

(1990) 09 BOM CK 0064

In the Bombay High Court

Case No : Criminal Application No's. 250 of 1988, 628 of 1989 and 556 and 599 of 1990

Shaymrani Gaur

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-09-1990

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(3), 482

Citation : (1991) 1 BomCR 324 : (1991) 93 BOMLR 467

Hon'ble Judges : V.A. Mohta, J;G.D. Patil, J

Bench : Division Bench

Advocate : Anand Parchure, in Cr.A. 599/90, Savitri Dave, in Cr.A. 556/90, V.S. Sirpurkar and K.V. Sirpurkar, in Cr.A. 250/88, M.R. Daga, in Cr.A. 628/89, for the Appellant; H. Ahmad, Asst. Govt. Pleader for non-applicant No. 1. in Cr.A. 599/90, A. Wahedkhan, for non-applicant No. 2 in Cr.A. 599/90, M.G. Joshi and J.M. Shamkuwar for non-applicant No. 1 Cr.A. 556/90, Kishore Pande, Asst. Govt/ Pleader for non-application No. 2 in Cr.A. Nos. 250/88 and 556/90, D.V. Bagde and P.T. Trivedi, in Cr.A. 628/89, for the Respondent

Judgement

V.A. Mohta, J.—This is a reference arising out of difference of opinion between two learned Single Judges of this Court upon the following question:

Whether the application u/s 482 of the Criminal Procedure code independently or read with Article 227 or independently under Article 227 of the constitution of India is maintainable at the instance of the party who has availed the remedy of revision u/s 397 of the Criminal Procedure code ?

We record the answer in the affirmative for the reasons that follow.

2. Section 397 of the Criminal Procedure Code (the Code) confers co-extensive and concurrent revisional powers upon the High Court or any Sessions Judge. A glance at the aforesaid provision will indicate that the revisional powers (i) can be exercised even suo motu (ii) cannot be exercised in relation to any

interlocutory order and (iii) cannot be pressed into service second time in the other Court at the behest of the same party in respect of the same subject matter. Section 482 of the Code saves the inherent powers of High court and reads thus:

"Saving of inherent powers of High court.

482. Nothing in this code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Going by the plain language and the non-obstante clause employed in section 482, first impression is inevitable that this provision has the effect of superseding and excluding all the other provisions as a result High court's inherent jurisdiction is all pervading and can be exercised in regard to any matter to secure ends of justice. But it is not so. Law is crystalized by judicial precedents that this extra-ordinary power cannot be exercised in matters for which there is an express provision or express bar in the Code.

3. The leading decision on the subject is the case *Madhu Limaye Vs. The State of Maharashtra*, , which has been followed in several later decisions by the Supreme court. The following principles in relation to the exercise of the inherent powers of the High Court are settled therein:-

(i) That the power is not to be resorted to if there is a specific provision in the code for the redress of the grievance of the aggrieved party;

(ii) That it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice.

(iii) that it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

4. In the case of *Raj Kapoor and Others Vs. State and Others*, .

"The first question is as to whether the inherent power of the High Court u/s 482 stands repelled when the revisional power u/s 397 over laps. The opening words of section 482 contradict this contention because nothing in the code, not even section 397 can affect the amplitude of the inherent power preserved in so many terms by the language of section 482. Even so, a general principle pervades this branch of law; when a specific provision is made easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code."

5. In the case of *V.C. Shukla Vs. State through C.B.I.*, , with reference to section 397(3) of the Code, it is said :

"sub-section (3), however, does not limit at all the inherent power of the High

court contained in section 482, as mentioned above. It merely curbs the revisional power given to the High Court or the Sessions Judges u/s 397(1) of the code. We need not dilate on this aspect because we are not called upon to consider the interpretation of section 397(3) of the Code, although in one of the cases cited before us this aspect has been gone into."

6. Following observation in the case of *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, are also to the point:

" Thus, the scope, ambit and range of section 561-A (which is now section 482) is quite different from the powers conferred by the present code under the provisions of section 397. It may be that in some cases there may be overlapping but such cases would be few and far between. It is well settled that the inherent powers u/s 482 of the present Code can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. Further, the power being an extraordinary one, it has to be exercised sparingly. If these considerations are kept in mind, there will be no inconsistency between section 482 and 397(2) of the present Code."

