

A. Sivanesan Vs. the State

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Court : Chennai

Decided On : Jul-19-1996

Reported in : 1997CriLJ598

Judge : Rengasamy, J.

Acts : Constitution Of India - Article 21; Code of Criminal Procedure (CrPC) , 1908 - Sections 362, 385, 385(1) and 482

Appeal No. : Cri. O.P. Nos. 4623 and 4624 of 1996 and Cri.M.P. Nos. 1907 and 1908 of 1996

Appellant : A. Sivanesan

Respondent : The State

Advocate for Def. : S. Somasundaram, Govt. Adv.

Advocate for Pet/Ap. : K.A. Panchapagesan, Adv.

Judgement :

ORDER

1. These two petitions have been filed to set aside the judgment dated 26-4-1996 in C.A. nos. 795 and 796 of 1987 passed by this Court and rehear the appeals.

2. In the affidavits filed by the petitioner, the contents which are common are as follows : The petitioner was the Court's accused in C.C. Nos. 79 and 80 of 1986 on

the file of the X Metropolitan Magistrate, Madras, filed by the Drug Inspector under Section 18-A(i) read with 27(d) of the Drugs and Cosmetics Act, in which he and other accused were acquitted, that now he comes to know that appeals were filed by the complainant before this Court in C.A. Nos. 795 and 796 of 1987 for which he did not receive any notice, that though the other accused, who received the notices, engaged a counsel to appear for them in this Court, somehow, he did not appear and therefore, this Court appointed an amicus curiae namely Mr. E. J. Ayyappan, Advocate, and hearing his arguments, this Court convicted all the accused under Section 27(d) of the Drugs and Cosmetics Act, sentencing them to undergo rigorous imprisonment for six months and also to pay a fine of Rs. 5,000/- and he did not know anything about the pendency of the appeals till he received the non-bailable warrant after the order of conviction. He has further stated that as he received no notice from the High Court with regard to the appeals filed against him, he did not engage a counsel, that under Section 385(1) Code of Criminal Procedure, it is mandatory for the Appellate Court to cause notice to the respondent but in this case, he has not been given the opportunity of hearing under Section 385(1)(4) Code of Criminal Procedure while the Appellate Court reversed the order of acquittal and convicted him, which is against the principles of natural justice and also ultra vires the Article 21 of the Constitution of India, that as the judgment was passed against him in the appeals without giving opportunity of hearing him, the judgment is a nullity and the same has to be reheard after giving him an opportunity to place his defence.

3. The learned Government Advocate has resisted these petitions contending that as the judgment has been passed on merits, the Court, which passed the judgment, cannot set aside the same as the Court has no powers to alter or review the judgment under Section 362 Code of Criminal Procedure.

4. The question is whether the judgment passed by this Court against the petitioner setting aside the order of acquittal, can be re-considered on the ground that the petitioner, who was the 4th accused in the case, was not served with the notice on the appeals.

5. Before proceeding to consider the question involved in these petitions, the facts relating to the pendency of the appeals namely C.A. Nos. 795 and 796 of 1987 have to be referred to. This petitioner, who was the fourth accused, and three others, were prosecuted by the Drug Inspector, Perambur Range, Madras, for an offence under Section 18-A(i) read with Section 27(d) of the Drugs and Cosmetics Act before the X Metropolitan Magistrate, Madras in C.C. Nos. 79 and 80 of 1986 alleging manufacture of substandard drugs. The learned X Metropolitan Magistrate, who tried these cases, acquitted all the accused holding that the offence was not proved against them. The complainant/Drug Inspector filed the appeals C.A. Nos. 795 and 796 of 1987 before this Court and notices were issued to all the respondents accused as required under Section 385 Code of Criminal Procedure on 13-5-1988. Even though the notices sent to the accused respondent were not returned after service, one Mr. N. Chellaperumal, Advocate, filed vakalat for the first three respondents accused entering appearance for them on 13-6-1988. Even though only the first three accused respondents have signed the vakalat giving authorisation to the advocate to appear for them, in the docket of the vakalat, he has mentioned that he is the counsel for the respondents as though he was appearing for all the respondents. The Registry, misled by this endorsement on the docket thinking that Mr. Chellaperumal was appearing for all the accused respondents, though he entered appearance only for the first three respondents, did not seek permission of the Court for fresh notice to this petitioner, who was the fourth accused. In the usual course, these appeals of the year 1987, came in the list in February 1994. But none appeared for the respondents accused. Even the counsel Mr. Chellaperumal, who entered appearance for the respondents 1 to 3 also, did not appear in the Court for his clients. Therefore, on 7-2-94, notice was issued to all the respondents accused fixing the date of hearing to 28-2-94. This notice returned unserved with the endorsement that the addressees were not found. Again another notice was issued to the petitioner and others on 13-6-1994 fixing the date of hearing to 5-7-1994. This notice also returned unserved with the endorsement that the addressees were not found. Once, again, a fresh notice was issued on 19-7-1994 to the petitioner and other accused for their appearance on 10-8-1994 which also returned with the same endorsement and therefore, finally, a notice dated 5-9-1994 was issued to the petitioner and other accused for their

