

(1964) 10 OHC CK 0010

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 188 of 1963

Siba alias Siba Prasad Rout and Others

APPELLANT

Vs

Kailash Chandra Jena

RESPONDENT

Date of Decision : 22-10-1964

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 369, 411A(2), 417, 422, 424
Penal Code, 1860 (IPC) — Section 379

Citation : (1965) 31 CLT 37

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : G. Rangarao and G. Narasimham, for the Appellant; M.K.C. Rao and A.K. Rao, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—The point involved in this case is whether this Court has power to review, recall or alter its own decision in Criminal Appeal No. 5 of 1963, and rehear the same and, if so, under what circumstances.

2. The relevant facts are that on the complaint of one Kailash Chandra Jena u/s 379, Indian Penal Code, the four Petitioners and two others were tried and acquitted by the Judicial Magistrate, Kendrapara. In Criminal Appeal No. 5 of 1963, the order of acquittal was set aside and all the six Respondents there in were convicted u/s 379, Indian Penal Code, and sentenced to pay a fine of Rs. 75/- each. There was an order of compensation in favour of the complainant. In the criminal appeal, the service of notices on the Respondents was held as sufficient, but none appeared for them at the time of hearing. The present miscellaneous case has been filed for setting aside the judgment of this Court on the ground that there was no service of notice of the appeal on the six Respondents and that the judgment is a nullity and not binding on the Petitioners. The complainant filed a memo refuting the facts of non-service of notices.

The Registrar of this Court was directed to make an enquiry and submit a report on the truth of the conflicting contentions of the parties. He took evidence and after hearing the parties submitted his report on 31-3-1964. He found that there was no service of notices on Fakir Charan Naik and Bijay Kumar Jena (Respondents 2 and 3 respectively) in the criminal appeal, but there was personal service of notices on the other four Respondents who refused to take the notices. Fakir Charan Naik and Sarat Chandra Ransingh are not Petitioners in this case. Thus of the four Petitioners, notice was not served only on Bijoy Kumar Jena (Petitioner No. 2).

3. Mr. M.K.C. Rao does not assail the findings of the Registrar. Mr. Rangamo made a faint attempt to attack the finding as being contrary to the evidence. After going through the evidence and having heard him, I find no substance in his attack. I accordingly accept the findings returned by the Registrar.

Section 422, Code of Criminal Procedure, prescribes that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the Appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal; and in cases of appeals u/s 411-A, Sub-section (2), or Section 417, the appellate Court shall cause a like notice to be given to the accused. Criminal Appeal No. 5 of 1963 was an appeal u/s 417, Code of Criminal Procedure, against an order of acquittal, and the Appellate Court was bound to give notice to Bijoy Kumar Jena. Notice u/s 422, Code of Criminal Procedure, must be personally given to the accused. In other words, the service must be personal AIR 1960 S.O. 756). The peon offered notices to Petitioners 1, 3 and 4 who refused to accept the same. So there was personal service on them by refusal.

The question arises whether refusal amounts to service. The section does not clarify the legal position. But it is common sense that refusal of notice must be treated as personal service. No process-server can compel a person to accept notice. His duty is only to offer. If the offer is refused, it cannot but be treated as sufficient service. No authority laying down contrary has been brought to my notice. In this view of the matter, I would hold that there was personal service of notices, as required u/s 422, Code of Criminal Procedure, on Petitioners 1, 3 and 4 and on the non-Petitioner Sarat Chandra Ransingh. Though no notice was served on Fakir Charan Naik, he is not a Petitioner and his case need not be taken into consideration. Only the case of Bijoy Kumar Jena (Petitioner No. 2) on whom no notice was served requires examination.

