Basheer @ N.P. Basheer vs State Of Kerala on 9 February, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2757, 2004 AIR SCW 932, 2004 (2) SCALE 415, 2004 SCC(CRI) 1107, 2004 CRILR(SC MAH GUJ) 187, (2004) 2 JT 299 (SC), 2004 (2) JT 299, (2004) 1 ALLCRIR 692, 2004 (2) SLT 350, 2004 (3) SRJ 540, 2004 (2) ACE 289, 2004 ALL MR(CRI) 893, 2004 (3) SCC 609, (2004) 1 KHCACJ 791 (SC), 2004 CRILR(SC&MP) 187, (2004) 1 RECCRIR 1008, (2004) 2 CURLR 95, 2003 BLJR 3 2371, (2004) 1 EASTCRIC 234, (2004) 1 RECCRIR 815, 2004 CHANDLR(CIV&CRI) 410, (2004) 2 CHANDCRIC 1, (2004) 113 ECR 321, (2004) 1 EFR 471, (2004) 2 KER LT 39, (2004) MAD LJ(CRI) 532, (2004) 1 CURCRIR 364, (2004) 2 SCALE 415, (2004) 1 UC 670, (2004) 2 ALLCRILR 608, (2004) 2 CRIMES 197, (2004) 2 SUPREME 213, (2004) 2 ALLCRIR 1631, (2004) 100 FACLR 1217, (2004) 2 LAB LN 471, 2004 LABLR 315, (2004) 1 LABLJ 935, (2004) 27 OCR 794, 2004 CHANDLR(CIV&CRI) 181, 2004 (1) ALD(CRL) 648

Bench: K.G. Balakrishnan, B.N. Srikrishna

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           CASE NO.:
Appeal (crl.)  1334 of 2002

PETITIONER:
Basheer @ N.P. Basheer

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 09/02/2004

BENCH:
K.G. Balakrishnan & B.N. Srikrishna.

JUDGMENT:
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JUDGMENT WITH CRIMINAL APPEAL Nos.1335-1337 OF 2002 AND CRIMINAL APPEAL Nos.28-29,708,741 & 613 OF 2003 SRIKRISHNA, J.

These appeals have been placed before us for deciding a question of law as to the Constitutional validity of the proviso to Sub-section 1 of Section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001).

Although, the facts and other contentions raised in each of these appeals are different, for the purposes of deciding the question of law urged before us, it is sufficient to note that in all these cases

the accused were convicted by the Trial Courts and had filed appeals before the respective High Courts. Further, their appeals were pending before the High Courts on 2nd October, 2001, when Act 9 of 2001, came into force. In all these cases, the accused were found guilty of offences in connection with narcotic drugs and psychotropic substances and were sentenced to rigorous imprisonment of 10 years and a fine of Rs. One lakh, which was the minimum punishment prescribed under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act, 1985") as it stood prior to the aforesaid amendment coming into force from 2nd October, 2001.

The NDPS Act, 1985 contemplates severe and deterrent punishment as is evident from the minimum term of imprisonment prescribed in Sections 21 and 22 of the NDPS Act, 1985. It was found that a large number of cases, in which the accused were found to be in possession of small quantity of drugs, were really cases of drug addicts and not traffickers in narcotic drugs and psychotropic substances. As a result of the stringent bail provisions there were hardly any cases where such persons could obtain bail. Thus, the trials were pending for long periods and the accused languished in jail. Under Section 27 of the Act of 1985, there was a marginal concession in favour of drug addicts by providing a reduced quantum of punishment if the accused could prove that the narcotic drug or psychotropic substance in his possession was intended for his personal consumption and not for sale or distribution.

The provisions of NDPS Act, 1985 were amended by the Amending Act 9 of 2001, which rationalised the structure of punishment under the Act by providing graded sentences linked to the quantity of narcotic drug or psychotropic substance in relation to which the offence was committed. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences. The Statement of Objects and Reasons appended to the Bill declares this intention thus:-

> "Statement of Objects and Reasons:- Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

As a consequence of the Amending Act coming into force on 2nd October, 2001, the sentencing structure underwent a drastic change. The Act introduced the concept of "commercial quantity" in relation to narcotic drugs or psychotropic substances by adding clause (viia) in Section 2, which

defines this term as any quantity greater than a quantity specified by Central Government by notification in the official gazette. Further, the expression "small quantity" is defined in Section 2, sub- section (xxiiia), as any quantity lesser than the quantity specified in the notification. Under the rationalised sentencing structure, the punishment would vary depending on whether the quantity of offending material was "small quantity", "commercial quantity" or something in between. This is the effect of the rationalisation of sentencing structure carried out by the Amending Act, 9 of 2001, in Section 27. A notification was issued on 9th October, 2001, specifying in respect of 239 Narcotic Drugs and Psychotropic Substances, as to what would be "small quantity" and "

commercial quantity".

