

(1996) 02 MP CK 0084

In the Madhya Pradesh High Court

Case No : Criminal Rev. No. 196 of 1992

State of Madhya Pradesh

APPELLANT

Vs

Khizar Mohammad and Others

RESPONDENT

Date of Decision : 24-02-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(1)

Citation : (1996) ILR (MP) 223 : (1997) 1 JLJ 99 : (1996) 1 MPJR 426 : (1996) MPLJ 1007

Hon'ble Judges : Fakhruddin, J; D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : M.M. Qureshi, for the Appellant; Rakesh Saxena, for the Respondent

Judgement

Fakhruddin, J.

This matter has come up before us on reference made by Hon''ble the Chief Justice in view of the contrary opinions referred in two Single Bench decisions rendered in Shridhar Shastri v. Prakashwati, Cri. Misc. Case No. 2194/1980, decided on 16-8-1990, reported in 1990 (II) MPWN 185 by Hon''ble Shri Gulab Gupta, J. as he then was, and the other decision of Hon. Shri D. M. Dharmadhikari, J. passed in Cri. Rev. No. 608/1991 decided on 17-3-1992 reported in 1993 (I) MPWN 186, Vijay Rao v. State of M.P. and the following question has been referred :-

"Whether it is obligatory to move the Court of Session first before asking the High Court for exercise of the revisional jurisdiction u/s 397(1) of the Criminal Procedure Code?"

Section 397 of the Code of Criminal Procedure, 1973 gives an option to an aggrieved party to approach High Court or the Sessions Judge. The question involved is of general importance and of day to day recurrence.

Brief facts of the case are - State of Madhya Pradesh preferred a revision against the order passed by Judicial Magistrate First Class, Bhind in Cri. Case No. 231 of

1992 whereby a supplementary charge sheet filed against the non-applicants has been quashed and the accused has been discharged, as the non-applicants were newly added accused persons. The case of the prosecution was that Zebunnisa is the wedded wife of co-accused Chhinga alias Nijamuddin. It is alleged that acid was thrown on her body as a result of which she received acid burns. Her husband and other in-laws brought Zebunnisa in unconscious condition for treatment in a Private Nursing Home of non-applicant No. 2, Dr. Vinod Kumar Saxena, where non-applicant No. 3 Rajveer was working as a Compounder. Non-applicant No. 1 is a neighbour of the co-accused Chhinga and is connected with profession of journalism. Zebunnisa remained under treatment for a period of about 15 days. When she regained consciousness, she told the doctor and the Compounder that acid was thrown on her person by her husband and other members of the family. The doctor asked her to keep mum. After treatment,, she was taken by her in-laws in the matrimonial home where she was kept under confinement. Thereafter, on 5-10-1988 the mother of injured Zebunnisa came and took her to her parental house from where a written report was sent by Zebunnisa against several persons including the present non-applicants to the Superintendent of Police, Bhind. On this, a case under Sections 326, 498A, 120B and 201, Indian Penal Code was registered at police station Bhind at Crime No. 26/89, but after investigation the charge sheet was filed only against five accused persons, namely, Chhinga, the husband of Zebunnisa, Pappu, brother-in-law, father-in-law Phoolkhan, Akhtari mother-in-law and Sitara, sister-in-law of the complainant Zebunnisa.

The trial Court on perusal of documents framed charge under Sections 147, 326/149, 498A/149 and commenced the trial and recorded statement of Zamil on 25-7-1990. Meanwhile, the police made a further investigation and on its completion filed a supplementary charge sheet against all the three non-applicants making them as additional accused. The non-applicants raised objection on the filing of supplementary challan against them. The trial Court, after considering the fact that Mst. Zebunnisa has not named these three persons as accused in her statement recorded during investigation on 4-12-1990, held that they could not have been added without seeking permission from the Court, discharged the three non-applicants, the newly added accused persons. State of Madhya Pradesh, therefore, preferred this revision, Cri. Rev. No. 196 of 1992 against the said order of discharge.

