

Prem Singh Vs. State and anr.

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Court : Jammu and Kashmir

Decided On : Aug-21-1981

Reported in : 1982CriLJ297

Judge : Mufti Baha-Ud-Din Farooqi, Actg. C.J.,; A.S. Anand,; I.K. Kotwal and; G.M. Mir, JJ.

Appellant : Prem Singh

Respondent : State and anr.

Judgement :

ORDER

Mufti Baha-Ud-Din Farooqi, Actg. C.J.

1. On the night intervening 17th/18th of July, 1973, one, Rajinder Singh, was found carrying timber in truck No. 4475/JKA in contravention of the Land Transport Rules, framed Under Section 15 of the Jammu and Kashmir Forest Act. The relevant Rule reads :

No timber or other forest produce shall be moved on any route on which a depot or check post has been established unless, covered by a pass issued by the Forest Officer or the Revenue Officer or by the owner of a private forest or his agent.

The timber was being transported without a pass. The contravention is punishable Under Section 16 of the Forest Act. The accused Rajinder Singh was put on trial

Under Sections 15/16 of the Forest Act in the Court of the Chief Judicial Magistrate, Udhampur. On consideration of the evidence, the learned Magistrate convicted him and sentenced him to two months' rigorous imprisonment. He also ordered the confiscation of the truck. On appeal the learned Sessions Judge, Udhampur, upheld the judgment. The accused came up in revision to this Court. Along side the owner of the truck viz. New Karan Bus Service, also filed a petition challenging the order of confiscation. Both these revisions were heard together and disposed of by a common judgment dated 26-12-1975 by one of us. The owners revision was disposed of in his absence in these words:

This brings me to the revision challenging the order of confiscation. Section 28 of the Forest Act, clearly provides that all tools, beats, carts, motor vehicles and cattle used in committing any forest offence, shall be liable to confiscation. On the findings given by the courts below, there can be hardly any doubt that the truck in question was involved in the transportation of timber without the requisite permission. The finding was not challenged before me as none appeared on behalf of the petitioner to challenge it. I have, however, examined the record and see no reason to interfere with this finding. Accordingly the order of confiscation made by the trial Court and upheld by the appellate Court cannot be held to be unjustified. The revision challenging the confiscation is, therefore dismissed.

The owner filed an application Under Section 561-A, Cr. P. C. for recalling this order. The application came to be heard by one of us. At the time of hearing it was discovered that on the question whether Under Section 561-A, Cr. P. C. the High Court has power to revoke, review, recall, or alter its own order in a criminal case, the judicial opinion in the country was divided. The High Courts of Allahabad, Punjab, Mysore and Patna had held that the High Court had such power while the High Courts of Madras, Andhra Pradesh, and Himachal Pradesh had expressed a contrary view. Accordingly the following question was referred for an authoritative decision by a larger Bench of this Court namely:

Whether the High Court has power to revoke, review, recall, or alter its own decision in a criminal case and rehear the case and in particular, whether it has the power to do so, in respect of a decision previously rendered in a criminal

revision?

2. The question has been dealt with at length in a recent judgment of the Supreme Court in *State of Orissa v. Ram Chander* : 1979 CriLJ33 . The Supreme Court has held that Section 369 of the Cr. P. C, 1898, precludes a High Court from altering or reviewing a judgment passed in exercise of its appellate or revisional jurisdiction when once it has signed it. Further the Court has held, that Section 561-A cannot be invoked to exercise powers which are inconsistent with any of the specific provisions of the Code and consequently a High Court has no power to alter or review its own judgment which is specifically prohibited by Section 369 by providing that no Court, when it has signed its judgment, shall alter or review the same except to correct a clerical error.

3. Section 369 of the Criminal P. C, 1898 reads as follows:

Save as otherwise provided by this Code or by any other law for the time being in force, or, in the case of a High Court, by the Letters Patent or other instrument constituting such High Court, no Court when it has signed its judgment shall alter or review the same, except to correct a clerical error.

The Criminal P. C, 1898, does not apply to our State. The State has its own Code called 'The Criminal P. C, 1989'. Under the said Code, Section 369 provides:

Save as otherwise provided in this Code or by any other law for the time being in force, or, in the case of the High Court, by the constitution of High Court, no Court, when it has signed its judgment, shall alter, or review the same, except to correct a clerical error.