Apart from these provisions, the Act of 2001 introduced further amendments by substituting a new section for old Section 27 of the 1985 Act. A new provision, Section 32B was inserted by the Amending Act 9 of 2001, which prescribes the factors to be taken into account for imposing higher than the minimum punishment. Sections 41 to 43, which are substituted by the amendment, deal with the power of issuing warrant and authorization; power of entry, search, seizure and arrest without warrant or authorisation; and power of seizure and arrest in public places. Significant changes were made in section 54 of the Act, which deals with the presumption to be applied in a trial under the Act arising from possession of illicit articles. Section 41(1) of the Amending Act, 9 of 2001 is the section which determines the application or exclusion of the amending provisions, and reads as under:-

> "41. Application of this Act to pending cases. (1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:
>
> Provided that nothing in this Section shall apply to cases pending in appeal".

By this Section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) All cases pending before the court on 2nd October, 2001; (b) All cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing structure to cases pending in appeal.

Learned counsel for the appellant in this group of appeals has urged that, as a general rule, retrospective amendment of a criminal statute would be hit by Article 20(1) of the Constitution subject to the exception that where the amending statute mollifies the rigour of law, the benefit of

the mollification shall be available to the accused, whose cases are pending on the date on which the amending provision comes into force. Hence, they contend that the benefit of the rationalised structure of punishment introduced by the Amending Act of 2001 should also be made available to all pending cases (including appeals) in Courts on the date of the amendment coming into force. Inasmuch as the proviso to Section 41 of Act 9 of 2001 denies them this benefit, by putting them in a different category, the said proviso is unreasonable and violative of the equality right guaranteed by Article 14 of the Constitution, resulting in hostile discrimination. They contend that, in reality, there could be no difference between cases pending before the Courts or cases pending in appeal, since an appeal is the continuation of the trial. Hence, they urge that the classification made by the legislature is unreasonable, not based on any intelligible differentia having rational nexus with the rationale or objectives of the amending Act. They cite in support of their contention the judgments of the Punjab and Haryana High Court in Ram Singh v. State of Haryana, 2003 (1) EFR 444, and the Judgment of the High Court of Madhya Pradesh at Jabalpur in Ramesh v. State of Madhya Pradesh and Anr., (Writ Petition 537 of 2003 decided on 25.4.2003 by Division bench of Deepak Mishra and A.K. Srivastava, JJ.) Undoubtedly, the two judgments cited take the view that the proviso to Section 41(1) of Act 9 of 2001 is hit by Article 14 of the Constitution and have declared it to be unconstitutional relying upon some judgments of this Court which we shall presently refer to. The correctness of these High Court decisions is open to question.

In Ratan Lal v. State of Punjab, AIR 1965 SC 444, it was unequivocally declared by this Court that an ex post facto criminal law, which only mollifies the rigour of law is not hit by Article 20(1) of the Constitution and that if a particular law makes provision to that effect, though retrospective in operation, it would still be valid.

In T. Barai v. Henry Ah Hoe and Anr., AIR 1983 SC 150, this view was reiterated and it was emphasized that if an amending Act reduces the punishment for an offence, there is no reason why the accused should not have the benefit of such reduced punishment. Relying on Craies on Statute Law (7th Edn., pp. 387-388), this Court (at p.157, para

22) said:

> "The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law .The principle is based both on sound reason and commonsense."