appearance on 28-9-1994. This notice also was not served. As all the notices sent to the petitioner and others could not be served on them, the Court directed the Registry to address the Legal Aid Board to appoint a counsel to enter appearance for all the respondents. The High Court Legal Aid Centre, by its letter dated 23-2-1996 addressed Mr. E. J. Iyappan, an Advocate practising in this Court asking for his consent to appear in C.A. Nos. 795 and 796 of 1987 on the file of this Court on behalf of M/s. Shiyal Chemicals, and three others, i.e., for all the respondents accused. The learned Advocate, accepting the brief given by the High Court legal Aid Centre, entered appearance filing the memo of appearance on 5-3-1996. Even though in this memo, he has not specified the parties' name, the printed memo reads that he was entering appearance on behalf of the respondent. Anyhow, the Legal Aid Centre had requested him to appear for all the respondents accused in this case. As Mr. E. V. Iyappan, Advocate, entered appearance for the respondents the appeals, were listed and the arguments on behalf of the State and the respondents accused were heard. This Court, by its judgment dated 26-4-1994, allowed the appeal setting aside the order of acquittal and convicted the respondents accused 2 to 4 to undergo rigorous imprisonment for the (sic) minimum punishment prescribed under the Act and also directed them to pay a fine of Rs. 5,000/- each. As the minimum punishment prescribed under the Act was imposed on the accused 2 to 4, they were not called to appear before the Court to question about the sentence. It is only after this judgment of conviction, warrant has been issued against the respondents accused for their arrest and thereafter, the petitioner, fourth accused has come forward with these petitions to set aside the judgment as against him on the ground that Section 385 Code of Criminal Procedure has not been complied with.

6. The learned counsel appearing for the petitioner Mr. K. A. Panchapagesan submits that under Section 385 Code of Criminal Procedure, it is mandatory on the part of the Court to cause notice of the time and place of the appeals to be heard and the causing of notice to the accused is for the purpose of serving the notice and in this case, as the notice was not served on the petitioner/fourth accused, no opportunity was given to him to appear before this Court to defend himself but this Court has set aside the order of acquittal and has convicted this petitioner to imprisonment and also fine, behind his back without hearing him and therefore the

judgment passed against this petitioner has to be set aside. The learned counsel Mr. Panchanagesan would further submit that even though there is no specific provision under the Code of Criminal Procedure to set aside the judgment passed by the same Court, Section 482 Code of Criminal Procedure empowers the High Court to invoke its inherent jurisdiction to set aside its own judgment and set right a wrong and do the natural justice, which a party is entitled to according to law, and therefore, the judgment of this Court dated 26-4-1996 has to be set aside. Section 362 Code of Criminal Procedure is a bar on a Court to alter or review a judgment after final disposal except to correct a clerical or arithmetical error.

7. According to the learned Government Advocate Mr. Somasundaram when Section 362 Code of Criminal Procedure is a bar to review the judgment passed by a Court on merits, this Court has no powers to reconsider the judgment passed against this petitioner fourth accused. The learned Government Advocate further argues that in this case notices were taken to the petitioner as required under Section 385 Code of Criminal Procedure fixing the date of hearing for the appeals but the petitioner/fourth accused did not appear before the Court and therefore, the Court had appointed an amicus curiae to argue on behalf of the petitioner fourth accused and only after hearing the State as well as the amicus curiae representing the petitioner accused, the judgment was passed and therefore, these petitions are not sustainable. In support of his argument, that the issue of notice to the accused, though not served on him, is a sufficient compliance to Section 385 Code of Criminal Procedure, he refers to a decision of the Apex Court in Mohammed Dastagir v. State of Madras : 1960 CriLJ1159 . In that case, the Supreme Court has observed that Section 422 of old Code of Criminal Procedure (Section 38 of new Code of Criminal Procedure) does not speak of the notice being served on the accused and it states that notice is to be given to the accused and as it was complied with, the accused cannot complain against the disposal of the appeal. In that case after the filing of the appeal against the accused person, Mr. V. L. Ethiraj and Mr. V. T. Cassim entered appearance for the accused and an advocate, who worked in that office, made a request to the Registry not to issue summons to the accused as the advocate had entered appearance and the notice might be dispensed with. Therefore, notice was not issued at that stage. However after the appeal was ready for hearing the usual intimation under Rule 240A,

