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Court : Rajasthan

Decided On : Nov-16-1954

Reported in : 1955CriLJ1390

Judge : Bapna and; Ranawat, J.

Appellant : Arjun

Respondent : State of Rajasthan

Judgement :

Ranawat, J.

1. Has is an application by Arjun, son of Sarwan Mina, under Article 226 of the Constitution of India, and also Under Section 491, Criminal P. C.
2. The petitioner was convicted Under Section 290 OF the Jaipur Penal Code (corresponding to Section 302 of the Indian Penal Code) by the Sessions Judge of Jaipur ob 11-5-1942, and sentenced to life imprisonment, which was described by the Sessions Judge as -equivalent to 25 years' rigorous imprisonment. The judgment of the Sessions Judge was confirmed by the then High Court of Jaipur on 2-12-1942.
3. The case of the petitioner is that after taking into account the remission awarded to him, he has already undergone a sentence of a little more than 20 years'

rigorous imprisonment and According to the law then in force a sentence of life imprisonment passed by the Courts of the former Jaipur State has been held to be of 20 years' rigorous imprisonment only, and that he is, therefore, entitled to be released from jail. The jail authorities, it is said, are detaining him on the assumption of his sentence being of 25 years' rigorous imprisonment as specified in the warrant of imprisonment by the Sessions Judge of Jaipur.

4. The Superintendent of Jail, Jodhpur, where the petitioner is undergoing his sentence, has verified by his letter No. Jud/Pet/C. 9887/6308 dated 26-8-1954, that the petitioner has undergone a sentence of 12 years 3 months and 20 days, and has earned a remission of 7 years 11 months 24 days, thus he has undergone a total sentence of 20 years 8 months and 14 days upto the date of the report.

5. The Deputy Government Advocate has raised a preliminary objection that this petition is not competent, as the petitioner had once before applied Under Section 491, Criminal P. C., and Article 226 of the Constitution of India, and his application was dismissed by this Court on 7-1-1952.

6. It may be noted here that the petitioner had moved this Court under Article 226 of the Constitution of India on 15-11-1951, previously, and his petition was dismissed on the ground that though a sentence of life imprisonment had been awarded to him, yet, as life imprisonment in his case had been described to be equal to a sentence of 25 years rigorous imprisonment by the Courts of the then Jaipur State, this Court was not competent to revise the sentence passed by the Courts of the former Jaipur State, which had long before become final.

After the decision in that case, doubts were entertained about the correctness of that decision in - 'Chhotia v. The State', (Habeas Corpus Appln. No. 36 of 1953), and a reference was made to a Full Bench, which was decided on 29-7-1953, vide - 'Chhotia v. The State', 1954 RLW 212 (FB) (A). It was observed that

'But - 'Janardhan Roddy v. State of Hyderabad' : [1951]2SCR344 , did not specifically consider the other part, namely, where the sentence is, on'. the face of it, excessive either because it is more than what the law prescribed for the particular offence, or it is more than which the Court of the. grade which purported

to pass the sentence could pass under the law as it was in force at the time the sentence was passed.

These two types of cases appear to us to be dearly exceptions to the rule laid down in Janar-dhara Reddys case (B), and where the sentence is illegal' on those grounds, it would, in our opinion, be open to the High Court, when dealing with an Application for a writ of habeas corpus, whether under Art 226 of the Constitution or Section 491 of the Criminal P. C, to examine the legality of the sentence._____ -

We may say at once that it is not open to the High Court to substitute any sentence in place of the sentence passed by the Court, which has already become final. The High Court may, however, do one of two things. If the legal portion of the sentence has been served, and only the illegal portion remains to be served, the High Court should order the release of the convict; but if the legal portion of the sentence has not been fully served and some part of it still remains to be served, the application must be dismissed leaving it to the prisoner to come again when the legal portion has been completely served.'

7. The point whether successive applications can be made Under Section 491, Criminal P. C, Or Article 226 of the Constitution of India has come up before the High Courts in India, and it seems there is some divergence of opinion on this point. The Common Law practice in England is that successive applications can be made for a writ of habeas corpus to each one of the Judges of the High Court, though such an application cannot be made to the Judge who has already decided it. As regards India, their Lordships of the Privy Council in - 'C. P. Matthen v. District Magistrate, Trivandrum' AIR 1939 PC 213 (C), have held that the English Common Law practice of filing successive application for a writ of habeas corpus is not applicable to India, where the making of such applications was governed by the provisions of Section 491, Cr.PC

The position has, however, altered after the coming into force of the Constitution of India by Article 226, which invests the High Courts in India with authority to issue writs or directions in the nature of the English Common Law writs. In - 'Mt. Haydari Begum v. Tawad Ali Shah' AIR 1934 All 22 (D), it was held by the High Court of

Allahabad that

where an application Under Section 491 is dismissed by a Judge of the High Court, a second application to the same effect and with the same object is expressly prohibited and is not maintainable by Rule 8 of Allahabad High Court Rules.

