
(2013) 08 GAU CK 0042
In the Gauhati High Court
Case No : Criminal Revision No. 05 (K) of 2011

Horangse Sangtam

APPELLANT

Vs

State of Nagaland and Another

RESPONDENT

Date of Decision : 02-08-2013

Acts Referred:

Citation : (2013) 5 GLT 1

Hon'ble Judges : N. Chaudhury, J

Bench : Single Bench

Advocate : Imti Longchar, for the Appellant; K. Sema, Addl. AG, Nagaland, for the Respondent

Judgement

N. Chaudhury, J.—This case is unique in the sense that the accused has challenged his conviction and sentence citing lack of inherent jurisdiction of the learned trial Court as the only ground for challenge without saying a word against the findings of the said court on merit. Horangse Sangtam, the petitioner in this case, was accused in Dimapur (West) P.S. Case No. 138/2000 corresponding to G.R. Case No. 606/2000(A) u/s 467/468/471/34 IPC for fraudulent withdrawal of a sum of Rs. 1,65,472/- in connivance with other accused persons. The said case arose out of an FIR dated 17.12.2000 lodged by Shri. J. Singh SDPO, Nuiland as a member of the SIT constituted by Police HQ Nagaland. The crux of the allegation was that the petitioner gave a letter of authorization to one Mr. Revo Anar, shown to have been issued by one Thekrusielhou Angami, S.K., SOS, Kiphire, Nagaland claiming medical reimbursement for treatment of his son Master Sibiu to be drawn from the Directorate of Food and Civil Supplies, Dimapur, Nagaland for an amount of Rs. 1,65,472/- and said Mr. Revo drew said amount vide Bill No. 249 dated 30.3.2000 from the treasury/Bank Dimapur on 31.3.2000. But on investigation it was established that said Mr. Thekrusielhou Angami had never such submitted such bill for medical reimbursement nor did he took his said son to any where for any medical treatment as stated in the bill. Investigation revealed that the whole

episode of fraudulent withdrawal of the amount was done by the petitioner, one Mohan Das and aforesaid Mr. Revo and the petitioner in course of investigation himself made confession and corroborated the prosecution story. The petitioner faced trial and participated in trial in full earnest. According to the learned Trial Court, offence of the petitioner was established beyond reasonable doubt on the basis of evidence led by the prosecution which included opinion of Handwriting expert. Consequently, by the impugned judgment and order dated 18.8.2011 in G.R. Case No. 606/2000(A) the learned Court found him guilty u/s 467/468/471 IPC and accordingly convicted him. He was ordered to suffer sentence of simple imprisonment for one year on each of the aforesaid counts.

2. The aforesaid judgment and order of conviction is an appealable one u/s 374 of the Code of Criminal Procedure. But the petitioner did not prefer any appeal and has approached this Court under Article 227 of the Constitution of India read with Rule 32 of the Rules for Administration of Justice and Police in Nagaland and also u/s 401 of the Code of Criminal Procedure. The grounds stated in this application do not include any challenge on merit at all. It is not the case of the petitioner that the prosecution case has not been proved beyond reasonable doubt or that the judgment and order of conviction is not based on materials on record but only on the ground that the impugned judgment has been passed by the Tribunal for Disciplinary Proceeding, Vigilance Commission which is not a Criminal Court as defined under the Cr.P.C. and as such this judgment and order dated 18.8.2011 is liable to be set aside.

3. This revision petition under Article 227 of the Constitution of India appears to have been listed for admission on 10.6.2013 on which date this court was pleased to permit the learned Addl. Advocate General to file an affidavit with regard to delegation of powers by the State Government to the member of the Tribunal for Disciplinary Proceeding, Vigilance Commission with regard to jurisdiction of the said Tribunal to try criminal cases and to impose punishment by it. The State accordingly submitted an affidavit and annexed a notification dated 28.6.2011 issued by the Government whereby Smt. Khesheli Chisi, the incumbent in the office of the respondent No. 2 herein was appointed by the Governor, Nagaland as District and sessions Judge, Tribunal for Disciplinary proceeding, Vigilance Commission, Nagaland for administering Criminal and civil Justice with respect to cases transferred to the Court of Deputy Commissioner (J) in the Vigilance Commission. The same Officer was also conferred jurisdiction in respect of criminal cases already transferred and tried in the Court of her predecessor, the then Tribunal for Disciplinary Proceeding, Vigilance Commission vide notification dated 22.5.2006. The said notification dated 22.5.2006 has also been placed on record to show that the predecessors in office of the respondent No. 2 herein, namely, Tribunal for Disciplinary Proceeding Vigilance Commission was conferred jurisdiction u/s 15 of the Rules for Administration of Justice and Police in Nagaland 1937 thereby empowering exercise of jurisdiction in respect of criminal case already transferred to it. The notification dated 22.5.2006 is quoted below:-

In exercise of powers conferred by the proviso to Section 15 of the Rules for Administration of Justice & Police in Nagaland, 1937, the Governor of Nagaland is pleased to appoint Shri S. Hukato Swu, Tribunal for Disciplinary Proceedings, Vigilance Commission, Nagaland as Deputy Commissioner, in addition to his own duties, for the purpose of administering criminal and civil justice with respect to specific proceedings as be transferred to him for disposal in accordance with the provisions of law with effect from 20.12.2005.