During hearing of the revision petition a preliminary objection was raised by non-applicants to the effect that though there is concurrent revisional jurisdiction to the Court of Session as well as the High Court as a rule of practice the State ought to have preferred a revision before the Court of lowest jurisdiction i.e. Sessions Court. It was contended that this was the practice which was in vogue in this Court and therefore no interference is called for and the revision is liable to be dismissed. The State of Madhya Pradesh repelled the objection. The learned single Judge noted in the judgment under reference case of Vijay Rao v. State of M.P. (supra) decided by one of us (Dharmadhikari, J.) in which it has

been observed that provisions of Section 397 of the Code confer concurrent revisional jurisdiction on the High Court and the Sessions Judge and the option is with the party aggrieved to approach any one of the two Courts. Learned single Judge also considered the case of Shridhar Shastri v. Prakashwati, 1990 (II) MPWN 185 in which Hon. Shri Gulab Gupta, J. held :-

"Indeed, this Court thinks that in view of extraordinary jurisdiction of this Court u/s 482, Criminal Procedure Code, it might still be profitable for an applicant to first approach the Sessions Court for the purpose. This Court's power to correct an error committed by the Sessions Court in exercise of revisional jurisdiction is not in dispute that it will be exercised with care and circumspection and only in exceptional cases."

In view of the so called cleavage of opinions in Vijay Rao v. State of M.P. (supra) and Shridhar Shastri's case (supra) on the provisions contained in Section 397, Criminal Procedure Code, 1973, the question involved being of general importance and day to day recurrence, has been referred to this Bench for resolving the controversy.

Chapter XXX of the Code of Criminal Procedure deals with the Reference and Revision. Section 397 deals with the calling for records to exercise powers of revision. Section 397 is quoted below :-

"397. Calling for records to exercise power of revision. - (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation. - All Magistrates, whether Executing or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) 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."

Section 399 deals with Sessions Judge's power of revision. The same is also quoted below:-

"399. Sessions Judge's powers of revision. - (1) In the case of any proceeding

the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1) the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as reference to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and so further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court."

Section 400 deals with the power of Additional Sessions Judge and it contemplates that an Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge. Section 401 deals with the power of the High Court of revision. Section 402 deals with the power of the High Court to withdraw or transfer revision cases. Sections 403 to 405 are not material for decision of this revision.

The counsel for the respondents drew attention of the Court to Rule 15 of Chapter IV of M.P. High Court Rules. The same rule is reproduced below:-

"No petition for revision of an original order of a Magistrate shall be entertained unless it is accompanied by a copy of the order of the District Magistrate or Sessions Judge concerned "refusing to refer the case to the High Court."

Learned counsel for the State, however contended that the said rule was framed in view of the old provisions contained in Sections 435 to 438 of the Code of Criminal Procedure, 1898. It was also contended that in view of the provisions contained in Sections 397 and 401 of the Code of Criminal Procedure, 1973, Rule 15 of the High Court Rules is rendered otiose. Section 438 of Code, 1989 provided as under :-

"438. (i) The Sessions Judge or District Magistrate may, if he thinks fit, on examining u/s 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence (or an order) be reversed or altered, may order that the execution of such sentence (or order) be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(ii) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him (by or under any general or special order of the Sessions Judge)."

It is, thus, clear that drastic changes have been made now in the new Code. Power of the revision has now been conferred to High Court as well as to the Sessions Court, .

The controversy came before the Full Bench of the Kerala High Court in the case of Kesavan Sivan Pillai Vs. Sreedharan Rajamohan and Others, . In view of the majority opinion it was held that the direct criminal revision petition is maintainable in the High Court. There is no necessity to follow the old practice of insisting on a party to file revision petition first to the Sessions Judge before approaching High Court. High Court of Mohan Lal and Others etc. Vs. Prem Chand and Others etc., held that the applicant cannot be compelled to apply to the Sessions Judge before approaching the High Court. Sessions Court has all powers which High Court can exercise. Full Bench of the Himachal Pradesh High Court further held that in view of the changes made by the new Code, Rule 3 of Chapter I-A(b) of Vol. V of the High Court Rules and Orders so far as it requires an applicant to move the Sessions Judge before making an application before the High Court have become ultra vires. It is held that a rule cannot alter, amend or modify the statutory provisions. The right conferred by the new Code cannot be taken away by a rule framed by the High Court. The enforcement of this rule will result in preventing persons to directly move the High Court in revision against all orders passed by a Magistrate. Once the statute has given a right to a person to choose between the High Court and the Court of Session it is for him to choose the Court. The Parliament having clearly spelled out its intention the Court cannot be wiser and impose any condition so as to deny that option to an aggrieved party.

In this connection the view taken by the Apex Court in the case of Jagir Singh Vs. Ranbir Singh and Another, , is relevant and quoted below :-

"The object of Section 397(3) is clear. It is to prevent a multiple exercise of revisional powers and to secure early finality to orders. Any person aggrieved by an order of an inferior Criminal Court is given the option to approach either the Sessions Judge or the High Court and once he exercises the option he is precluded from involving the revisional jurisdiction of Section 397(3) is clear and peremptory and it does not admit of any other interpretation. We may also mention here that even u/s 435 of the previous Code of Criminal Procedure while the Sessions Judge and the District Magistrate had concurrent jurisdiction, like present Section 397(3) previous Section 435(1) provided that if an application under the section had been made either to the Sessions Judge or District Magistrate no further application shall be entertained by the other of them."

