

Mohar Singh Prem Singh Vs. State

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Court : Himachal Pradesh

Decided On : Jan-05-1978

Reported in : 1979CriLJ216

Judge : T.U. Mehta, J.

Appellant : Mohar Singh Prem Singh

Respondent : State

Judgement :

ORDER

T.U. Mehta, J.

1. This revision application is filed against the order passed by the learned Special Judge, District Sirmur at Nahan in Cr. M. P. No. 18-N/4 of 1977 on 7-12-1977 with regard to the disposal of the case property under Section 457 Cr.P.C. The case of the prosecution is that the present petitioner, who is accused of the offences under Sections 379/420/467/ 468/120-B, I.P.C. read with Section 8

(2) of the Prevention of Corruption Act, has felled some trees belonging to the Government and, therefore, certain pieces of timber which the petitioner has obtained from these felled trees are stolen property, It is found that the police, during the investigation, has seized this property, and thereafter on 9-11-1977, the Deputy Superintendent of Police, C.I.D. (Crime), Himachal Pradesh, Simla made

an application to the learned Special Judge for auction of this property as contemplated by Section 457 of the Cr.P.C. The respondent in reply to this petition submitted that he had filed a civil suit in the High Court in respect of this timber, which is treated by the prosecution as case property, and that he should be given an opportunity to establish his claim to this property. The learned Special Judge has, after hearing the parties, accepted the prayer of the police for the sale of the case property by auction through the Forest Department. He has passed this order evidently under Section 457 of the Code of Criminal Procedure. Being aggrieved by this order the petitioner has preferred this revision in which he has raised two points, namely,

(1) the learned Special Judge had no jurisdiction to take any action in the matter under Section 457 of the Cr.P.C. as it could not be said, within the meaning of Section 457 of the Code, that the property in question was not produced 'during the course of enquiry or trial', and

(2) at any rate, the learned Special Judge should have given the petitioner an opportunity to prove that he is entitled to the possession of this property before the order in question was passed by him.

2. It is the first contention raised by the petitioner which is more important because it touches the question of jurisdiction of the learned Special Judge to act under Section 457 of the Cr.P.C. On this point the contention raised on behalf of the petitioner was that Section 457 can be invoked only when it is found that the property seized by the police is not produced 'during an enquiry or trial'. It is pointed out that in this case the stage of enquiry and trial has not yet reached because the police has not submitted any charge sheet and the matter is still pending for investigation before the police. It was, therefore, contended that the learned Special Judge had no jurisdiction to pass any orders under Section 457 of the Code.

3. In support of the above contention the learned Advocate of the petitioner put reliance upon the decision given by Allahabad High Court in *Nanoo Mal v. Sher Mohammad Khan* reported in 1976 Cri Lj 1783 and Anr. decision given by Andhra Pradesh High Court in *Balaji v. State of Andh. Pra.* reported in 1976 Cri LJ 1461.

In both these cases the provisions of Section 457 of the Code have been interpreted and it is held that Section 457 (1) would apply only when the seized property is not produced before the Court during the course of inquiry or trial and order thereunder can be made only after the trial is concluded. Following are the relevant observations made by the Allahabad High Court (at p. 1784):

A plain reading of Section 457 (1), Cr.P.C. 1973 clearly shows that it is applicable only when the property seized is not produced before a criminal court during an inquiry or trial. A Magistrate under this section can make an order regarding the seized property only after the inquiry or trial is concluded and the seized property is in fact not produced in the inquiry or trial. He cannot make an order regarding the seized property under this section during the investigation of the case. Under Section 523 (1), Cr.P.C. 1898, it was open to a Magistrate to pass orders regarding the disposal of seized property during the investigation of the case. There is however no provision in the Cr.P.C. 1973 similar to Section 523 (1) Cr.P.C. 1898. A Magistrate has therefore, no jurisdiction to pass orders regarding the disposal of seized property during the investigation of a case under the Cr.P.C. 1973. There appears to be a lacuna in the Cr.P.C. 1973 in this regard. It is however well settled that courts cannot correct mistakes of legislatures and fill in lacuna in statutes. This has obviously to be done by the legislature itself.

4. The Andhra Pradesh High Court has considered all the relevant provisions with regard to production and disposal of the property and comparing them with the provisions of old Code, has come practically to the same conclusion, but has made some more observations going to show that unlike the provisions contained in Section 523 of the old Code, under the provisions of Section 457 of the new Code, there is no obligation on the police to make report to the Magistrate with regard to the seized articles.

5. However, both the above referred decisions are based on the reasoning that the stage of inquiry or trial cannot be said to have reached when the matter is under investigation by the police, and if that be so, it cannot be said that the property was not produced during the course of inquiry or trial and, therefore, Section 457 of the Code has no application in such a case.

6. As against this, the High Courts of Calcutta and Orissa have taken a different view. A Division Bench of Calcutta High Court has held in *Ambika Roy v. State of West Bengal* reported in 1974 Cri LJ 1002 that the words 'such property is not produced before a criminal court during an inquiry or trial' merely refer to a stage of investigation and not the stage of inquiry or trial. During the course of their judgment the learned Judges have not given any reasoning to show why they are of the opinion that the stage of inquiry or trial refers to the stage of investigation by police.

