
(1993) 04 GUJ CK 0004
In the Gujarat High Court

Rajendra L. Acharya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-04-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 439, 482, 482
Penal Code, 1860 (IPC) — Section 341, 376

Citation : (1993) 2 GLR 1259

Hon'ble Judges : K.R. Vyas, J;A.N. Divecha, J

Bench : Division Bench

Judgement

A.N. Divecha, J.—The petitioner has moved this application under Sections 439 and 482 of the Code of Criminal Procedure, 1973 ("the new Cr. P. C for brief). He has thereby prayed inter alia for his release on bail after quashing and setting aside the order passed by This Court on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992 and for restoration of the order of the Sessions Court at Vadodara passed in Misc. Criminal Application No. 896 of 1992 releasing him on bail.

2. This matter was placed before our learned Brother K.G. Shah, J. for hearing and disposal. It appears that he found it difficult to reconcile the loss of liberty without affording an opportunity of hearing and the ruling of the Supreme Court in the case of Vikramjit Singh v. State of Madhya Pradesh reported in ATR 1992 SC 474 declaring the law to the effect that no Bench can comment on the functioning of a Co-ordinate Bench of the same Court, much less sit in judgment as an appellate Court over its decision" Our learned Brother K.G. Shah, J. has thereupon chosen to refer the following question for decision by a Division Bench of This Court:

Whether in the facts and under the circumstances of the case, the order dated December 30, 1992, passed by the learned single Judge of This Court in Misc. Criminal Application No. 4998 of 1992, could be and should be quashed and set aside?

This Division Bench has been assigned the task of answering the aforesaid question posed by our learned Brother K.G. Shah, J.

3. Before adverting to answer the aforesaid question, the factual backdrop occasioning the raising of the question will have to be examined. The petitioner in this case appears to have been charged inter alia with commission of raping a girl of about 2 years in age. He was arrested. The necessary charge-sheet against him was filed on completion of investigation charging him with the offences punishable under Sections 341 and 376 of the Indian Penal Code, 1860 ("the I.P.C. for brief). About three months thereafter, he appears to have moved the Sessions Court at Vadodara for bail. It appears to have been registered as Misc. Criminal Application No. 896 of 1992. It appears to have been assigned to the learned Addl. Sessions Judge for hearing and disposal. The learned Addl. Sessions Judge appears to have released the present petitioner on bail. It appears that the order of the learned Additional Sessions Judge of Vadodara granting bail to the present petitioner aggrieved the prosecution agency. The State of Gujarat thereupon preferred Misc. Criminal Application No. 4998 of 1992 for cancellation of the bail granted by the lower Court in favour of the present petitioner. It appears to have come up for hearing before our learned Brother B.J. Shethna, J. It appears that on the very first day of hearing our learned Brother Shethna, J. accepted the application for cancellation of bail and ordered re-arrest of the petitioner as the accused. It appears that no notice of hearing was given to the petitioner before accepting the aforesaid application for cancellation of bail preferred by the State of Gujarat. It transpires from the order passed by our learned Brother Shethna, J. that he was conscious that the accused was not before the Court and no opportunity of hearing was given to him and he has therefore in the end observed: If the respondent accused is aggrieved by this order then he may approach This Court within 15 days from the date of his arrest." It appears that pursuant to this order passed by This Court on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992, the petitioner herein was re-arrested on 9th February, 1993. He has thereafter moved this application on 6th April, 1993, certainly not within 15 days from the date of his re-arrest. As aforesaid, he prayed inter alia for quashing and setting aside the order passed by This Court on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992 and for restoration of the order passed by the learned Addl. Sessions Judge in Misc. Criminal Application No. 896 of 1992 granting bail in his favour.

4. It is an admitted position on record that the present petitioner was not heard before his bail was cancelled by This Court by its order passed on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992. His liberty to remain free pending the trial for the offences with which he has been charged has thus been taken away without affording him an opportunity of hearing. The question is whether this can be a ground for quashing and setting aside the order passed by This Court on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992. In other words, the question is whether This Court can review it,

aforesaid order on the ground of violation of the audi alter am partem rule.

5. It cannot be gainsaid that the right of hearing before an adverse decision affecting the rights of a person is a very valuable right. The Apex Court has time and again pronounced that no decision affecting the rights of any party adversely can be taken without giving an opportunity of hearing to such party. It cannot be gainsaid that liberty to remain free pending the criminal trial is also a very valuable right. An opportunity of hearing has to be given before depriving a person of such a right. If a person is deprived of his liberty to remain free pending the criminal trial without affording an opportunity of hearing to him, can he claim review for such order by invoking inter alia Section 482 of the new Cr.P.C.?

