

Kanika Bewa Vs. State

Kanika Bewa Vs. State

SooperKanoon Citation : sooperkanoon.com/531110

Court : Orissa

Decided On : Jul-02-1975

Reported in : 1976CriLJ418

Judge : G.K. Misra, C.J. and; P.K. Mohanti, JJ.

Appellant : Kanika Bewa

Respondent : State

Judgement :

G.K. Misra, C.J.

1. The petitioner has been convicted under Section 429. Indian Penal Code and Section 11(1)(a) of the Prevention of Cruelty to Animals Act and sentenced to a fine of Rs. 100/- under Section 429, Indian Penal Code in default to undergo 10 days' S.I. No separate sentence has been imposed under Section 11(1)(a) of the Prevention of Cruelty to Animals Act.

2. Prosecution case is that the petitioner gave a lathi blow to a calf of P.W. 1 on 21-10-1971. The calf had a fracture in the left hind leg and died on 27-10-1971. P.W. 1 lodged the FIR on the very day the calf was injured. Charge-sheet was submitted on 13-3-1972 and cognizance was taken on 18-4-1972. The petitioner was convicted and sentenced as already stated on 30-4-1974 after the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the new Code) came into force on 1-4-1974. The defence was one of denial,

3. Mr. Ray for the petitioner contended that the conviction is unsustainable as it is based on no evidence. Mr. Patra, the learned Standing Counsel, on the other hand, contended that as the fine imposed was more than Rs. 50/- an appeal lay to the Sessions Judge under the Code of Criminal Procedure, 1898 (hereinafter to be referred to as the old Code) and no revision lies,

The case was initially heard by Mohanti, J., who referred the question to a larger Bench and this is how the case has come before us.

4. The following points arise for consideration:-

(1) Is the order of conviction sustainable on merits 2

(2) Is the revision maintainable?

(3) If the revision is not maintainable, what is the remedy open to the petitioner?

5. Section 429, Indian Penal Code and Section 11(1)(a) of the Prevention of Cruelty to Animals Act, 1960 run thus:-

429. Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

11. (1) If any person -

(a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes or, being the owner permits, any animal to be so treated;

XX XX XXhe shall be punishable, in the case of a first offence, with fine which may extend to fifty rupees, and. In the case of a second or subsequent offence committed within three years of the previous offence, with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

6. If the prosecution case that the petitioner gave a lathi blow to P.W. 1's calf is true, the conviction under both the sections is sustainable.

It is therefore necessary to examine the evidence if the prosecution case has been established beyond reasonable doubt. The only witness who is alleged to have seen the assault is Babaji Behera, P.W. 3. His entire evidence runs thus:-

I know the accused. The occurrence took place about two years back in the morning at 8 A. M. I found the calf of P.W. 1 was going towards the house of the accused. She came and gave a blow to its leg. I found that his bone was fractured. When I called P.W. 1. he came. I told about the occurrence. I went away.

Cross - I cannot say about the location of house of the accused. I cannot say because I do not know her.

It is clear from the answer given in cross-examination that P.W. 3 does not know the petitioner and does not know the location, of her house. Admittedly P.W. 1. P.W. 3 and the petitioner belong to the same lane and if P.W. 3 does not know either the petitioner or her house, It is difficult to accept his evidence as establishing the case of assault on the calf by the petitioner.

The learned magistrate in paragraph 6 of his judgment also took the same view, but did not ultimately discard the evidence of P, W. 3 as no question was put to him in cross-examination that he was deposing falsely. The learned Magistrate's view is rather curious. If the intrinsic evidence of a witness is unreliable, it cannot gather credibility merely because a question is not put in cross-examination that the witness was deposing falsely.

We accept the contention of Mr. Ray that the order of conviction is based on no evidence. The order of conviction is liable to be quashed if the same is not based on evidence, provided the revision is maintainable.

7. If the old Code applies, the revision is not maintainable. If the new Code applies, the revision is maintainable.

8. Sections 408, 413 and 439 (5) of the old Code are material, They are extracted hereunder:-

408. Any person convicted on a trial held by an Assistant Sessions Judge. District Magistrate or any other Magistrate, ...may appeal to the Court of Session.

