
(1992) 12 GUJ CK 0010
In the Gujarat High Court

Ratilal Amarshi Chawda

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 07-12-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(3), 401, 401
Penal Code, 1860 (IPC) — Section 380, 380, 411, 411, 457

Citation : (1993) 1 GLR 731

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

J.N. Bhatt, J.—Petitioner herein is the original complainant who has questioned the legality of the order with regard to the disposal of muddamal passed by the learned Additional Sessions Judge, at Morvi, in Criminal Revision Application No. 24 of 1987, on 24-12-1991, by invoking the aids of the provisions of Section 397 read with Section 401 of the Criminal Procedure Code, 1973 ("Code" for short).

2. A conspectus of salient and relevant facts giving birth to the present revision may shortly, be narrated at the outset with a view to appreciate the merits of the revision and the challenge against it.

3. The petitioner had filed a Criminal complaint with Morvi Police Station, on 3-6-1985, in connection with the theft of 3 tons of pig iron, committed in his factory premises in the night of 2-6-1985 pursuant to which offence with C. R. No. 63 of 1985 was registered and investigation was commenced.

4. The police, during the course of the investigation, had arrested one Satwara Jeram as one of the two accused persons, who is respondent No. 2, herein, and co-accused Kalu Mamad could not be traced as he was absconding. On the strength of the complaint, Criminal Case No. 808 of 1985 was registered in the Court of learned Judicial Magistrate, First Class, Morvi.

5. Respondent No. 2 (accused) came to be acquitted from the offences punishable under Sections 457, 380 and 411 of the Indian Penal Code, by the

learned trial Magistrate and while acquitting respondent No. 2 herein, the learned trial Magistrate also ordered to hand over the muddamal article - pig iron - to the accused from the custody of the complainant/appellant. It is not in dispute that the complainant was handed over the muddamal article during the pendency of the trial by way of interim arrangement.

6. Being aggrieved by the said order with regard to the muddamal article at the conclusion of the trial, the complainant preferred Criminal Revision Application No. 24 of 1987 in the Court of learned Additional Sessions Judge, Morvi. The learned Additional Sessions Judge dismissed the revision application on 24-12-1991. Being dissatisfied by the said order, the complainant has come up in this appeal, challenging its legality and validity in so far as the handing over of the muddamal article pig iron, is concerned.

7. The following facts may be narrated which are no longer in controversy:

(1) That the complainant is running a foundry in the name "Gayatri Metal Works", in Morvi.

(2) The theft was committed in respect of pig iron from the factory premises of the complainant in the night of 2-6-1985.

(3) The pig iron was weighing about 3 tons in respect of which the theft was committed from the factory premises was valued at Rs. 7,500/-

(4) The accused Kalu Mamad was absconding against whom original complaint was registered.

(5) Another accused, respondent No. 2 herein, Satwara Jeram Hirabhai came to be acquitted from the offence punishable under Sections 380,411 and 457 of the Indian Penal Code.

(6) The learned trial Magistrate while acquitting the accused directed that the muddamal article, i. e., 3 tons of pig iron, should be handed over to the accused, respondent No. 2, Satwara Jeram Hirabhai.

(7) The said muddamal, 3 tons of pig iron, were handed over to the complainant during the pendency of the trial on the condition to return as and when directed by the Court.

(8) That the complainant personally or through his Advocate was not heard on the specific aspect of return of the muddamal at the conclusion of the trial

8. The learned Counsel for the respondent No. 2, original accused, has initially raised a legal objection against the maintainability of this revision. In that he has contended that the impugned order of the learned Additional Session Judge was passed in revision application and, therefore, second revision is not maintainable in view of the specific bar contained in the provisions of Section 397(3) of the Code. Prima facie, this submission would appear to be captivating but not convincing and acceptable. No doubt, it is true that there is a bar in Section

397(3) of the Code in entertaining second revision application. It would be appropriate to refer to Section 397(3) of the Code at this juncture, which reads as under:

If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

9. Thus, the underlying purpose and the policy of Section 397(3) of the Code is very clear that the Court shall not entertain second revision application at the instance of the same party. It is also true that the petitioner/original complainant had questioned the order of the learned trial Magistrate with regard to the muddamal articles by filing revision in the Court of Additional Sessions Judge, Morvi.

