
(1977) 06 SHI CK 0004
In the High Court Of Himachal Pradesh

Kesru and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 28-06-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 435, 439, 561A
Penal Code, 1860 (IPC) — Section 379, 449

Citation : (1978) CriLJ 297 : (1977) ShimLC 436

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Judgement

C.R. Thakur, J.—Sarvshri Kesaru and others have come up in revision u/s 435 read with Sections 439 and 561-A of the Cri. P.C. 1898 against the order of the Sessions Judge, Simla, whereby he set aside the order of discharge passed by the Chief Judicial Magistrate, Kalpa, on 30-4-1975.

2. The police had challaned Kesaru and others u/s 379/449 IPC, but the Chief Judicial Magistrate on the basis of the statements u/s 161 CrIPC recorded by the police, and on the ground that there was delay of 17 days in lodging the F. I. R. found that no case had been made out against the accused persons and that the charge against the accused was groundless. Further he held,, "the case has been hanging fire since 1972, there was no progress for want of P. P. inasmuch as (sic) any representation on behalf of the State, with the result that the accused had already suffered much financially and mentally which was much more punishment than what could be awarded in law even if the case was proved against them. Further that the potatoes, which was the subject matter of the theft, was such a commodity which it was difficult to be identified." Further he observed, "the accused were not caught red handed by any person whose statement was recorded by the police u/s 161 Cr.PC The land from which the theft was alleged to have been committed was owned by Kesaru accused according to the entries in the revenue record and as such if Dhianu had any grievance the same can be properly adjudicated by the civil court in view of the nature of the allegations made by him". He therefore, discharged the accused.

The Sessions Judge after hearing the parties held that from the jamabandi for the year 1960-70, it was apparent that Dhianu was recorded in possession of the land from which the theft was alleged to have been committed and that in the column of rent the entry is "Bila Lagan Bawaja Rishta". He found that since Dhianu was recorded in possession, the Chief Judicial Magistrate, Kalpa, had erred in holding that it was a question of civil nature because Kesaru and others were the owners of the land. What the court had to see was the possession of the property and not the ownership for purposes of the criminal prosecution. He also did not agree with the observation of the Chief Judicial Magistrate that it was necessary that the accused should have been apprehended red handed and that there was delay of 17 days which was fatal to the prosecution case, and, therefore, he further held that the order of discharge was not sustainable and accordingly set aside that order of discharge and remanded the case for further enquiry and trial, vide his order, dated 8-10-1975.

3. Shri H. K. Paul appearing on behalf of the State raised a preliminary objection that this revision petition was not maintainable, inasmuch as the order setting aside the order of discharge and remanding the case is not a final order and a revision is barred and he has referred me to Dilip Kumar Ghosh Vs. State, Durga Prasad Khosla Vs. State of Uttar Pradesh and Others, AIR 1949 1 (Federal Court) and Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another, . In the former two cases while disposing of the applications under Article 134 (1) it was held that the order disposing of the application in revision and setting aside the order of the Sessions Judge and sending back the case to him for being heard on merits was not an order which could be said to be final.

4. In the third case, i. e. S. Kuppuswami Rao 1948) Cri LJ 625 (FC) (supra) it was the scope of the expression "judgment" and "final order" which fell for consideration, it was held that final order must be an order which finally determines the points in dispute and brings the case to an end. Further, it was observed that in a criminal case the expression "judgment and final order" cannot cover a preliminary order, interlocutory order made on a preliminary objection (such as want of sanction u/s 197, Cr. P. C).

5. In the last case Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another, which was a civil case, an application under Article 133 (1) (a) and (b) was filed and the scope of the expression "final order" was considered and it was held that the expression means a final decision on the rights of the parties in dispute in a suit or proceeding; if the rights of the parties in dispute in the suit or proceeding remain to be tried, after the order, the order is not final.

6. In the present case what the Sessions Judge did was setting aside the order of discharge passed by the Chief Judicial Magistrate and sending back the case for retrial. Therefore, the order cannot be said to be a final order resulting in the setting aside of the order of discharge. The case against the petitioners revives and the trial is to proceed in accordance with law. Such an order keeps alive the case -and does not amount to a judgment or final order.

7. The learned counsel for the petitioners in his reply also has relied on a number of cases. The first case is P.T. Doddiah Vs. Hanumanthappa and Others, In that case the Sessions Judge on a revision set aside the order of discharge and had directed the framing of a charge. Against that order a revision petition was filed by the aggrieved person. Before the High Court a preliminary objection was taken that the criminal revision in view of a decision of that court in *Giriappa Gowda v. Basavarajappa* (1975) 1 Kant LJ 434) was not maintainable. The High Court observed: Although Section 397 (2) bars the revisional jurisdiction of the High Court and the Sessions Judge in regard to interlocutory orders, it does not control or operate in regard to orders falling within Section 398 viz. orders dismissing a complaint u/s 203 or Section 204 (4) or of discharge under the relevant provisions of the Code. The High Court can, therefore, revise u/s 401 the order passed by the Sessions Judge in revision against an order of discharge."* But, in view of the rule laid down in *Dilip Kumar Ghosh* (1962) Cri LJ 321 (Cal)) and: *Durga Prasad Khosla Vs. State of Uttar Pradesh*, the order remitting back the case for trial cannot be said to be a final order. The case cited by the learned counsel for the petitioners does not appear to have any persuasive force.

8. The second authority relied on by the learned counsel is *Shri Dina Nath v. Shri Hans Raj etc.* ILR (1973) H.F 749). In this authority the scope of interference in revision by the High Court is laid down, and, this says that against the order of discharge based on evidence available to the accused even if the other court takes a different view of the matter that is not the ground for interference. This authority also has got no relevancy because the learned Sessions Judge has set aside the order of discharge passed by the learned Chief Judicial Magistrate. The order of discharge as a matter of fact amounted to final order passed by the Court below and therefore, a revision against that order was competent inasmuch as it was a final order and not an interlocutory order.

9. The further authority is *Devi Dayal v. State of Himachal Pradesh* ILR (1974) H.P 796) but this authority also has got no relevancy inasmuch as in that authority also it was the scope of interference by the High Court in revision which fell for consideration and it was held that though the scope of interference in exercise of revisional powers by the High Court is quite limited but when the order is based on wholly irrelevant and no evidence at all then necessarily the High Court has got vast powers to interfere and rectify the wrong. This authority has got no bearing to the present facts of the case inasmuch as the order of discharge was a final order and not an interlocutory order.

10. The *Sonaullah Mir and Others Vs. State*, also does not assist the petitioner; rather it helps the respondent. It only says that if the discharge of the accused is simply on the ground that the copies of documents were not supplied to the accused on the date fixed, the order is illegal. Further that where the accused is properly discharged, the Sessions Judge has got the powers of revision and to recommend to quash the discharge without being moved by the prosecution for

doing so.

11. State of Mysore Vs. Koti Poojary and Another, is an authority for the proposition that the order of discharge, unless improper, should not be disturbed by the High Court, in the instant case the order of discharge was patently wrong as found by the learned Sessions Judge and, therefore, he was justified in setting aside the order of discharge and remand the case for framing the charge,

12. The other authorities cited have got no bearing on the facts of the case so as to make a mention of the same.

13. The order of discharge was found to be illegal by the learned Sessions Judge and that order of discharge amounted to final order and, therefore, the revision before the learned Sessions Judge was maintainable and the order passed by "him remanding the case for framing [the charge against the accused is an interlocutory order and a revision under Sub-section (2) of Section 397 is barred and therefore, this revision petition fails and is hereby dismissed.