SUPREME COURT OF INDIA

Sujoy Kumar Chanda

Vs.

Damayanti Majhi

Crl.A.No.273 of 2006

(Ranjana Prakash Desai and Madan B. Lokur JJ.)

20.02.2014

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Both these appeals are directed against Judgment and Order dated 7/6/2005 passed by the Calcutta High Court in C.R.R. No.3140 of 2004 and, hence, they are being disposed of by this common order.

2. The facts which give rise to this judgment need to be shortly stated.

> One Khagen Majhi was killed in the early hours of 30/4/1997. He was shot dead. On the same day P.S. Kalyani registered Case No.50 of 1997 under Sections 147, 148, 149, 353, 307 and 326 of the Indian Penal Code ("the IPC") and Sections 25 and 27 of the Arms Act against unknown persons. On 17/5/1997, a complaint was filed by Smt. Damyanti Majhi, the mother of deceased Khagen Majhi against SI Sankar Chatterjee, ASI Ajay Roy, appellant - S.K. Chanda, appellant - S.S. Banerjee and one Kartik Sarkar under Sections 302, 201 and 120B read with Section 34 of the IPC which was registered as Case No.138C of 1997. In this case, between 21/8/1997 to 6/6/2000, 12 witnesses were examined prior to the issue of process under Sections 200 and 202 of the Criminal Procedure Code ("the Code") by learned SDJM., Kalyani, Nadia.

3. It appears that Association for Protection of Democratic Rights, Ranaghat Branch, made a complaint to the West Bengal Human Rights Commission alleging

that some police officers had shot down Khagen Majhi. The West Bengal Human Rights Commission by its Order dated 21/1/1998 recommended that prosecution should be started against SI Shankar Chatterjee and ASI Ajoy Roy. The Commission directed that displeasure of the Commission should be communicated, in writing, to the appellant - S.K. Chanda, SDPO, Kalyani for having attempted to mislead the Commission by his Report which was not in alignment with facts. There was no direction as against appellant - S.S. Banerjee. On 22/5/2000, pursuant to the above recommendation of the Commission, P.S. Kalyani, registered Case No.78 of 2000 against SI Shankar Chatterjee, ASI Ajoy Roy and Kartick Sarkar under Sections 147, 148, 149, 353, 307 and 326 of the IPC read with Sections 25 and 27 of the Arms Act. On 4/6/2000 upon investigation, charge-sheet was submitted against the abovementioned accused persons. On 31/7/2000, learned SDJM, Kalyani found sufficient ground to proceed against SI Shankar Chatterjee, ASI Ajoy Roy and Kartick Sarkar under Sections 302 read with Section 120B or Section 304 read with Section 120B and Section 201 read with Section 34 of the IPC. Learned SDJM, however, refused to issue process against appellant - S.K. Chanda and appellant - S.S. Banerjee. Since over the same incident, there was a police case also against those three accused persons, learned Magistrate directed that Complaint Case No.138C of 1997 be tagged with Police Case No.78 of 2000 for further proceedings. On 25/8/2000, the complainant filed a revisional application against the said Order dated 31/7/2000 passed by learned SDJM being C.R.R. No.2174 of 2000 in the Calcutta High Court. The appellants were not party to this revisional application. On 23/7/2001, the High Court set aside the Order of the learned Magistrate clubbing the complaint case with the police case and directed that the complaint case be committed to the Court of Sessions. It would be appropriate to quote the relevant paragraphs from the Order of the High Court:-

> "Taking into account the entire facts and circumstances of the instant case, I am of the view that the learned Magistrate's Order directing that both the cases should be clubbed together under Section 210 of the said Code cannot be sustained and accordingly, the Revisional Application is allowed. The order dated 31/7/2000 passed by the learned Magistrate is set aside and the learned Magistrate is further directed to commit the case immediately after proper compliance of the provisions of law and soon reach the stage of section 208 of the said Code"
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> "It would be also open to the Learned Sessions Judge, upon commitment of the arrayed Accused/Opposite Parties during the Trial to arraign the other accused who has been left out by the Learned Magistrate, if the situation so demands in exercise of his power under Section 319 of the said Code in accordance with the steps known to law without being guided by the disposal of this Application."

