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Ashok Kumar Moharana Vs. State

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Court : Orissa

Decided On : Feb-24-1994

Reported in : 1994(I)OLR525

Judge : G.T. Nanavati, C.J. and P.C. Misra, J.

Acts : Probation of Offenders Act, 1958; Code of Criminal Procedure (CrPC) , 1973 - Sections 360

Appeal No. : Criminal Revision No. 473 of 1990

Appellant : Ashok Kumar Moharana

Respondent : State

Advocate for Def. : S.K. Das, Government Adv.

Advocate for Pet/Ap. : S.C. Sahoo, ;S.K. Nayak and ;S.K. Sahoo, Advs.

Judgement :

G.T. Nanavati, C.J.

1. While this revision application was heard by our learned brother Pasayat. J., a question arose as to whether the convicted accused in this case can be given benefit Under Section 360 of the Code of Criminal Procedure, 1973. It appears that it was contended on behalf of the State that as the Probation of Offenders Act (hereinafter referred to as 'the Act') has been applied in the State of Orissa.

Section 360 of the Code is no longer applicable in State. In support of that contention, that decision of this Court in Brundaban Misra and Anr. v. Kalu Misra, 75(1993) CLT 467 was cited In that case, our learned brother K. C. Jagadeb Roy, J. after considering the effect of Section 193 the Act held that the provision contained in Section 360 of the Code are not applicable in the state of Orissa as the Act has no been brought into force throughout the State Pasayat, J. doubted correctness of that judgment and for that reason this revision application is placed before us for deciding whether the said decision lays down the correct law. Pasayat. J. was the view that Sub-section (10) of Section 360 clearly indicates to the contrary He was also of the view that the situations contemplated by Secs 3 and 4 of the Act are not similar to those where Provisions of Section 360 are applied. In his order he has referred to the fact that in a large number of cases this Court has applied Sections 360 and 361 of the Code. As an instance he has referred to the case of Saradhakar Sahu v. State of Orissa, 59(1985) CUT 297, simulteneously observing that the point raised in this petition was not specifically considered either in that case or in the other cases.

2. Under the old Code of Criminal Procedure power was conferred upon the Court to release certain convicted offenders after admonition or on probation of good conduct instead of sentencing them at once to any punishment. The said provision was, however, not found sufficient and, therefore, in 1931 the Government of India prepared a draft of Probation of Offenders Bill and circulated it to the then Local Governments for their views. The Government of India could not proceed further with the Bill and, therefore, in 1934 it informed the Provincial Governments that there was no prospect of Central legislation being undertaken at the time and there would be no objection to the provinces undertaking such legislation. A few provinces accordingly enacted their own probation laws. Several States did not have separate probation laws at all and even in States where there were probation laws they were not uniform and were not found to be adequate to meet the requirements. Considering these deficiencies and 'increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of the society without making him subject to the deleterious effects of jail life and also the necessity to have a Central Law on the subject, the Parliament enacted the Probation of Offenders Act, 1958. Section 19 of the said Act provides that

subject to the provisions of Section 18, Section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force. The Code referred to in that section is the Code of Criminal Procedure, 1898. The said Code has now been repealed by the Code of Criminal Procedure, 1973. Sub-sections (1), (3), (4),

(5) and

(6) of Section 360 correspond to Sub-sections (1)), (1-A), (2),

(3) and

(4) of Section 562 of the old Code. Section 360 also contains provisions which correspond to old Sections 563, 563 and 564 of the Code. Sub-section

(10) of Section 360 provides that--

'Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960, (16 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.'

In this context we have to consider whether Section 360 of the Code which came to be enacted subsequently, i.e., after Section 19 of the Act was enacted, can co-exist with Section 19 or will not apply where the provisions of the Act are applied.

