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Court : Kerala

Decided On : Sep-22-2011

Judge : S.S. Satheesachandran

Appeal No. : Crl.M.A.No.7423 of 2011 in Unnumbered Crl.R.P.No. of 2011

Appellant : T. Balakrishnan Master

Respondent : K.M. Ramachandran Master and Another

Judgement :

(Prayer: Petition praying that is the circumstances stated in the affidavit filed therewith the High Court be pleased to condone the delay of 21 days caused in filing the Crl. Revision Petition in the interest of justice.)

1. The unnumbered revision with the afore numbered petition to condone delay, has been filed by the de facto complainant in C.C.No.127 of 2004 of the Judicial First Class Magistrate Court – V, Kozhikode, impeaching the legality and correctness of the order of acquittal passed in favour of the first respondent/accused, who was prosecuted for the offences punishable under Sections 166, 167 and 466 of the Indian Penal Code, on a report filed by the Sub Inspector of Police, Faroke Police Station.

2. The delay petition coming up for consideration, a question arose whether the de facto complainant/revision petitioner has an alternate efficacious remedy of preferring an appeal against the order of acquittal. The crux of the allegations for

prosecution of the first respondent was that on account of the illegal acts committed by him in making false entries in the service records of the de facto complainant calculation of his pensionable service was wrongly made and, thereby, he suffered reduction in pension. Since he suffered injury by the alleged illegal acts, constituting the offences imputed against the accused, the de facto complainant has the status of ‘victim’ as defined under Section 2 (wa) of the Code of Criminal Procedure, for short, the ‘Code’, which was inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), is conceded to. As under the aforesaid Amendment Act, by the proviso added to Section 372 of the Code, a right of appeal is provided to a victim against an order of acquittal of the accused, it has become necessary to examine whether this Court has to consider the delay petition on its merits when a challenge under the revision appears to be not entertainable.

3. The learned counsel for the revision petitioner canvassed that a revision against the order of acquittal is maintainable in the case placing reliance on an order passed by a learned Judge of this Court in an unnumbered revision, in which, the applicability of the proviso added to Section 372 of the Code under the Amendment Act was considered and a view expressed, taking note of the decision rendered by the Apex Court in National Commission for Women v. State of Delhi and Another ((2010) 12 SCC 599), that the aforesaid proviso will have only prospective effect, and the remedy of the de facto complainant against the order of acquittal is by filing a revision. The learned counsel also relied on Subodh S. Salaskar v. Jayprakash M. Shah (2008 (3) KLT 616 (SC)) and Bhaskaran v. State of Kerala (2010 (2) KLT 908) to contend that the proviso inserted to Section 372 of the Code has effect only from the date when the amendment came into operation with reference to the date of incident giving rise to the prosecution of the accused, and not with reference to the date of judgment rendered in the case.

4. Since the question posed for consideration required a deeper look, I have requested Adv.Sri.T.N.Manoj to assist this Court, and, accordingly, the learned counsel argued extensively over the scope and ambit of the aforesaid proviso inserted to Section 372 of the Code.

5. The learned counsel for the revision petitioner has produced a copy of the order passed in the unnumbered revision, which had been banked upon to contend that the amendment inserting the proviso to Section 372 of the Code has no retrospective effect and it is inapplicable to cases registered over incidents which had taken place before such proviso was brought into operation, that is, on 31.12.2009. Going through the order, it is seen, in the case considered in that unnumbered criminal revision the Registry had raised objections over the entertainability of the revision on the basis of the applicability of the aforesaid proviso. In that case, the incident involved and also the judgment rendered, both of them, were earlier to the date of commencement of operation of the proviso to Section 372 of the Code. The incident in that case was on 02.12.2003 and judgment was rendered on 16.10.2009. This Court has held that the objection of the Registry is not sustainable as the aforesaid proviso came into operation only on 31.12.2009. Perusing the order dated 13.06.2011, passed in the aforesaid unnumbered revision, relied by the counsel for the revision petitioner, it is seen, other than expressing a view that the proviso inserted as per Act 5 of 2009 will have only prospective effect, placing reliance on the observations made by the Apex Court in National Commission for Women's case (cited supra) the question how the prospective effect of the proviso has to be considered as to whether it has to be examined with reference to the date of incident or date of judgment rendered in a case, to which such proviso is applicable, has not at all been considered or decided. So much so, the order dated 13.06.2011 rendered in the unnumbered revision, relied by the counsel, does not lay down any proposition that such prospective effect of the proviso has to be reckoned from the date of incident involved in the case. That order does not assist the revision petitioner in the present case to contend that a revision by a victim against the order of acquittal of the accused, after the Amendment Act (Act 5 of 2009) came into force, is still entertainable on the premise that applicability of proviso depends on the date of incident of the case.