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which...a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding 50 rupees only....'

439 (5). Where under this 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.

Shri L. Mohanty, who has passed the impugned order of conviction and sentence, is a Magistrate. First Class. The sentence imposed a fine of Rs. 100/- exceeding Rs. 50/- as prescribed in Section 413, An appeal lies to the Sessions Judge under Section 408, As an appeal lies to the Sessions Judge, the revision shall not be entertained by the High Court at the Instance of the petitioner, Thus if the old Code applies, the revision is not maintainable.

9. Sections 374(3)(a). 376(c) and 401(4) of the new Code are material in this connection and may be extracted:-

374 (3). Save as otherwise provided In Sub-section (2). any person,-

(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class,

XX XX XXmay appeal to the Court of Session

376 (c). Notwithstanding anything contained in Section 374. there shall be no appeal by a convicted person in any of ithe following cases, namely:

XX XX XX(c) where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees.

401 (4), Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

As Shri Mohanty who is a Magistrate, i first class, imposed a sentence of fine of Rs. 100/- under Section 376(c), no appeal lies. Consequently a revision would be maintainable under Section 401(1).

Thus if the new Code applies, the revision is maintainable,

10. The main question for consideration is whether the old or the new Code applies. Section 484 of the new Code deals with repeal and savings. So far as material. It runs thus:-

484. (1) The Code of Criminal Procedure, 1898. is hereby repealed.

(2 Notwithstanding such repeal,-

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 as in force immediately before such commencement, (hereinafter referred to as the old Code), as if this Code had not come Into force;

Provided that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code:(b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the old Code and which are In force immediately before the commencement of this Code, shall be deemed, respectively, to have been published. Issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code; XX XX XX

11. Section 484(2) for deals with pending proceedings. If a trial was pending by the date the new Code came into force, then the same shall be continued and disposed of as if the new Code had not come into force.

The proviso sets forth an exception Commitment enquiries held under Chapter XVIII of the old Code which were pending at the commencement of the new Code are to be dealt with and disposed of in accordance with the provisions of the new Code. This exception indicates the clear legislative intention that all other proceedings shall be dealt with and disposed of in accordance with the provisions of the old Code. The trial in which the order of conviction was passed was pending by 1-4-1974 when the new Code came Into force. It came to an end on 30-4-11974 when the order of conviction and sentence was passed. The order of conviction and sentence was passed under the provisions of the old Code and not under the provisions of the new Code. Thus far, there is no dispute.

The controversy is whether In filing the appeal and/or revision against the order of conviction and sentence the old or the new Code would apply.

12. Law Is well settled that a right of appeal Is a substantive right (Sea : [1957]1SCR488 , Garikapati v. Subbiah Choudhry), Their Lordships laid down the following propositions in paragraph 23 of the judgment. For convenience they may be extracted:-

(1) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(2} The right of appeal Is not a mere matter of procedure but is a substantive right.

(3) The Institution of the suit carries with It the Implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career, of the suit,

(4) The right of appeal Is a vested right and such a right to enter the euperior court accrues to the litigant and exists as on and from the date the Us commences and although it may be actually exercised when the adverse judgment is pronounced

such right is to be governed by the law prevailing at the date of the Institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(5) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary favtendment and not otherwise.

13. On application of the afore-! said principles it would be clear that the criminal case and the appeal to be filed against the ultimate decision are to be regarded as one legal proceeding and the right of appeal is a substantive right. This right of appeal is preserved to the petitioner till the rest of the career of the criminal case. This right exists from the date the cognizance was taken and not on the date the judgment was pronounced. The right of appeal of the petitioner is to be governed by the old Code as the cognizance was taken under the old Code and the trial took place under the old Code though the decision was rendered subsequent to the coming Into force of the new Code.

This vested right of appeal could be taken away by the new Code. In Section 484(2)(a) there is no provision either expressly or by necessary implication which has taken away this right of appeal. On the contrary, the proviso prescribing that commitment proceedings pending by the date the new Code came into force would be tried under the new Code gives ample indication by necessary Implication that the vested right of appeal under the old Code was preserved.