3. What is concluded by the learned Advocate for the petitioner is that the new Code is a subsequent legislation covering the same field. The legislature while enacting the new Code was aware of the existence of the Act and Section 19 thereof. Even then it did not amend Section 19. Section 360 is more exhaustive than Section 562 of the old Code. Moreover, while enacting Section 360, the legislature has also provided in Sub-section (10) that nothing in the section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (16 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders. According to the learned Advocate, all these indicate that the legislature wanted both Section 360 of the old Code and the relevant provisions of the Act to apply and, therefore, it will be for

the Court to decide benefit of which provision should be made available to the accused. In support of his submission, the learned Advocate has relied upon the decision of the Gauhati High Court in State of Assam v. Cheniram Saikia and Anr., 1993 (II) Crimes 469. In that case, it was contended on behalf of the State of Assam that as the provisions of Section 19 of the Probation of Offenders Act, 1958 were made applicable to the State of Assam, Section 360 of the Criminal Procedure Code did not apply in the State. The Gauhati High Court after examining the provisions of the Act and Section 360 of the new Code, observed :

'.....If it would have been the intention of the legislature not to apply Section 360 Cr PC to the areas where the Act is in force it would have been expressly stated in the said Sec. 360. As this has not been done by implication we can safely hold that legislature intended that both the provisions of the Act and Section 360 Cr PC may co-exist of the Act and Section 360 Cr PC may co-exist in the same area. That apart Section 361 was newly added in the Cr PC, 1973 and this section, inter alia, provides that where in any case the Court could have dealt with an accused person under Sec 360 or under provisions of the Probation of Offenders Act, 1958 but has not done so, it shall record in its judgment the special reasons for not having done so. Thus from reading Section 361, Cr PC it is absolutely clear that intention of the legislature is that the provisions of Section 360 Cr PC and the Act may co-exist in the same area.'

It has further observed that:

'Considering the condition of the people of the country in some cases, it may not be necessary to invoke the provision of the Act and the case can be disposed of Under Section 360 Cr PC where the procedure is simple. The discretion shall have to be applied judicially by the trial Court as the Court would have to find out whether benefit of the provisions of the Act it necessary in any particular case.....'

In support of its view, the Gauhati High Court has relied upon two decisions of the Supreme Court in Surendra Kumar v. State of Rajasthan, AIR 1979 SC 1048, and Roshanali Gurhanali Syed v. State of Gujurat, AIR 1982 SC 784. It has disagreed with the view taken by the Kerala High Court in State of Kerala v. Chellappan George and Ors., 1983 Crl. L.J. 1780, as it was of the opinion that the intention of

the legislature is that both the provisions can co-exist, even in the same area.

4. Neither in the case of Surendra Kumar (supra) nor in the case of Roshanali (supra) such a question arose for consideration by the Supreme Court. It is, therefore, difficult to appreciate how any support could have been derived from those two judgments. With respect to the inference drawn as regards the intention of the legislature, with due respect, it is not possible to agree with the reasons given by the Gauhati High Court in support of the same. Section 361 of the Criminal Procedure Code costs an obligation on the Court to record its reasons for not applying Section 360 of the Coda or the provisions of the Act. That would only mean that the legislature intended that in the areas where Section 360 applies benefit of that section should be given to the accused and where the provisions of the Act apply benefit of those provisions should be given to the accused, and if the Court does not grant the available benefit to the accused then it shall record its reasons for not giving that benefit. He cannot read more in that section. A provision casting an obligation to record reasons for not giving benefit of Section 360 or provisions of the Act, as the case may be, cannot be construed as a provision conferring a discretion on the Court either to apply Section 360 or the provisions of the Act, It is also not correct to conclude that in absence of any specific provision, by implication it can be held that it was the intention of the legislature that the provisions of the Act and also Section 360 of the Code are to co-exist in the same area. In view of the clear provisions contained in Section 19 the Act, it was really not necessary for the legislature to make such a provision in express terms. Legislature had to enact Section 360 as the provisions of the Act were not by then applied to all the areas of at the States and the accused in those areas would have been in a worse position in absence of such a provision.

5. In our opinion, the contention that Sub-section (10) of Section 360 is a clear indication of the legislature's intention that, both the provisions of the Act and Section 360 of the Code, are to apply even in the same area, has also no substance.

