

D.A.S. Swami Vs. Kubendran

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Court : Chennai

Decided On : Jun-29-1966

Reported in : AIR1967Mad276; 1967CriLJ1020

Judge : Venkataraman, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 4(1) and 540-A;
[Constitution of India](#) - Article 19(1), 19(5) and 19(6)

Appeal No. : Criminal Revn. Case No. 763 of 1966, (Cri. R.P. No. 747 of 1966)

Appellant : D.A.S. Swami

Respondent : Kubendran

Judgement :

ORDER

(1) The facts giving rise to this revision petition filed under Section 439, Cri. P. C. by one D.A.S. Swami in his personal capacity are these. In C. C. 6481 of 1966 on the file of the Second Presidency Magistrate, Madras, on Kuppuswami alias Kubendran filed a complaint against Kandaswami Mudaliar under Sections 409 and 403, I.P.C. On 23-4-1966 he prayed for the issue of the summons to the accused for appearance on 30-4-1966. On 30-4-1966 on Sri. T. R. Venkataraman, a lawyer, entered appearance on behalf of the accused and prayed that the absence of the accused for the day might be excused on medical grounds. That was excused. The case was adjourned to 9-5-1966, and that day, being a holiday,

it was adjourned again to 20-5-1966. In the meantime the accused executed a power of attorney in favour of D.A.S. Swami. It may be taken that thereby Sri. T. R. Venkataraman was no longer appearing for the accused. The power of attorney is in the following terms:

'I hereby appoint my lawyer Mr. D.A.S. Swami B. A. B. L. of 33 Habibullah Sahib St. T. Nagar, Madras to represent me and to act on my behalf in C. C. 6481 of 1966 and M. P. 70 of 1966 on the file of the Second Presidency Magistrate, George Town, in addition to or in substitution for any advocate engaged or to be engaged by him. He is further authorised by me to apply under S. 4(1)(r) and Section 540-A Crl. P. C.'

(2) It may be mentioned at once that though in the power of attorney D.A.S. Swami is described as a lawyer and is a person holding a law degree, actually he is not on the rolls as a lawyer. It is necessary to mention this at the outset, because there is a special definition of a 'pleader' in Section 4(1)(r) Cri. P. C. to the following effect:

' 'Pleader' user with reference to any proceeding in any Court means a pleader authorised under any law for the time being in force in practice in such court, and includes as advocate, a vakil and an attorney of a High Court so authorised and any other person appointed with the permission of the court to act in such proceeding'.

(3) Since Swami was not an advocate, a vakil or an attorney, he would not be a pleader under the first sub-clause and would require the permission of the court under sub-clause (2) to be a pleader and act for the accused in the case. The power of attorney seems to take note of this and that was why it mentioned Section 4(1)(r).

(4) On 10th May 1966 itself D.A.S. Swami presented two petitions; one petition in the name of the accused under Section 4(1)(r) was to this effect:

'It is prayed that the petitioner be permitted to appear through his lawyer D.A.S. Swami in whose favour he has executed a power of attorney for this purpose'.

(5) The other petition was under S. 540--A CrI. P. C. to this effect:

'It is prayed that the personal attendance of the petitioner be dispensed with as a medical certificate has been already produced'.

(6) Both these petitions were signed by D.A.S. Swami styling himself as 'petitioner's agent'. No orders were passed on the above petitions. Section 540-A may be quoted here:

'At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the court is not necessary in the interests of accused is represented by a pleader dispense with his attendance and proceed with such enquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.'

(7) On 20th May 1966 a further petition was presented in the name of the accused to this effect:

'It is prayed that the presence of the accused be dispensed with under Section 540-A CrI. P. C.

(8) This was also signed by D.A.S. Swami as 'petitioner's agent'. The learned Magistrate passed an order which may be deciphered as 'dispensed with'. Some two petitions were filed on 27th May 1966 and 30th May 1966, but they were ordered to be called on 31st May 1966.

