PATNA HIGH COURT

Ramballabh Jha

Vs

State of Bihar

Criminal Appeal No. 202 of 1960

(S.C. Misra and S.P. Singh, JJ.)

27.02.1962

JUDGMENT

S.C. Misra, J.

1. This is an application under Section 561A, Code of Criminal Procedure, for re-hearing of Criminal Appeal No.202 of 1960. This appeal was preferred from jail by the appellant Ramballabh Jha who was convicted under Section 302, Indian Penal Code, and sentenced to undergo rigorous imprisonment for life. The appeal was listed for final hearing and it was disposed of by this Court on the 11th of January, 1962. The appeal was dismissed. Thereafter, on the 14th of February, 1962, the present application was filed by the learned advocate Mr. Mahendra Kant Choudhary stating that he had filed Vakalatnama on behalf of the appellant long before the case was put up on the daily list, but through inadvertence somewhere in the office his name did not appear as counsel for the appellant on the daily list. The result of this was that he had no information of this appeal having been listed for hearing and, accordingly, it was decided without his being heard by the Bench, treating it to be a jail appeal as it was originally filed. His grievance is that his failure to appear in the appeal on behalf of the appellant was not due to any laches or negligence on his part but on account of the error on the part of the office of the High Court, because, according to the settled practice, when the daily list is printed showing the number of the case, the name or names of the parties and those of the counsel, every member of the Bar engaged relies upon the daily list for information as to whether the particular case in which he has been engaged has been put up in the list or not. In the circumstances, therefore, it should be held that judgment has been delivered in this appeal by the Bench without giving him the reasonable opportunity to argue the appellant's case, and the appellant is entitled to a re-hearing.

2. In this connection, Mr. Raghunath Jha appearing in support of the application for re-hearing has drawn our attention to Sections 369, 421 and 561A of the Code of Criminal Procedure (the three relevant sections) for decision of the point raised in this petition. Section 369 provides, in so far as it is relevant, that no Court when it has sighed its judgment shall alter or review the same except to correct a clerical error. He concedes that if S.369 were to be read in isolation, the language being mandatory and comprehensive, it would not be open to any Criminal Court

including the High Court to alter or review the judgment once it has been pronounced and signed. But his main contention is that this, however, is subject to the provisions of S.421 of the Code, sub-section (1) of which runs thus:

> "On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:
> Provided that no appeal presented under Section 415 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same".

So far as Section 561A is concerned, it is a general section providing for the inherent jurisdiction of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. Mr. Jha has urged accordingly that in order to invoke the finality and unalterability attaching to S.369 of the Code, the judgment must be one which complies with the requirement of the proviso to S.421 of the Code, i.e., no appeal presented to the Court under Section 419 shall be dismissed without reasonable opportunity being given to the appellant or his pleader of being heard in support of the case. This is a matter of procedure, the exact application of which to the facts of a particular case will depend on its own context. The sine qua non however, of the proviso is that before an appeal is disposed of, the appellant or his pleader must be given a reasonable opportunity to be heard. In relation to an appeal in the High Court where all cases to be posted before a Bench are printed in the daily list, it is the duty of the Court to confine itself only to those cases which are on the printed daily list as a rule. Where, however, a particular appeal has been disposed of without its having been so posted in the daily list in the proper form, without showing the name of the advocates for the parties, and as a consequence of which the advocate for a party has not been able to appear to argue the appeal, it must be held that reasonable opportunity has not been given to him to press the appeal and bring out the various aspects of the questions involved in the decision of the criminal case. Section 561 A, accordingly, comes into operation and such a manifest error on the part of the office resulting in the non-compliance of the requirement of S.421 can be rectified taking recourse to Section 561-A. As S.421 stands, there is considerable substance in the argument in support of the application put forward by the learned counsel. As it is, however, this matter is not res integra, but it has been considered in a number of cases and the views of all the High Courts are consistent with the argument advanced by the learned counsel. He has drawn our attention in support of his contention, therefore, to the following cases: *Mahomed Sadiq v. Emperor*[1], *Shahu v. Emperor*[2], *Chandrika v. Rex*[3], and *State v. Kunjan Pillai*[4], learned counsel for the State, however, has mainly relied upon a decision in the matter of Gibbons, ILR 14 Cal 42.

3. It may be stated that the decisions of the Calcutta High Court, Travencore-Cochin High Court and that of Sind Judicial Commissioner's Court are all decisions of the Full Bench of those Courts respectively. The observation in ILR 14 Cal 42, upon which reliance was placed by the learned counsel for the State, however, is not relevant for answering the question which has been raised in the present petition. That was a case in which a Division Bench of the Calcutta High Court reversed the verdict of acquittal by the jury who found the accused person not guilty and convicted and sentenced him to one year's rigorous imprisonment and a fine of Rs.100/- or, in default, to suffer six months rigorous imprisonment. Subsequently, an application was filed on

behalf of the accused for appointment of a Bench to re-hear the application to review the order. The learned Chief Justice constituted the Full Bench accordingly of five Judges to hear the matter as to whether it was open to the Court to review the judgment which was duly pronounced by a Division Bench after hearing the counsel for the accused. They held, in the circumstances, that there was no power in the High Court to review the judgment in a criminal case inasmuch as it became absolute as soon as it was pronounced and signed by the Judge; the High Court after that became functus officio and neither the Court itself nor any Bench of it had, the power to interfere with it in any way. That was a judgment pronounced by a Division Bench.