6. The decisions relied by the counsel for the revision petitioner in Subodh's case (cited supra) and Bhaskaran's case (cited supra) also do not in any way support the case canvassed over the applicability of the proviso to Section 372 of the Code brought in by the Amendment Act. In Subodh's case (cited supra), it was held that

the proviso added to Section 142(b) of the Negotiable Instruments Act extending period of limitation for taking cognizance of a complaint under Section 138 of the N.I.Act does not have retrospective effect. The question involved therein was whether the aforesaid proviso inserted to was a procedural one or a substantive provision, and holding that it is a substantive provision, it was held it cannot be given retrospective effect. The question emerging for consideration in the present case in entirely different. Whether the substantive right conferred on a victim to prefer an appeal under the circumstances referred to in the proviso inserted to Section 372 of the Code has to be given effect to from the date of commencement of the operation of the proviso, or its operation has to be reckoned with reference to the date of incident of the case giving rise to the prosecution of the accused emerges for consideration in the case. It is not a question of retrospective operation of the proviso with reference to the incident involved in the case but whether its operation has to be considered at least positively from the date of judgment of the case covered by any of the three circumstances involved, that is the limited question arising for consideration in the present case. So much so, the decision in Subodh's case (cited supra), is inapplicable and has no parallel or connection with the present case. In Bhaskaran's case (cited supra), the question involved was whether a rule brought in by way of amendment providing for and substituting a larger period restraining the pattadars from alienating his patta land would have retrospective effect; and, considering that question, it was held that the rule has only prospective effect and will not affect the rights of persons, who had obtained pattas under the rules before the aforesaid amendment. The right enjoyed by a pattadar under the previous rule with the limited period fixed for alienation of his land, could not be affected by the amendment of the rule fixing a larger period and the amended rule has no retrospective effect and it does not apply prior to the date of coming into force of the amendment, it was held by this Court. What was involved and considered in that case was whether the substantive right of the pattadar, as conferred under a previous rule, could have been interfered by a subsequent amendment of the rule. That being the position, the decision relied in Bhaskaran's case (cited supra), has no application to the present case.

7. Section 2 (wa) of the Code, inserted under the Amendment Act 5 of 2009 defines a ‘victim’ thus:

“’victim’ means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir”.

By the proviso inserted and added to Section 372 of the Code, the victim is conferred with a right of appeal to challenge an order of acquittal rendered in favour of the accused or his conviction for a lesser offence or imposing of inadequate compensation. Such appeal by the victim, it is stated, shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court. The amendment in so far as it relates to conferring rights on victims, who often suffered substantive harm by the crimes perpetrated against them, is the outcome of the recommendations made by the Law Commission of India. The Commission in its 154th Report dealing with ‘victimology’, as under Chapter XV therein had made a series of recommendations to ensure the rights of the victims covered by the criminal cases. The objects and reasons to the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) also spell out that the amendments are intended to tone up the criminal justice system making adequate provisions with respect to several aspects including those of the rights of the victims, who suffered worst in the crimes.

8. Proviso to Section 372 of the Code reads thus:

“[Provided that the victim shall have a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.]”

The question is whether the right of appeal conferred on the victim by the proviso to Section 372 of the Code, has to be determined with regard to the date of order of acquittal or conviction of the accused for a lesser offence or order providing inadequate compensation, or, with respect to the date of incident giving rise to the prosecution of the accused. What is conferred by the Amendment Act 5 of 2009 on