There is no doubt as to the correctness of the principle on which the two judgments of the High Courts rely. All statutes must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section 41, in terms, says that the Amending Act would apply to all cases pending before the Court or under investigation on the date of commencement of the Amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, we find that the amendments (at least the ones rationalising

the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity, they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the Amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

Nothing much however, turns on this principle as far as the appeals before us are concerned. Notwithstanding the application of the mollifying provisions of the Act retrospectively, by the proviso to Section 41(1), Parliament has expressly declared that the benefit of the retrospective mollificatory provisions would not be available to the cases "pending in appeal". What is crucial is whether this segregation of "cases pending in appeal" and their exclusion from the application of the beneficial effects of the amending Act infringes the equality right guaranteed under Article 14 of the Constitution.

Counsel contend that there may be cases where the trial may have concluded before 2nd October, 2001; equally, for reasons not within the control of the accused, there may be cases where the trials may have continued beyond 2nd October, 2001. Therefore, on account of the fortuitous reason of quick disposal of trials prior to 2nd October, 2001, appeals might have been filed and these could be pending on the date on which the Amending Act came into force. It is argued that these fortuitous circumstances should not determine the fate of the accused nor whether they should get the benefit of the mollification of the rigour of the law. Counsel contends that persons similarly situate would be subject to discriminative yardsticks of punishment only because of fortuitous circumstances. According to them, the proviso hostilely discriminates against the class of cases pending in appeal, the classification is unsupported by any rational basis or intelligible differentia having nexus with the objective of the amending Act. Thus, according to the appellants, the proviso to sub-section (1) of Section 41 of Act 9 of 2001, infringes Article 14 and is, therefore, unconstitutional.

In our view, the contention is without substance and has to be rejected.

A careful scrutiny of sub-section 1 of Section 41 of Act 9 of 2001 shows that all cases have been divided into three categories:

a) Cases pending before the Trial Courts.

b) Cases pending investigation; and

c) Cases where the trials have concluded and which are pending in appeal.

Counsel contends that, barring cases, which are pending investigation, there is no rational basis for differentiating cases pending before the Court and cases pending in appeal. They submit that a case pending in appeal is nothing but an extension of the trial and, therefore, the two categories of cases (a) and (c) above are identically situated. The validity of this reasoning needs to be critically appraised.

Before we do that, we may dispose of a subsidiary contention based on fortuitousness. In State of AP & Ors. v. Nallamilli Rami Reddy & Ors., (2001) 7 SCC 708, a similar contention, urged to impugn a statutory provision as infringing Article 14 of the Constitution, was dismissed by this Court in the following words:- [at p.715, para 8] " What Article 14 of the Constitution prohibits is "class legislation" and not "classification for purpose of legislation". If the legislature reasonably classifies persons for legislative purposes so as to bring them under a well defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is twofold: (i) that the classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (ii) that differentia must have a rational connection to the object sought to be achieved. Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstance arising out of (sic) peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation."

We think that these observations are equally applicable to the cases before us.

Merely because the classification has not been carried out with mathematical precision, or that there are some categories distributed across the dividing line, is hardly a ground for holding that the legislation falls foul of Article 14, as long as there is broad discernible classification based on intelligible differentia, which advance the object of the legislation, even if it be class legislation. As long as the extent of over- inclusiveness or under-inclusiveness of the classification is marginal, the Constitutional vice of infringement of Article 14 would not infect the legislation.

In the case before us, Parliament had two discernible objectives in bringing forth the amendment of 2001. These are evident from the Statement of Objects and Reasons and they are:

(1) Avoidance of delay in trials; and (2) Rationalisation of sentence structure.

Inasmuch as Act 9 of 2001 introduced significant and material changes in the parent Act, which would affect the trial itself, application of the amended Act to cases where the trials had concluded and appeals were pending on the date of its commencement could possibly result in the trials being vitiated, leading to retrials, thereby defeating at least the first objective of avoiding delay in trials. The accused, who had been tried and convicted before 2.10.2001 (i.e. as per the unamended 1985 Act) could possibly urge in the pending appeals, that as their trials were not held in accordance with the amended provisions of the Act, their trials must be held to be vitiated and that they should be re-tried in accordance with the amended provisions of the Act. This could be a direct and deleterious consequence of applying the amended provisions of the Act to trials which had concluded and in which appeals were filed prior to the date of the Amending Act coming into force. This would certainly defeat the first objective of avoiding delay in such trials. Hence, Parliament appears to have removed this class of cases from the ambit of the amendments and excluded them from the scope of

the Amending Act so that the pending appeals could be disposed off expeditiously by applying the unamended Act without the possibility of reopening the concluded trials.