It is clear, therefore, that the above case does not stand in the way of accepting the argument in support of the present application. As opposed to it, however, Scott-Smith and Zafar, Ali, JJ. of Lahore High Court in AIR 1925 Lahore 355 have held that where an appeal has been dismissed without the appellant or his pleader being given a reasonable opportunity of being heard in support of the same, the order dismissing the appeal must be held to have been passed without jurisdiction and the Court has inherent power to make an order that the appeal should be reheard after giving the appellant or his counsel a reasonable opportunity of being heard in support of the same. The learned Judges referred in that connection to Gibbons' case, ILR 14 Cal 42 (FB), quoted above as also to another decision of the Calcutta High Court in *Rajab Ali v. Emperor*[5], and other cases and pronouncd the above dictum. The matter came up for consideration also before a Full Bench of the Judicial Commissioner's Court of Sind in AIR 1935 Sind 84 and Rupchand Bilaram, A. J. C., after elaborate consideration of the cases of the various High Courts observed as follows:

> "I am now in a position to give my findings upon the points submitted to us for our opinion. First point. - An order passed under Section 421, dismissing an appeal filed under Section 419 is prima facie final. Second point. - Such an order cannot be vacated under Section 561-A unless it is proved that either of the conditions precedent to the passing of the order as laid down by Section 421 has not been fulfilled and this is a question of fact depending on the circumstances of each case. The burden of proving that either of the conditions has not been complied with lies heavily on the person challenging the finality of the order. Third point - Where it is proved that either of the conditions precedent has not been complied with, the High Court has power to interfere under Section 561-A and in such a case it is immaterial whether the Bench which is called upon to interfere is composed of the same or different Judges. Where there is no proof that either of the conditions have not been complied with the High Court whether the Bench is composed of the same or other Judges has no power to interfere."

Haveliwala, A.J.C, in a separate but concurrent judgment has also expressed the same opinion based on section 421 of the Code of Criminal Procedure.

The decision in Chandrika's case, AIR 1949 Allahabad 176, which is a judgment of a single Judge, is based relying upon the previous decisions of that Court and other decisions. It has been held therein that although a judgment pronounced without giving the party a reasonable opportunity to be heard in terms of the proviso to section 421 of the Code of Criminal Procedure is not a judgment delivered without jurisdiction but, all the same, the previous order can be vacated on the basis of the inherent jurisdiction reserved to the Court under Section 561-A of the Code. Apart from the basis of the conclusion in which some difference of opinion has been

expressed by the learned Judge, his conclusion also is in conformity with the view of the Lahore High Court and the Sind Judicial Commissioner's Court. In the case AIR 1952 Travencore Cochin 210, the learned Judges constituting the Full Bench have laid down that in cases in which the parties were not given an opportunity of being heard, it may be taken to be an implied condition of such judgment or order that it should be open to reconsideration at the instance of the party prejudicially affected. The power of the Court to reconsider the matter is implied in the very nature of an 'ex parte' decision.

4. Learned counsel for the State has not been able to bring to our notice any decision of any High Court laying down a contrary proposition. He has, however, relied upon a decision of this Court in *Ramautar Thakur v. State of Bihar*[6], where it has been laid down that where a criminal revision application was dismissed for default in the form of non-compliance with a peremptory order of the Court, it has got inherent jurisdiction to restore it if sufficient caus6 is made out for non-compliance of the order. The ratio of the case is that such a dismissal as a result of an order not having been complied with is not a judgment. Learned counsel has placed reliance on the following observation in the judgment:

> "A long line of decisions has established that as provided by Section 369, Criminal P. C, the moment a judgment is pronounced and signed, the High Court is 'functus, officio', and neither the Court itself, nor any Bench of it, has any power to revise that decision, or interfere with it in any way." This observation is taken verbatim from ILR 14 Cal 42, referred to above. We have already stated how this dictum in Gibbons' case is not relevant and how this case has been distinguished by all the High Courts which we have referred to above. In the case considered by the learned Judges in the above decision, the question did not arise as to what was the effect of a judgment, in appeal having been delivered without giving a reasonable opportunity to the appellant or his pleader to be heard in the case as required under section 421 of the Code of Criminal Procedure, inasmuch as the point for consideration which also found favor with the learned Judges was whether an application in criminal revision, having been dismissed for failure to carry out the peremptory order of the Court, was one in which the Court in the exercise of its inherent jurisdiction could pass the order for restoration. Their Lordships laid down that that could be done and it was within the inherent jurisdiction of the Court. The observation quoted in paragraph 7 of the judgment referred to above, AIR 1957 Patna 33, therefore, was made in passing and did not arise for consideration in that case at all.

5. On a consideration of the relevant provisions of the Code of Criminal Procedure, referred to above, and in view of the authorities upon which reliance was placed by Mr. Raghunath Jha for the petitioner, it must be held that the judgment of this Court dated the 11th of January, 1962, was a judgment rendered without any opportunity being given to the appellant or his advocate to be heard, and must be set aside. The appeal is accordingly put down for re-hearing and it must come up in the ordinary course.

Order accordingly.

Cases Referred.

[1] AIR 1925 Lah 355
[2] AIR 1935 Sind 84 (FB)
[3] AIR 1949 All 176
[4] AIR 1952 Tra Coc 210
[5] ILR 46 Cal 60 : (AIR 1919 Cal 409)
[6] AIR 1957 Pat 33