the victim is a substantive right to prefer an appeal in certain circumstances as specified, and that alone. Act 5 of 2009 has come into effect from 31.12.2009. Such right is available to a victim where a judgment is rendered by the court on or after 31.12.2009, provided, any one of the three circumstances covered by the proviso is involved in the case. The right is dependent on the judgment rendered by the court and not in relation to the incident which gave rise to the prosecution of the accused, whether or not it was at the instance of the victim. Any person who has suffered any loss or injury by the act or omission of the accused who had been prosecuted, and thus qualified to be a victim as defined under the Amendment Act 5 of 2009, gets a vested right after the coming into operation of the aforesaid Act to prefer an appeal in the event such prosecution of accused has resulted in a judgment giving rise any one of the three situations specified under the proviso to Section 372 of the Code. Where there is no doubt that what is conferred under the proviso to Section 372 of the Code enabling the victim to prefer an appeal in the circumstances specified is a substantive right conferred on him by the Statute its effect cannot be nullified taking a view that the applicability of the proviso inserted has to be reckoned with reference to the date of incident in the case which led to the prosecution of the accused. Any such view would be against the letter and spirit of the aforesaid proviso and also the very purpose for which a right of appeal is conferred on the victim, illustrating and defining the person falling thereunder, and specifically limiting to what situation such a right could be exercised.

9. In National Commission for Women's case (referred to above), only a casual reference to the proviso to Section 372 of the Code was made while examining the right of a third party (National Commission for Women) to impeach the inadequacy of a sentence imposed on an accused convicted of an offence under Section 376 of the IPC. Paragraph 8 of the aforesaid decision reads thus:

"Chapter XXIX of the Code of Criminal Procedure deal with "Appeal(s)". Section 372 specifically provides that no appeal shall lie from a judgment or order of a criminal court except as provided by the Code or by any other law which authorises an appeal. The proviso inserted by Section 372 (Act 5 of 2009) with effect from 31.12.2009, gives a limited right to the victim to file an appeal in the

High Court against any order of a criminal court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence."

Observations were made as above by the apex court while examining a Special Leave to appeal in a case, applied for by a third party, National Commission for Women. Such appellant, which could not be considered as a victim, with the challenge sought to be raised over the inadequacy of sentence awarded to the accused, and that too, where Section 377 of the Code specifically ordains as to who are all competent to prefer an appeal on the ground of inadequacy of sentence, was declined leave to appeal observing that granting leave in such a case "would be a dangerous doctrine and would cause utter confusion in the criminal justice system". Advertence made in the observations of the Apex Court as to the applicability of the proviso which became operative in the year 2009, that is, long after the incident covered by the case, does not postulate that a ratio is laid down that the applicability of the proviso has to be adjudged with reference to the date of incident giving rise to the prosecution of the accused as against whom an appeal could be preferred by a victim in the event of any one of the three circumstances stated in the proviso.

10. The Apex Court in Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others ((1994) 4 SCC 602) has spelt out the ambit and scope of an amending act and its representative operation as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in

nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) a procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

11. The representative operation of the proviso to Section 372 of the Code has to be examined with reference to the guiding principles referred to above. An appeal is a right of entering superior court and inviting its aid and interposition to redress an order of the court below. The central idea is a right conferred on an aggrieved person though the appeal is governed by and surrounded by procedures. So much so, it has been recognised by judicial decisions as a right which vests in a suit or proceedings at the time of institution of the proceedings. Any change in law relating to appeals after institution of the original proceedings, which adversely touches this vested right is presumed not to be retrospective. However, there is a cardinal distinction as regards any alteration or amendment in law relating to appeals when it reduces already existing rights of appeal from those which, by such alteration, increases rights of appeal. In pending proceedings, by alteration or amendment a right of appeal is provided, it will be presumed to be retrospective applying to orders subsequently made in such proceedings but without affecting finality of orders already made. An order which on the date itself made is final gives rise to vested rights and subsequent change in law giving rise to new appeal or revision is presumed not to affect the finality of the orders already made, unless it is so clearly provided by the enactment. The above principle has been settled by the Privy Council in Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner, Delhi and another (AIR 1927 Privy Council 242). However, the right to finality does not apply until the making of the order. That being so, if a new right or appeal or revision is conferred before making of the order, and during the

pendency of the proceedings, by way of amendment any right of appeal or revision is provided against orders subsequently made, it cannot be contended that a vested right at the commencement of the proceedings was available to one or other party in the proceedings, and it insulated the orders passed from a challenge by an appeal or revision as the case may be. If a new right of appeal or revision is conferred before making of the order by way of amendment, that will have effect in a pending proceedings and all orders subsequently made. This has been so held in Indira Sohanlal v. Custodian of Evacuee property, Delhi and others (AIR 1956 SC 77). In the above case, the apex court has held that where the attribute of finality in a pending proceeding is affected by subsequent legislation providing for a revision over and above an appeal already attached to, it is of no consequence as it amounted only to an alteration of procedure. The court has observed thus:

"………………, it appears to be clear that while a right of appeal in respect of a pending action may conceivably be treated as a substantive right vesting in the litigant on the commencement of the action – though we do not so decide – no such vested right to obtain a determination with the attribute of finality can be predicated in favour of a litigant on the institution of the action."

