Joshy Vs. the State

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Court : Kerala

Decided On : Aug-23-1985

Reported in : 1986CriLJ263

Judge : S. Padmanabhan, J.

Appellant : Joshy

Respondent : The State

Judgement :
ORDER

S. Padmanabhan, J.

1. Crime 100 of 1985 of the Ernakulam Town North Police Station was registered against four accused for offences punishable under Sections 420 and 471 read with Section 34 of the Indian Penal Code and Sections 63 and 65 of the Copyright Act on the basis of the statement made by one Satheesh Sathyan, Public Relations Manager and power-of-attorney holder, Tharangini Records, Trivandrum.

2. Tharangini records claims to be the exclusive producers and distributors of cassettes recorded from the original plates manufactured in the Tharangini records. It is alleged that the accused are reproducing without permission certain cassettes for which Tharangini records is having absolute copyright. In the course

of investigation the police searched the premises where the petitioner is running the 'Swathi recording unit' and seized certain articles including equipments purported to have been used for making the infringed copies of records. They are kept in police custody itself as directed by the Magistrate. The case is even now pending investigation.

3. The de facto complainant Satheesh Sathyan filed Cri. M. P. 1302 of 1985, One Sebastian John filed Cri. M. P. 1301 of 1985 and the revision petitioner filed Cri. M. P. 1371 of 1985, all before the magistrate under Section 451 of the Code of Criminal Procedure for getting interim custody of the articles. Accepting the argument of the Asst. Public Prosecutor that the articles are case properties which require to be used at the trial for proving the allegations, the Magistrate rejected all the three petitions. Revision is against that order.

4. All the articles were admittedly seized from the possession of the revision petitioner whose ownership and right to possession over the articles is not disputed by anybody. The main objection is that they are articles alleged to be used for the commission of the offence and at this stage when investigation is only in progress no order for disposal of property could be made since they have to be subjected to examination by sound and track experts for the purpose of getting their opinion and used as evidence in the case. The revision petitioner contends that he has not committed any offence and no incriminating material has been seized from him. According to him, he is having the license to conduct recording of music and programmes which was produced before the Magistrate and he will be put to heavy loss if they are not returned. That aspect of the matter I shall consider later.

5. Section 64 of the Copyright Act as amended in 1984 reads:

64. Power of police to seize infringing copies.- (1) Where a magistrate has taken cognizance of any offence under Section 63 in respect of the infringement of copyright in any work; it shall be lawful for any police officer, not below the rank of sub-inspector, to seize without any warrant from the magistrate, all copies of the work wherever found, which appear to him to be infringing copies of the work and all copies so seized shall, as soon as practicable, be produced before the

magistrate.

(2) Any person having an interest in any copies of a work seized under Sub-section (1) may, within fifteen days of such seizure, make an application to the magistrate for such copies being restored to him and the magistrate, after hearing the applicant and the complainant and making such further inquiry, as may be necessary, shall make such order on the application, as he may deem fit.

6. The provisions of Section 64(1) and (2) of the Copyright Act were relied on by the State to contend that seizure of the work and plates used for making infringing copies, wherever found, is permitted without warrant and any person claiming interest on the materials will have to apply to the magistrate under Sub-section (2). The power of the police for seizure is not challenged by the petitioner. He only wants the materials to be given back after they are examined by the experts to find out whether any infringement of copyright was effected with these materials. In this case no application has been filed by anybody under Section 64(2) of the Copyright Act and no order has been passed by the magistrate under that provision. Therefore, the question whether such an order will be revisable or nor on account of the bar under Section 397(2) of the Criminal Procedure Code does not arise for consideration. That sub-section only confers power on the interested person to make an application and makes it obligatory on the magistrate to make such order as he deems fit after the necessary enquiries.

