Vafati Gokul vs The State Of Gujarat on 26 August, 1966

Equivalent citations: (1966)7GLR1114

JUDGMENT

A.D. Desai, J.

1. This is an application filed by original 'accused in Ahmed-bad City Sessions Court Case No. 72 of 1963. The applicant was charged under Section 302 of the Indian Penal Code for intentionally causing death of one Shankar Budhi by giving him blows on his head with an iron pipe and fracturing his skull. The City Sessions Judge, Ahmedabad after regular trial convicted the accused by his judgment and order of conviction dated October 14, 1963 and sentenced him to suffer imprisonment for life for an offence punishable under Section 302 of the Indian Penal Code. The accused was defended in the said Sessions Case by his Advocate Shri K.K. Shivhare.

2. Being aggrieved by the said judgment and order of conviction dated October 14, 1963 passed by the City Sessions Judge, the accused preferred an appeal to this Court being Criminal Appeal No. 1000 of 1963. The said appeal was filed through his advocate Shri K.K. Shivhare. The appeal was fixed for preliminary hearing under Section 421 of the Criminal Procedure Code on October 28, 1963 and the same was argued by Shri K.K. Shivhare. A Bench consisting of Divan and Mehta JJ. who heard the appeal dismissed the same summarily. A writ intimating that the appeal was dismissed was sent to the Sessions Court on October 28, 1963. In the memo of appeal, there was a prayer for bail and the Assistant Government Pleader appeared only to oppose the prayer of bail.

3. The accused has now preferred this application alleging that a few days back the applicant read in the papers that Shri K.K. Gupta who was appearing for accused in "Sanyal Murder Case" at Delhi, was truly K. K. Shivhare who represented himself to be an advocate and appeared as such in Ahmedabad Courts and also for the applicant in Sessions Case as well as in the appeal, and that he was not a lawyer at all. He further alleged that after it transpired that K. K. Gupta (Shivhare) was not a lawyer a fresh trial was ordered in "Sanyal Murder Case" on the ground that the person appearing for accused was not a qualified lawyer and that a trial in which the accused were defended by a person having no qualification was no trial at all. The applicant further alleged that if he had known that K. K. Shivhare was not an advocate he would not have engaged him as his advocate, for the Sessions Case and also for the appeal. K.K. Shivhare not being an advocate was incompetent to defend the applicant. K. K. Shivhare practised fraud on the Court and on the applicant, appeared as an advocate for the applicant in the Sessions Case as well as in the appeal and thus deprived the applicant of a valuable right to have legal assistance in his trial, and this according to the applicant had led to a serious procedural defect which resulted in failure of justice vitiating the whole trial. The applicant further alleged that there was no fair trial in the eye of law and his defence was materially prejudiced in view of the fact that Shivhare who conducted the matter was not an advocate possessing requisite qualification or skill to defend the applicant particularly as the offence

alleged was a serious offence punishable under Section 302 of the Indian Penal Code. Ordinarily, when an accused is unable to engage a lawyer of his own, he is always provided a lawyer by the State at the state expense. According to the applicant this resulted in miscarriage of justice and incurable defect in procedure vitiating the trial itself. On these allegations, the applicant prayed that the order of summary dismissal passed by this Court in Criminal Appeal No. 1000 of 1963 be set aside and it may also be ordered that the judgment and order of conviction passed by Sessions Court in Sessions Case No. 72 of 1963 be also set aside and an order of retrial may be passed.

4. This application has been preferred under Section 561A of the Criminal Procedure Code. A rule was issued by the Court and the matter has now come up for final hearing.

5. The questions which arise for our consideration are:

> (1) Whether the High Court has jurisdiction to review its own order of summary dismissal passed in Criminal Appeal No. 1000 of 1963.
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> (2) Whether the application which is preferred by the accused is within the period of limitation; and (3) Whether the evidence on the record is sufficient to enable this "Court to review the order of summary dismissal passed in Criminal Appeal No. 1000 of 1963.