2. It is further ordered that Shri. S. Hukato Swu as Deputy Commissioner shall exercise jurisdiction in respect of criminal cases already transferred to the Court of Shri. N. Benjamin Newmai, the then Tribunal Disciplinary for Proceedings and Deputy Commissioner (now transferred) by specific orders of the State Government issued earlier in this regard.

4. I have heard Mr. I. Longchar, learned counsel for the petitioner and Mr. K. Sema, learned Addl. Advocate General, Nagaland on behalf of the two respondents.

5. Mr. I. Longchar, learned counsel for the petitioner submits that the learned Judge who passed the judgment and order of conviction was appointed by way of transfer as Tribunal for Disciplinary Proceedings, Vigilance Kohima in the rank of District and Sessions Judge by the Hon''ble Chief Justice of Gauhati High Court and not by the Government of Nagaland and as such she could not have exercised jurisdiction as a Court under Cr.P.C. Consequently, the impugned judgment and order passed by her convicting the petitioner is without jurisdiction and is, there fore, liable to be set aside and quashed. The respondent No. 2 in this case is the Member, Tribunal for Disciplinary Proceedings, Vigilance, Commission, Nagaland, Kohima and no one has been impleaded in person. Of course, it is admitted at the Bar that aforesaid Smt. Khesheli Chishi is/was the incumbent in the office at the relevant time. The prayer made in the revision petition does not contain any challenge as to legality and validity of the appointment of Smt. Kheseli Chishi vide order dated 28.6.2011 as referred to above.

6. In course of argument, Mr. I. Longchar, the learned counsel for the petitioner has placed on record a certified copy of order dated 30/1/2013 passed by this Court in Crl. Appeal No. 6(K)/2005 wherein the judgment and order dated 13.9.2005 passed by the Deputy Commissioner as Special Judge Kohima in CBI case was set aside holding that the said Judge did not have jurisdiction to pass the judgment observing that the Deputy Commissioner, Dimapur was not empowered by to try any CBI related case and, therefore he had no jurisdiction to pass the judgment impugned in that Criminal appeal. According to the learned Counsel, the present revision petition is also liable to be allowed on similar ground on the basis of the said order. I have gone through the order dated 30.1.2013. It appears that relevant law holding the field including various earlier judgments of the Hon''ble Supreme court, more particularly the case of Gokaraju Rangaraju (to be relied on by me herein below) were not brought to the notice of

the Hon"ble Judge of this Court and consequently the said order dated 30.1.2013 in Crl. Appeal No. 6(K) 2005 referred to above, has gone per incurium. Since there is Supreme Court judgment in the same matter, I feel inclined to rely on the judgment of the Hon"ble Supreme Court in this regard.

7. Per contra, Mr. K. Sema, learned Addl. Advocate General submits that the petitioner not having challenged the appointment order of the Presiding Judge of the Tribunal for Disciplinary Proceeding, Vigilance Commission, the judgment and order passed by the said Presiding Officer cannot be challenged on the ground of alleged defect in appointment of the learned Judge. Moreover, notification dated 22.5.2006 as well as the order dated 28.6.2011 referred to above issued by the Government show that the respondent No. 2 was duly entrusted with the power to try criminal cases transferred to it as a District and sessions Judge. The case in hand was transferred to the Court of the predecessor in office of the said respondent No. 2 and the petitioner having submitted to the jurisdiction of the said Court and having participated in trial in full earnest, it is too late in the day to challenge the jurisdiction of the said learned Court. The learned Addl. Advocate General also submits that the challenge of judgment and order of conviction is contrary to the de facto doctrine as held by the Hon"ble Apex Court in various Judgments. The learned Addl. Advocate General relied on the following judgments:-

1. Gokaraju Rangaraju Vs. State of Andhra Pradesh,
2. State of U.P. Vs. Rafiquddin and Others,
3. Krishnadevi Malchand Kamathia and Others Vs. Bombay Environmental Action Group and Others,
4. Union of India (UOI) and Others Vs. S. Srinivasan,

8. De facto doctrine is a rule of public policy. A de facto Judge is one who is not a mere intruder or usurper but who holds office under colour of lawful authority though his appointment may be later on found to be defective. H.W. Wade has traced the origin of this law from the Act of 1461 (IED W, iv, cap. I) which followed the maxim "en fait et nient en droit" (i.e. in fact and not in law). The said law became necessary on the accession of Edward IV to the throne so as to remove doubts as to the judgment given in the reigns of Henry IV, Henry V and Henry VI, then considered usurper. This Act of 1461 was said to be declaratory of common law. Thus, the de facto doctrine has a long history and it has also been applied to a wide variety of Offices in the Common wealth countries including India. It was even applied to the monarchy so that it might validate acts done in the name of Kings whose title to the throne was later on considered illegitimate and who were Kings in fact and not in law. H.W. Wade and C.F. Forsyth in Administration Law (9th edition) (PP 285-286) observed as follows:

.....The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic

of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure.