6. The learned Public Prosecutor has asked us to answer the aforesaid questions in the negative in view of the recent ruling of the Supreme Court in the case of Vikramjit Singh (supra). In that case, bail was granted by a Judge of the Madhya Pradesh High Court to one accused. Another accused involved in the trial preferred his bail application and it appeared before another Judge of the Madhya Pradesh High Court. That bail application was also accepted with certain observations. That occasioned application for cancellation of the bail granted to the accused earlier. The application for cancellation of bail was accepted by the Madhya Pradesh High Court presumably after hearing the parties. The matter was carried before the Apex Court questioning the correctness of the bail cancellation order. While setting aside the impugned order, the Supreme Court has ruled:

It appears that the learned Judge while passing the impugned order, failed to appreciate that no Bench can comment on the functioning of a co-ordinate Bench of the same Court, much less sit in judgment as an appellate Court over its decision. If the State was aggrieved by the order of bail by Mr. Justice B.C. Varma it could have approached This Court but, that was not done. The judgment of Mr. Justice B.C. Varma, therefore, became final so far as the High Court was concerned. If the appellant had misused the bail or new materials came to light, it would have been open to the prosecution to move for cancellation, but that is not the position in the present case. On the basis of the same materials and in the same circumstances in which the order was earlier passed in favour of the appellant by the High Court, the application for cancellation was made entirely as a sequel of the observations made by Mr. Justice Gupta while dealing with the application of another accused. It must be, therefore, held that Mr. Justice Gupta had no authority to upset the earlier order of the High Court. That which could not be done directly could also not be done indirectly. Otherwise, a party aggrieved by an order passed by one Bench of the High Court would be tempted to attempt to get the matter re-opened before another Bench, and there would not be any end to such attempts. Besides, it was not consistent with the judicial discipline which must be maintained by Courts both in the interest of administration of justice by assuring the binding nature of

an order which becomes final, and the faith of the people in the judiciary. The impugned order dated 16-7-1991 is, therefore, set aside and the order dated 6-7-1990 granting bail to the appellant is resorted.

Relying on the aforesaid observations of the Supreme Court in its ruling in the case of Vikramjit Singh (supra), the learned Public Prosecutor has urged that the order passed by This Court on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992 cancelling the bail granted to the present petitioner has become final qua This Court and no Bench can review that order.

7. As against this, the learned Advocate for the petitioner has urged that the aforesaid order passed by This Court on 30th December, 1992 is in contravention of the audi alteram partem rule and it is therefore a nullity. He has farther submitted that a nullity order can just be ignored; it is no order in the eyes of law. He has further submitted that the impugned order passed by This Court on 30th December, 1992 may not be reviewed but it can certainly be recalled. In support of the submission he has relied on the Full Bench ruling of the Rajasthan High Court in the case of Habu Vs. State of Rajasthan, .

8. It would be quite proper to look at the ruling of the Supreme Court in the case of State of Orissa Vs. Ram Chander Agarwala and Others, . In that case certain firms and their partners or proprietors were convicted u/s 20(e) of the Forward Contracts (Regulation) Act, 1952 (Act 74 of 1952) by the Addl. District Magistrate (Judicial) at Cuttack and the sentence imposed was a consolidated fine of Rs. 200 in default of which simple imprisonment for three months was ordered. The appeal by the convict to the Sessions Court failed. The Sessions Court however found that the minimum sentence of fine of Rs. 1000 for each offence was required to be awarded and, since the trial Court did not award the prescribed minimum sentence, the Sessions Court referred the matter to the High Court for passing of appropriate sentence. The order of the Sessions Court dismissing the appeals against conviction was challenged before the High Court by the accused. Their revision applications failed. The High Court however accepted the reference made by the Sessions Court and enhanced the sentence to a sum of Rs. 3900/- at the rate of Rs. 1300/- for each offence in the case of the firms and sentence of rigorous imprisonment for six months was passed qua the managers or the managing partners of the firms. The persons sentenced to imprisonment sought review of the order passed by the High Court in the reference proceedings. The High Court accepted the petitions for review and recalled its previous order imposing substantive sentence of rigorous imprisonment for six months but imposed a fine of Rs. 3900/- at the rate of Rs. 1300/- for each of the offeree on each of the review petitioners. The ground for review was given by the High Court to be absence of proper opportunity to the concerned petitioners before passing the order of enhanced sentence against them. The prosecution agency carried the matter before the Supreme Court. The Apex Court found that the review petitioners were in fact given an opportunity before the order of enhanced sentence was passed against them. It appears that

before the Apex Court the impugned order passed by the High Court was sought to be justified on the basis of its inherent powers u/s 561A of the Code of Criminal Procedure, 1898 ("the old Cr.P.C." for brief.) In that context, the Supreme Court has held:

