Swarth Mahto and Another

Vs

Dharmdeo Narain Singh

Criminal Appeal No. 70 of 1969

(CJI S. M. Sikri, D. G. Palekar M. H. Beg JJ)

31.01.1972

JUDGMENT

PALEKAR, J. -

1. This is an appeal by special leave. The appellants who were accused Nos. 1 and 3 respectively were acquitted by the learned Munsif-Magistrate 1st Class, Aurangabad on March 19, 1966. The case against them had been started on a complaint filed by the respondent for an offence under Section 420 of the Indian Penal Code. Aggrieved by the acquittal, the respondent filed an appeal under Section 417(3) of the Code of Criminal Procedure and the same was registered as Criminal Appeal No. 52 of 1966 in the Patna High Court. The order-sheet shows that notice was issued to the appellant on July 5, 1966. In pursuance of the notice, the appellants appeared in the case on July 28, 1966 through Shri Kedar Nath Verma, Advocate. By some mistake, neither the name of the appellants nor of their advocate Shri Kedar Nath Verma appeared in the cause list, and the case was heard in their absence on December 16 and 17, 1968. The appeal was allowed and the appellants were convicted of the offence under Section 420 of the Indian Penal Court and sentenced to undergo rigorous imprisonment for two months and pay a fine of Rs. 500/- each. The appellant came to know about this order subsequently. On January 7, 1969 an application was made to the court for rehearing the appeal, in the presence of the appellants. The application was dismissed on January 24, 1969, the court holding that no opportunity had been denied to the appellant of being heard.

2. The only question before us is whether a reasonable opportunity had been given to the appellant of being heard before the order of acquittal was converted into one of conviction. The appellant have also challenged their conviction; but, on the view we are taking on the above question, we do not think that we should enter into the merits of the case.

3. As already stated, notice was issued to the appellants on July 5, 1966. The case came on for hearing on December 4 1968. The cause for that date no doubt shows that Criminal Appeal No. 52 of 1966 was on the board; but neither the names of the appellant nor of their advocate, was mentioned in the cause list. On that day, the case was not heard. It came on board on December 11, 1968, but an order was made that it will not be taken up for hearing during that week. Then, it came on board on December 16, 1968. But the same mistake of not showing in the cause list either the name of the appellants or of their advocates was repeated. The learned Judge heard the appeal on that day and the next day and delivered judgment immediately convicting the appellants.

4. It is clear from the record that the appellants or their advocate was not heard. Though Criminal Appeals No. 52 of 1966 was duly shown in the cause list on December 16, 1968, the cause list had failed to show either the name of the appellants or their advocate. When an advocate examines the

cause list, he is generally not guided by the number of the case but by his name appearing against the case. Therefore when Shri Kedar Nath Verma or his clerks examined the cause list, they may not have noticed that the case is on board either on December 4, 1968 or December 16, 1968. In a case of this type which had been filed in court in 1966 and came up for hearing two and a half years later, it will be wrong to post the advocate with notice when the cause list is improperly published. If the name of the advocate who appears in the case is not shown, there would be good reason to think that he had no notice of the case being posted for hearing. Therefore, when an application is later made by the parties who were not heard, it would be an exercise of sound discretion if an opportunity is given to the party who is not heard.

5. The appellants came to know from rumours in the village, apparently traceable to the respondent, that the case had been heard and they had been convicted. So on January 7, 1969, they approached the court by an application complaining that the case was heard in their absence. They alleged :

> "..... the petitioners have been prejudiced on account of the absence of their names as well as the name of the petitioner's advocate from the cause list."

6. The order sheets shows that Shri Kedar Nath Verma filed his Vakalat again on January 7, 1969 and appeared to argue the application, in the very first para of which it was alleged that he had filed his appearance in the Criminal Appeal on July 28, 1966. Since his case was that neither he nor his client had any notice of the date of hearing, the matter should have been investigated. But the order passed by the learned judge on January 24, 1969 dismissing the applications does not disclose that any such investigations was made. It is, therefore, quite probable that the office mislaid the vakalatnama filed on July 28, 1966 by Shri Verma in the appeal and that is how his name did not appear in the cause lists. If, in fact, no such Vakalatnama had been filed, we would expect that when the appeal came on board for hearing on December 4 1968, nearly 2 1/2 years after the filing of the appeal, some intimations would have been sent personally to the appellants who were the respondent in the appeals. We do not, therefore, believe as stated in the office note, dated February 6, 1969, that Shri Verma had not filed his appearance in Criminal Appeal No. 52 of 1966. If after filing his appearance, his name is not shown in the cause list, there was every possibility of Shri Verma not becoming aware of the fact that the appeal had been placed on board for hearing. The learned Judge has come to the conclusion that the application for rehearing of the appeal was not maintainable on the grounds that no opportunity had been denied to the appellants of being heard. We are unable to see how it could be said in the circumstances of this case that a fair and reasonable opportunity had been given to the appellants before they were convicted. If by mistake the court or its Office, the appellants who were respondents in the case were not informed of the date of hearing, it will be unreasonable to hold that an opportunity had been given to them, merely because notice had been issued to them of the appeal some 2 1/2 years earlier. The very idea behind publishing the cause list is to give notice to advocated and the parties that the case in which they were concerned was going to be heard on or after a particular day. Where no such notice had been given, it will be idle to say that no opportunity had been denied.

7. In our opinion, there was no proper hearing of Criminal Appeal No. 52 of 1966 and, therefore, the order of conviction and sentence recorded by the High Court must be set aside. We have not referred to the facts of the case because we are not concerned with the same. The High Court shall hear the appeal afresh after issuing necessary notices to the parties.

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