7. In the case of *Lalit Mohan Mondal and Others Vs. Benoyendra Nath Chatterjee*, it has been held that, an order passed in appeal u/s 341 of the code though not revisable u/s 397(2), can be examined u/s 482 which expressly overrule the bar contained in section 341."

8. In the case of *Sailesh v. Dilip Harilal* 1980 BC.R. 208, a Division Bench of this Court following *Madhu Limaye (supra)*, held:

"In the first instance, it must be made clear that the present application filed by the accused is not u/s 397(3) but u/s 482 of the said code and under Article 227 of the constitution. The provisions of section 482 of the said Code are available to prevent an abuse of the process of the court even where a second revision application is barred by the provisions of sub-section (3) of section 397 of the said code as is now laid down by the Supreme court in its latest decision reported in *Madhu Limaye Vs. The State of Maharashtra*, . Therefore, there is no difficulty in the way of the accused in filing the present application u/s 482 of the said code. This is apart from the fact that under Article 227 of the constitution, this court has power of supervision over the subordinate courts and whenever there is an error apparent on the face of the record the discretionary power under Article 227 of the Constitution can be exercised to correct the said error and keep the subordinate courts within their jurisdiction if the Court finds that the order challenged has resulted in injustice to the accused."

9. This takes us to the consideration of the ambit of bar created u/s 397(3). The bar is limited and operates only against the unsuccessful applicant from moving the other concurrent Court over again in the same subject matter. Bar does not operate against others. Bar also does not operate against suo motu exercise. It is pertinent to notice that no finality as such is attached to the revisional order in the code. There is also no warrant for a conclusion that either section 397(3) or

any other provision in the Code engrafts an express bar in the matter against the High Court exercising inherent powers to give effect to any order under the Code or to prevent abuse of process of Court or to secure ends of justice. Any one can move the High Court for exercise of inherent jurisdiction suo motu and High Court can, if satisfied, choose to exercise the said jurisdiction in appropriate cases. Crux of the matter is, most High Courts refuse to exercise the said jurisdiction merely because an unsuccessful revisional applicant (who has no right of second revision) has brought the matter to its notice. In our view, no law, no equity, no principle can permit such a course of action. There is a fine but well defined distinction between revisional and inherent jurisdiction though at times they may overlap.

10. In *Re: Puritipatti Jega Reddy*, has dealt with the similar situation in the following manner:

"Now coming to the first contention as to whether it is open to a party to invoke the provisions of section 482 Cr.P. Code when he seeks to file a second revision in the High court u/s 397(3), it is manifest that he is precluded from filing a second revision in the High Court by virtue of the provisions of section 397(3). We have already pointed out that the High court can exercise its inherent powers where that exercise is warranted irrespective of the manner in which the matter has been brought to its notice. Therefore, a party who has been unsuccessful before the Sessions Judge, may seek to bring it to the notice of the High Court u/s 482 Cr.P.C. but that shall not be automatically taken notice of by the High Court. It must be scrutinised and examined whether there has been miscarriage of justice in any particular case before it entertains any such petition filed by an unsuccessful party. The best course would be to place the matter before the Court for admission and at the time of such admission, the Court must be prima facie satisfied before it admits that there has been abuse of process of any Court or that the High Court's interference would be warranted in the ends of justice. Once that Prima facie satisfaction is reached by the High Court at the time of admission, then a petition even by the party who has been unsuccessful before the Sessions Judge can be received, entertained and finally disposed of. The label given to the case is immaterial. It is the satisfaction of the Court whether the case warrants the exercise of its power u/s 482 which is important. Therefore, such matters must be carefully scrutinised even at the admission stage."

We have respectful concurrence to the above approach.

11. Is petition under Article 227 of the Constitution legally maintainable in such matters. In our view, there is only one answer to the question and it is "Yes". No statute can bar that constitutional remedy. No doubt, its exercise has certain limitations, but that is an altogether different subject.

12. Our attention is invited to certain decisions purporting to lay down the law to the contrary. *Amar Nath and Others Vs. State of Haryana and Another*, deals with section 397(2) relating to interlocutory matters. Enunciation of law is as follows:

"Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred u/s 397(2) and cannot be the subject of revision by the High court, then to such a case the provisions of section 482 would not apply."