On the aforesaid analysis we are satisfied that the petitioner has a right of appeal under the old Code,

14. Mr. Ray. however, placed reliance on Section 484(2)(b) in contending that the sentence passed under the old Code after the commencement of the new Code shall be deemed to be a sentence passed under the new Code. The sub-sec-tion does not purport to deal with an order of conviction passed under the old Code, It merely refers to a sentence passed. An appeal is filed against the order of conviction and sentence. This sub-section therefore does not deal at all with the right of appeal against an order of conviction and sentence. By this subsection the

validity of certain sentences passed under the old Code is maintained to keep the sentence alive for the purpose of execution.

That apart, the sentences referred to, In this sub-section are sentences passed under the old Code which are in force immediately before the commencement of the new Code. In this case no sentence was passed before the commencement of the new Code and consequently the imposed sentence was not in force Immediately before the commencement of the new Code. The sentence passed in this case does not at all come within the ambit of Section 484(2)(b). We find no substance in the contention of Mr. Ray.

15. Reliance was placed on : 1975 CriLJ182 (B. P. Andre v. Superintendent. Central Jail). In that case the sentence had been passed under the old Code prior to the commencement of the new Code and the sentence had not fully run out and was in force. Their Lordships considered whether the appellant was entitled to set off under Section 428 of the new Code. In paragraph 3 they held that the sentence of imprisonment and fine passed against the petitioner under the provisions of the old Code shall be deemed to have been passed under the corresponding provisions of the new Code. They observed that it is well settled law that where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. Accordingly the prayer for set off was allowed. This decision is distinguishable in principle and has no application to the facts of this case. In that case the question canvassed was whether set off would be granted in respect of a sentence which was running even after the commencement of the new Code. That related to the execution of the sentence. Rightly Section 484(2)(b) was applied to invoke the benefits of Section 428. Whether the petitioner's right of appeal under the old Code had been preserved did not arise for consideration in that case. This Supreme Court decision must therefore be confined to its own facts while considering the applicability of Section 428 of the new Code to sentences which were running subsequent to its commencement.

16. (1974) 15 Gui LR 725 : (1976 Cri LJ 84) (Hiralal Nansa Bhavsar v. The State), a decision of the Full Bench, has fully discussed the matter and we are in respectful agreement with the ultimate conclusion taken therein. Doubtless : 1975

CriLJ182 was not referred to therein, but that makes no difference to the correctness of the conclusion.

17. On the aforesaid analysis we are of opinion that an appeal lay against the impugned order of conviction under Section 408 of the old Code, and no revision lies.

18. The next question for consideration is as to what relief the petitioner is entitled. We have held that the impugned order of conviction and sentence is based on no evidence and is liable to be quashed. It is, however, not open to us to set aside the order of conviction and sentence as the revision is not maintainable. The revision petition is to be returned to the petitioner for filing an appeal before the Sessions Judge if she so chooses. Under Article 115 (b) (ii) of the Limitation Act, 1963, the period of limitation for filing an appeal before the Sessions Judge is 30 days from the date of the sentence or order passed under the old Code.

19. Section 5 of the Limitation Act, 1963, can be invoked by the petitioner for condoning delay if she satisfies the Sessions Judge that there was sufficient cause for not preferring the appeal in time. In this case there would be sufficient cause for condonation of delay as the petitioner was faced with a difficult and complex legal problem as to whether an appeal would lie under the old Code or a revision under the new Code. We indicate the legal position so that there may not be difficulty for the Sessions Judge to condone the delay and hear the appeal.

20. We sum up our conclusions thus:-

- (1) The impugned judgment cannot stand on merits as it is based on no evidence.
- (2) An appeal lies under the old Code against the impugned order of conviction and sentence, and no revision lies.
- (3) This is a fit case in which the revision application should be returned to the petitioner so as to enable her to file an appeal before the Sessions Judge after making an application for condoning the delay under Section 5 of the Limitation Act.

21. On the aforesaid analysis, the revision is not maintainable. The revision application be returned to the petitioner to be filed in the appropriate court.

Mohanti, J.

22. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com