The Supreme Court has found that neither the Letters Patent nor any other instrument governing the constitution of the High Courts in the territory of India to which Cr. P. C, 1898, applies, enables such Court to alter or review its own judgment passed in exercise of the criminal jurisdiction. Undoubtedly the language employed in Section 369 of our Cr. P. C, 1989, is not the same as in the corresponding section of the Code of Criminal Procedure, 1898, but the effect of either section is the same. Our High Court like other High Courts in India has no

power given to it by the instrument constituting it to alter or review a judgment passed in exercise of the criminal jurisdiction. I say so, because our High Court is a creature of the State Constitution called 'the Constitution of Jammu and Kashmir' and there is nothing in the State Constitution to show that the High Court has power to alter or review its own judgment passed in exercise of the criminal jurisdiction. Section 102 of the Constitution of Jammu and Kashmir provides as under :-

Saving of existing jurisdiction of the High Court: Subject to the provisions of this Constitution and to the provisions of any law for the time being in force, the jurisdiction of and the law administered in the High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof, sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution.

This takes us to the Jammu and Kashmir Constitution Act, 1996, and the Letters Patent which was issued to the High Court of Jammu and Kashmir by the then His Highness on 20th Aug., 1943. There is no provision either in the Constitution Act of 1996, or in the Letters Patent enabling the High Court to alter or review its judgment passed in exercise of its criminal jurisdiction. It necessarily follows that Section 369 of the State Code does not give to our High Court increased powers which any other High Court in India does not possess under the corresponding section of the Cr. P. C, 1898. Section 561-A is couched in identical terms in both the Codes. Consequently the view expressed by the Supreme Court in the case of Ram Chander 1979 Cri L.J. 33 (supra) would equally hold good under our Code. In that view, our reply to the question set out above would be that this Court has no power to revoke, review, or alter its own judgment in a criminal case whether such decision has been rendered in exercise of its appellate or revisional jurisdiction.

4. In what we have stated above, we assume, that the decision has been validly pronounced and is not a nullity. The question arises whether the bar against alteration or review would be applicable where the decision is a nullity. It seems to

us that if there is no decision because it is a nullity, the bar cannot operate. To this view support is lent by the decisions in the matter of T. Somu Naidu (AIR 1924 Mad 640): (26 Cri LJ 370) and Ramesh Pada Mandal v. Kadambini Dasi (AIR 1927 Cal 702): (28 Cri LJ 831) in which it was held that where the conditions laid down by law as precedent and requisite to the hearing of the case are not observed, the Court acts without jurisdiction and its order is, therefore, void ab initio and the case can be reheard and that such rehearing would not be barred by Section 369 of the Cr. P. C, 1898. In either case it was found that the requirements of Section 439 (2) had not been complied with in the hearing of the revision, and consequently the order passed was void ab initio and that it was, therefore, open to the Court to rehear the case on merits and that Section 369 could not stand as a bar. These cases are only illustrative. Cases are conceivable where the order passed in appeal or revision is a nullity not because of any procedural non-compliance by the Court of appeal or revision, which goes to the root of the matter, but because the order passed by the trial Court itself is found to be a nullity. That may be so where the trial Court has passed the order in violation of principles of natural justice and the appellate or the revisional Court had no jurisdiction of its own to make an order but its jurisdiction is only to confirm or set aside the order of the trial Court. In such cases, the order passed in appeal or revision would be a nullity because in law the order of the trial Court will be deemed to be non-existent and it would necessarily follow that there was no order which the appellate Court or the revisional Court would confirm or set aside. Consequently, it shall be open to the appellate Court or the revisional Court, as the case may be, to proceed to rehear the case as if the order already passed by it did not exist. Section 369, Cr. P. C. would not stand in its way. We hold accordingly.

5. Let the petition be placed before the learned single Judge for hearing and disposal in light of the observations made above.

I.K. Kotwal, J.

6. During the course of hearing, it came to light that at one stage I had appeared as a counsel for one of the parties in this case and as such I decline to express my opinion in the matter.

