

(1987) 06 KAR CK 0016

In the Karnataka High Court

Case No : Criminal Revision Petition No. 219 of 1985

Anjanappa

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 29-06-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 308, 397, 397 (1), 401, 401 (4)
Karnataka Police Act, 1963 — Section 56, 56 (d), 78 (3)

Citation : (1987) ILR (Kar) 2326 : (1987) 2 KarLJ 201

Hon'ble Judges : K.B. Navadgi, J

Bench : Single Bench

Advocate : T. Devakumar, for N. Y. Hanumanthappa, for the Appellant; S.S. Koti, High Court Govt. Pleader, for the Respondent

Judgement

1. This is a Revision Petition u/s 397 read with Section 401 of the Code of Criminal Procedure (the Code for short) and is directed against the order dated 9-4-1985 made by the Sub-Divisional Magistrate, Chitradurga Sub-Division, in MAG. CR 7(D)/1984-85 on his file.

2. The facts, as they appear in the record, necessary to dispose of the present petition, are these :

Anjanappa, son of Gidda Hanumanthappa, the petitioner, is a resident of Barageri Colony on Davangere Road in the limits of the City of Chitradurga.

The Circle Inspector of Police, Chitradurga Circle, on 4-6-1984 registered a case against the petitioner in Crime No. 55/84 u/s 56(d) of the Karnataka Police Act, 1963 (the Act for short). The allegation in the complaint lodged by the Circle Inspector of Police, on behalf of the State was that the petitioner moving on public roads, frequented by the members of the public was beckoning the members of the public to play Mataka gambling. The further allegation in the complaint was that the petitioner was encouraging the members of the public to play game, with money with a view to obtain unlawful gain.

It appears from the complaint that a case had been registered against the petitioner in Chitradurga Fort Police Station in Crime No. 44/82 u/s 78(3) of the Act on 17-3-1982 and on completion of investigation, the petitioner had been sent for trial to the jurisdiction magistrate. It also appears that in C.C. No. 684/82 registered on the basis of the charge-sheet, the petitioner pleaded guilty to the offence charged and on his plea he was convicted and sentenced to pay a fine of Rs. 40/- with default clause on 1-4-1982. It is seen from the complaint that there was another case registered in the Fort Police Station on 15-10-1982 in Crime No. 198/82 u/s 78(3) of the Act and that in this case also the petitioner was convicted and sentenced to pay a fine of Rs. 75/- on 9-11-1982. It is in the complaint that there was the third case registered against the petitioner on 15-11-1982 in Fort Police Station Crime No. 212/82 u/s 78(3) of the Act and that in that case also there was conviction and sentence on the basis of the plea of guilty.

The Circle Inspector of Police stated in his complaint that in spite of the prosecution of the petitioner during the year 1982, in three cases, ending in convictions and sentences, the petitioner had not swerved from the path of indulging in gambling; that the petitioner had taken the gambling as his avocation; that it was not possible to prevent the activities of the petitioner and to bring him to the path of rectitude; and that the activities of the petitioner were detrimental to the interest and welfare of the society. He also stated in the complaint that if the petitioner was left unpunished, the anti-social activities indulged in by the petitioner would be increased and would result in great danger to the welfare of the society.

It was on the basis of these allegations, the Circle Inspector of Police, after registering the case, requested the Sub-Divisional Magistrate, Chitradurga, to initiate externment proceeding against the petitioner and to direct the petitioner to remove himself outside the limits of Chitradurga District.

The Circle Inspector of Police submitted to the Sub-Divisional Magistrate, the extract of Register No. III (Register of Criminal Cases) issued by the Judicial Magistrate First Class, Chitradurga giving particulars of the three cases instituted against the petitioner u/s 78(3) of the Act and the reports of three Constables, all dated 3-6-1984.

The Sub-Divisional Magistrate, took the report on his file and issued notice to the petitioner dated 8-6-1984 stating therein that, as reported by the Circle Inspector of Police, the petitioner was one of the originators of the Mataka gambling in Chitradurga; that his activities were causing alarm and danger to the poor people in the locality; and that several cases had been instituted against him (the petitioner) for a number of times and asking the petitioner to appear before him (the Sub-Divisional Magistrate) on 26-6-1984 to furnish the explanation as to why he should not be externed outside Chitradurga Taluk Chitradurga District. The Sub-Divisional Magistrate, enclosed a copy of the report received from the Circle Inspector of Police, to the show cause notice.