6. In order to consider the first question, as to whether the order of summary dismissal that has been passed by the High Court in Criminal Appeal No. 1000 of 1963 can be reviewed or not, we must determine as to whether the said order amounts to a judgment or an order. The Criminal Procedure Code nowhere defines what a 'judgment' is. Whether the order of summary dismissal amounts to a 'judgment' or an 'order' was considered by the Supreme Court in U. J. Section Chopra v. State of Bombay Bhagwati J. speaking for himself and Imam J. has observed:

> The judgment however pronounced was however the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments and would therefore either be a judgment of conviction or acquittal and where it would not be possible to predicate of the pronouncement that it was such an expression of opinion the pronouncement could certainly not be taken as the judgment of the High Court.
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> A judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would certainly be arrived at after due consideration of the evidence and all the arguments and would therefore be a judgment and such judgment when pronounced would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below.

> When however a petion of appeal presented by a convicted person from jail is summarily dismissed under Section 421 or a revision application made by him is dismissed summarily or 'in limine' without hearing him or his pleader what the High Court does is to refuse to entertain the petition of appeal or the criminal revision' and the order passed by the High Court dismissed or rejected" cannot be said to be the expression of the opinion of the Court arrived at after due consideration of the evidence and all the arguments.
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> It is a refusal to admit the appeal or the criminal revision so that notice be issued to the opposite party and the matter be decided after a full hearing in the presence of both the parties. It would be only after the appeal or the criminal revision was admitted that such a notice would issue and the mere refusal by the High Court to entertain the appeal or the criminal revision would certainly not amount to a judgment.

7. Therefore, in the light of this decision of the Supreme Court it is clear that the order of summary dismissal is not a judgment but merely an order.

8. The next question is whether the High Court has got powers to review its own order. Chapter XXVI of the Code of Criminal Procedure contains rules relating to judgments. Section 366 of the Chapter lays down the mode of delivering judgment. Section 367 deals with the language of judgment and the contents of the judgment. Section 369 provides:

> Save as otherwise provided for by this Code or by any other law for the time being in force, or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.
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> Now, it is evident that these provisions of Chapter XXVI relate to judgments that are delivered by the trial Court or the High Court in its original jurisdiction. They do not refer to the judgments which are delivered by the High Court in its appellate or revisional jurisdiction. This interpretation gets support from the provisions of sees. 424 and 430 of the Criminal Procedure Code. Section 424 of the Code provides:
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> The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court.
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> There is a proviso to section with which we are not concerned. Section 369 clearly lays down that the judgment once delivered is not open to review. Section 424 makes the provision of Chapter XXVI applicable to judgments of appellate Court other than a High Court. Therefore, it is evident that Section 369 applies to judgments of appellate Court other than High Court. Section 430 of the Code provides:

> 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.
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> Section 430 provides for the finality of judgments given by the appellate Court. Both Section 424 and 430 are contained in Chapter XXI relating to appeals. It is clear, therefore, that the rules contained in Chapter XXVI apply to the Court of original jurisdiction; otherwise there was no meaning in enacting Section 424 and Section 430 of the Code of Criminal Procedure. This interpretation of Section 369 of the Code is supported by the decision of the Division Bench of the Bombay High Court in State of Bombay v. Geoffrey Manners and Co. 53 Bom. L.R. 117. The Division Bench observed as under:
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> ...the rules contained in Chapter XXVI, relating to judgments, have no application to the judgment of a High Court exercising appellate jurisdiction. Section 369 of the Code of Criminal Procedure does not, therefore, apply, so far as the criminal appellate judgments of a High Court are concerned, and it is therefore not possible to argue from the wording of that section that the High Court exercising criminal appellate jurisdiction can alter or review a judgment before it has been signed. In fact, there are no rules governing the judgment of the High Court exercising criminal appellate jurisdiction.

