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H. P. GUPTA

v.

MANOHAR LAL AND ORS.

November 3, 1978

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[V. D. TULZAPURKAR AND R. S. PATHAK, JJ.]

Criminal Procedure Code, (Act II of 1974), 1973 Scope of Sec. 456(2)—Whether the Court of appeal, after having disposed of the appeal has the power to order restoration of possession of immovable property?—Construction of the words “while disposing of the appeal, reference or revision” in S. 456 of the Code.

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Respondents 1 to 4 were convicted by a Metropolitan Magistrate under S. 447 I.P.C. for trespassing and taking forcible possession of the immovable property, which was in possession of the appellant. The said conviction was confirmed by the Court of Sessions. As the Magistrate did not pass any order for restoration of possession under s. 456 (1) Cr. P.C., the appellant made an application two weeks after the confirmation of the conviction to the Appellate Court for restoration of possession of the property under s. 456 (2) Cr. P.C. which was ordered. But the Delhi High Court while allowing the application under Art. 227 of the Constitution r/w s. 482 Cr. P.C. made by the respondents 1 to 4 set aside the order of restoration of possession holding that “the language of sub-s. (2) of s. 456 Cr. P.C. is plain and unambiguous and leaves no doubt that the Court of appeal, confirmation, or revision has no power to pass any order of restoration after the appeal, reference or revision has been disposed of”. The construction placed by the High Court on the words “while disposing of the appeal, reference or revision” occurring in s. 456 (2) Cr. P.C. was challenged by the appellant.

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Allowing the appeal by special leave, the Court

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HELD: (1) The appellate or revisional Court acting under s. 456 (2) will have jurisdiction or power to pass the order for restoration of possession at any time but it has to be exercised with discretion within reasonable time of the disposal of the appeal, reference or revision. [213G-H, 214A]

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(2) The language of sub sec. (2) of Section 456 Cr. P.C. clearly shows that the same is applicable to a case where a conviction has been recorded by the trial Court and the trial Court has through mistake or inadvertence omitted to make an order for restoration of possession of immovable property to the complainant or has refused to pass such order either because the offence was not attended by criminal force or show of force or by criminal intimidation or because the application in that behalf was made after expiry of 30 days and an appeal or revision either against the conviction or the order refusing restoration has been preferred; in such a case sub-s. (2) provides that the appellate Court or the revisional Court while disposing of such appeal or revision may make an order restoring possession of the immovable property to the complainant. [213D-F]

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3. Under Sub. sec (1) of Section 522 of the 1898 Code, the Trial Court could order restoration of possession “when convicting such person or at any

time within one month from the date of the conviction" whereas under the new s. 456 the limitation of one month has been relegated to a proviso to sub-s. (1) of s. 456. Sub-s. (2) of the present s. 456 corresponds to old s. 522(3), but there has been a change in the phraseology with a view to resolve the conflict of views between various High Courts that obtained under the old Code on the question whether the limitation of 30 days was applicable to the Court of appeal, reference or revision. [211E-F, 212A-B]

The change in phraseology clearly suggests that Parliament did not intend to prescribe any limitation on the powers of the appellate Court or revisional Court; the words are not "when convicting" or "when upholding the conviction" but the words are "while disposing of the appeal, reference or revision" and these would mean in continuation of the disposal of the appeal, reference or revision and these words cannot be regarded as importing a limitation on the power to effect that such order must be incorporated in the body of the judgment disposing of the appeal, reference or revision. [213F-G]

Abdul Mannan and Ors. v. Taiyab Ali, A.I.R. 1947 Cal 390, *Krishnan Moothan v. V. K. A. Krishnankutty Moothan*, A.I.R. 1960, Kerala 348, *Nihal Singh v. Emperor*, A.I.R. 1939 Allahabad 662, *Basanta Kumar Maity v. Kenaram Maity*, A.I.R. 1953 Cal. 393, *Fida Hussain v. Sarfaraz Hussain*, A.I.R. 1933 Patna 617 and *Savlaram Sadoba Navle v. Dhyaneswar Vishnu Chinke*, A.I.R. 1942 Bom. 148; referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 38 of 1976.

(From the Judgment and Order dt. 25-9-75 of the Delhi High Court in Original Misc. Main No. 118 of 1975).

R. L. Kohli and *S. K. Sabharwal* for the appellant.

Jairam Singh and *N. S. Das Behl* for the respondent.

The Judgment of the Court was delivered by

TULZAPURKAR, J.—The short question raised in this appeal by special leave is whether the Court of Appeal, after having disposed of the appeal, has the power to order restoration of possession of immovable property under s. 456(2) of the Code of Criminal Procedure, 1973 ?