It appears, pursuant to the show cause notice, the petitioner entered appearance and filed objections on 23-7-1984. The Sub-Divisional Magistrate, heard the arguments and by the order challenged in this Revision Petition, directed the petitioner to remove himself from the Revenue Taluka of Chitradurga District for a period of 6 months to Kudligi Taluk in Bellary District by following the route Chitradurga, Challakere Molakalmuru, Kudligi and not to enter or return to the prohibited places from where the petitioner was directed to remove himself.

3. It may be mentioned that the petitioner filed the written briefs incorporating his submissions. No evidence was recorded during the course of the enquiry conducted by the Sub-Divisional Magistrate.

4. There was some debate at the Bar with regard to the competence and maintainability of the Revision Petition u/s 397 of the Code. The debate focussed on two issues : (i) the Sub-Divisional Magistrate being not an inferior Criminal Court within the meaning of the expression used in Section 397(1) of the Code, his orders are not amenable to the revisional jurisdiction of this Court; and (ii) the Revision Petition is barred by virtue of the provisions contained in Section 401(4) of the Code, in view of the provisions contained in Section 59 of the Act Providing an appeal to the Government against an order made under Section 56, by the person aggrieved of the order.

5. Sections 397 to 402 of the Code deal with the revisional jurisdiction and powers. The power, to call for records of inferior Criminal courts with a view to being satisfied as to the correctness, legality or propriety of any finding, sentence or order and the regularity of any proceeding (concurrently by the High Court and the Court of Session); the power, on examination of the records called for, to direct the Chief Judicial Magistrate to make (and the Chief Judicial Magistrate may himself make or direct the Magistrate subordinate to him to make) a further enquiry into a complaint dismissed or into the case of an accused discharged, the power in any other case of illegality, irregularity or error in any proceedings or order made therein, of final disposal in respect of cases which have been called for by them or which have otherwise come to their knowledge, are the general powers.

6. The powers of High Court and the Court of session to deal with such cases or with cases which have been called for by them or which have otherwise come to their knowledge are enumerated in Sections 399 and 401 of the Code. They can exercise any of the powers of a Court of Appeal.

7. The only limitations to the exercise of the revisional powers are : (i) the powers of revision will not be exercised in respect of interlocutory orders; (ii) where an appeal lies and no appeal is brought, no revision is maintainable at the instance of the party who could have appealed; and (iii) a finding of acquittal cannot be converted into a finding of conviction.

8. The revisional jurisdiction of the High Court extends over all inferior Criminal Courts.

9. The question for consideration is whether the Sub-Division, Magistrate, Chitradurga Sub-Division, who has been specially empowered by the Government the jurisdiction and power to pass an order u/s 56 of the Act is an inferior Criminal Court within the meaning of the expression in Section 397 of the Code.

10. The word "inferior" conveys the meaning statutorily incompetent to hold or exercise equal powers. There may be inferiority without subordination, but there would be no subordination without inferiority. The word "inferior" in Section 397(1) refers to a subordinate Court over which the Court called upon to exercise revisional jurisdiction has the appellate jurisdiction.

11. It is necessary to advert to Section 6 of the Code appearing in Chapter II under the Heading "Constitution of Criminal courts and offices".

Courts of sessions, Courts of Judicial Magistrates of the First Class, and in any metropolitan area, courts of Metropolitan Magistrates, courts of the Judicial Magistrates of the Second Class, and the Courts of executive Magistrates, are the classes of Criminal Courts mentioned in Section 6 of the Code. It is significant to note Section 6 of the Code. So far as the categories of Courts 2, 3 and 4 are concerned, the expressions used are, "Judicial Magistrates of the first Class and, in any Metropolitan area, Metropolitan Magistrates, Judicial Magistrates of the Second Class; and Executive Magistrates", and these expressions are not prefixed with the word "Courts".

12. We may note that the Code in most of the places uses the terms "District Magistrate, Sub-Divisional Magistrate, Magistrate, of the First Class, Metropolitan Magistrate, Executive Magistrate" instead the Court of Magistrate and in some places with the word "Court". It can be said that the equivalent to court of a Magistrate.