(emphasis supplied)

The principle as above finds similar expression in the cases of Nathoo Lal v. Durga Prasad (AIR 1954 SC 355) and Garikapati Veeraya v. N.Subbiah Choudhry and others (AIR 1957 SC 540). When the Sales Tax Act was amended during the pendency of a revision providing for a reference at the instance of the Commissioner of Sales Tax, it was held in M/s.Tikaram and Sons Ltd. etc. v. The Commissioner of Sales Tax, U.P. (AIR 1968 SC 1286) that the Commissioner could apply for a reference against the order made in the pending revision. When such be the position of law, where a right is conferred on the victim to prefer an appeal in the circumstances enumerated under the proviso to Section 372 of the Code by the Amendment Act (Act 5 of 2009), such right will be presumed to be retrospective applying to orders subsequently made in pending proceedings, as and when the amendment came into force, that is, 31.12.2009.

12. Prospective operation of the proviso to Section 372 of the Code will not enable the victim to prefer appeal where judgment had been rendered prior to the coming into force of the Amendment Act 5 of 2009. In cases where judgment is rendered on or after 31.12.2009, after the commencement of the Act 5 of 2009, and that too, where any of the circumstances covered by the proviso, the victim has a right to prefer an appeal before the competent court to which an appeal ordinarily lies in the event of conviction of the accused in such case. The incident giving rise to the prosecution of the accused was before the commencement of the operation of the proviso to Section 372 of the Code cannot be given any merit in deciding the right conferred on the victim to prefer the appeal, which has to be looked into with reference to the date of commencement of the amending Act and also the circumstances enabling the victim to prefer the appeal against the accused.

13. No question of any prejudice being caused to the accused or of his substantive rights affected by operation of the proviso would arise for consideration. The accused in a case has no vested right in procedural or processual law. By way of the amendment and insertion of the proviso to Section 372 of the Code, a right is conferred on the victim, no doubt, a substantive right on him, to challenge the judgment rendered as against the accused, provided, it satisfied any one of the three contingencies enumerated. What is prohibited under Article 20 of the Constitution of India is only a conviction or sentence under an ex post facto law and not the trial thereof. Change in procedure, even enabling a third party, who, hitherto, had no right, to challenge an order/judgment, in a pending proceedings, cannot amount to any invasion of the rights of the accused except in a case where there is any objection by way of discrimination or the failure of any other fundamental right.

14. The order of acquittal passed in favour of the respondent/accused under the judgment passed by the court below, sought to be assailed in the revision with the above petition to condone delay is dated 8.12.2010, much later to the commencement of Act 5 of 2009. When that be so, the revision petitioner/de facto complainant, who could be qualified as a victim, has a right of appeal as the challenge against the order of acquittal is covered by the proviso inserted to Section 372 of the Code under Act 5 of 2009. Where a right of appeal is so

provided, a revision at the instance of the de facto complainant is not entertainable as it is interdicted under sub section (4) of Section 401 of the Code, which reads thus:

“Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

When such be the position of law, I find, the petition for condonation of delay is not to be examined by this Court as the challenge against the order of acquittal by way of a revision at the instance of the petitioner/victim is not entertainable before this Court.

15. Registry is directed to return the copy of order impugned with the accompaniments produced, to the counsel for the petitioner to enable the filing of the appeal against the order of acquittal, if so advised. In case any such appeal is filed within a period of three weeks from the date of this order, before the competent forum, the period from the date of presentation of the petition for condoning delay and unnumbered revision before this Court till the date of preferring of appeal, if so preferred within the aforesaid period, shall be given credit to in condoning the delay of such period by the court concerned as the petitioner has been bona fide prosecuting the challenge against the order of acquittal before this Court and, thus, entitled to get exemption for such period under Section 14 of the Limitation Act.

I place on record my appreciation for the valuable assistance rendered by Adv.Smt.Bindu George, who appeared for the petitioner and also Adv.Sri,T.N.Manoj, both of whom had presented arguments on various facets of the issue covered by the case meritoriously.

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