Now, the view taken therein has been expressly considered and explained in a "modified and modulated form" by a larger Bench of the Supreme court in *Madhu Limaye* (supra) thus:

"As pointed out in *Amar Nath and Others Vs. State of Haryana and Another*, the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in section 397. On the one hand, a bar has been put in the way of the High Court's (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court." But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in section 397(2) can limit or affect the exercise of the inherent power by the High court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly."

13. The case of *Jagir Singh Vs. Ranbir Singh and Another*, , had the following backdrop:

"The unsuccessful party filed a second revision before the High court which was allowed. Against that decision, an appeal was filed in the Supreme court raising a contention that in view of section 397(3) of the Code, second revision was barred. The respondents before the Supreme court supported the order of the High court contending that the application before the High court could either be treated and maintained as one directed against the order of Sessions Judge or as one under Article 227 of the Constitutions. Having regard to the whole background, the supreme court did not accept the request for treating the revision as one against the order of the Sessions Judge or as a petition under article 227 of the Constitution and observed that it would amount to do indirectly which is not permissible directly and the code cannot be evaded by shift or contrivance. It was observed :

where the Criminal Procedure code itself banned the exercise of revisional powers by the High court, it would indeed require very exceptional circumstances to warrant interference under Article 227 of the constitution, since the power of superintendence was not meant to circumvent statutory law. In the first place, it was doubtful, if the High Court could exercise any power of judicial superintendence on the date of its order as the Constitution 42nd Amendment Act It would be seen that the above decision only deals with the width of power u/s 397(3) and the limitations of exercise of the jurisdiction under Article 227. It does not deal with the width of inherent power of the High Court u/s 482 at all".

14. The case of State of Orissa Vs. Ram Chander Agarwala and Others, , lays down that the High Court has no power to review its own judgment u/s 482 of the Code under the writ jurisdiction since review is specifically barred. Almost to the same effect is the decision in Smt. Sooraj Devi Vs. Pyare Lal and Another, . The case of Rajan Kumar Machananda Vs. State of Karnataka, , also relates to the proper exercise of the inherent jurisdiction and not to its existence.

15. In the case of M. Chandran Vs. B. Jagadamma and Another, , Kerala High court while reiterating the well known principle that power expressly taken away by the Statute cannot be saved by reference to the inherent power, observed:

"The High Court decline to exercise inherent power in such cases not because of absence of such power but because of the policy of extreme self-restraint the court has to impose on itself."

It further observed:

"The High Courts have time and again alerted against misuse of the inherent power saved u/s 482 Cr. P.C. to review decisions of subordinate Courts as if such power enables the Court to sit in judgment over them as an appellate or revisional court could do."

This decision is also upon the exercise of the jurisdiction and not upon the existence. There can be no manner of doubt that object of section 397(3) is to prevent multiple exercise of revisional power in the interest of speedy trial and

justice and section 482 of the Code cannot be so used in practice as to defeat its object.

16. The case of State (Delhi Administration) v. Kumari Tukkanna & others, 1984 Cri.L.J. 1866, has dealt with the distinction between the scope of the provisions contained in sub-sections (2) and (3) of section 397. Relying upon the said decision, it is argued that ratio in Madhu Limaye (supra) is restricted to only section 397(2) and hence cannot be extended to section 397(3). We find it difficult to accept this submission and to endorse the view taken in that decision by Delhi High court in the face of Raj Kapoor, V.C. Shukla and Municipal Corporation of Delhi (supra). These decisions refer to section 397 as a whole and make no distinction between these two provisions while considering the ambit of section 482. The submission that observations in V.C. Shukla are merely obiter and, therefore, have no binding force upon us has merely to be stated to be rejected. Settled legal position is that even obiter of the Supreme court is binding on High courts.

17. The case of Dassu Vs. Smt. Manitra, merely lays down that no second revision lies u/s 397(3) and the provision of section 482 cannot be invoked for the purposes of circumventing the express provisions of barring the second revision. In the case of Mangal Singh Vs. Smt. Dalvindra Kaur and Another, , Allahabad High court has held that inherent power cannot be invoked in a manner that the effect would be just entertaining a second revision. The case of Khurshid Khan Amin Khan v. Husnabanu Mahimood Shaikh 1976 MLJ. 628 also does not lay down the principle that such a petition is not legally maintainable at all. In that particular case pure questions of fact were involved and the petition was in truth and substance held to be a mere second revisional application. The case of Smt. Kamlabai Sarode v. Laxmanrao Sarode 1982 (2) BCR 183 merely lays down that in view of the bar of second revision, resort to section 482 should normally be not permitted except where there is a real miscarriage of justice. In Damodar Das Jain v. Krishna Charan Chakraborti 1985 MLR 306 it is held that in view of alternate remedy of appeal against order of acquittal provided u/s 378(4) of the Code, no writ petition under article 227 of the constitution or an application u/s 482 of the code can be entertained. In Bhim Reddy v. Smt. Ranjana 1985 MLR 798 it is held that application under 482 does not lie in such matters as a matter of course. In Nagorao Hiranman Sondule v. Anjanabai w/o Nagorao and others 1990 MLJ 36 inherent powers were not exercised on the ground that pure questions of fact were involved and the matter was examined in one round of revision.