Criminal Rules of Practice, was sent through the Special Judge, Trichy for communication to the accused as it was a practice at that time. In that appeal, the order of acquittal was set aside and therefore, it was contended before the Apex Court that the accused was convicted by the Appellate Court without serving the notice of appeal on the accused and the conviction was illegal. It was also submitted by the accused that he came to know that his brother in law initially approached M/s. V. L. Ethiraj and S. M. Cassim to appear for him and he did not give any instruction to them but later on his brother-in-law kept him in dark without informing anything about the appeal and therefore, he could not give any instructions to the advocates. In that connection, the Supreme Court has observed that when notice was issued as required under Section 422 of old Code of Criminal Procedure (corresponding to Section 385 of new Code of Criminal Procedure), it is a sufficient compliance because the Section does not speak of the notice being served on the appellant.

8. The learned counsel for the petitioner Mr. Panchapagesan has cited a decision in *Anwar Hussain v. The State of UP*, : 1982 CriLJ1700 where in the the Supreme Court has set aside the conviction of an accused by the High Court reversing the order of acquittal by the trial Court holding that the High Court had passed the order behind the back of the accused without hearing him and remanded back to the High Court for disposal of the appeal after notice to the accused therein.

9. Another decision relied upon by the learned counsel Mr. Panchapagesan is *Bombay Cycle and Motor Agency v. B. R. Pandey*, 1975 Cri LJ 820 (Bom). This decision has referred to a series of decisions of different High Courts including that of this Court and it has held that the High Court is entitled to exercise the inherent powers to set right a mistake committed by the Court for the purpose of securing the ends of justice. In that case, a vehicle, which was used for transportation of the contraband, was seized by the Police and the appellant in that case claiming to be the owner of the vehicle, filed petition for the return of the vehicle to him as he was not involved in the offence. The trial Magistrate, before whom the petition was filed, rejected the petition directing to keep custody of the vehicle with the police pending disposal of the criminal case. After the trial, one of the accused was convicted and the other was acquitted and the trial Magistrate ordered for

confiscation of the vehicle, without hearing the party who claimed ownership to the vehicle. The State filed appeal against the order of acquittal of one of the accused and the High Court set aside the order of acquittal and confirmed the order of disposal of the vehicle by confiscating the same to the Government. The appellant therein who was the owner of the vehicle, was not aware of the order of confiscation passed by the trial Court as well as the Appellate Court as he had no notice of the same and therefore he filed the application before the High Court to set aside the order of confiscation. The Bench of the Bombay High Court has referred to the Full Bench decision of the Travancore Cochin High Court in *State v. Kunjam Pillai Aiyappan Pillai*, , the Full Bench decision of the Andhra Pradesh High Court in *Public Prosecutor, Andhra Pradesh v. Deviredi Nagi Reddy*, AIR 1962 AP 479 : (1962 (2) Cri LJ 727, the decision of the Allahabad High Court in *Chandrika v. Rex*, : AIR1949 All176 , the decisions of this Court in *In Re Somu Naidu*, AIR 1924 Mad 640 : 1925 (26) Cri LJ 370 and *In Re Anthony Doss* 1963 (2) Cri LJ 224 (Mad), the view of the Lahore High Court in *Muhammed Sadiq v. Emperor*, AIR 1925 Lah 355 : 1925 (26) Cri LJ 1169 and lastly earlier decision of the Bombay High Court in *A. H. Satranjiwala v. State of Maharashtra* : (1972)74BOMLR742 , to hold the view that the inherent powers of the High Court can be invoked to set aside its own order if the order was passed without complying with the provisions of the Code and it has caused the failure of justice. In all these decisions referred to above, the Courts have discussed the scope of Section 561-A of the old Code of Criminal Procedure (Corresponding to Section 482 new Code of Criminal Procedure). In the Travancore-Cochin decision mentioned above, it has observed that though Section 369 of the old Code of Criminal Procedure (corresponding to Section 362 of new Code of Criminal Procedure) restricts the powers of the Court to alter or review its judgment, it is only subject to the other express provisions of the Code and as Section 561-A of the old Code (Section 482 of the new Code) empowers the Court by inherent powers to set right the mistake, the High Court has power to reconsider the matter which it has decided ex parte. In the Andhra Pradesh decision above mentioned also, the view taken is that if the High Court has pronounced a judgment without jurisdiction or in default of appearance i.e. without affording an opportunity to the accused to appear, the High Court has such inherent power under Section 561-A