The case of Shridhar Shastri v. Prakashwati (supra) decided on 16-8-1990 though holds that Sessions Court and the High Court both have concurrent jurisdiction of revision but in that case it was held that Sessions Court should be approached first. In the above case none of the cases cited above 1979 (I) SCC 560 , Mohan Lal and Others etc. Vs. Prem Chand and Others etc., and Kesavan Sivan Pillai Vs. Sreedharan Rajamohan and Others, have been considered.

Then, the Court in Shridhar's case (supra) proceeded to consider whether a revision u/s 397, Criminal Procedure Code could be filed before the Sessions Court and is maintainable. In that context it has also been observed that Section 397, Criminal Procedure Code confers concurrent jurisdiction on the High Court and the Sessions Court to call for and examine the record of any proceedings pending before any inferior Criminal Court, situate within its or his legal jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or any other recorded or passed and as to the regularity of any proceedings of such inferior Court. In the referred case Ram Lal Sharma Vs. State of Madhya Pradesh, in which though it is observed that "It may be that under the present Code, this rule cannot be followed, as it would result in the destruction of the right of the party to move the High Court and yet it does not take away the right of a party to select the forum of its own choice under this provision. Section 397(3), Criminal Procedure Code is very clear on this point. In Shridhar Shastri's case (supra) the Court, however, observed that "Indeed, this Court thinks that in view of extraordinary jurisdiction of this Court u/s 482, Criminal Procedure Code it might still be profitable for an applicant to first approach the Sessions Court for the purpose. This Court's power to correct an error committed by the Sessions Court in exercise of revisional jurisdiction is not in dispute that it will be exercised with care and only in exceptional cases."

In our opinion these observations in Shridhar Shastri's case (supra) are somewhat misleading. We are fortified in our opinion by the decision of the Supreme Court in Jagpati Vs. State of Madhya Pradesh, where the Apex Court has held that a second revision application by the same person after disposal of the first cannot be entertained by High Court in exercise of Section 482, Criminal Procedure Code. It is well settled that the inherent powers u/s 482, Criminal Procedure Code cannot be utilised for exercising powers which are expressly barred by the Code. In view of decision of the Supreme Court the observation quoted above in Shridhar Shastri's case cannot be supported. The provisions under the new Code also indicate that the option is given to the person to approach either to the High Court or the Court of Session and same is also clear from the provisions of Section 397(3) of the Code of Criminal Procedure, 1973, which categorically states that where 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. It is also made clear that by the provision of Section 397 of the Code of Criminal Procedure that if an application has been made by any party to the Sessions Judge the same party cannot approach the High Court. Reading of this, thus, shows that if a party approaches the Sessions Court and the order is passed then the other party or opposite party has a right to approach the High Court.

In this context, it is worthwhile to notice the provisions contained in Section 402 of the Code of Criminal Procedure, 1973. Section 402 deals with the power of High Court to withdraw or transfer revision cases where one or more persons

convicted at the same trial makes or make application to a High Court for revision, the High Court shall decide, having regard to the general convenience of the parties and the importance of the question involved, which of the two Courts should finally dispose of the application for revision and when the High Court decides that all the applications for revision should be disposed of by itself, the High Court shall direct that the application for revision pending before the Sessions Judge be transferred to itself and where the High Court decides that it is not necessary for it to dispose of the application for revision, it shall direct that the applications for revision made to it be transferred to the Sessions Judge. Section 402, thus, makes it clear that the legislature conferred the revisional jurisdiction concurrently to the High Court as well as to the Court of Session and left the option with the party or parties. In case where two or more revisions are preferred, one or more before the High Court and other or others before the Court of Session and it is for the High Court to decide having regard to the general convenience of the parties and the importance of the question involved, which of the two Courts should finally dispose of the applications for revision and when the High Court decides that all the applications for revision should be disposed of by itself, the High Court shall direct that the application for revision pending before the Sessions Judge be transferred to itself and where the High Court decides that it is not necessary for it to dispose of the applications for revision, it shall direct that the applications for revision made to it be transferred to the Sessions Judge.

In view of the above discussion, we are of the opinion that the option contained in Section 397(1) of the New Code is with the aggrieved party and the High Court cannot insist that the party should first approach the Sessions Court before its powers of revision are invoked.

Let the matter be placed now before the appropriate single Bench for deciding the revision on merits.