7. The main objection was that the order is interlocutory in nature and is covered by the prohibition contained in Section 397(2) Cr. P.C. which says that the revisional power under Section 397(1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. But the stand taken by the revision petitioner is that the order in this case is not an interlocutory order hit by the prohibition contained in Section 397(2). The general question whether an order passed under Section 451 of the Code will remain only as an interlocutory order under all contingencies or whether under certain circumstances it could be treated as an intermediate or even a final order revisable under the revisional powers in spite of the prohibition under Section 397(2) of the Code are matters which are only of academic importance so far as the case in

hand is concerned. There are certain decided cases which show that under certain circumstances such orders could be treated as intermediate orders or final orders as between the parties thereto. But such circumstances do not arise for consideration in this case.

8. Section 451 of the Code reads:

451. Order for custody and disposal of property pending trial in certain cases. - When any property is produced before any Criminal Court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Normally an order passed under Section 451 as distinguished from one passed under Section 452 is undoubtedly only an interlocutory order. It is actually not a disposal of property, but only an arrangment for proper custody pending conclusion of inquiry or trial. It does not settle the title, or even right to possession. Rejection of claim for custody under Section 451 will not preclude a party from making a claim under Section 452 or under any other provision. What is made under Section 451 is only an interim arrangement for the upkeep of the property for which the court entrusts a person with custody, to act according to further directions from the court, binding the person to certain conditions by bond or otherwise. Custody continues to be that of the court and the person who is given custody continues to be bound to obey further directions or orders from court. Until final disposal of the property is made under Section 452 after conclusion of inquiry or trial, he continues to be only as the representative of the Court holding the property on behalf of the Court. I had occasion to hold so in Yadav Agencies Pvt. Ltd. v. Philomina 1985 Ker LT 560 : 1985 Cri LJ 1798. In Pathu v. State of Kerala 1975 Ker LT 696, Janaki Amma J. had occasion to observe that under the circumstances of that case an order under Section 451 was a final order between the parties as it finally disposed of the rights of one of the parties who was a stranger to the litigation. There are other decisions also which took the same view.

AH those decisions could be taken as having interpreted the orders under Section 451 only on the facts and circumstances of each case. The fact remains that normally an order under Section 451 is only an interlocutory order to which the bar under Section 397(2) applies.

9. The term 'interlocutory order' has been used in Section 397(2) of the new Code only in a restricted sense and not in any broad or artistic sense. The concept of an interlocutory order in relation to the revisional jurisdiction was completely foreign to the old Code. That encouraged filing of revisions against all sorts of interim or interlocutory orders which led to the flooding of High Courts with revisions of all kinds resulting in huge arrears and consequent delays in the disposal of criminal cases pending for trial in the subordinate courts. Such delays on account of stay orders from revisions caused harassments to the poor litigants also. It was in the background of these facts and circumstances that the Law Commission submitted its report which formed the basis of the new Code of 1973 which included revolutionary changes in the powers of the High Courts. The powers of revision against interlocutory orders were taken away as it was found to be one of the contributing factors in the delay of disposal of criminal cases. Section 397(2) was incorporated in the 1973 Code with the avowed object of cutting out delays and ensuring fair and speedy trial. Paramount object is to safeguard the interest of the accused. It is in this background that the connotation of the term 'interlocutory order' appearing in Section 397(2) of the Code will have to be understood and interpreted. Decided cases have laid down that for the purpose of Section 397(1), revisable orders could be those which decide the rights and liabilities of parties concerning a particular aspect as distinct from orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties. Ordinarily and generally 'interlocutory' order will have to be understood to mean as a converse to the term 'final order'. But whatever is not final order cannot be taken as interlocutory order. If such an interpretation is placed, the revisional powers of the Sessions Court or the High Court will be rendered nugatory because only such orders on final determination of the action which are not appealable will become revisable. Evidently that is not the intention of the legislature when it retained the revisional powers of the High Court under the new Code. The retention of the revisional power and the bar in the exercise of such