4. It may be stated here that the said Order has not been challenged by the State or any of the parties.

5. It appears that Learned SDJM interpreted this order to mean that the High Court had issued a direction to it to proceed against the present appellants as well and on 5/1/2002, he issued warrant of arrest against the appellants and one Kartick Sarkar for offences under Sections 302, 201 and 120B read with Section 34 of the IPC. On 14/1/2002, the appellants preferred a revisional application before the learned Sessions Judge challenging Order dated 5/1/2002. By his Order dated 24/9/2004, learned Sessions Judge modified the Order of learned Magistrate dated 5/1/2002.

6. Learned Sessions Judge considered all the facts in proper perspective and noted that learned Magistrate had by his earlier order dated 31/7/2000 refused to issue process against S.K. Chanda and S.S. Banerjee (the appellants herein) and had passed order of clubbing the complaint case with the police case. This order was challenged by Smt. Damayanti Majhi. The High Court set aside the clubbing of both the cases. Learned Sessions Judge further noted that the High Court directed learned Magistrate to commit the case immediately after compliance of the provisions of the Code and reach the stage of Section 208 of the Code. Learned Sessions Judge further observed that the High Court had clarified that it would be open to learned Sessions Judge, upon commitment of the case, to summon those accused who have been left out by learned Magistrate in exercise of his powers under Section 319 of the Code. Relevant observations of learned Sessions Judge need to be quoted.

> "It appears from order dated 31.7.2000 that Ld. Magistrate has left out the accd. No.3 S.K. Chanda and accd. No.4 S.S. Banerjee while proceeding as per provisions of section 204 Cr.P.C. Therefore in such circumstances and in view of specific observations of Hon'ble Court stated above, the said left out accd. persons may be arraigned during trial by the Ld. Sessions Judge U/s 319 of Cr.P.C. after commitment of the arrayed accd./O.Ps. i.e. accds. Sankar Chatterjee, Ajoy Roy and accd. Kartick Sarkar since absconding who

may be sent up during trial if arrested. But it appears from the impugned order dated 5.1.2002 Ld. Magistrate has passed the order to issue W.A. against all named 5 accd. persons including said S.K. Chanda and S.S. Banerjee who have been left out by order dated 31.7.2000 as observed by the Hon'ble Court."

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"Considering all these facts and circumstances and specific observations direction of the Hon'ble Court discussed above this Court find no reason to disagree with the aforesaid submissions of Ld. Lawyer of the Petitioner/revisionist and accordingly it is held that the impugned order dated 5.1.02 issuing W.A. Against the petitioner and another is illegal and without jurisdiction and in gross violation of the direction of the Hon'ble Court and as such the said Order dated 5.1.02 is not sustainable in law so far as the case of the petitioner and another i.e. accd. No.3 S.K. Chanda and accd. No.4 S.S. Banerjee is concerned and the impugned order is to be modified to that effect through interference by this revisional court. The instant Cr. Motion is fit to be allowed."

7. Having perused this order, we are of the opinion that the learned Sessions Judge was right in saying that the order passed by learned SDJM dated 5/1/2002 was without jurisdiction and in violation of the High Court's earlier Order dated 23/7/2001. In the facts of this case, learned SDJM having once refused to issue process against the appellants, he could not have recalled that order by a subsequent order. In this connection, we may refer to the judgment of this Court in Bindeshwari Prasad Singh v. Kali Singh[1], where this Court has clarified that there is absolutely no provision in the Code empowering the Magistrate to review or recall an order passed by him. This view has been reiterated by this Court thereafter in several authoritative pronouncements.

8. We are also of the view that the High Court in its order dated 23/7/2001, did not issue any direction to the learned Magistrate to proceed against the appellants. The High Court only set aside the order of clubbing of the complaint case with the police case and observed that after commitment of the case, learned Sessions Judge could, if the situation so demands in exercise of his powers under Section 319 of the Code, summon other accused persons who have been left out by learned Magistrate. Thus, learned Magistrate was to commit the case to the Sessions Court and the Sessions Court in its discretion could have summoned other accused under

Section 319 of the Code, if found necessary. Learned Magistrate appears to have misconstrued the High Court's order dated 23/7/2001 and taken it as a direction to issue process against all the accused.