Once a judgment has been pronounced by a High Court either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment as there is no provision in the Code which would enable the High Court to review the same or to exercise revisional jurisdiction.

xxx xxx xxx The provisions of Section 561A cannot be invoked for exercise of a power which is specifically prohibited by the Code,

It is not in dispute that Section 561A of the old Cr. P.C. has been re-enacted as Section 482 of the new Cr. P.C. In view of the aforesaid binding dictum of law pronounced by the Apex Court in its ruling in the case of Ram Chander Agarwala (supra), Section 482 of the new Cr. P.C. cannot be resorted to by the High Court for review of its earlier order.

9. In this connection, a reference also deserves to be made to the ruling of the Supreme Court in the case of Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan, . In that case a reference made by the Sessions Court with respect to setting aside and revising the order passed by the trial Court was accepted by the Andhra Pradesh High Court without giving an opportunity of hearing to the affected party. When it was brought to the notice of the High Court that the affected party was not heard, it added the following note in the order:

It is true that the case has been disposed of without hearing the Counsel for the respondent as he could not appear at the time of the hearing because his name was not printed in the cause list, But this is a revision case where the respondent is not entitled to be heard as of right Having regard to the facts of the case. I do not think any review of the order already passed is necessary.

(Emphasis supplied)

The matter was carried before the Supreme Court. After reproducing the aforesaid note added to the order, it has been held:

This view taken by the High Court is manifestly contrary to the audi alteram partem rule of natural justice which was applicable to the proceedings before the High Court. On this short ground we think that the order of the High Court does not deserve to be maintained. Accordingly, we set aside that order and send the case back to the High Court.

(Emphasis supplied)

We think that the aforesaid ruling of the Supreme Court in the case of Makkapati Nageswara Sastri (supra) provides the clue as to what should be done when an order affecting the rights of a person is passed without giving an opportunity of

hearing to him.

10. A reference also deserves to be made to the ruling of the Supreme Court in the case of Swarth Mahto and Another Vs. Dharmdeo Narain Singh, . In that case an appeal against acquittal was placed on board for hearing nearly 2 1/2 years after the issue of notice to the accused and the cause list of the day of hearing contained only the appeal number but not the names of the accused respondent and his Advocate resulting in conviction of the accused without hearing his Counsel. Thereupon an application for re-hearing of the appeal was made by him. That application was rejected on the ground that no opportunity of hearing had been denied to the concerned parties. The matter was carried before the Supreme Court. It was held that an application for re-hearing of appeal ought to have been accepted as no opportunity of hearing was given to the affected parties. The dictum of law emerging from the aforesaid ruling of the Supreme Court in the case of Swarth Mahto (supra) is to the effect that, when an adverse order is passed against a person without hearing him, his application for rehearing can be entertained and accepted. It is thus clear that the right of re-hearing, when the case was decided without giving an opportunity of hearing was accepted by the Supreme Court. This could be done only by invoking the inherent powers by the High Court u/s 482 of the new Cr. P.C.

11. We think that the Full Bench of the Rajasthan High Court has also taken the same view in its ruling in the case of Habu (supra). It is not necessary for us elaborately to deal with the same.

It however becomes clear from the binding dictum of law pronounced by the Supreme Court in its ruling in the case of Vikramjit Singh (supra) that "no bench can comment on the functioning of a co-ordinate bench of the same Court, much less sit in judgment, as an appellate Court over its decision". It would thus mean that re-hearing of a case when it is decided without giving an opportunity of hearing is to be claimed before the same Judge and not before any other Judge.

12. Besides, in the instant case as observed earlier, our learned Brother Shettna, J., while disposing of Misc. Criminal Application No. 4998 of 1992 by his order passed on 30th December 1992, was conscious that no opportunity of hearing was afforded to the present petitioner as the accused before cancelling the order of bail passed by the trial Court in his favour and has therefore reserved the right of hearing in favour of the accused by observing: "If the respondent-accused is aggrieved by this order, then he may approach This Court within 15 days from the date of his arrest." It was for the petitioner as the accused to have claimed the right of hearing from the learned Judge who passed the impugned order on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992. The petitioner as the accused could not have moved under Sections 438 or 439 of the new Cr. P.C. in absence of any fresh grounds or new facts and circumstances. He could have moved only u/s 482 thereof for claiming the right of hearing in respect of the adverse order passed against him. He has in fact invoked inter alia Section 482 of the new Cr. P.C. in this petition.