9. Further Section 430 of the Code of Criminal Procedure provides that judgments and orders passed by an Appellate Court shall be final, except in the cases provided for in Section 417 and Chapter XXXII. The word "final" in this section has a specific and definite meaning and it is that the order off the High Court is not capable of being challenged in that Court by any further proceedings. There is no provision in the Criminal Procedure Code providing for an appeal to the Supreme Court. Therefore, the word "final" cannot be construed as prohibiting any further appeal being filed against the judgment of the High Court. The provisions of appeal to Supreme Court against the judgment of High Court in criminal cases are contained in Article 134 of the Constitution of India. No provision in the Criminal Procedure Code can be construed to limit this right of appeal conferred by the Constitution. It is clear, therefore, that the word "final" in Section 430, Criminal Procedure Code prohibits any further proceedings in the appellate Court against its judgment or order. There is no specific provision in the Code enabling the High Court to review or revise its own order. It is also clear that the word "final" can affect only the powers of review of the High Court. When the order of the High Court is made "final" by Section 430 of the Criminal Procedure Code, it clearly means that the High Court has no power to review its own order. There is an express prohibition in Section 430 of the Criminal Procedure Code which takes away the jurisdiction of the High Court for reviewing its own order.

10. The Supreme Court in U. J. S. Chopra (supra) had also considered the effect of Section 430 of the Criminal Procedure Code. The facts of that case were that U.J.S. Chopra was convicted by Presidency Magistrate, 13th Court Bombay for an offence under Section 66(b) of the Bombay Prohibition Act (Act XXV of 1949), and was sentenced to undergo imprisonment for one month and to pay a fine of Rs. 250/- or to undergo R. F. I. for one month. Chopra preferred an appeal to the

High Court of Judicature at Bombay but his appeal was summarily dismissed by a bench of that Court on January 19, 1953. After the dismissal of that appeal the State of Bombay preferred a Criminal Revision Application to the High Court for enhancement of the sentence. Notice of this was issued to Chopra. The learned Counsel for Chopra claimed a right under Section 439(2) to show cause against the conviction. The High Court did not permit him to do so. The question before the Supreme Court was whether summary dismissal of the appeal preferred by Chopra precluded him from taking advantage of the provisions of Section 439(2) of the Criminal Procedure Code, when he was subsequently called upon to show cause way the sentence imposed on him should not be enhanced. Justice Bhagwati speaking for himself and Imam J. has observed at page 648:

> Once such a judgment has been pronounced by the High Court either in the exercise of its appellate or its revisional jurisdiction no review can be entertained against that judgment and there is no provision in the Criminal Procedure Code which would enable even the High Court to review the same or to exercise revisional jurisdiction over the same.
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> and further at page 650, the observations are:
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> In all these cases there will be no judgment of the High Court replacing the judgment of the lower Court and the action of the High Court would only amount to a refusal by the High Court to admit the petition of appeal or the criminal revision and issue notice to the opposite party with a view to the final determination of the questions arising in the appeal or the revision.
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> The order dismissing the appeal or criminal revision summarily or "in liming" would no doubt be a final order of the High Court not subject to revision even by the High Court itself but would not tantamount to a judgment replacing that of the lower Court. The convicted person would be bound by that order and would not be able to present another petition of appeal or application for criminal revision challenging the conviction or the sentence passed upon him by the lower Court.
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> It is, therefore, clear that Section 430 of the Criminal Procedure Code makes the order of summary dismissal final and it cannot be reviewed by the High Court. The same view was taken by a Division Bench of the Bombay High Court in State of Bombay v. Geofferry Manners (supra).