of the old Code (Section 482 of the new Code). The Allahabad High Court also held the same view holding that when no appearance was made on behalf of the appellant accused when the case was heard, he was deprived of the opportunity of being heard and the hearing the appeal depriving the opportunity of being heard, will amount to abuse of process of the Court even if it was not deliberate and in such circumstances, the inherent powers of the High Court could be invoked. In *In Re Somu Naidu* AIR 1924 Mad 640 : 1925 (26) Cri LJ 370, referred to above a case was mistakenly taken up on an anterior date earlier to the date fixed in the notice and without hearing the accused sentence was enhanced. In the decision of the Lahore High Court also the appeal was dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of his contention and therefore, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court had inherent power to make an order for rehearing the appeal after giving an opportunity to the counsel. The earlier decision of the Bombay High Court referred to above also was of the same type and the matter was disposed of without hearing the party, who had the right to be heard. Therefore, analysing the views of the different High Courts, the Bombay High Court has held that when a party, who is entitled to be heard was not heard without there being any fault on his part or on the part of his counsel, the High Court is entitled to invoke Section 561-A of the old Code of Criminal Procedure (Section 482 of the new Code) to rehear the appeal to secure the ends of justice.

10. So, relying upon these decisions, the learned counsel Mr. Panchapagesan submits before me that as no notice was served on the fourth accused, petitioner herein, in the appeal, and as he was not given an opportunity of being heard, this Court is bound to set aside the judgment passed against him under Section 482 Code of Criminal Procedure and re-hear the appeals against him. But on a perusal of the decisions cited by the learned counsel Mr. Panchapagesan and all the other decisions referred to in the judgment of the Bombay High Court the accused, in these cases, was not heard and the matter was disposed of ex parte in his absence or the order was passed on merit hearing only the Public Prosecutor or the opposite party. So in all those cases, there was no representation at all for the aggrieved party and therefore, the Courts took the view that when a party entitled

to be heard, was not heard, it will amount to abuse of powers of the Court and therefore, to set right that mistake, the inherent powers of the High Court under Section 482 of Code of Criminal Procedure can be invoked. But that is not the position in this case. An amicus curiae was appointed for this petitioner accused and for others, who represented the cause of the applicant and only after hearing him, who represented the petitioner, though he was appointed as an amicus at the instance of the Court, the judgment was passed and it cannot be stated that there was no representation for the petitioner accused.

11. These appeals were filed in the year 1987 and were pending for more than eight years. This petitioner fourth accused is one of the partners of the first accused firm along with the other accused. The other accused received notice in the year 1987 itself and they had entered appearance through an advocate. It is not stated before me that the other partners were inimical towards him and did not inform about the filing of the appeal against the partners. But in the year 1995, when the appeal was taken up, for enquiry no one represented the respondents accused, though the counsel had entered appearance for three of them. Therefore, four notices were issued to this petitioner and other accused and as their presence could not be secured, the amicus curiae was appointed for all of them. Mr. E. J. Ayyappan, the amicus curiae, who received all the papers from this Court relating to those appeals, represented the petitioner and argued the matter. Only after hearing his argument on behalf of the petitioner and the other accused, the appeals were disposed of on merits setting aside the order of acquittal of the accused respondents. Therefore, this case is distinguishable from the cases cited in the decision quoted by the learned counsel for the petitioner Mr. Panchapagesan. In *Mohd. Dastagir v. State of Madras*, : 1960 CriLJ1159 even though the appellant therein contended that he did not give instructions to the advocate, who entered appearance on his behalf but his brother-in-law had engaged them and he had no notice of the appeal, the Supreme Court has held that when the notice was issued and there was representation for him, there was compliance of Section 422 of old Code of Criminal Procedure. Similarly, in this case also, notice had been issued to the petitioner and an amicus curiae also had argued for the petitioner representing him. Therefore, it cannot be stated that the petitioner was not given opportunity of being heard or there was abuse of process

of the Court or there is failure of justice to invoke the inherent powers of the High Court. When it is made clear that this is not a fit case in which Section 482 Code of Criminal Procedure can be invoked, Section 362 Code of Criminal Procedure is a bar to review the judgment passed already by this Court. Therefore, the argument raised by the learned counsel for the petitioner will have to fail.

12. In the result, these petitions are dismissed. Consequently, Crl MP 1907 and 1908 of 1996 are dismissed.

13. Petition dismissed.

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