10. However, it may be stated that the attention of the learned Additional Sessions Judge, Morvi was not drawn to the fact that the revision application was not maintainable against the order passed in respect of muddamal articles u/s 452 of the Code. There is no dispute about the fact that any order passed u/s 452 of the Code is not revisable but it is appealable u/s 454 of the Code. It is also not disputed that the learned trial Magistrate passed the order for the disposal of the muddamal article at the conclusion of the trial while acquitting the accused. Thus, in so far as the order for disposal of 3 tons of pig iron - muddamal article - was concerned, it was passed u/s 452 of the Code for disposal at the conclusion of the trial. Section 452 of the Code prescribes provision authorising the Criminal Courts to pass order with regard to the disposal of the muddamal at the conclusion of the trial. Section 454 of the Code provides for a provision whereby right to appeal against the orders passed u/s 452 of the Code is given. Section 454 of the Code reads as under:

454. (1) Any person aggrieved by an order made by a Court u/s 452 or Section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in Sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in Sub-section (1) was made.

10A. Unfortunately, the aforesaid provision of law that appeal and not revision was competent against the order with regard to the disposal of the muddamal article passed by the learned trial Magistrate at the conclusion of the trial could not be examined and appreciated by the learned Additional Sessions Judge, Morbi, while dealing with the Criminal Revision Application No. 24 of 1987. In fact, it was wrongly labelled as revision instead of appeal. So, in substance, the

learned Additional Sessions Judge was dealing with an appeal and not with a revision. Therefore, the learned Additional Sessions Judge also committed serious error of law while observing that the scope of revision was very much limited, in the impugned judgment. Thus, it becomes clear that what was entertained by the learned Additional Sessions Judge, at Morvi, was not a revision as such, but in reality, it was an appeal. Under the provisions of Section 454(1) of the Code, an aggrieved party may question the order passed by the learned trial Magistrate with regard to the disposal of the muddamal article at the conclusion of the trial purported to have been passed u/s 452 (1) of the Code. Therefore, the contention that second revision is not maintainable in view of the provisions of Section 397(3) of the Code cannot be accepted in the present case in view of the aforesaid peculiar facts and circumstances. Courts cannot sit helplessly without considering the real nature of the application and the claim made therein. Can it be said that a memo wrongly labelled or wrongly branded as revision instead of appeal, would "ipso facto" constitute legal hurdle in hearing the revision or a matter which makes first revision ? The spontaneous answer would be in the negative. In the peculiar facts and circumstances of the present case, this Court is satisfied that the present revision is maintainable and the first legal hurdle sought to be raised is required to be rejected.

11. Next it brings into the sharp focus the second contention raised on behalf of the respondent No. 2/original accused. In that, it has been contended that while passing any order u/s 452 (1) of the Code. fresh inquiry is not necessary and complainant is not required to be heard.

In that it is further contended that the complainant was examined as one of the witnesses of the prosecution and the prosecution has failed to prove the guilt of accused in relation to the muddamal article-pig iron. Therefore, the order of the learned Magistrate was competent and legal and was rightly confirmed by the learned Additional Sessions Judge.

12. In support of this contention, two decisions are relied on by the learned Counsel for the respondent No. 2/original accused. Firstly, reliance is placed on the decision of the Madras High Court in Criminal Revision Case No. 77 of 1917 with Criminal Revision Petition No. 64 of 1917, decided on 1-2-1917, in reference case known as Vemi Reddy Babu Reddy, reported in 39 Indian Cases 309. Secondly, reliance is placed on another decision of the Calcutta High Court in Criminal Revision No. 1180 of 1922, decided on 26-2-1923 in reference case known as Gour Mohan Dalui, reported in 71 Indian Cases 702.

13. Having examined the ratio of the aforesaid two decisions, this Court is of the clear opinion that the ratio of the said decisions in both the aforesaid cases relied on, does not apply to the point in question in this matter.