13. Section 20 of the Code deals with appointment of as many Executive Magistrates as it thinks fit by the State Government in every District and in every metropolitan area, the appointment of one metropolitan area, the appointment of one among them as District Magistrate, the appointment of any Executive Magistrate, the appointment of any Executive Magistrate to be an Additional District Magistrate, placing of an Executive Magistrate incharge of a Sub-Division to be called the Sub-Divisional Magistrate and conferment of all or any of the powers of the Executive Magistrate in relation to a metropolitan area on a Commissioner of Police. Section 22 of the Code deals with local jurisdiction of Executive Magistrates while Section 23 refers to subordination of Executive Magistrate.

14. Therefore, it has to be held that the Sub-Divisional Magistrate, Chitradurga Sub-Division is the Officer presiding over the Court of the Sub-Divisional Magistrate, Chitradurga.

15. Explanation to Section 397(1) provides that all Magistrate whether Executive

or Judicial and whether exercising the original or appellate jurisdiction shall be deemed to be inferior to the Session Judge for the purposes of Sections 397(1) and 398 of the Code.

16. From what has been stated in the Explanation, it would be clear that the Court of the Sub-Divisional Magistrate at Chitradurga is an inferior Court to the Sessions Judge, Chitradurga for the purposes of Section 397(1) of the Code. It was this Court of the Sub-Divisional Magistrate, Chitradurga, which has been specially empowered by the Government to exercise the jurisdiction and power stated in Section 56 of the Act.

17. The next question for consideration, in this context, would be as to the nature of the proceedings u/s 56 of the Act initiated before the Court of the Sub-Divisional Magistrate, Chitradurga. Having regard to the nature and character of the proceedings u/s s 54, 55 and 56 of the Act, and the provisions contained in Section 58 and 60, it cannot but be held that they are of criminal nature. True, the test in deciding whether revisions are entertainable is not whether the proceedings are of a criminal or civil nature. It does not depend upon the nature of the proceedings, but on the nature and character of the Court. The issue has to be determined with reference to the character of the Court and not that of the proceedings. Though there has been considerable divergence in judicial opinion in this regard, the preponderance of authority is in favour of the test stated above.

18. In *Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another*, the Supreme Court while considering the question as to whether the Appellate Authority constituted u/s 6-C of the Essential Commodities Act was amenable to the revisional jurisdiction of the High Court under sections 435 and 439 of the Code of Criminal Procedure, 1898 (the Code of 1898 for short), held :

"11. We are accordingly of the opinion that even though the State Government is authorised to appoint an appellate authority u/s 6-C" the legislature clearly indicated that such appellate authority must of necessity be a judicial authority. Since under the Constitution the Courts being the repository of the judicial power and the officer presiding over the Court derives his designation from the nomenclature of the Court even if the appointment is made by the designation of the judicial officer the appellate authority indicated is the Court over which he presides discharging functions under the relevant Code and placed in the hierarchy of Courts for the purposes of appeal and revision. Viewed from this angle, the Sessions Judge, though appointed an appellate authority by the notification, what the State Government did was to constitute an appellate authority in the Sessions Court over which the Sessions Judge presides. The Sessions Court is constituted under the Code of Criminal Procedure and indisputably it is an inferior criminal Court in relation to High Court. Therefore, against the order made in exercise of powers conferred by section 6-C a revision application would lie to the High Court and the High Court would be entitled to entertain a revision application u/s 435 and 439 of the Code of Criminal

Procedure, 1898 which was in force at the relevant time and such revision application would be competent."

19. In N.S. Ganesh Rao Vs. Sarphina D'Souza Bai and Another, a Division Bench of this Court has held that the expression "District Judge" in section 48 of the Karnataka Rent Control Act, 1961, as it stood then, to whom an appeal lay from an order of Munsiff passed u/s 21 of the said Act, meant the District Court having jurisdiction over the area in which the premises in question was situated and the plea that the District Judge was a persona designata was rejected.

20. It appears from a reading of Section 56 of the Act that the Courts of the Sub-Divisional Magistrate whenever considered necessary were and would be specially empowered to pass orders u/s 56 and in this case what the State Government has done is to specially empower the Court of the Sub-Divisional Magistrate, Chitradurga Sub-Divisional presided over by the Sub-Divisional Magistrate, with jurisdiction and power to pass orders u/s 56. As observed by me earlier the Court of the Sub-Divisional Magistrate, Chitradurga is constituted under the Code and it is an inferior Criminal court to this Court. In view of the above reasoning, it is difficult to hold that the Sub-Divisional Magistrate, Chitradurga, specially empowered to pass orders u/s 56 of the Act is a persona designata and not the Magistrate presiding over the Court.