The facts giving rise to the aforesaid question are briefly these : Respondents 1 to 4 were convicted by a Metropolitan Magistrate under s. 447 I.P.C. for trespassing and taking forcible possession of the immovable property which was in the possession of the appellant Shri H. P. Gupta. The Magistrate, however, did not pass any order for restoration of possession under sub-s. (1) of s. 456 Cr.P.C. The respondents filed an appeal to the Court of Sessions against their conviction which was dismissed by the Additional Sessions Judge, New Delhi on January 6, 1975. Two weeks later the appellant made an application to the Appellate Court for restoration of possession of the property

A under s. 456 (2) of Cr. P.C. and the learned Additional Sessions Judge ordered its restoration to him on February 1, 1975. The respondents moved the Delhi High Court under Article 227 of the Constitution read with s. 482 Cr. P. C. being Criminal Miscellaneous Petition No. 118 of 1975, challenging the said order of the Additional Sessions Judge on the ground that the Appellate Court had no jurisdiction or power to pass the order after disposing of the appeal. The High Court set aside the impugned order holding that "the language of sub-s.(2) of s.456 Cr. P.C. is plain and unambiguous and leaves no doubt that the Court of appeal, confirmation, or revision has no power to pass any order of restoration after the appeal, reference or revision has been disposed of."

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C The construction placed by the High Court on the words "while disposing of the appeal, reference or revision" occurring in s.456(2) Cr. P.C. is being challenged by the appellant before us in this appeal.

Counsel for the appellant raised a two-fold contention in support of the appeal. In the first place he contended that an appeal was a continuation of the original trial by the Magistrate and the Court of Appeal would possess all the powers of the trying Magistrate and if the trying Magistrate could order restoration of the possession of the immovable property under proviso to sub-s. (1) of s.456 Cr. P.C. within one month after the date of conviction, the Appellate Court must be held to possess similar power and it was pointed out that in the instant case the Appellate Court had ordered restoration of possession of the property in question to the appellant within one month from the date when the respondents' convictions were confirmed in appeal. Secondly, he contended that unlike the trial Court where a limitation of 30 days has been prescribed under proviso to sub-s. (1), no period of limitation is prescribed so far as the powers of Appellate Court under sub-s.(2) of s.456 Cr. P.C. are concerned, which means that the Appellate Court can pass an order for restoration of possession at any time, though within reasonable time of recording or confirming the conviction after having been satisfied that the offence was attended by criminal force or show of force or by criminal intimidation. In any event, he contended that the phrase "while disposing of the appeal, reference or revision" occurring in sub-s. (2) of s.456 Cr. P.C. cannot be interpreted to mean that the order of restoration of possession must form part of the judgment disposing of the appeal, reference or revision as that was not the intention of the Legislature when it changed the phraseology of the equivalent provision of the old Code of 1898. On the other hand, counsel for the respondents laid considerable stress on the words "while disposing of the appeal, reference or revision" occurring in sub-s. (2) of s.456 Cr. P.C. and contended that these words imported a limitation on the power of the Appellate or Revisional Court to pass the order for

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restoration of possession at the time of the disposal of the appeal, reference or revision and such Court could not do so after the disposal of the appeal, reference or revision. A

In order to determine the question raised before us it will be necessary to consider the equivalent provision of the old Code of 1898 which was contained in s. 522 thereof. Section 522 ran thus : B

“522. *Power to restore possession of immovable property.*—(1) Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immovable property, the Court, may, if it thinks fit when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same. C

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able, to establish in a civil suit. D

(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision.”

It will appear clear that under sub-s. (1) of aforesaid provision the trial Court could order restoration of possession “when convicting such person or at any time within one month from the date of the conviction” whereas under the new s. 456 the limitation of one month has been relegated to a proviso to sub-s. (1) of s.456. Sub-s. (2) of the present s.456 corresponds to old s.522 (3), but there has been a change in the phraseology and the reasons for such change have been explained by the Law Commission in its 41st Report in para 43.24 thus : E

“43.24. Sub-section (3) of section 522 provides that an order under sub-section (1) may be made by any Court of appeal, confirmation, reference or revision. This is to meet cases where the trial Court has failed to make an order under sub-section (1) and it appears to the Court of appeal or revision that such an order ought to be made in the interests of justice. There is a conflict of decisions as to whether the period of one month from the date of the conviction which is mentioned in sub-section (1) also applies to the Court of appeal or revision. This conflict should be set at rest by a slight re-wording of sub-section (3) indicating that the Court of appeal, confirmation, reference or revision may make an F

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A order while disposing of the appeal, reference or revision, as the case may be.”