4. The first point for consideration is the effect of non-service of notice u/s 422, Code of Criminal Procedure. The question was directly considered by the Supreme Court in a series of decisions. In an unreported decision Hanumant v. State of Madhya Pradesh Criminal Appeal No. 86 of 1952 : D/13-11-1952 the facts were that:

In an appeal against an order of acquittal, the Respondent could not be personally served u/s 422, Code of Criminal Procedure, and the warrant of arrest could not be executed as he had absconded. Proclamation was issued u/s 87, Code of Criminal Procedure. Despite it, the accused did not appear. The State Government engaged a counsel on behalf of the accused who argued and supported the judgment of acquittal. The High Court set aside the order of acquittal and convicted the accused. In appeal, their Lordships of the Supreme Court set aside the decision of the High Court and observed.

It is contended on behalf of the Appellant that no notice u/s 422, Code of Criminal Procedure, was served on him of the appeal preferred by the State Government in the High Court. It is clear from the record that though a notice was served, it was not served on the Appellant as he was not traceable. We are therefore of opinion that the order of the High Court converting his acquittal into a conviction without serving a notice on him as provided in Section 422, Code of Criminal Procedure, is bad and must be set aside. An opportunity must be afforded to the Appellant to contest the appeal preferred by the State Government in the High Court.

In another unreported case *Dwaraka Prasad v. State* Criminal Appeal No. I of 1950 : D/6-10-1950 (S.C.) which arose out of the judgment of the High Court setting aside an order of acquittal, where no notice was served on the Respondent u/s 422, Code of Criminal Procedure, their Lordships observed.

The provision of Section 422, as its language shows, is mandatory and a compliance with it an essential preliminary to the hearing of the appeal. The arrest of the accused under nonbailable warrant cannot be a substitute of the notice of appeal as required under law.

In that case, even the lawyer for the accused appeared in the High Court under the instruction of the father of the accused and, not on the instruction of the accused himself. Despite that, their Lordships observed:

As the position is extremely obscure we cannot but feel that there has been material defect in the procedure relating to the hearing of the appeal by reason of noncompliance of a mandatory provision of the Code and this has led to a miscarriage of justice. All these cases were reviewed in AIR 1960 S.C. 756, and though in that particular case their Lordships held that the notice was served, the aforesaid principles were affirmed.

On the basis of the decisions of the Supreme Court, the principle of law can be formulated as that though there is no inherent lack of jurisdiction on the part of the Court to hear the appeal without giving notice prescribed u/s 422, Code of Criminal Procedure, the jurisdiction to hear an appeal can not be exercised without fulfilling the essential condition precedent which constitutes in effecting service of notice as required u/s 422, Code of Criminal Procedure. In the words of the Supreme Court, hearing of an appeal without service of notice would amount to noncompliance of essential preliminary to the hearing of the appeal

resulting in material defect in the procedure relating to the hearing of the appeal.

From this dictum the conclusion is irresistible that all the proceedings in the appeal subsequent to non-service of notice consisting in hearing of the appeal and delivery of judgment in consequence thereof are without jurisdiction. Such judgments are nullities and can be ignored even in the very proceedings and not necessarily in collateral proceedings. Dealing with similar circumstances some of the cases are to be found in AIR 1925 355 (Lahore) and Ramballabh Jha Vs. The State of Bihar, .

5. It is now necessary to examine the incidence of the aforesaid view on the topic that judgments delivered by the High Court in Criminal Appeals are final and cannot be reviewed. Section 369, Code of Criminal Procedure enacts that save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error. This section applies only to trial Courts U.J.S. Chopra Vs. State of Bombay, . By virtue of Section 424, Section 369 is made applicable so far as practicable to the judgments of any Appellate Court other than a High Court. Section 430, Code of Criminal Procedure says that judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII. All these sections were considered in U.J.S. Chopra Vs. State of Bombay, and their Lordships held that the judgments of the High Court in appeals and revisions are final orders not subject to review or revision even by the High Court itself. The same view has been taken in Nalu Sahu and Another Vs. The State, which arose out of a criminal revision.