21. When a Judicial Officer who presides over a Court is appointed to perform the functions, to judge and decide in accordance with law, and nothing is mentioned about the finality or otherwise of the decisions made by that authority, it would be an indication that the authority is to act as a Court, in which case it is not necessary to mention whether they are final or not, as all the incidents of exercising jurisdiction as a Court would necessarily follow. Vide The Public Prosecutor Vs. Legisetty Ramayya and Another, approved by the Supreme Court in Thakur Das's case referred to supra. Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another, Judge by applying the said test, it cannot be said that the Sub-Divisional Magistrate, presiding over the court of Sub-Divisional Magistrate, exercising jurisdiction and power to be persona designata. Add to that an appeal is provided against the order made by the Sub-Divisional Magistrate u/s 56 of the Act. The provisions contained in Section 58 of the Act lend further support to the said conclusion.

22. For the reasons stated above, I hold that, the expression "Sub-Divisional Magistrate," in Section 56 of the Act means the Court of the Sub-Divisional Magistrate which is indisputably an inferior Criminal Court in relation to this court and that the Sub-Divisional Magistrate acting as such is not a persona designata, I, therefore, further hold that the order made by the Sub-Divisional Magistrate in exercise of the powers conferred by Section 56 of the Act is amenable to the revisional jurisdiction of this Court and can be revised.

23. A bare perusal of Section 60 of the Act would show that any order passed u/s 56 or by the Government u/s 59 or by the Government u/s 59 of the Act can be

called in question in any Court on the ground, that the authority making the order or any officer authorised by it had not followed the procedure laid down in sub-section (1) of Section 58 or that there was no material before the authority concerned, upon which it could have based its order or on the ground stated in the concluding part of the section which is not relevant for our present purpose.

24. In view of the plain and explicit language employed in Section 60 of the Act, I am clearly of the opinion that the order of the Sub-Divisional Magistrate passed u/s 56 of the Act can be examined to decide its correctness, legality or propriety by this court in the exercise of the revisional jurisdiction and also on the grounds stated in Section 60 of the Act.

25. Add to that, merely because an order passed u/s 56 or by the Government u/s 59 cannot be called in question in any Court except on the grounds stated therein I am afraid, it would take away the paternal and supervisory jurisdiction of this Court in revision under sections 397 and 401 of the Code.

26. Section 401(4) of the Code provides :-

"Where under the 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."

27. Learned High Court Government Pleader submitted that an appeal is provided u/s 59 of the Act, that any person aggrieved by an order made u/s 56 may appeal to the Government within thirty days from the date of such order, and that the petitioner having not availed of the said remedy, has approached this Court in revision and that in view of the bar contained in Section 401(4) of the Code, the revision is not competent.

28. u/s 401(4), the High Court is precluded from exercising the powers of revision at the instance of the accused who had a right of appeal but did not exercise it. The order in question is one passed by the Court of the Sub-Divisional Magistrate, Chitradurga Sub-Divisional u/s 56 of the Act and the appeal is provided against such order u/s 59 and not under the Code.

29. The petitioner has stated in his petition that he had not availed of the remedy provided by Section 59 of the Act. Stating that he would not get any relief since the order to be appealed against is the one passed by the Sub-Divisional Magistrate on the direction of the State Government. Though this plea of the petitioner cannot be accepted as a valid plea for not exercising the right of appeal, it is my considered view that the petitioner can approach this court in revision without availing of the remedy of appeal provided u/s 59 of the Act. It is well settled by a long catena of decisions that the rule embodied u/s 401(4) of the code is not an inflexible rule. In cases covered by Section 401(4) of the Code, the High Court has to exercise the powers sparingly and in exceptional cases.

30. In *Ambadas v. State of Karnataka* ILR (1987) Kant 1481 : (Reported in 1988

Cri LJ 246) there was a petition u/s 482 of the Code against the order of externment passed u/s 55 of the Act. A contention had been raised on behalf of the State in the said matter that it would not be proper to invoke the provisions of Section 482 of the Code where remedy by way of appeal was available and that the petitions deserved to be dismissed on that score.

31. The plea was negatived by this court and it was held that by a reading of Section 59 together with Section 60, there was no bar against this Court interfering with an order of externment in the circumstances enumerated in Section 60 of the Act.