The learned authors have considered the case of Buckley Vs. Edwards (1892 AC 387) where the appointment of Judge of the Supreme Court of New Zealand was found to be void but that did not avail any respite to the prisoner whom he had sentenced as a Judge. What is required in the de facto doctrine as observed by the said illustrated learned authors is that the office holder has colourable authority or some colour of title to the appointment.

9. The Supreme Court of India has applied the De facto doctrine in a catena of cases. In the case of Gokaraju Rangaraju (supra), the Hon'ble Supreme Court discussed De facto doctrine in paragraph 17 of the said judgment and the same is quoted below:-

17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between the two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

10. In the case of State of U.P. vs. Rafiquddin (supra), the Hon'ble Supreme Court relied on the case of Gokaraju Rangaraju (supra) in paragraph 20 and held that the defective appointment of de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to question the same collaterally in a litigation between two private litigants, where it would be of no concern or consequence. It was mentioned in paragraph 20 as follows:-

.....We have adverted to this aspect of the case in order to avoid any challenge to the validity of judgments and orders by the unplaced candidate of the 1970 Examination on the ground of legal infirmity in their appointments.

11. By relying on the case of Union of India vs. Srinivasan (supra), the learned Addl. Advocate General submitted that the judgments and orders passed by a Tribunal do not become null and void merely because the appointment of the Presiding Officer is invalid in any way. In this aspect, the learned Addl. Advocate General has drawn my attention to paragraph 50 of the said judgment the relevant extract of which is quoted below:-

To avoid any confusion, we clarify that the judgments and orders passed by the Appellate Tribunal by the Chairperson or members who were not qualified and whose appointments have been quashed shall not be treated to be null and void.

12. On consideration of the aforesaid judgments, it is clear that de facto doctrine is very much followed in India and as such when a Judge has been exercising judicial function as a matter of course and or in fact, the judgments/decisions given by the Judge remain valid and the same cannot be held null and void even if subsequently the appointment of the said learned Judge may be found to have been illegally made. The de facto doctrine being apart of public policy saves the judgment passed by someone who may not be a judge de jure. It is not the case of the petitioner here that he has not submitted to the jurisdiction of the said Court or that the Judge in question was not taking similar cases as a matter of fact or that he challenges the authority of the Judge by way of writ of Quo Warranto.

13. This application under Article 227 of the Constitution of India challenging the validity of a judgment and order of conviction and the appointment of the Presiding Officer of the Tribunal has only been questioned collaterally without any prayer against the appointment order. In this regard, the learned Addl. Advocate General has referred to the case of Krishnadevi Malchand (Supra). The learned Addl. Advocate General submits that the appointment order of the Presiding Officer (respondent No. 2 herein) not having been challenged, the said order remain valid till the appointment is adjudged illegal. Relying on paragraph 16 of the said judgment, the learned Addl. Advocate General submits that it is a settled legal position that even if an order is void, it requires to be so adjudged by a competent forum and till the same is done it continues to remain in force. This means that the respondent No. 2 still continues to exercise jurisdiction as District and Session Judge trying criminal cases.

14. Factually, it appears from aforesaid notification dated 28.6.2011 as well as 22.5.2006 that the respondent No. 2 has been vested with the power to try criminal cases transferred to the said Court. Admittedly, the case in hand was transferred to the Court of respondent No. 2. There was a full-fledged trial wherein the present petitioner participated. Now that the petitioner has been convicted and sentenced to suffer imprisonment, the petitioner has challenged the very jurisdiction of the Court and has challenged his conviction saying that the very appointment of the Judge was illegal. Fact remains that the petitioner has not challenged the appointment order in any direct proceeding. The writ of Quo Warranto also requires that the usurpation of office by unauthorized

occupants is to be directly challenged and the same cannot be done collaterally. In the case in hand, application has been filed under Article 227 of the Constitution of India challenging the judgment and order of conviction and collaterally the appointment of the Judge has been called in question. Such a challenge, therefore, is not entertainable.

15. There is yet another aspect of the matter. The present proceeding under Article 227 of the Constitution of India is directed against a judgment of conviction passed under the Code of Criminal Procedure read with the relevant provision of the Rules for Administration of Justice and Police in Nagaland. This judgment is an appealable one. But the petitioner having chosen not to avail the remedy of appeal no revision also can be entertained in view of specific bar u/s 401 of the Code of Criminal Procedure. Even in the present proceeding, not a word has been said so as to impeach the judgment of the learned Court below on merit. Thus the findings of the learned trial Court remain unchallenged. The learned Court has been found to have been authorized for trying criminal cases. So, on consideration of all the angles, the present proceeding is devoid of any merit whatsoever and as such this revision petition is liable to be dismissed.

16. The revision petition is dismissed.

17. Consequently, the judgment of conviction dated 18.8.2011 passed in GR. Case No. 606/2000 (A) u/s 467/468/471/472/34 IPC is upheld. The interim order passed by this Court on 15.9.2011 is hereby vacated. The petitioner shall surrender before the learned Court below immediately to undergo the sentence as per the said judgment, if not already undergone.