

Abdul Rasheed Vs. the State of Kerala

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SooperKanoon Citation : sooperkanoon.com/727712

Court : Kerala

Decided On : Oct-14-2008

Reported in : 2009CriLJ527; 2008(3)KLJ730

Judge : R. Basant, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 125, 126, 397(1), 397(2) and 482

Appeal No. : Cri.M.C. No. 3753 of 2008

Appellant : Abdul Rasheed

Respondent : The State of Kerala

Advocate for Def. : S.U. Nazar, PP

Advocate for Pet/Ap. : V. Chitambaresh, Sr. Adv.,; T.C. Suresh Menon,; Jibu P.

Judgement :

ORDER

R. Basant, J.

1. Does the petitioner have a right to challenge the impugned order in revision? If he has such a right, is he justified in coming to this Court with this petition under Section 482 Cr.P.C.,? These are the questions of importance raised at the

threshold in this Cri.M.C.

2. Against the petitioner a claim for maintenance under Section 125 Cr.P.C. was filed by the claimants - his wife and two minor children. That claim was decided ex parte by Annex.A order. The petitioner was directed to pay maintenance to his wife and two minor children at the rates of Rs. 1,500/- and Rs. 1,250/- and Rs. 1,000/- p.m. respectively. The petitioner filed an application to set aside the ex parte order. That petition was disposed of by the impugned order, copy of which is produced as Annexure-C. The court took the view that the petition is meritless and represents only an attempt to protract the proceedings to the maximum extent possible. The petitioner has come to this Court with this petition under Section 482 Cr.P.C. to challenge the impugned order rejecting his application to set aside the ex parte order filed under the proviso to Section 126 Cr.P.C.

3. I am called upon to invoke and exercise the extra ordinary inherent jurisdiction which is available to this Court under Section 482 Cr.P.C. Section 482 Cr.P.C. does not really confer any powers on the High Court. Instead, it saves certain powers which are already there vested inherently in all High Courts to act in aid of justice. It is trite that powers under Section 482 Cr.P.C. are 'awesome' in nature and can in an appropriate case be invoked even to do justice beyond the law. The only, primary and predominant consideration while exercising the jurisdiction under Section 482 Cr.P.C. is whether the interests of justice demand invocation of such extra ordinary inherent jurisdiction. By the very nature of the power - considering the width, amplitude and sweep of such powers, the High Court must be reluctant to invoke such powers as a matter of course. Where the aggrieved party has equally efficacious alternative remedy under law, such extra ordinary powers need not and should not be invoked by this Court Extra ordinary situations may call for extra ordinary responses and it is only under such circumstances that this court would be justified in invoking the powers under Section 482 Cr.P.C.

3. It is trite that when under the Code an alternative remedy exists the party must resort to such ordinary remedy to claim the relief which he wants. The extra ordinary powers being so wide in its sweep, this Court may in an appropriate case be justified in invoking such powers even when alternative remedy is available. But

that can only be an exception to the normal rule. The requirement of order and discipline in proceedings before court mandates that where specific avenues of challenges are available under the ordinary provisions of the Code, resort to powers under Section 482 Cr.P.C. should not ordinarily be made. I remind myself that it is not want of jurisdictional competence, but only a matter of self restraint imposed by court on itself that such powers cannot be invoked ordinarily unless exceptional reasons are there. Where remedies are otherwise available under the ordinary provisions of the Code resort to such extraordinary inherent jurisdiction will not be justified, unless exceptional circumstances of a given case warrant invocation of such powers in the interests of justice.

4. It is in this context that the question arises whether the impugned order is revisable or not. The learned Counsel for the petitioner submits that the impugned order is not a revisable order and consequently the availability of the option to challenge the order in revision cannot fetter his right to approach this Court with the petition under Section 482 Cr.P.C. The learned Counsel contends that the bar under Section 397(2) Cr.P.C. shall apply and inasmuch as the impugned order is an interim order, he has no right of revision and consequently he will be without remedy if it were to be held that this petition under Section 482 Cr.P.C. is not maintainable.

5. Section 397(2) Cr.P.C. on which reliance is placed reads as follows:

397. Calling for records to exercise powers of revision.- (1) xxx

(2) The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

6. An interlocutory order is not defined under the Code. There has been a dispute as to what order can be held to be an interlocutory order and what order can be held to be not an interlocutory order for the purpose of Section 397(2) Cr.P.C.

7. It is unnecessary to advert to the precedents in any greater detail in this order. The law appears to be well settled that all orders cannot be categorised into two

water tight compartments of interlocutory orders and final orders. Between these two categories of orders, another third orders. Between these two categories of orders, another third category of orders exists which are described to be intermediate orders, to which orders the bar under Section 397(2) Cr.P.C. does not apply. The orders which are not strictly final and which affect the rights of parties substantially though passed ad intermediate stage of a pending proceedings will fall under this third category of intermediate orders which can be revised.

8. A final order is certainly an order which finally concludes the proceedings before court. In that view of the matter, it appears to me that the impugned order is not even an intermediate order; but must be held to be a final order itself. I say so because an application is filed under the proviso to Section 126 Cr.P.C. to set aside an ex parte order already passed under Section 125 Cr.P.C. The order under Section 125 Cr.P.C. is a final order. An application is filed to set aside such ex parte final order. When that petition is dismissed, proceedings before the Family Court on the subject comes to an end. In this view of the matter, I hold that the impugned order is a final order to which the bar under Section 397(2) Cr.P.C. cannot at all apply.