6. It appears to us that, as Section 360 of the Code is a subsequent Legislation and lest it may be contended that for the said reasons the provisions of the Act

even though were applicable till then ceased to apply, the legislature specifically made it clear that enactment of Section 360 is not to affect the applicability of the provisions of the Act. It is difficult to appreciate how from such a clarification by the legislature a further inference can be drawn that the legislature intended both the provisions-Sec. 360 of the Code and the provisions of the Act to apply in the same area.

7. In our opinion the intention of the legislature has remained the same, viz., that in the areas where the Act is applied. Section 360 of the Code will not apply. The Code of Criminal Procedure. 1971 is an Act consolidating the amending laws relating to Criminal Procedure. It repealed the Code of Criminal Procedure, 1898. Section 8 of the General Clauses Act provides that where that Act, or any Central Act or Regulation made after the commencement of that Act, repeals and re-enacts with or without modification, any provision of a former enactment, then reference in any other enactment or in any Instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted. Therefore, unless we are able to spell out a different intention of the legislature, we will have to construe the words 'Sec. 562 of the Code' in Section 19 of the Act to mean the re-enacted provisions of Sections 360 and 361 of the Code.

8. The view we are taking is supported by the decision of the Punjab and Haryana High Court in State of Punjab v. Harbans Lal, 1983 Crl, LJ 13, wherein it is held :

'The universal application of Section 562 of the old Cods, thus ceased. The old Code has now been placed by the new Code and the analogous provision therein in Section 360 providing for release of offenders on probation of good conduct or after admonishing. The new provision now has to be read in Section 19 of the Act in place of S.561 of the old Code.'

A regards the effect of Section 361 of the new Code, the following observation has been made :

'It is note-worthy that Section 351 of the new Code of Criminal Procedure makes it incumbent upon a Court, if it does not want to deal with a case of an accused

person either Under Section 360 of the Code of Criminal Procedure or under the provisions of the Probation of Offenders Act (1958), to record special reasons in the judgment for not having done so. There was no analogous approvision in the old Code. The spirit of the Legislation now is that the twin beneficial provisions should alternatively be available to every Court be it whether in the form of Section 360 of the new Code or in the form of the provisions of the Act.'

9. The Kerala High Court also in the case of Chellappan George and others (supra) applying Section 8 of the General Clauses Act construed Section 19 as referring to Section 360 of the new Code. The Kerala High Court has also pointed out that co-existence of Section 360 of the Code and the provisions of the Act in any given area would lead to anomalous position because of the difference in provisions of the two statutes. Two statutes with significant difference cannot coexist at the same time in the same area. For this reason the Kerala High Court has taken the view that though Section 360 of the Cods as well as the provisions of the Act can certainly coexist, they cannot co-exist in the same area.

10. The Full Bench of the Himachal Pradesh High Court in State of Himachal Pradesh v. Lat Singh and Ors., 1990 Crl LJ 723, has also held that view of Section 8 of the General Causes has reference to Sac. 582 of the 1898 Code in Section 19 of the Act would have a reference to Section 360 of the new Code. In this connection it has observed as under ;

'.....The provisions of the Probation of Offenders Act, 1958 are more beneficial and result-oriented and wider in scope and applicability for the reformation and rehabilitation of the offenders as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life' than the provisions of Section 360. Therefore, an option has been given to the State Governments to apply or not to apply the provisions of the Act to the areas falling within their territory presumably keeping in view their respective law and order situation. No such option has been given as regards Section 360 which has been made applicable, broadly speaking, to the whole of India except the State of Jammu and Kashmir Consequently, Section 360 would be applicable to a State or an area within a State to which the provisions of Probation of Offenders Act have not been

brought into force.....'

The Himachal Pradesh High Court has also taken the same view as ours as regards the effect of Sub-section (10) of Section 360.

11. For the reasons stated above, we hold that Section 360 of the Code has ceased to apply to the State of Orissa as the Probation of Offenders Act has already been brought into force in the State and Brundaban Misra and Anr. v. Kalu Misra, 75(1993) CLT 467 lays down the correct law on this point. The matter will now go back to the learned Single Judge for hearing other points, if any. and for final disposal.

P.C. Misra, J.

12. I agree.

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