14. As held by this Court in the case of Ganchi Ibrahim Billy v. Ganchi Abdulla Mussa and Ors. reported in 1992 (2) GLH 339, although Section 452 of the Code does not expressly so require but by implication in the eye of law, the parties

likely to be adversely affected including the complainant should invariably be heard before the Court makes any order of return of seized property or muddamal article. It is clearly held by this Court in the aforesaid decision that no doubt. Section 452 of the Code does not in clear terms prescribe that a notice should be issued to the complainant and although the law is silent on that point and it does not expressly require service of notice, in the eye of law, the parties likely to be affected adversely should be heard before passing an order u/s 452(1) of the Code in relation to the seized property or muddamal article. This Court, in the aforesaid decision in the case of Ganchi Ibrahim Billy (supra) had also placed reliance on the latest decision of this Court (Coram : J. N. Bhatt, J.) in the case of Soni Bhagwandas Narbheram v. Binduben Gulabrai reported in 1991 (2) 32 (2) GLR 796 : 1991 (2) GLH 255. In the aforesaid two decisions, reliance was placed on the decision of the Apex Court in the case of State Bank of India Vs. Rajendra Kumar Singh and Others,

15. Unfortunately, though the decision of this Court in the case of Soni Bhagwandas Narbheram (supra) was cited and relied on by the petitioner, it was not followed and accepted by the learned Additional Sessions Judge holding that the facts were different in the case on hand. The clear ratio propounded by this Court in the aforesaid two decisions based on the decision of the Apex Court is unfortunately, misappreciated and wrongly overlooked by the Isaraed Additional Sessions Judge. The gum and substance of the aforesaid two decisions of this Court has been that although provisions of Section 452 of the Code in terms does not prescribe any procedure for issuance of notice or of giving an opportunity of being heard to be given to the parties who are likely to be affected adversely before passing any order under the provisions of Section 452(1) of the Code, it is inherent in the nature of the proceedings and by necessary implications it was read that the parties who are likely to be affected due to an order to be passed with regard to the disposal of muddamal article at the conclusion of the trial should invariably be heard. It is-very unfortunate that the clear proposition of law, with due respect to, the learned Additional Sessions Judge, was misread, misinterpreted and misapplied by him.

16. It is an admitted fact that the complainant from whose factory premises the theft was committed in respect of 3 tons of pig iron was not heard by the trial Court at the time of passing the impugned order with regard to the disposal of muddamal article. It cannot be contended even for a moment that since the complainant being one of the witnesses of the prosecution he should not be given an opportunity of being heard on the question of disposal of muddamal articles for which he had raised his claim and pursuant to his claim custody of the same was handed over to him on the condition to return the same as and when ordered by the trial Court. It is an admitted fact that the complainant was interested person who was likely to be affected by passing any order in the trial Court and he was not heard on the point of disposal of muddamal article at the conclusion of the trial. Therefore, the impugned order of the learned trial Magistrate, wrongly confirmed by the learned Additional Sessions Judge, is

required to be quashed being patently illegal and the present case is directly covered by the aforesaid two decisions of this Court.

17. It may be mentioned at this stage that the jurisdictional sweep of the revisional Court u/s 397 read with Section 401 of the Code is very much circumscribed. This Court is very much conscious and cautious of it. However, if the revisional Court finds any illegality or perversity, it is necessary to interfere with the impugned order and to put it in correct legal shape. As observed hereinbefore, the order passed by the learned trial Magistrate u/s 452(1) of the Code with regard to the disposal of the muddamal article and confirmed by the learned Additional Sessions Judge, both are patently illegal and, therefore, this Court has no option but to interfere with the impugned order by exercising its power u/s 397 of the Code.

18. For the foregoing reasons, this revision is allowed. The impugned order of the learned trial Magistrate with regard to the disposal of muddamal articles, passed on 4-11-1937 in Criminal Case No. 808 of 1985, and confirmed by the learned Additional Sessions Judge, Morvi, in Criminal Revision Application No. 24 of 1987 (wrongly levelled as revision instead of Appeal) on 24-12-1991 with regard to the disposal of muddamal articles is, hereby, quashed and set aside and the matter is remitted back to the learned Judicial Magistrate, First Class, Morvi, for disposal in accordance with law as expeditiously as possible after giving an opportunity of being heard to the parties concerned, including the present petitioner/ original complainant.

The revision is therefore allowed to the aforesaid extent. The interim stay granted by this Court during the pendency of this revision in respect of muddamal articles shall remain operative till the disposal of the matter by the learned Judicial Magistrate, First Class, Morvi, on merits.

Rule made absolute.