power in relation to interlocutory orders will have to be harmoniously interpreted. Orders summoning witnesses, adjourning cases, granting or refusing bail, calling for reports and such other steps which have nothing to do with determination of the rights of parties and which are only steps in aid of the pending proceedings will no doubt be only interlocutory orders from which revision petitions are barred under Section 397(2). Normally, an order under Section 451 which is only for proper custody of the property pending conclusion of trial or inquiry could be taken only as a step in aid of the pending proceedings and as such interlocutory, unless some rights of parties are determined by such an order. Generally such an order will not determine any such rights and the converse are only exceptions. In the case of such interlocutory orders, revision is definitely barred under Section 397(2). Consequently the power of interference under Section 482 of the Cr. P.C. also may not be there normally. But if the order brings out a situation which is an abuse of the process of court or the interference of the High Court is otherwise required for securing the ends of justice, the bar under Section 397(2) cannot affect or limit the right of the High Court in interfering under the inherent powers. Such a contingency has not arisen in this case and the inherent power has not been sought to be invoked also.

10. On account of my earlier decision in Yadav Agencies' case 1985 Ker LT 560 : 1985 Cri LJ 1798 and in order to convince me that the order in this case purporting to be one under Section 451 of the Code is not an interlocutory order but only an intermediate order or a final order which is revisable, the learned Counsel for the petitioner brought to my notice certain decisions having bearing on this aspect. They are Amarnath v. State of Haryana : 1977 CriLJ1891 , Madhu Limaye v. State of Maharashtra : 1978 CriLJ165 , V.C. Shukla v. State : 1980 CriLJ690 and Varkey v. Govindan 1983 Ker LT 623.

11. In Amar Nath's case : 1977 CriLJ1891 , it was held:

The term 'interlocutory order' in Section 397(2) has been used in a restricted sense and not in any broad or artistic sense, it merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the

accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis. for insertion of this particular provision in Section 397. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2). But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory orders so as to be outside the purview of the revisional jurisdiction of the High Court.

12. That was a case in which the appellants were not included in the array of accused when the police charge was laid, for want of evidence against them. The magistrate accepted the report and set the appellants at liberty. Revision filed against that order was dismissed. The informant then filed a regular complaint impleading the appellants also. That was dismissed by the magistrate on the merits. In revision the Sessions Judge set aside the order and directed further inquiry. Without any further inquiry the magistrate summoned the appellants and put them to trial. Against that a petition under Sections 482 and 397 was filed before the High Court and it was dismissed on the ground that the order sought to be revised is only an interlocutory order. The Supreme Court held that the order was a matter of moment which decided a serious question as to the rights of the appellants to be put on trial and they were forced by the order to face a trial and hence it cannot be taken as an interlocutory order. That order has no comparison with an order under Section 451 of the Code. The principles laid down therein will not in any way help the petitioner to persuade me in entering a finding that the order in this case purporting to be one under Section 451 of the Code is not an interlocutory order.

13. In Madhu Limayes case AIR 1978 SC 47 : 1978 Cri LJ 165, what was decided was:

Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the 'final order'. But an interpretation and the

universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 297(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the ones in the 1898 Code.

14. In that case the appeal was against the framing of charge under Section 500 I.P.C. after rejecting the contentions of the appellant. The principles laid down therein also will not help the petitioner in his contention that an order under Section 451 is not an interlocutory one.

15. In V.C. Shukla v. State : 1980 CriLJ690 , it was said:

We must reiterate here even at the risk of repetition that the term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial because the bar contained in Section 397(3) of the Code would apply to a variety of cases coming up before the courts not only being offences under the Penal Code but under numerous Acts. If, therefore, the right of revision was to be barred, the provision containing the bar must be confined within the four corners of the spirit and the letter of the law. In other words, the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory, but intermediate or quasi-final.

16. All these decisions recognised the fact that it is the policy of the law incorporated in Section 397(2) that interlocutory orders, pure and simple, are not intended to be taken up in revision before the High Court resulting in unnecessary litigation and inconvenience and delay to the parties. The above decison also will not be of any use to the petitioner.