9. The complainant being aggrieved by Order dated 24/9/2004 passed by the Sessions Court filed a revisional application before the High Court against Order dated 24/9/2004 of learned Sessions Judge. By the impugned order, the High Court set aside the order of the Sessions Court and restored the order of learned Magistrate dated 5/1/2002. It is this order, which is challenged before us.

10. While setting aside the order of learned Sessions Judge, the High Court has passed caustic comments on him, which in our opinion, are unwarranted. Learned Sessions Judge rightly interpreted the High Court order dated 23/7/2001. We have already stated the reasons for this conclusion drawn by us. In fact, learned Sessions Judge was of the view that the High Court's order dated 23/7/2001 was not followed by learned Magistrate and in that anxiety, he modified the said order. We do not see either any disrespect being shown to the High Court or any casual approach being adopted by learned Sessions Judge.

11. Having considered the facts of the case and the settled legal position, we are of the opinion that it would be appropriate to remit the matter to the Court of Additional Chief Judicial Magistrate, Kalyani, Nadia for committal of the case to the Sessions Judge at District Nadia so that the case can proceed after the evidence is led. If it appears to learned Sessions Judge that involvement of any person is evident, he can summon the appellants or any other persons under Section 319 of the Code. Hence, we pass the following order:-

12. The impugned Order dated 7/6/2005 passed by the High Court at Calcutta is set aside.

13. The Complaint Case No. 138C of 1997 is remitted to the learned Additional Chief Judicial Magistrate, Nadia. The Additional Chief Judicial Magistrate shall commit it to the Court of Sessions, Nadia in accordance with the provisions of the Code. Learned Sessions Judge, Nadia shall immediately proceed with the case in accordance with the provisions of the Code. Needless to say that if in the course of trial, it appears to learned Sessions Judge from the evidence that any person has committed any offence for which he could be tried together with the accused, he may proceed against such person for the offences which such person appears to have committed. Needless to say further that if from the evidence, it appears to

learned Sessions Judge that the present appellants have committed any offence, he would be free to proceed against them. We, however, make it clear that we have not expressed any opinion on the merits of the case as to whether any case is made out against the present appellants for summoning them or not. It is for learned Sessions Judge to decide this question independently and in accordance with law. Considering the fact that this matter is pending since 1997 and involves alleged encounter killing, we direct learned Sessions Judge to dispose of the case as expeditiously as possible.

14. Before parting, we wish to add a rider. We feel that the High Court should not have passed such harsh comments on learned Sessions Judge. This Court has repeatedly stated that the superior courts should not pass caustic remarks on the subordinate courts. Unless the facts disclose a designed effort to frustrate the cause of justice with malafide intention, harsh comments should not be made. Bonafide errors should not invite disparaging remarks. Judges do commit errors. Superior courts are there to correct such errors. They can convey their anxiety to subordinate courts through their orders which should be authoritative but not uncharitable. Use of derogatory language should be avoided. That invariably has a demoralizing effect on the subordinate judiciary.

15. In this context, observations made by this Court in K.P. Tiwari v. State of M.P.[2] may be usefully referred to.

> "The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err... 'It is well said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks - more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every

> error, however gross it may look, should not, therefore, be attributed to improper motive."

16. Again in Braj Kishore Thakur v. Union of India[3], this Court observed as under:

> "2. Judicial restraint is a virtue. A virtue which shall be concomitant of every judicial disposition. It is an attribute of a judge which he is obliged to keep refurbished time to time, particularly while dealing with matters before him whether in exercise of appellate or revisional or other supervisory jurisdiction. Higher courts must remind themselves constantly that higher tiers are provided in the judicial hierarchy to set right errors which could possibly have crept in the findings or orders of courts at the lower tiers. Such powers certainly not for belching diatribe at judicial personages in lower cadre. It is well to remember the words of a jurist that "a judge who has not committed any error is yet to be born".

17. We need not burden our judgment by quoting similar observations made by this Court in several other judgments. With this caution, we dispose of the appeals.