
(2008) 02 AHC CK 0085
In the Allahabad High Court

Lallan Prasad

APPELLANT

Vs

State of U.P. and Noorul Haq

RESPONDENT

Date of Decision : 26-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 300
Evidence Act, 1872 — Section 33

Citation : (2008) 02 AHC CK 0085

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.P. Sahi, J.—This revision questions the legality of the order dated 23.1.2008 whereby the application moved by the prosecution for accepting the statements of the witnesses in the previous trial against the applicant has been accepted for being taken on record for the purposes of the present pending trial on the ground that such evidence was neither admissible nor entertainable inasmuch as this is a *denovo* trial and not a re-trial of the earlier proceedings.

2. Sri Anoop Trivedi, learned Counsel for the applicant, contends, that any evidence recorded in the previous trial is of no consequence, as the entire trial was invalid, as held in the judgment dated 4.5.1982, which has become final between the parties. He contends that the subsequent trial, which was initiated on a fresh cognizance with a fresh charge-sheet, was challenged on the ground of double jeopardy, and the bar contained in Section 300 Cr.P.C, which contention was negated by this Court vide judgment dated 29.5.1998 holding, that since the entire trial previously held was deficient on account of want of proper sanction, therefore, the bar of Section 300 Cr.P.C. would not operate and a fresh trial was permissible consequent to a valid sanction in respect of the same offence. Sri Trivedi contends that for the same reason when the earlier trial is being treated not to bar a second trial, then on the same logic, any evidence collected or witness examined, cannot be treated to be a relevant piece of

evidence worth receiving and admitting in the present proceedings inasmuch as the entire trial was vitiated being coram non-judice. He contends that if the entire proceedings were without jurisdiction, then in that event any evidence recorded therein would be inadmissible in law. It is urged that the decision relied upon by the court below in the case of Satyajit Banerjee and Others Vs. State of West Bengal and Others, is totally misplaced inasmuch as the said decision was in a matter where the High Court had remitted the matter to the trial Court in the same proceedings for re-trial. It is urged that a case of re-trial cannot be equated with the proceedings of a denovo trial and, therefore, the ratio of the said decision was not applicable on the facts of the present controversy and hence the order deserves to be set aside.

3. Learned A.G.A., on the other hand, contends that the evidence, which was led during the previous trial, does not stand wiped off and is very much admissible and, therefore, the order impugned does not suffer from any infirmity. He contends that there is no procedural impropriety or illegality which may warrant interference with the order impugned and hence the revision deserves to be dismissed.

4. Sri Trivedi, in rejoinder, has urged that keeping in view the decision of the Apex Court in the case of Baij Nath Prasad Tripathi Vs. The State of Bhopal, and the subsequent decisions which have followed the same, the entire trial is vitiated and hence on the same logic any evidence led in an incompetent trial, which was ultimately found to be invalid on the ground of grant of sanction, would not be available to the prosecution for evidence in the present case.

5. Having heard learned Counsel for the parties, one will have to refer to the provisions of Section 33 of the Indian Evidence Act, which is being quoted herein below:

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the

second proceeding.

6. A perusal of the said provision leaves the Court with powers to treat certain evidence as relevant for proving facts in subsequent proceedings. In the instant case, the proceeding is between the same parties and from a perusal of the judgment dated 4.5.1982, it appears that after the trial had concluded and the witnesses had been examined and cross examined, the applicant was acquitted without recording any finding on the merits of the case only on the ground that the sanction on the basis whereof the prosecution had started, was an invalid sanction. The case was one under the then Prevention of Corruption Act and under the provisions of the said Act it was found that the sanction had not been given by the competent authority. The applicant was being prosecuted for having accepted a sum of Rs. 100/- as bribe in an incident, which took place on 2.6.1976. The witnesses were examined and the trap conducted by the vigilance department was also proved by the prosecution but the court acquitted the applicant on the ground of an invalid sanction as referred to herein above.

7. The question, which has to be examined, is as to whether the trial which had been initiated on the basis of an invalid sanction, can the evidence led therein be also treated to be a nullity or nonest for the purposes of this trial.