11. Miss Shah however drew our attention to the decision of the Full Bench of the Allahabad High Court in Raj Narain and others v. The State A. I. R. 1950 Allahabad 315. Mootham C. J. in that case gave a differing judgment and referred to the Supreme Court case of U. J. Section Chopra (supra). The learned Chief Justice held that the High Court had no power to review its own order. Raghubar Dayal J. took the view that the High Court had power to review its own order under the provisions of Section 561A of the Criminal Procedure Code. The Supreme Court decision was cited before him. But the learned Judge distinguished it on the ground that the provisions of Section 561A were not considered. As regards Section 430 of the Criminal Procedure Code, the learned Judge held that the

word "final" meant that the judgment or order passed by the High Court in its appellate jurisdiction was not open to any further appeal and the powers of the High Court to interfere with the order otherwise than in appeal are not taken away. Chaturvedi J. also took the same view. Chaturvedi J. further held that saving clause in the beginning of Section 561A makes an exception in cases where the other provisions of the Code of Criminal Procedure provide to the contrary. We are unable to agree with the view taken by Raghubar Dayal and Chaturvedi JJ. We have already interpreted the word "final" used in Section 430 of the Criminal Procedure Code and have come to the conclusion that it takes away the power of the High Court to review its own order. With regard to the provisions of Section 561A it is well established that it is only an enabling provision. It recognises the inherent powers which the High Court had. The inherent powers cannot be used to override the express provisions of law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent powers of the Court cannot be invoked in order to cut across the powers conferred by the Code.

12. In the case of Sankatha Singh and others v. State of Uttar Pradesh, the Supreme Court had to consider the scope of the inherent powers under the Code. The facts in that case were: Sankatha Singh and others were convicted by the Magistrate First Class, Gyanpur for offences under Sections 452 and 323 read with Section 34 I. P. Code. Kharpatto one of the accused WES also convicted for an offence tinder Section 324 I. P. Code. They appealed against their conviction. The appeal was fixed for hearing on November 30, 1956. On that day neither the appellant nor their counsel appeared in the Court. The learned Sessions Judge dismissed the appeal after perusing the judgment of the trial Court and the record. On December 17, 1956, an application was presented by the accused (appellants) praying that the case be restored so that justice be done to them. This application was allowed by the learned Sessions Judge. The appeal was placed for hearing before Shri Tripathi who had succeeded Shri Teja Singh as Sessions Judge. Shri Tripathi held that the appellate Court had no power to review or restore an appeal which had been disposed of and held that the order restoring the appeal was ultra vires and without jurisdiction. Against this an application in revision was filed in the High Court but the same was dismissed. Aggrieved by this decision, an appeal was filed in the Supreme Court. The question before the Supreme Court was whether the Sessions Court had the power to review its own order. It was argued before the Supreme Court that the Sessions Court could review its own order in the exercise of inherent powers which every Court possesses in order to further the ends of justice. The Supreme Court held that the Court could not pass an order for rehearing an appeal when its jurisdiction was specifically taken away by the provisions of Section 369 read with Section 424 of the Criminal Procedure Code. The Supreme Court further held that the inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. In our opinion, this decision of the Supreme Court negatives the interpretation of Section 561A of the Criminal Procedure Code which found favour with the majority of the learned Judges of the Allahabad High Court in Raj Narain and others (supra). It is, therefore, clear that the High Court has no jurisdiction to review its own order.

13. Our attention was also invited to a judgment of this Court in Criminal Application No. 9 of 1965 dated 16th March 1965 of Division Beach consisting of Divan and Shah J J. (State of Gujarat v. Ratanshi Lakhiram noted at II G.L.T. 79). In that case an appeal filed by the State of Gujarat was

dismissed in view of the order passed on 14th December 1964 to the following effect:

> Office objections to be removed on or before December 19, 1964. If not removed by that time, the Criminal Appeal to stand dismissed.
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> It was against this order that an application for review was filed and the Bench allowed the said application relying upon the Supreme Court decision in Shivdeo Singh v. State of Punjab A. I. R. 1962 Supreme Court 1909. The facts of that Supreme Court case were that the High Court passed an order in a writ petition under Article 226 of the Constitution of India. The application was filed to review the said order and the question which arose was whether the High Court had jurisdiction to review the order. Now, proceedings under Article 226 of the Constitution are not governed by the Civil Procedure Code but are governed by the powers invested in the High Courts under the Constitution of India. It was under these circumstances that the Supreme Court held that a Court exercising the plenary jurisdiction had an inherent power to review its own order. Such is not the position when an application is made to review the order of summary dismissal passed by the High Court under Section 421 of the Criminal Procedure Code. Section 430 of the Criminal Procedure Code makes the order final. The effect of this finality is to take away the jurisdiction of the Court to review the order of summary dismissal. Inherent powers can never be exercised to nullify that which the Code expressly prohibits. It may be observed that the decisions of the Supreme Court in Sankatha Singh and others (supra) and U. J. Section Chopra (supra) which are directly in point were not brought to the notice of the Division Bench. In view of this circumstance, the said decision in Criminal Application No. 9 of 1965 cannot be considered as a binding authority.