13. The learned Advocate for the petitioner invited our attention to the single Judge ruling of This Court in the case of Chhabildas Shantilal Pala v. State of Gujarat and Anr. reported in 1975 Cri.LR.(Guj) 193 and the Division Bench ruling of the Bombay High Court in the case of Bombay Cycle & Motor Agency Ltd. v. Bhagwanprasad Ramragubir Pandey reported in 1974 (76) Bom 612 in support of his submission that the order passed by This Court in Misc. Criminal Application No. 4998 of 1992 on 3th December, 1992 is null and void as violative of the audi alteram partem rule, and as such it can be reviewed by any bench of This Court. The aforesaid rulings of This Court in the case of Chhabildas Pala (supra) and of the Bombay High Court in the case of Bhagwanprasad Pandey (supra) no doubt support the contention urged before us by the learned Advocate for the petitioner. However, in view of the ruling of the Supreme Court in the case of Vikramjit Singh (supra), the aforesaid submission urged before us by the learned Advocate for the petitioner cannot be countenanced. It has been clearly held therein that "no bench can comment on the functioning of a co-ordinate bench of the same Court, much less sit in judgment as an appellate Court over its decision." When a bench of This Court declares the order passed by another co-ordinate bench to be null and void as violative of the audi alteram partem rule, the former can be said to sit in appeal over the decision of the latter. It is a settled principle of law and it has been emphasised also in the aforesaid ruling of the Supreme Court in the case of Vikramjit Singh (supra) that what cannot be done directly cannot be permitted to be done indirectly. By setting aside the order of another bench on the ground of contravention of the audi alteram partem rule, another bench of This Court would indirectly exercise its appellate jurisdiction over it. This cannot be permitted to be done in view of the aforesaid ruling of the Supreme Court in the case of Vikramjit Singh (supra).

14. It may be mentioned at this stage that the order carried before the " Supreme Court in the case of Makkapati Sastri (supra) was passed without hearing the affected person or his Pleader, and yet the Supreme Court has not branded it null and void on that ground. In that view of the matter also, we need not rely on the aforesaid rulings of This Court in the case of Chhabildas Pala (supra) and of the Bombay High Court in the case of Bhagwanprasad Pandey (supra) for the purpose of permitting review of the order passed by our learned Brother Shethna, J. on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992 by another bench of This Court.

15. No prejudice could or would be caused by appearing before the same Judge. The reason therefore is quite simple. When the right of hearing is reserved, the learned Judge can be said to have kept his mind open. The decision though termed as final disposal of the case can be said to be only a tentative decision. It often happens that at the time of preliminary hearing some ad-interim relief is granted and, when the case comes up for final hearing, the very same Judge either vacates or modifies the ad-interim relief granted by him earlier. Let us consider this position in the light of an illustration. An accused pending a criminal trial before the Sessions Court moves it for grant of bail. That application of his is

accepted despite stiff resistance from the prosecution agency. At the instance of the prosecution agency the operation of the order releasing the accused on bail is stayed by the Sessions Court pending approaching and moving the High Court for cancellation of such bail. When the High Court is moved for the purpose, the High Court might grant ad-interim stay of the order releasing the accused on bail. In that case, the adverse order is passed against the accused without hearing him. He may appear before the High Court and after hearing him the High Court may pass an appropriate order. It is thus clear that an order is often passed affecting the liberty of the accused without hearing him. It will be open to such accused to approach the High Court and claim hearing him with respect to the case on hand. The very same Judge who might have passed an ad-interim order affecting the liberty of the accused can very well modify or vacate his earlier ad-interim order. We do not therefore think that the re-hearing claimed before the same Judge would be an empty formality more particularly when the right of re-hearing is reserved.

16. In view of our aforesaid discussion, we answer the question posed before "us in the following terms: On the facts and in the circumstances of the case the order passed by our learned Brother Shethna, J. on 30th December, 1992 in Misc. Criminal Application No. 4998 of 1992 could not and should not be quashed and set aside by any other bench of This Court. The present petitioner can at the most claim re-hearing of the case before the same Judge. It would be open to the, concerned Judge to recall his impugned order after hearing the affected party and it would be open to him to hear the matter himself or to send it for hearing and disposal by another bench. It is clear that sending the matter to another bench can be done only after the order is recalled by the same Judge who has passed it.

17. In view of our aforesaid answer, the matter will go before the learned single Judge for its disposal according to law.