6. On the basis of these decisions Mr. M.K.C. Rao contends that judgment in Criminal Appeal No. 5 of 1963 is final and this Court has no jurisdiction to set aside the judgment in respect of Bijoy Kumar Jena even though no notice was served on him u/s 422, Code of Criminal Procedure. The only provision under which an interference can be made is Section 561-A, Code of Criminal Procedure which lays down that nothing in this Code shall be deemed to limit or affect the inherent power 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. The scope of this section has been considered in a number of Supreme Court decisions. In Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, , their Lordships held:

It is obvious that this inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that Section 561-A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. It is only

where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any Court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent power u/s 561-A.

This view is affirmed in *State of U.P. v. Shankar* Doubtless Section 430 as construed in *U.J.S. Chopra Vs. State of Bombay*, , prohibits reviewing or setting aside judgments in criminal appeals which are final. But the judgment in this particular case is without jurisdiction, and, as such, a nullity due to non-service of notice u/s 422, Code of Criminal Procedure on Bijoy Kumar Jena. Thus I am satisfied that the judgment passed against Bijoy Kumar Jena would be rendered ineffective and that the ends of justice would be secured if the High Court would exercise its inherent power u/s 561-A, Code of Criminal Procedure and restore the appeal for re-hearing so far as he is concerned. There is no specific provision in the Code that the hearing and the judgment would be legal and within jurisdiction even if no notice is served on the party concerned. In cases where judgment is without jurisdiction and is a nullity, there is no conflict of the aforesaid principles.

7. This view, however, does not assist the Petitioners 1, & 3 and 4 to whom notices were duly given and against whom the judgment passed in Criminal Appeal No. 5 of 1963 has become final. Mr. Rangarao contends that once the appeal is to be re-heard so far as Bijoy Kumar Jena is concerned, in furtherance of justice the judgment should be set aside and the entire appeal should be re-heard. I find no force in this argument and such a step would be contrary to the settled principles that the judgment against them is final the High Court has no jurisdiction or power to review or alter the same.

8. One more important fact to be noticed is that Kailash Chandra Jena, the sole complainant, died on 30-5-1964 even after receiving the compensation. The question is whether the appeal against Bijoy Kumar Jena would abate. Section 431, Code of Criminal Procedure prescribes that every appeal u/s 411-A, Sub-section (2) or Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the Appellant. Criminal Appeal No. 5 of 1963 is one u/s 417, Code of Criminal Procedure. As Bijoy Kumar Jena is not dead, the appeal shall not abate. There is no provision that the appeal shall abate on the death of the complainant. The appeal would be properly constituted despite the death of the complainant. In 1961 2 M.E.J. 652 a learned Single Judge of the Madras High Court held that in warrant case after a charge has been framed, there can be no termination of all proceedings because the complainant is dead. Mr. Rangarao informs the Court that the fines imposed by the Court have been paid by all the (sic) and the compensation money was received by the complainant before his death. Once the order is passed that the Criminal Appeal No. 5 of 1963 would be re-heard so far as it relates to Bijoy Kumar Jena alone, it would be better by way of abundant caution to add the legal representatives of

the deceased complainant as parties to the criminal appeal so that in their presence the appeal can be effectively heard and determined, though no substitution is necessary in law.

9. It need hardly be clarified that the view taken by me does not run counter to the decision of this Court in *Nalu Sahu and Anr. v. State*. In that case, the criminal revision was fully heard in the presence of the lawyers of both parties after due service of notice. A mandatory provision of law under the Probation of Offender's Act had not been brought to the notice of the Court. Such a case does not affect the jurisdiction of the Court. It amounted to taking a view contrary to a mandatory provision of law which can be rectified only by a higher Court.

10. To sum up, the criminal miscellaneous case is dismissed so far as Petitioners 1, 3 and 4 are concerned and is allowed so far as Petitioner No. 2 is concerned. Criminal Appeal No. 5 of 1963 is restored and should be set down for hearing before me in due course only against Bijoy Kumar Jena. Mr. M.K.C. Rao is directed to add the legal representatives of the deceased complainant within two weeks from today. Case dismissed in part.