(9) On 31st May 1966 the complainant's counsel presented a petition to the following effect:

'The accused in the above case is not appearing before this Hon'ble Court and no power of attorney can represent the accused under Section 205 CrI. P. C. Only an advocate in whose behalf special Vakalat is given by the accused can represent the accused and none else. It is prayed that this Hon'ble Court may be pleased to direct the accused to appear in this Hon'ble court or a duly authorised agent and reject the memo filed by the power of attorney holder'.

(10) Section 205(1) Crl. P. C. may be quoted here:

'Whenever a magistrate issues a summons, he may, if he sees reasons so to do dispense with the personal attendance of the accused and permit him to appear by his pleader'.

(11) Upon the above petition, the learned Magistrate passed the following order on 8th June 1966:

'Heard, Unless the accused appoints and the court permits one cannot come in as pleader to represent the accused. As such the accused is directed to appear and move for permission of Court to appoint his pleader if necessary.'

(12) The present revision petition has been filed against the above order dated 8th June 1966.

(13) As stated already, this petition has been filed by D.A.S. Swami on his own behalf and not in the name of the accused. A question arises out of this straightway whether D.A.S. Swami can claim right of audience in this court on behalf of the accused in the case. On this, clauses 9 and 10 of the Letters Patent of this court make it clear that since D.A.S. Swami, is not an advocate on the rules of this court he cannot have a right of audience to represent the accused. The only exception to these Clauses 9 and 10 is that any suitor shall be allowed to appear, plead or act on behalf of a co-suitor. But that exception does not apply here. These provisions have been interpreted by a Full Bench of this court in *Thayarammal v. Kuppuswami Naidu* : AIR1937 Mad937 and this has been followed recently by a Branch of this court in L. P. S. (S. R.) No. 1363 of 1966 desirable consequences which would ensure if a person other than a lawyer is allowed to have a right of audience. A lawyer who is qualified for the purposes is subject to some discipline, but this cannot be necessarily postulated of persons other than lawyers. It is of some interest to note that in L. P. A. (S. R.) No. 1363 of 1966 (Mad), the right of audience was refused to Sri. D.A.S. Swami himself. But those decisions are in civil matter, and so far as these matters, and so far as the Criminal Procedure Code is concerned, there is a special provision in Section 4(1)(r). Here again, as I have already pointed out, D.A.S. Swami cannot come in

under the first clause he not being an advocate, vakil or an attorney on the rolls of this court, and in order to plead for the accused, he must get the permission of this court. But D.A.S. Swami does not seek any such permission from me and claims to have a right to plead for the accused without any such permission. Alternatively he says that he has a grievance in his individual capacity against the order dated 8th June 1966 and that he is entitled to ventilate that grievance in his own right without any permission.

(14) I shall take up the first part of his argument. His contention is that the definition of 'pleader' in Section 4(1)(r) Crl. P. C. used only the word 'includes' and is, therefore, not an exhaustive definition and cannot bar a power of attorney agent like himself. He points out that there are other sections in Criminal Procedure Code and the Indian Penal Code using the words 'agents of the accused' for instance, Section 172, 173 and 174. I.P.C. and Forms 12 and 13 of Sch. V to the Crl. P. C. I am however unable to accept this contention. The definition of 'pleader' in S. 4(1)(r) Cri. P. C. must be understood as an exhaustive definition, that is as saying 'means and includes'. To hold otherwise would mean that sub-clause (2) of the definition requiring the previous permission of the court in the case of a person who is not an advocate, a vakil or attorney of a High Court, would become a dead letter. The context, therefore, clearly shows that the definition is an exhaustive one. It may be that for the other purposes contemplated in the previous and forms quoted by D.A.S. Swami, an agent may represent the accused without prior permission of the court. But that cannot control the interpretation of the definition of 'pleader' in Section 4(1)(r) Crl. P. C. It is also understandable that where a person other than an advocate, a vakil or an attorney is given the privilege of pleading for an accused, previous permission of the Court is necessary. Hence both, as a matter of construction and on the probability of the matter, I have no difficulty in holding that the definition of 'pleader' in Section 4(1)(r) means that a person who is not an advocate, vakil or attorney, requires the permission of the court to become a pleader as defined. Hence, the contention of D.A.S. Swami that he has a right to argue the case of the accused in this criminal revision petition without such permission cannot be accepted.