8. A perusal of the judgment dated 4.5.1982 indicates that the applicant was acquitted therein. The proceedings, therefore, were before, a Court which had the jurisdiction to decide as to whether the proceedings were valid or invalid. The court, which acquitted the applicant, was, therefore, not a court of incompetent jurisdiction. The trial was vitiated on account of an invalid sanction which had not emanated with a sanction from the appropriate authority. It is this error which led the Court to conclude that the applicant could be acquitted. The judgment, therefore, is one of acquittal and is not an incompetent judgement. As a matter of fact, the proceedings were initiated and terminated by a competent court. In this view of the matter, it cannot be said that the proceedings were undertaken before an incompetent court. After all, it was the court concerned which had the jurisdiction to acquit the applicant on the findings that there was an invalid sanction.

9. In such a situation, can it be said, that any evidence that had accumulated, ipso facto stands diluted, inasmuch as, had the sanction been valid, the same court had the jurisdiction to entertain the evidence and proceed with the trial. The recording of the evidence of the witnesses would, therefore, in my opinion, not become an invalid piece of evidence ipso facto. The question as to whether an evidence is relevant or not has to be decided by the Court after considering it in view of the provisions of Section 33 of the Indian Evidence Act referred to "herein above. The question is Of a distinction between a retrial or a denovo trial. In the instant case, it has already been held that the bar of Section 300 Cr.P.C. does not operate. Whether the mere filing of a fresh charge-sheet and the taking of a fresh cognizance after the sanction had been obtained from the appropriate authority, would wipe out of existence the evidence which had been led in the

earlier trial in which the applicant was acquitted is the moot question. The acquittal did not result in prevention of holding of them trial again in respect of the same incident. To give another interpretation on the submissions advanced may allow the accused to escape from prosecution as, in such an event, there is a possibility that immense delay may be caused in summoning of the witnesses again and there is also a possibility that the witnesses may not be available as the incident is of the year 1976. Once there is no bar for proceeding with the trial after a fresh sanction, then can it be said, that the evidence which had already been led, would also be barred for being taken into consideration for the purposes of the trial in respect of the same incident. In my opinion, the said evidence does not get dissolved automatically.

10. The distinction, however, will have to be considered in the light of the proceedings of a *denovo* trial as in contradistinction to a retrial. In a *denovo* trial the entire process of leading evidence has to be adopted afresh. In the instant case, in the absence of a proper sanction, the trial could not have proceeded further and, as such, the court for want of appropriate sanction, was not competent to record any evidence. It was a defect which could not be cured by the court itself. It was a fundamental legal defect as a result whereof the proceedings could not have been initiated at all. The mandate of law as then existed already said that "No court shall take cognizance..." which means that proceedings could not be initiated at all. The language being prohibitory, it was not dependent on the decision arrived at, it rather renders the proceedings void *ab initio*. The defect led to the acquittal of the applicant which made the proceedings not merely irregular but without jurisdiction. If the court could not have taken cognizance for want of an appropriate sanction, it could not have proceeded further. The evidence that was led in the previous trial, could not have been received and, as such, the order dated 23.1.2008 is clearly unsustainable.

11. Sri Anoop Trivedi, learned Counsel for the applicant has rightly relied on the decisions in the case of Sankappa Rai and Ors. v. Keraga Pujary and Ors. AIR 1931 Mad 575, Koti Darbar v. Ram Chand AIR 1949 H.P. 15 (paragraphs 14-19), Sudhindra Nath Vs. The State, and Jaggan v. Basantu and Ors. 1965 AWR 772, which fully support the conclusion drawn herein above.

12. The aforesaid position, therefore, distinguishes the present case as one of *denovo* trial, as the earlier trial was *coram non-judice* and, therefore, the decision in the case of Satyajit Banerjee and Ors. v. State of West Bengal, which was a simple case of remand, was not at all applicable on the facts of the present case. The court below clearly erred in applying the said ratio and, therefore, arrived at a wrong conclusion.

13. Accordingly, the order dated 23.1.2008 is set aside with a direction to the court to proceed and conclude the trial in accordance with law.

14. The revision petition is allowed. No order as to costs.