9. An ingenious contention is raised by learned senior Counsel Sri. V. Chitambaresh that the impugned order is an interlocutory order notwithstanding the fact that the proceedings the test pending before court are finally closed and disposed of by the impugned order. The learned Counsel borrows from precedents to ascertain what an interlocutory order is. Reliance is placed by the learned Counsel on the decisions in *Madhu Limaye v. State of Maharashtra* (1997) 4 SCC 541; *State v. N.M.T. Joy Immaculate* : 2004 CriLJ2515 ; *K.K. Patel v. State go Gujarat* : 2000 CriLJ4592 and *Bhaskar Industries Ltd. v. Bhiwani Denim Apparels Ltd.* : 2001 CriLJ4250 and a host of other decisions on this aspect. The learned Counsel for the petitioner submits that these decisions clearly stipulate the test to distinguish between an interlocutory order and a non-interlocutory one. The Counsel relies on the specific passages in these decisions which lay down the test. The Counsel relies on the safe test to identify an interlocutory order referred to in para-8 of *Bhaskar Industries Ltd.*, in the following words:

8. The interdict contained in Section 397(2) of the Code of Criminal Procedure (for short 'the Code') is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The same test laid down by this Court through a series of decisions is this: if the contention of the petitioner who moves the superior court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not interlocutory in spite of the fact that it was passed during any interlocutory stage.

10. The Counsel also relies on the decision in K.K. Patel Para-11 in which also the test is spoken to in the following words:

11. That apart, the view of the learned Single Judge of the High Court that no revision was maintainable on account of the bar contained in Section 397(2) of the Code, is clearly erroneous. It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage vide *Amar Nath v. State of Haryana* : 1977 CriLJ1891 ; *Madhu Limaye v. State of Maharashtra* : 1978 CriLJ165 ; *V.C. Shukla v. State through CBI* 1980 Supp. SCC 92 and *Rajendra Kumar Sitaram Pande v. Uttam* : 1999 CriLJ1620 . The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable.

(emphasis supplied)

11. The same test is seen repeated in para-12 of *State v. N.M.T. Joy Immaculate* in the following words:

The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings. If so, any order passed on such objections

would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code.

12. I have no quarrel with the proposition that in respect of an order can apply. But the converse cannot be said to be correct or acceptable. In the course of a proceedings when an objection is raised as to maintainability and that objection is turned down 11 can be said that the order is interlocutory in the sense that the proceedings are not brought to termination by such an order. The decisions referred above clearly stipulate that the mere fact that the proceedings do not come to an end on the basis of such an order will not render such an order an interlocutory one as to be beyond the revisional jurisdiction of the court under Section 397(2) Cr.P.C. But in a case where the proceedings pending before the court are actually brought to termination by the impugned order that order must certainly be held to be a final one in the strict sense and a non-interlocutory one to which the bar under Section 397(2) Cr.P.C. cannot at all apply.

13. The interesting contention raised by the learned Counsel for the petitioner is that if the contention of the petitioner were accepted, the ex parte order will have to be set aside and the proceedings will have to continue. The Counsel hence contends that if the petitioner were successful in the contention raised by him it will not terminate the proceedings finally; but the matter will have to go further and a final decision will have to be rendered in the claim under Section 125 Cr.P.C. It is hence that the Counsel contends that the impugned order is an interlocutory and a non-revisable one. He hence contends that this petition would be maintainable.

14. Interesting though the contention be, I am afraid the same cannot be accepted. In the instant case proceedings have come to final termination by the impugned order. If a contra decision were taken, may be the proceedings under Section 125 Cr.P.C. may have to continue. But definitely that is not the invariable test to identify an interlocutory order and distinguish the same from a final order which is revisable. In a case where matter continues in spite of the impugned order, the test laid down by the decisions referred above would apply; but in a case where the objections have been upheld and the proceedings have been brought to final termination, there is no difficulty in identifying whether the order is interlocutory or

final. The proceedings have actually been brought to termination by the impugned order. In the absence of challenge the proceedings would not continue. In that situation the fact that the challenge against it if upheld would oblige the court below to continue with the proceedings will not reduce that final order to an interlocutory one. The test stipulated in the above decisions shall not apply and need not be pressed into service in such a situation, The entire proceedings have come to termination by the impugned order and in that view of the matter the impugned order is a final one and hence revisable as the bar under Section 397(2) Cr.P.C. will not apply to such an order. The feasible test accepted by the Supreme Court referred above can be pressed into service to distinguish between an interlocutory order which is not revisable and in intermediate order which is revisable. It is unnecessary to insist that an order which is undisputedly final (in the sense that no proceedings survive) should also answer that test.

15. It follows that the impugned order is a final order and hence a revisable order. I have already noted that notwithstanding the fact that the order is revisable, in an appropriate under Section 482 Cr.P.C. But this definitely, according to me, is not a fit case where such extraordinary inherent jurisdiction can or ought to be invoked notwithstanding the existence of an equally efficacious alternative remedy. The petitioner must hence be relegated to seek his relief by revision before the appropriate forum and in that view of the matter, this CrI.M.C. only deserves to be dismissed.

16. This CrI.M.C. is, in these circumstances, dismissed. I may, however, hasten to observe that the dismissal of this CrI.M.C. will not in any way fetter the rights of the petitioner to challenge the impugned order by instituting a revision petition before the appropriate court.

17. The certified copy of the order produced - Annexure-C shall forthwith be returned to the learned Counsel for the petitioner.