(15) D.A.S. Swami contends that the above interpretation would interfere with the fundamental right of the accused to insist on anybody of his own choice, but necessarily a lawyer representing him and arguing his case D.A.S. Swami urges that the accused might not have the means to engage a lawyer and might find it cheaper to ask his son or person like D.A.S. Swami to appear for him and that the requirement in Section 4(1)(r) Crl. P. C. of the previous permission of the court would be an unwarranted restriction on the right of the accused to acquire, hold and dispose of property within Art. 19(1)(f) of the Constitution. It seems to me that this argument is very far-fetched and that it will be straining the language to say that the requirement in Section 4(1)(r) of the previous permission of the court to act for the accused in the case of a person other than an advocate, a vakil or an attorney, is an interference with the fundamental rights of the accused under Art. 19(1)(f) of the Constitution. The definition is intended to regulate the procedure in Criminal court, and from that point of view it is quite reasonable for the Legislature to say that the permission of the court is required in the case of a person other than an advocate, a vakil or an attorney. Even if it should be considered as restrictive of the fundamental right under Art. 19(1)(f) it can be justified under Art. 19(5) of the Constitution as a reasonable restriction in the interests of the general public. Swami refers to the provision in Article 19(6) of the Constitution which refers to sub-clause (g) of Art. 19(1) which says:

'All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.'

(16) Art 19(6) says:

'Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to--

(f) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. (ii).....'

(17) The argument is that D.A.S. Swami is carrying on the occupation of being a power of attorney agent of persons like the accused and that it will be competent for the State under Art. 19(6) to impose a reasonable restriction on the said right of D.A.S. Swami when he seeks to represent, plead and act for the accused in a criminal case and that because of the existence of such a power it is unnecessary to restrict the right of the accused to choose a person of his own choice to represent and plead for him. Now it seems to me that this very argument gives away the case of D.A.S. Swami and justifies the restriction in S. 4(1)(r) of the Criminal Procedure Code, requiring the permission of the Court where a person other than an advocate, a vakil or an attorney wants to act for the accused. It will be seen that in the above argument D.A.S. Swami concedes that it will be competence for the State to impose some technical qualification where the power of attorney agent wants to appear in court and plead for an accused and it will be noted that the provision in Sec. 4(1)(r) concerns itself directly only with such a situation. It does not purport to affect the general right of a person like D.A.S. Swami to carry on the occupation of being a power of attorney agent of others. Sec. 4(1)(r) Crl. P. C. will come into play only where such a person seeks to act for the accused and plead for him.

(18) It should be clear from the discussion so far that D.A.S. Swami has no locus standi to ventilate in this petition any grievance of the accused. It will be time enough to consider the situation if the accused himself should come forward with another criminal revision petition ventilating his own grievance.

(19) I shall turn to the alternative limb of the argument of D.A.S. Swami that in this petition he is ventilating his own personal grievance. He urges that he has got a fundamental right under Art 19(1)(g) to carry on the occupation of a power of attorney agent of persons like the accused and that the provision in Sec. 4(1)(r) Crl. P. C. requiring him to seek the previous permission of the court is in violation of that fundamental right and must be struck down. I shall assume for the purpose of this argument without deciding it that the activity of D.A.S. Swami can be called 'carrying on an occupation' within the meaning of Art 19(1)(g). As part of the occupation he wants to appear in a criminal court and act for the accused by which he also means a right to plead for the accused. It seems to me that the restriction

in S. 4(1)(r) Crl. P. C., requiring the previous permission of the court is quite a reasonable restriction within the meaning of Art. 19(6) of the Constitution Art. 19(6) itself contemplates that it is open to the State to make a law relating to professional or technical qualification necessary for practicing any profession, or carrying on any occupation, and Sec 4(1)(r) Crl. P. C. can be justified under this provision. The court may in a given case permit even a person not qualified in law to plead for an accused and certainly the previous permission of the court is only a minimum requirement and cannot be attacked as an unreasonable restriction on the supposed fundamental right of D.A.S. Swami.

(20) In the result, the petition is dismissed.

(21) Petition dismissed.

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