record an order of acquittal in favour of the accused.

3a. On the other hand, the reported cases go to show that in such circumstances the Court has inherent power to reconstruct its records and allow such secondary evidence as may be available, and, if this is not possible, it can order a fresh trial. The earliest Indian decision reported in 'GOOROO DYAL SINGH v. DURBAREE LAL', 7 WR 18, is of the year 1867. The records of the Trial Court were lost) in transit from the first Court to the second. The High Court held that the Court had to choose between two orders, namely either to direct the Court below to receive such secondary evidence of the contents of the original records as will be forthcoming or to direct an entirely new trial. It is true that there is no specific provision in the Criminal Procedure Code to enable the reconstruction of a lost record or to indicate how this reconstruction is to be done. But there can be no doubt that the inherent power of the Court to reconstruct such records has been recognised. In construing the Acts of a Legislature we should take for guidance the following remarks which are to be found in Dormet's Civil Law, Chapter XII, Section 17 page 80 :

'Since laws are general rules they cannot regulate the time to come, so as to make express provision against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of the law-giver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner that, without entering into the details of singular cases, he may establish rules applicable to them all; and next, it is the duty of the Judges to apply laws not only to what appears to be regulated by their express dispositions but to all cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it.'

According to Black on Judgments, Vol. 1 Section 125 the power of supplying a new record where the original has been lost or destroyed, is one which appertains to Courts of general jurisdiction independent of legislation. In America jurisdiction with regard to restoration of lost or destroyed records is, in some cases, expressly

conferred by statute, but a statute which gives such jurisdiction to a Court as to its own records, is merely declaratory of the common law, or merely cumulative, for every Court of general jurisdiction has, independently of the statute, the power to restore or supply its own records where they have been lost or destroyed, either in whole or in part, and this power may be exercised either after or before judgment, or on a motion during the trial of a case -- See 53 Corpus Juris p. 636. The Court should be satisfied that the record has been lost or destroyed and the only question in issue is the fact as to the previous existence and the loss or destruction of the original. A record, duly substituted by an order of the Court in place of the one lost or destroyed, has the same efficacy, force, and effect, as the original record would have -- no more and no less.

3-b. In 'NARSINGH NARAIN v. HURKHOO SINGH', 8 Cal LJ 521, it was held that where a judgment has been lost it is open to the judge to write from memory the substance of it. It, cannot be expected that the Civil Procedure Code would provide for such a contingency. The Court has to act on its inherent power to restore its record when it has been lest or destroyed. In a later case reported in 'RAJ GIR SAHAYA v. ISHWARDHARI SINGH', 11 Cal LJ 243, Mookherji, J. held that in order to prove the contents of the lost judicial record secondary evidence may be given, and there is no restriction as to the nature of the secondary evidence admissible. What applies to the records of the Civil Court would equally apply to those of the Criminal Court.

3c. In 'IN RE KAMAKSHYAMMA', AIR 1915 Mad 1038, the accused was convicted and sentenced in a criminal case, the records in the case being at the time lost. Justice Sadasiva Iyer held that the learned Additional Sessions Judge was entitled to replace the lost judgment by a new judgment and that the conviction and sentence passed by him was not void. In 'MARAKKARUTI v. VEERANKUTTI', 46 Mad 679, a Full Bench of the Madras High Court followed the decision in 'GOOROO DYAL v. DARBA', 7 WR 18. In that case the records in the Court of a District Munsif in South Malabar were destroyed in the Moplah Rebellion. Their Lordships relied upon a decision of the Supreme Court of New York and the decision in 'MACLEDEN v. JONHS', (1845) 42 American Decisions 640, a judgment of the Court of Alabama, and relied upon the following passage in that

case :

'Cases most frequently have occurred in which, by accident, the records of, Courts of Justice have been destroyed or lost, and it would seem strange if the common law had provided no adequate means by which the injuries growing out of such accidents should be averted or remedied.'

The Court is not bound to have the case re-heard. The prosecution is entitled to the benefit of having the charge, which has been framed, against the petitioner. In re-constructing the record the Court is not to decide what the evidence in the case is to support the charge but what the record of that evidence was before its destruction. In 'SANDER-SON v. WALKER', (1836) 40 ER 413, a petition heard by the Lord Chancellor who made an order upon it was lost. The Lord Chancellor allowed a certified copy of it to be filed instead of the original petition. See also 'DOUGLAS v. YALLOP', (1759) 97 ER 532.

4. On a review of the authorities, therefore, it is clear to me that the trying magistrate has got the power to reconstruct the records by substituting secondary evidence. I would not uphold his order directing that there should be a de novo trial as, on the facts stated, the case has already had a prolonged career. It has been pending from the year 1948 and more than three years have elapsed since information was laid against the petitioner. The evidence recorded, certified copy of which is available, is voluminous; the trial itself took more than a year before the charge was framed. In these circumstances it appears to me that it would be an abuse of the powers of the Court to subject the petitioner to further harassment by directing a new trial and recording of evidence afresh. I would, accordingly, direct that the trying magistrate should substitute certified copies of the despositions already made, and such other records as are available, and act upon that evidence in place of the original.

5. In his order dated 26-4-51 the Magistrate remarks

'There is absolutely no deposition before me and the case must therefore start de novo.'

As a matter of fact copies of all the depositions were produced before him by the prosecution. In his explanation sent to this Court the magistrate says

'It appears that the certified copies taken by the accused were not sufficient by themselves to reconstruct the records completely.'

The Assistant Government Advocate, appearing for the State, was unable to explain why he felt that the certified copies of the depositions of the prosecution witnesses were not considered sufficient. I should like to make it clear that if secondary evidence of the deposition of any particular witness or of any exhibit is not available it will be open to the Magistrate to re-summon the witnesses and record their evidence, but where such secondary evidence is available, it could be freely used.

6. I would not, therefore, quash the proceedings as prayed for by the petitioner, nor uphold the order of the trying magistrate directing that there should be a de novo trial. I have already stated that the certified copies now on the record can be used as substantive evidence. The Court may prepare fresh copies on copying stamp paper, to be supplied free of cost to the accused. If the Court finds that such copies as are available are not adequate to reconstruct the records completely, it will be open to the Magistrate to take such other evidence or further evidence, to help it to reconstruct the records, but always remembering that no fresh evidence is permitted which had not already been adduced before the records were destroyed. I have also to remind the Magistrate that adjournments should not be granted at the instance of the public prosecutor so frequently as has been done in the past. The accused is entitled not only to a fair, but also a speedy trial, and the leisurely way in which this case has been proceeding is, I regret to say, a slur on the administration of Justice. I do fervently hope that the Magistrate will use all the means within his power to bring the trial to a close as expeditiously as possible.

7. These petitions are accordingly disposed of in the light of the observations made above.