

Suprovat Bose Vs. the State

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SooperKanoon Citation : sooperkanoon.com/880183

Court : Kolkata

Decided On : Jun-27-1975

Reported in : 1976CriLJ313

Judge : Sudhamay Basu, J.

Appellant : Suprovat Bose

Respondent : The State

Judgement :

Sudhamay Basu, J.

1. This is a petition by the appellant of Criminal Appeal No. 2 of 1970 (Suprobhat Bose v. The State of West Bengal) to set off the period of detention undergone by him during investigation and trial against the term of imprisonment imposed upon him, in accordance with Section 428 Criminal P.C.

2. Section 428 of the Code of Criminal Procedure 1973 is as follows :

Where the accused person has, on conviction, been sentenced to imprisonment for a term, the period of detention, if any, undergone by him during investigation enquiry or trial of the same case and before the date of such conviction, shall be set off against the terms of imprisonment imposed on him on such conviction and the liability of such persons who undergo imprisonment on such conviction shall be

restricted to the remainders, if any, of the term of imprisonment imposed on him.

3. The Supreme Court, in the case of B. P. Andre v. The Superintendent, Central Jail, Tihar, New Delhi reported in : 1975 CriLJ182 specifically held that where the accused person has been convicted and is still serving his sentence at the date when the new Code of Criminal Procedure came into force Section 428 would apply and the connected person would be entitled to claim that the period of detention undergone by him during the investigation, enquiry or trial of the case should be set off against the terms of imprisonment imposed on him and he should be required to undergo only the remainder of the term.

In the said case the Supreme Court was in seisin of the matter as a writ petition under Article 32 of the Constitution was made before it after another petition on Habeas Corpus before the Delhi High Court had failed. The Delhi High Court held the view that since the conviction made by the Sessions Court had taken place prior to the coming into force of new Criminal Procedure (Sic) Section 428 had no application and the petitioner was bound to suffer imprisonment for the full term of three years. The Supreme Court differed from the Delhi High Court decision and approved of two other decisions one by the Andhra Pradesh High Court in *Biddina Jogannadham v. The Superintendent, Central Jail, Vishakapatnam* reported in (1974) 2 Andh PLJ 302 and the other of the Bombay High Court in *N. Nam-besam v. The State of Maharashtra* : (1974) 76 BOMLR 690 . The Supreme Court ordered that the petitioners be set at liberty forthwith.

In another decision *Hardev Singh v. The State of Punjab* : 1975 CriLJ243 the Supreme Court in a criminal appeal allowed the appeal in part and at the same time held that the appellant was entitled to get a set off or adjustment under Section 428 of the Criminal Procedure Code of 1973 of the period, if any, during which he remained in jail as an under-trial prisoner.

4. The present petitioner seeks a set off in terms of Section 428 on the basis of the aforesaid decisions of the Supreme Court, According to him, as the provisions relating to set off were available retrospectively he might be given relief correspondingly.

5. The problems confronting the Court in granting relief to the petitioner in terms of Section 428 of the Criminal Procedure Code, 1973 stem from the fact that the rights claimed by the petitioner did not arise at the time when the Court disposed of the criminal appeal by upholding the conviction ordered by the Sessions Court. Normally, the Court ceases to have seisin over a matter which is disposed of. Relief, it appears, can be given either under Section 386(e) of the new Code in the form of passing a consequential or incidental order or by exercising the powers of the Court under Section 482 of the new Code (corresponding to Section 561-A of the old Code). So far as the first course is concerned it is true that there are decisions which would go to show that the Court can make an order even after disposing of the appeal under that Section but, after a careful consideration, we are unable to hold that the relief sought for is either incidental or consequential to the order we passed in disposing of the appeal. The right to relief did not accrue when the appeal was disposed of. It can hardly be said that the relief is consequential or incidental to the Appellate Courts order.

6. The only other course is to exercise the powers of the Court to secure the ends of justice under Section 482 of the new Code. It is well known, that the inherent power of the Court to be exercised *ex debito justiae* is not to override any express provision of the laws or when another remedy is available. In this connection we take into note the fact that the new Criminal Procedure Code has conferred a new right to the petitioner. The Supreme Court has held that this right would accrue retrospectively. In the two Supreme Court cases cited above the Supreme Court was in seisin of the matters while disposing of retrospectively a petition under Article 32 and an appeal in a criminal case. The remedies in terms of Section 428, therefore, could be made available to the accused persons without any difficulty, In the present case the Court can grant relief only by invoking its extraordinary inherent powers on the basis of an application which is not in terms of any known provision of law, The position seems to be that the petitioner while he is entitled to a right is unable to obtain any relief. To deny him relief for which undoubtedly he has a rightful claim would be inconsistent with the ends of justice. The Criminal Procedure Code, however, exhaustive is hardly expected to provide for every contingency that might arise. It is precisely on recognition of this inadequacy that Section 482 was enacted to save the inherent powers of High Court. The Court is

conscious that this extraordinary power which is wide is to be exercised with caution and in exceptional cases. In the present case there is no Known procedure by which any relief can be granted to the petitioner. On the other hand, invoking the inherent powers will not amount to overriding any express provision of law. In case this Court refuses to grant the petitioner any relief he will be forced to be in jail illegally at least one day before he can file a petition for Habeas Corpus. Forcing the petitioner to such a step would derogate from the valued principles associated with administration of justice. We, therefore, consider that absence of any specific provision should not trammel the fountain of justice and stand in the way of the Court in granting relief in this case.

7. On the facts and circumstances of the case, it is ordered that the period of detention undergone by the accused during investigation, enquiry or trial and before the date of his conviction shall be set off against the term of imprisonment imposed on him on conviction. His liability to undergo imprisonment on the basis of the conviction and sentence passed on him shall be restricted to the remainders of the terms of imprisonment imposed on him.