32. The bar in Section 401(4) is attracted to those cases in which the High Court is asked to interfere at the instance of the party who could have appealed but has not done so. It leaves untouched the power to exercise revisional power in all other cases, e.g. on information of each case by third party or which otherwise has come to its knowledge. That the rule contained in Section 401(4) of the Code is not an inflexible rule is also evident from the provisions of Section 401(5) which provides, that where under this Code an appeal lies but where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies there to and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly. For the aforesaid reasons, I hold that the revision to this Court against the order made u/s 56 of the Act is competent notwithstanding the fact that the petitioner has not availed of the right of appeal provided u/s 59 of the Act.

33. I now go to the merits. It is not the case of the petitioner that the Sub-Divisional Magistrate, before passing the order impugned in this revision petition, had not followed the procedure laid down in sub-section (1) of Section 58 of the Act. The Sub-Divisional Magistrate, while issuing show cause notice enclosed a copy of the Police report to it. The records show that on the request of the petitioner, the copy of the Police report containing the allegations was furnished. There was reasonable opportunity to the petitioner to tender an explanation regarding the allegations. There was no request by the petitioner at any time to permit him to adduce oral evidence. The written briefs filed by the petitioner is lodged with the record of the case. The petitioner had appeared by a legal practitioner.

34. The only question for consideration is, whether the material depended upon by the Sub-Divisional Magistrate was sufficient to hold that the petitioner was likely again to engage himself in the commission of an offence u/s 78(3) of the Act.

35. The material allegations would indicate that there cases came to be registered on 17-3-1982, 15-10-1982 and 15-11-1982 and that they were

disposed of by the learned Magistrate on 1-4-1982, 9-11-1982 and 23-11-1982 respectively and that in all the three cases, the petitioner pleaded guilty to the accusations and the Magistrate, on the basis of the plea of guilty, convicted and sentenced the accused for the offence u/s 78(3) of the Act.

36. The convictions were between 1-4-1982 and 23-11-1982. The Proposal for externment came to be made by the Circle Inspector of Police on 9-5-1984. The Sub-Divisional Magistrate sent that proposal back with certain observations and the Circle Inspector of Police, in compliance with the observations, registered a case against the petitioner on 4-6-1984 and re-submitted the proposal. There is no material to show that between 23-11-1982 and 9-5-1984, there was any activity on the part of the petitioner which could have been sufficient to reasonably believe that petitioner was likely to engage himself again in the commission of the offence punishable u/s 78(3) of the Act. u/s 26 of the Indian Penal Code, a person is said to have reason to believe a thing, if he has sufficient cause to believe that thing but not otherwise. Suspicion or doubt cannot be raised to the level of reason to believe. To say that a person must be said to have reason to believe, the circumstance must be such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference, although the circumstances may fall short of carrying absolute conviction in his mind on the point.

37. The word "belief" is very much stronger word than "suspect". Merely because there were three convictions against the petitioner between 1-4-1982 and 23-11-1982, it is difficult to hold that the Sub-Divisional Magistrate had reason to believe on 9-4-1985 that the petitioner was likely again to engage himself in the commission of the offence punishable u/s 78(3) of the Act. The mere statement by the Sub-Divisional Magistrate at the close of the order that the materials furnished gave him subjective satisfaction, that the accused was likely to engage himself again in committing the same offence, cannot salvage the order from being set aside. The subjective satisfaction has to be tested on the anvil of objective circumstances.

38. All that the Circle Inspector of Police had placed before the Sub-Divisional Magistrate was the material showing the conviction of the accused u/s 78(3) of the Act in three cases between the period 1-4-1982 and 23-11-1982. It is difficult to uphold the subjective satisfaction of the Sub Divisional Magistrate reached on 9-4-1985 that the petitioner was likely to commit the same offence for which he had been convicted in 1982, in three cases.

39. The fact that no case came to be registered against the petitioner after 23-11-1982 till the date of proposal and thereafter till the date of the order, u/s 78(3) of the Act could not exclude the possibility of the petitioner having turned a new leaf.

40. For the aforesaid reasons, particularly having regard to long lapse of time between 23-11-1982 the date of last conviction and 9-5-1984 the date of

proposal, I am clear in my mind that there was no reason for the Sub-Divisional Magistrate to believe that the petitioner was likely to commit the offence u/s 78(3) of the Act. Even no suspicion could be deciphered from the record about the likelihood of the petitioner engaging himself in committing the offence u/s 78(3) of the Act. The order appears to be clearly erroneous and unsustainable. I, therefore, allow the Revision Petition and set aside the order dated 9-4-1985 challenged in this Revision Petition.

41. Petition allowed.