17. All these decisions were considered by Sivaraman Nair J. in Varkey v. Govindan 1983 Ker LT 623 and it was observed:

In showing cause, an opposite party can as well say that the proceedings are devoid of jurisdiction in the sense that the matter relates to a private dispute and not a public right. If such an objection is taken as part of the cause shown by an opposite party, the Magistrate before whom that objection is taken cannot but decide that question. If the decision goes against the opposite party, he may seek to revise it by invoking the revisional jurisdiction under Section 397(1) of the Criminal Procedure Code. Mere possibility of a preliminary objection to an order would not transform that order from an interlocutory to an intermediate order amenable to correction under Section 397 of the Code, notwithstanding the bar under Sub-section (2) thereof. An order on a preliminary objection, which, if considered favourably, would terminate the proceedings, would be amenable to revision notwithstanding the fact that, that order does not, in fact, qualify as a final order. Even orders on preliminary objections during interim stages of the proceedings would be revisable, if the objections are such as would terminate the proceedings, if accepted. The only order liable to be revised in this case would therefore be either an order upholding the objection raised by the opposite party or an order rejecting the objections. The preliminary conditional order does not cease to be one such, and therefore revisable, only because the respondents had filed objections including those to the jurisdiction or competence of the Sub-Divisional Magistrate to act under Section 133 of the Code, The revision if at all, would be not against the preliminary order, but only against a subsequent order either accepting or rejecting the objections. That order may be an intermediate and not interlocutory order. But the order under Section 133 is only an interlocutory order, pure and simple.

18. After having gone through all these decisions and after hearing both sides, I am not persuaded to think that an order pure and simple under Section 451 of the Code granting or refusing custody of property pending conclusion of trial could be considered as intermediate, quasi-final or final order enabling revision. The position may be different if there is determination of some right or right to possession which will prejudicially affect a party or cause miscarriage of justice. In the ordinary course granting or rejecting custody under Section 451 will not involve any such questions for reasons already stated by me. Properties produced before court during inquiry or trial may be required as material objects to be used or

identified during trial in relation to the offence. Its preservation may otherwise be necessary for final disposal at the conclusion of trial. Preservation for that purpose is the duty of court. Arrangements made by the court for proper custody may sometimes cause inconvenience to somebody. In the ordinary course that may not be a ground for treating the order as revisable. I do not mean to say that it is a universal rule of application.

19. But the impugned order in this case cannot be treated as one passed under Section 451 of,the Code. Section 451 only deals with orders for the proper custody of property produced before the court during any inquiry or trial. Condition precedent to an order under Section 451 is that an inquiry or trial must be pending and property must have been produced before court during the pendency of such inquiry or trial. In this case charge sheet has not been filed and the case is only pending investigation. Therefore there is no inquiry or trial pending. No orders could, therefore, be passed under Section 451. Orders could have been passed only under Section 457 of the Code which reads:

457, Procedure by police upon seizure of property: (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a. Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

20. We are not concerned with Section 458 because such a contingency has not arisen. Under Section 457(1) the Magistrate has to make such order as he thinks fit respecting disposal of such property or delivery of such property to the person

entitled to possession thereof. Section 457(2) provides that the Magistrate will have to order the property to be delivered to the person who is entitled to possession, if he is known, on such conditions as he thinks fit. In this case, there is no dispute regarding the person who is entitled to possession. Admittedly, revision petitioner is the owner of the articles and they were seized from him. There is no dispute that he is the person entitled to possession also. The only objections are that the articles are to be subjected to examination by experts in order to find out whether any offence has been committed with those articles, and that if necessary they, may have to be used during trial as evidence in relation to the offence. Petitioner says that these articles were purchased by him with heavy investment after huge loans also from Bank, that they are required for his profession which is the means of his livelihood and that even otherwise these articles are liable to be damaged. These facts are not disputed.