14. We, therefore, hold that the High Court has no power to review its own order of summary dismissal passed in Criminal Appeal No. 1000 of 1963 on 28th October 1966.

15. Miss Shah further contended that the order of summary dismissal of appeal by the High Court in the instant case was not at all an order. The contention was that the accused was not heard as Shivhare who represented him was not an advocate. Under Section 421 of the Criminal Procedure Code when a matter is placed for preliminary hearing, the High Court has ample power to dismiss the same after perusing the memo of appeal and the judgment. It is obvious therefore that in this case the High Court after perusing the judgment and the memo of appeal and in addition to it having heard Shivhare and after considering the points raised in the memo and the arguments, summarily dismissed the appeal. This contention of Miss Shah, therefore, cannot be accepted.

16. In view of foregoing conclusions it is not necessary to deal with other contentions raised before us. But even if we are wrong in the view we take about the finality of the judgment given in exercise of criminal appellate jurisdiction and it is open to this Court to review its judgment, no relief can be granted in the instant application for the reasons to be presently considered. We will now consider the question of limitation which was raised at the Bar. This application for review of the order of dismissal passed in Criminal Appeal No. 1000 of 1963 was filed on May 9, 1965. The period of

limitation would be governed by the new Limitation Act, 1963 being Act XXXVI of 1963. The relevant provisions relating to the limitation for filing a review application is Article 124 which provides that for a review of judgment by a Court other than the Supreme Court the period of limitation shall be 30 days and the said period begins to run from the date of the decree or the order. In the present case, the date on which the order of summary dismissal of the appeal was passed was October 28, 1963. This application was filed as stated on May 9, 1965. The argument, therefore, was that this application was clearly beyond the period of limitation. Miss Shah wanted to take advantage of Section 5 of the Limitation Act by contending that there were sufficient reasons for not preferring the review application within the period of limitation provided under Article 124 of the Act. She relied upon the allegations made in the application that the accused came to know that Shivhare was not an advocate only when the accused read about it in the news papers only a few days prior to the filing of the application. No specific date has been given in the application as to when the accused came to know that Shivhare was not an advocate. We do not know when the applicant came to know of it and therefore it is not possible for us to accept the contention that there are sufficient grounds to excuse delay. The application is barred by limitation as no sufficient reasons have been made out to excuse the delay.

17. Miss Shah also argued on merits and she contended that there were sufficient grounds for the High Court to review its own order of summary dismissal passed in Criminal Appeal No. 1000 of 1963. She contended that if the accused knew that Shivhare was not an advocate he would not have engaged Shivhare and this has prejudiced the case. We have gone through the judgment in Sessions Case No. 72 of 1963 and we find that all possible defences on behalf of the accused had been taken. The prosecution witnesses have been cross-examined effectively and on every material point. No specific case of prejudice has been made out in the petition or in the arguments. It was merely argued that Shivhare practised fraud upon the Courts and the accused and for that reason the order of the High Court summarily dismissing the application should be reviewed. But as stated above, there is no prejudice to the accused as all possible defences were taken and the prosecution witnesses had been cross-examined on every material point. We, therefore, hold that there is no prejudice to the accused and there are no grounds to review the order of summary dismissal passed by the High Court in Criminal Appeal No. 1000 of 1963.

All contentions urged on behalf of the petitioner fail. The Criminal Application is, therefore, dismissed. Rule discharged.