7. The High Court of Orissa has followed the above referred decision of the Calcutta High Court in *M. S. Jaggi v. Subaschandra Mohapatra* reported in 1977 Cri LJ 1902.

8. In view of this conflict of decisions between the above referred High Courts, the point which arises to be determined is whether the expression 'inquiry or trial' which is used in Section 457 means the stage of investigation by the police as held by the Calcutta and Orissa High Courts, or whether it means the stage of inquiry or trial before the court in the main case.

9. While considering this question it would not be out of place to state shortly the scheme as regards the disposal of property as envisaged in Chap. 34 of the Cr, P. C. 1973. Section 451 which is the first section in this Chapter contemplates the order for custody and disposal of property pending the trial and says that when any property is produced before any criminal court during any inquiry or trial, the court may make such orders as it thinks fit for proper custody of such property pending the conclusion of the trial. Thus Section 451 contemplates orders with regard to the property which is produced during inquiry or trial, in court.

10. Section 452 contemplates disposal of the property at the conclusion of the trial and says that when an inquiry and trial for any criminal court has concluded, the court may make any such order as it thinks fit for its disposal. This Section 452 refers to a stage when the trial is concluded. For the decision of this point we are not concerned with Sections 453 to 456. We, therefore, come to Section 457. Sub-section (1) thereof is in the following terms:

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

A plain reading of this section shows that it contemplates a contingency wherein even during the course of inquiry or trial of the matter in the court the seized property is not produced before the Court. If the same is produced before the Court during the course of inquiry or trial, then Section 451 would apply, but if it is not produced S, 457 would apply.

11. It is evident from the reading of Sections 451, 452 and 457 that the words 'inquiry or trial' are used in the same sense in all the three sections. The word 'trial' is not given any statutory definition but the word 'inquiry' is denned by Section 2 (g) of the Code as under:

'inquiry' means every inquiry, other f than a trial, conducted under this Code by a Magistrate or Court;

In ordinary circumstances, and unless it is otherwise found in the context, the rule of interpretation is that if a particular word is statutorily denned in the statute, then that definition should prevail. Therefore, when Sections 451, 452 and 457 speak of an 'inquiry, they speak of the inquiry which is defined in Section 2 (g) of the Code. There is nothing in context in which this expression is used in Sections 451, 452 and 457 to show that it should be given any meaning which is other than the statutory meaning given in Section 2 (g) of the Code. Under the circumstances, I find that it is difficult to accept the view taken by Calcutta and Orissa High Courts that the expression 'inquiry or trial' connotes the stage of investigation by police.

12. If this is so, it is obvious that before the stage of inquiry or trial in the court arrives, jurisdiction under Section 457 cannot be exercised by the Magistrate. To this extent I find myself in agreement with the view taken by the Andhra Pradesh and Allahabad High Courts.

13. I, however, find that there is no justification for taking the view that the Magistrate, or the Court for that matter, is powerless to pass any order with regard to the property seized by the police before the stage of inquiry or trial has reached. I find that the provisions of Section 459 of the Code have not been brought to the notice either of Allahabad or Andhra Pradesh High Court or of the Calcutta or Orissa High Court. These provisions of Section 459 are as under.

Power to sell perishable property. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported, is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees the Magistrate may at any time direct it to be sold; and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

The plain reading of this section shows that the concerned Magistrate can exercise the powers which the Court has under Sections 457 and 458 of the Code under any of the three circumstances, namely, (1) if the person entitled to the possession of such property (that is, seized property) is unknown or absent and the property is subject to speedy and natural decay, (2) if the Magistrate to whom the seizure is reported is of the opinion that the sale would be for the benefit of the owner; or (3) that the value of the property is less than rupees ten. In either of these three circumstances, the Magistrate can utilise the powers vested in him under Sections 457 and 458. The second circumstance, namely, that the sale should be for the benefit of the owner does not depend upon the report of the seizure by the police because that report can be given to the Magistrate by any person under Section 459. Therefore, even the accused, or any other person for that matter, can draw the attention of the Magistrate that the property to be seized by the police and that its sale would be for the benefit of the owner. When this is done, it would be open to the Magistrate to take action under Sections 457 and 458 applying their provisions 'as nearly as may be practicable'. Under the circumstances, I am of the opinion that even if in a given case the stage of inquiry or trial has not reached and the matter is pending the investigation by the police, the Magistrate can be moved under Section 459 of the Code.

14. So far as this case is concerned, I find that in his application which the Deputy Superintendent of Police, C.I.D. (Crime) has moved, he has referred to Section 459 but it appears that the learned Special Judge has confined his attention only to Section 457 and has passed the orders accordingly. He could have passed proper orders after the requirements of Section 459 were found satisfied. Since he has not applied his mind to the requirement of Section 459, the only course left open is to set aside the order which is sought to be revised, and to send the matter back to the learned Special Judge with direction to pass suitable orders under Section 459 after giving the necessary opportunity to both the parties to be heard. The rule is accordingly made absolute. Dasti order on usual terms.

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