Thus, in our view, the Rubicon indicated by Parliament is the conclusion of the Trial and pendency of appeal. In the cases of pending trials, and cases pending investigation, the trial is yet to conclude; hence, the retrospective mollification of the rigour of punishment has been made applicable. In the cases where the trials are concluded and appeals are pending, the application of the amended Act appears to have been excluded so as to preclude the possible contingency of reopening concluded trials. In our judgment, the classification is very much rational and based on clearly intelligible differentia, which has rational nexus with one of the objectives to be achieved by the classification. There is one exceptional situation, however, which may produce an anomalous result. If the trial had just concluded before 2.10.2001, but the appeal is filed after 2.10.2001, it cannot be said that the appeal was pending as on the date of the coming into force of the Amending Act, and the amendment would be applicable even in such cases. The observations of this Court in Nallamilli's case (supra) would apply to such a case. The possibility of such a fortuitous case would not be strong enough reason to attract the wrath of Article 14 and its constitutional consequences. Hence, we are unable to accept the contention that the proviso to Section 41 of the amending Act is hit by Article 14.

We are also unable to agree with the view taken in the judgments of the Division Benches of Punjab and Haryana High Court and the Madhya Pradesh High Court, which have been cited before us. In our view, these judgments have proceeded on an erroneous basis on the constitutional issue and have declared the relevant proviso to be unconstitutional. The two judgments are, therefore, overruled. The reliance upon the judgment of this Court in State v. Gian Singh, (1999) 9 SCC 312, Ratan Lal (supra) and T. Barai (supra) is of no avail to the appellants for these cases merely emphasise the permissibility of ex post facto legislation for reducing the severity of the punishment.

The appellants relied upon the observations of this Court in Akhtari BI (Smt.) v. State of M.P., (2001) 4 SCC 355, in which this Court has emphasized that to have speedy justice is a Fundamental Right that flows from Article 21 of the Constitution and that prolonged delay in disposal of the trials and thereafter in appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. There can be no dissent with this principle, which in fact forms the underpinning of the legislation under attack before us.

The learned Additional Solicitor General also relied upon the judgment of this Court in Gian Singh (supra). In our view, this authority does not have a bearing on the issue debated before us for two reasons namely:

> (a) First, the Amending Act there itself had Section 25, which was given overriding effect over anything that had been done under the previous Act;
>
> (b) Secondly, this authority also emphasises the principle of extending benevolent provision of the Amending Act to pending cases, since that was the intention of Parliament.

Learned Solicitor General also referred to K.S. Paripoornan v. State of Kerala & Ors., (1994) 5 SCC 593; R. Rajagopal Reddy (Dead) by LRs & Ors. v. Padmini Chandrasekharan (Dead) by LRs, (1995) 2 SCC 630 and Smt. Dayawati & Anr. v. Inderjit & Ors., (1966) 3 SCR

275. In our view, these cases are of no aid to us, as they neither dealt with retrospective application of a criminal statute, nor with the constitutional validity thereof. We do not propose to examine them in detail for these reasons.

In the result, we are of the view that the proviso to Section 41 (1) of the Amending Act 9 of 2001 is Constitutional and is not hit by Article 14. Consequently, in all cases, in which the trials had concluded and appeals were pending on 2.10.2001, when Amending Act 9 of 2001 came into force, the amendments introduced by the Amending Act 9 of 2001 would not be applicable and they would have to be disposed off in accordance with the NDPS Act, 1985, as it stood before 2nd October, 2001. Since there are other contentions of law and fact raised in each of these cases, they would have to be placed before the appropriate Benches for decision and disposal in accordance with the law.

CRIMINAL APPEAL Nos.708 & 741 of 2003 A perusal of the facts narrated in the appeal memoranda does not indicate that in these cases, the trials had concluded and appeals had been filed before 2.10.2001. It is not clear whether these cases would really fall under the proviso to Section 41(1) of Act 9 of 2001. We are, therefore, not making any orders in these two cases.

These cases are to be placed before the appropriate Bench for decision and disposal in accordance with the law in the light of our judgment in Crl. Appeal No.1334 of 2002 and other connected matters.

The Appeals stand disposed of accordingly.