All these decision are with relation to proper exercise of jurisdiction either u/s 482, or u/s 482 read with Article 227 or under Article 227 and not with relation to its existence.

18. We notice a long line of decisions of various High courts including this court taking a view in favour of maintainability. They are :

- (1) Mehbubabi Nasir Shaikh v. Nasir Farid Shaikh 1976 M.L.J. 631.
- (2) Ram Prasad & others v. Abdul Khaliq & others 1980 A.L.J. 921.
- (3) Criminal Application No. 498 of 1981, Sumatilal Shah v. State of Maharashtra, with Criminal Application No. 391 of 1981, Antariksha Parshwanath Swami digambar Jain Sansthan v. State of Maharashtra, decided on 9th September, 1981 by this court.
- (4) Smt. Maria Zazarte v. The State & four others, 1984(2) Crimes 965.
- (5) Krishna Sadan Ghosh Vs. Govind Prasad Saraf, .
- (6) K.M. Nagamallappa Vs. B.J. Lalitha and Another, .
- (7) K.M. Nagamallappa Vs. B.J. Lalitha and Another, .
- (8) Bhanu M. Vakil v. Chandra Oshiram Keswani and another 1990(2) BCR 524.
- (9) Criminal Writ Petition No. 38 of 1989 decided on 27th July, 1990 by this court in the case of Ashok Yeshwant Samant v. Smt. Suparna Ashok Samant.

19. In Hussainbhai Bohra v. The State, Criminal Application No. 363 of 1988 dated 23rd March, 1990 (earlier Single Bench decision disagreeing with which this reference is made) it has been rightly observed that revisional jurisdiction under the old Cr.P.C. (section 435 to 439) has undergone change in section 397 with the sole object of securing speedy trial and this legislative policy has to be given effect to. But section 397 cannot be read in isolation. It is pertinent to notice that inherent powers saved by section 561A of the old code have been retained in the original form in section 482 of the new Code. Section 397 and section 482 have to be harmoniously construed and exactly this exercise has been undertaken by the Supreme Court in various cases referred to earlier and balance between speedy justice and substantial justice has been struck. There is, therefore, no question of section 397 being allowed to succumb to section 482.

20. One of the points raised before us was that the Sessions Judge being a court of co-ordinate jurisdiction with the High court u/s 397, the Sessions Judge cannot be held to be an authority inferior to the High court for the purposes of Article 227 and hence also revisional order of the Sessions Judge cannot be challenged under that Article. Our attention was also invited in this connection to the provisions of section 399 of the code which deals with the extent of revisional power of Sessions Judge. Now, section 401 of the Code deals with High Court's power of revision and there is no manner of doubt that Sessions Judge has almost the same powers. But, this is as regards concurrent revisional jurisdiction only. These powers cannot be extended either to the inherent jurisdiction u/s 482 or constitutional jurisdiction under Article 227 vested exclusively in the High Court. Parameters of those jurisdiction are different not only from revisional jurisdiction but also from each other. Therefore, in the exercise of those jurisdictions Sessions Judge is certainly an authority inferior to the High Court.

21. Conclusion is, therefore, inevitable that an application or petition u/s 482 simpliciter or section 482 read with Article 227 or Article 227 simpliciter does lie but its exercise is restricted to rare and exceptional cases. In exercise of those powers care ought to be taken to see that bar of section 397(3) is not circumvented by shift and contrivance and therefore, not the form but the substance must be the deciding factor.

22. As indicated earlier, reference made in these matters is answered in the affirmative. We direct that these applications be now placed before the appropriate bench for disposal in accordance with law.

Reference answered in affirmative.