It was further held in that case that the rules of English Common Law which governed the procedure relating to an application for writ of habeas corpus were not applicable to the exercise of the statutory power conferred upon the High Courts Under Section 491, Criminal P. C. in India. In a subsequent case, - 'Satish Gopal v. Rex' AIR 1949 All 147 (FB) (E), the view in the previous case referred to above was modified and it was held that dismissal of an application Under Section 491 would not bar a second application where the further detention of a person had become illegal by something that transpired after the first application was disposed of.

In - 'Malhari Ramaji v. Emperor' AIR 1948 Bom 326 (SB) (F), it has been held by the High Court of Bombay that it is not open to a detenu to ask for a review of an order already made Under Section 491; in other words, successive applications cannot be made for a writ of habeas corpus being barred by Section 369, Criminal P. C. The learned Judges placed reliance on the decision of the first Allahabad case referred to above, which is based on Rule 8 of that Court, and the decision in - 'Kishori Lai v. Crown', 1LR (1945) 26 Lah 573 (G), which, it may be noted, has been dissented from by the East Punjab High Court in - 'Ramji Lai v. Rev AIR 1949 EP 67 (FB) (I-I), which is a Full Bench decision.

In a later case, viz., - 'In re Prahlad Krishna AIR 1951 Bom 25 (FB) (I), the Bombay High Court has slightly modified its opinion by holding that under Article 226 of the Constitution of India, Common Law writs could now be issued by a High Court, but at the same time it has been held that once an order is passed by the High Court on an application for issue of a writ of habeas corpus, successive applications cannot be entertained, Section 369, Criminal P. C. being a bar to such petitions.

In - 'Haridas Damaji v. Provincial Govt, C, P. and Berar' AIR 1949 Nag 201 (J), it has been held by the High Court of Nagpur that an order passed Under Section 491, Criminal P. C. is a judgment within tile meaning of Section 369, because it finally determines the legality or the propriety of the detention and the question whether the applicant is entitled to be released, and as such, cannot be altered or reviewed except to correct a clerical error.

Successive applications Under Section 491 were, therefore, held not to be entertainable.

8. It may be observed that in the present case after the decision was given in the previous application, the point whether this Court could examine the legality of a sentence passed by a Court of the then Jaipur State, which had become final, was referred to a Full Bench, and it has since then been decided that this Court can examine the legality of such a sentence.

Virtually, therefore, when the first petition was decided, this Court refused to go into the legality of the sentence passed against the petitioner on account of certain considerations which prevailed with the Court at that time. The opinion of this Court has since then been altered on account of the Full Bench decision, and now it is considered competent for this Court to go into the question of the legality of the sentence passed against the convict by the Courts of the former Jaipur State, in spite of the fact that those orders had become final long before.

There is, therefore, a new circumstance which has arisen in this case, and which supports the petitioner in his contention for making a second application for the same relief.

9. Coming to the facts of the present case, it may be noted that in Habeas Corpus Appln. No. 36 of 1953 (Raj) (FB) (A), it has been held by this Court that life imprisonment was equivalent to 20 years' rigorous imprisonment according to the law of the former Jaipur State. The Council resolution which purported to change the term of life imprisonment to 25 years' rigorous imprisonment was not valid, and no change in fact was brought about in the law.

Under Section 290 of the Jaipur Penal Code, sentence of life imprisonment could be passed, which meant a sentence of 20 years' rigorous imprisonment only. The Sessions Judge, therefore, could not legally pass a sentence of 25 years' rigorous imprisonment Under Section 290, Indian Penal Code. The sentence of 25 years' rigorous imprisonment passed by the Sessions Judge of Jaipur and later confirmed by the Chief Court of Jaipur is obviously illegal.

It should be treated a sentence of 20 years' rigorous imprisonment only. In view of the principle laid down in the judgment of the Full Bench, when the legal portion of the sentence has been undergone by the convict, he should be ordered to be released.

10. We, therefore, allow this petition, and order that the petitioner be released at once if not required in any other case.

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