21. If the impugned order is treated as one under Section 457 (the order could only be treated as one under Section 457), it cannot be an interlocutory one. The order affects his right to ownership and possession and is likely to damage and prejudice him. Going by the principles laid down in the decisions 1 have referred to earlier, the order cannot be one coming under the prohibition in Section 397(2). There is no reason why the revision petitioner should be asked to suffer loss of income or damage by deterioration of the articles. After examination of the articles by the experts is over they could be given to the revision petitioner on such conditions as the Magistrate deems proper including conditions for production in court whenever called for in connection with trial or otherwise if it becomes necessary.

22. Bharat Heavy Electricals Ltd. Hyderabad v. State 1981 Cri LJ 1529 (Andh Pra) is an identical case in which the Bharat Heavy Electricals engaged a transport agency with the job of transporting certain items. The agency committed criminal breach of trust in relation to the items and a case was registered. Bharat Heavy Electricals applied for custody of the items pending investigation on the ground of extreme urgency of the items. Magistrate accepted those contentions, but rejected the prayer on the ground that the petition is premature and under Section 451 of the Code he could dispose of the items only after recording some evidence during

trial. In revision, the Andhra Pradesh High Court observed after referring to Sk. Muktear v. State : AIR1954 Cal350 , State of Mysore v. Laxmi Trading Co. 1968 (1) Cri LJ 269 (Mys) and A. Kamaluddin v. Abdul Salim 1972 Cri LJ 1160 (Ker) (in which the Kerala High Court held that when police seize property during investigation and the inquiry or trial has not commenced, order for disposal of property should be made under Section 523(1) and not under Section 516-A of the old Code):

In view of these decisions I hold that since in this case the charge-sheet has not been so far filed, there is no inquiry or trial pending and, therefore, orders could not be passed under Section 451 Cr. P.C. They could be passed only under Section 457, Cr. P.C. Under Section 457(1) Cr. P.C. when the seizure of property by police officer is reported to a Magistrate and such property is not produced before a Criminal Court during an enquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof. Therefore, in the case on hand, I am of the opinion that the Magistrate could pass an order directing the delivery of the property to the petitioner-company under Section 457(1) Cr. P.C. Even if I am wrong, I could still direct the delivery of the property to the petitioner-company under Section 482 Criminal P.C. in order to secure the ends of justice.

15. I do not agree with the learned Counsel for the respondent that it is an interlocutory order and no revision lies under Section 397(2) Cr. P.C. The order in question substantially affects the rights of the parties. If so, it cannot be considered to be an interlocutory order. (See Amar Nath v. State of Haryana 1977 Cri LJ 1891) (SC).

23. Bharat Mahey v. State of LJ. P. 1975 Cri LJ 890 (All) relates to a similar matter in a crime which was pending investigation. In that decision, the Allahabad High Court said:

The impugned order finally disposes of the tins of Dalda. It is not an interim arrangement for the delivery, custody or production of the case property, as and when required by the court. The corpus of the tins will cease to exist on their sale.

Hence it cannot be said that the sale proceeds would adequately represent the corpus of the property in question.

On a reading of Sections 457(2) and 458(1) Cri. P.C, the position is clear that both final orders and temporary orders with regard to the disposal of seized property are contemplated under these two sections. By no stretch of imagination can the impugned order be deemed to be in the nature of an interim order. It is a final order regarding the disposal of the goods in question. As such, the revision filed by the applicant in this Court will not be barred on the ground that it is an interlocutory order passed in a proceeding which is not revisable.

The criminal revision petition is allowed and the order of the Magistrate is set aside. The investigating agency will see that the alleged examination of the articles seized in the case by the sound and track experts is conducted and completed within a period of one month from today. Immediately after expiry of one month from today the investigating agency must make available the seized articles to the Magistrate for being delivered to the revision petitioner. The Magistrate will thereafter without delay deliver all the items to the revision petitioner on such terms and conditions, including conditions for preservation and production before court whenever called for, as he deems fit.