It will thus appear clear that with a view to resolve the conflict of views between various High Courts that obtained under the old Code on the question whether the limitation of 30 days was applicable to the Court of appeal, reference by revision the phraseology was altered while enacting the new provision. The Calcutta High Court *Abdul Mannan and Ors. v. Taiyab Ali*⁽¹⁾ and the Kerala High Court *Krishnan Moothan v. V. K. A. Krishnakutty Moothan*⁽²⁾ had taken the view that the Court of appeal, confirmation, reference or revision acting under s. 522(3) must pass the order of restoration of possession when upholding the conviction or at any time within one month from the date of the order in appeal, reference or revision upholding the order of conviction. This was contrary to the view taken by the Allahabad High Court in *Nihal Singh v. Emperor*⁽³⁾ where it was held that there was no limitation of one month from the date of conviction for passing the order under sub-s. (3) of s. 522 as there was for an order under sub-s. (1) and, therefore, where an order for restoration of possession of the immovable property was passed by the Magistrate more than one month after the conviction under s. 447 I.P.C., the High Court in revision could set aside that order and itself pass an order for the restoration of possession. In a later case *Basanta Kumar Maity v. Kenaram Maity*⁽⁴⁾ the Calcutta High Court took the view that the Sessions Judge as a Court of Reference has power to pass an order under s. 522 even after one month of conviction and there was nothing to prevent his validating the order of the Magistrate (passed beyond one month of the conviction) which was a just order and the Sessions Judge not having done so, the High Court, as a Court of revision, had power under s. 522 to make such an order. In *Fida Hussain v. Sarfaraz Hussain*⁽⁵⁾ the Patna High Court took view that there was nothing in s. 522(3) to limit the jurisdiction of an appellate Court to the passing of an order within one month either of the original conviction or the appellate order and that it was left to the discretion of the appellate or revisional Court, not to exercise its power under this section in cases where there has been undue or excessive delay in moving the Court for its use : in other words the appellate or revisional Court will use its discretion in exercising power within reasonable time. In *Savlaram Sadoba Navle v.*

(1) A.I.R. 1947 Cal 390.

(2) A.I.R. 1960 Ker. 348.

(3) A.I.R. 1939 All. 662.

(4) A.I.R. 1953 Cal. 393.

(5) A.I.R. 1933 Patna 617.

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Dhyaneshwar Vishnu Chinke⁽¹⁾ the Bombay High Court took the view that although there be not before the Court any appeal or revision against the conviction of the accused, and the Magistrate had rightly dismissed the application for an order for possession under s. 522(1) because it was made more than a month after the conviction, still the High Court can under sub-s. (3) of s. 522 make an order for possession in a proper case in revision against the order dismissing the application for possession and in taking this view the Bombay High Court followed the view of the Patna High Court in ILR 12 Patna 787 and ILR 4 Patna 438 and of the Allahabad High Court in AIR 1939 All. 662. It was with a view to set at rest the aforesaid conflict of views that the Law Commission recommended the change in the phraseology and the Parliament accepting the recommendation enacted sub-s. (2) of s. 456 thus :

“456(2) Where the Court trying the offence has not made an order under sub-section (1), the Court of appeal, confirmation or revision may, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.”

The language of sub-s. (2) clearly shows that the same is applicable to a case where a conviction has been recorded by the trial Court and the trial Court has through mistake or inadvertence omitted to make an order for restoration of possession of immovable property to the complainant or has refused to pass such order either because the offence was not attended by criminal force or show of force or by criminal intimidation or because the application in that behalf was made after expiry of 30 days and an appeal or revision either against the conviction or the order refusing restoration has been preferred; in such a case sub-s. (2) provides that the appellate Court or the revisional Court while disposing of such appeal or revision may make an order restoring possession of the immovable property to the complainant. The change in phraseology clearly suggests that Parliament did not intend to prescribe any limitation on the powers of the appellate Court or revisional Court : the words are not “when convicting” or “when upholding the conviction” but the words are “while disposing of the appeal, reference or revision” and these would mean in continuation of the disposal of the appeal, reference or revision and these words cannot be regarded as importing a limitation on the power to the effect that such order must be incorporated in the body of the judgment disposing of the appeal, reference or revision. In other words, the appellate or revisional Court acting under s. 456(2) will have jurisdiction or power to pass

(1) A.I.R. 1942 Bom. 148.

- A** the order for restoration of possession at any time but it has to be exercised with discretion within reasonable time of the disposal of the appeal, reference or revision.

- B** In our opinion the view taken by the High Court is clearly erroneous. We accordingly allow the appeal, set aside the impugned order passed by the High Court on September 25, 1975 and restore that passed by the Additional Sessions Judge on February 1, 1975.

S.R.

Appeal allowed.