(2012) 07 BOM CK 0079

Bombay High Court (Aurangabad Bench)

Case No: Criminal Writ Petition No. 502 of 2012

Saheb Aglawe and Waman		APPELLANT
	Vs	
The State of Maharashtra and The Superintendent, Parbhani District Jail Class-II, Parbhani. Dist. Parbhani		RESPONDENT

Date of Decision: July 26, 2012

Acts Referred:

- Constitution of India, 1950 - Article 20(2), 21, 226, 32
- Criminal Procedure Code, 1973 (CrPC) - Section 31, 31(1)
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 323, 324
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v)

Hon'ble Judges: A.V. Nirgude, J; A.H. Joshi, J

Bench: Division Bench

Advocate: S.J. Salunke, for the Appellant; V.D. Godbharle, APP for Respondent Nos. 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

A.H. Joshi, J.

Rule. Rule made returnable forthwith and taken for final disposal with the consent of learned Advocate for the petitioners and the learned APP for the respondents. In all, 11 accused were charged and tried for offences punishable u/ss. 147, 148, 149, 323, 324 and 506 of the Indian Penal Code. The trial ended in conviction of all the accused for offences punishable u/ss. 147, 148, 149 and 323 of the Indian Penal Code. Separate sentence for each offence was ordered, which was rigorous imprisonment for three months each and the sentences were to run consecutively and fine of Rs. 1,000/and in default of payment of fine, simple imprisonment for one month. All sentences were to run consecutively.

2. Petitioners herein were accused nos. 1 and 8 in Criminal Appeal No. 56/2006 which was filed by them against conviction.

Other accused also filed appeals. All these appeals were heard and decided by common judgment and order rendered in those appeals i.e. Criminal Appeal Nos. 3/2006, 4/2006, 35/2006 and 56/2006 on 23.7.2007. The appeals have been dismissed.

3. Present petitioners were applicant nos. 1 and 3 in Criminal Revision Application No. 232/2007. Other accused had filed separate Criminal Revision Applications. Those are Criminal Revision Application Nos. 232/2007, 178/2007 and 196/2007. All these revision applications have been dismissed by this Court by judgment and order dated 6.9.2011 (Coram: Hon''ble Mr. Justice A.V. Potdar).

4. Petitioner''s grievance pursued in this petition is summarized in nutshell as follows:

[I] Conviction for offences punishable u/ss. 147 and 148 of the Indian Penal Code may be done separately, however, distinct sentence cannot be ordered. If separate sentences for these offences have to be ordered, those shall have to run concurrently.

[ii] The offence u/s 148 of IPC comprehends Section 147. Separate sentence for these two offences, therefore, results in double jeopardy and it violates Constitutional guarantee available under Articles 20(2) and 21 of the Constitution of India.

[iii] This is a petition for habeas corpus. Therefore, the petitioners are entitled to urge that separate sentencing for both the offences u/ss.147 and 148 of the Indian Penal Code results in confinement of the petitioners, which is liable to be regarded as illegal as it amounts to ordering two sentences i.e. punishing twice for one and the same offence that "he was a member of unlawful assembly".

[iv] Though the order passed by the trial Court giving two separate sentences has merged into order of Hon''ble High Court (Single Judge), ultimately it results in wrongful confinement and hence a petition under Article 226 of the Constitution for issue of habeas corpus is maintainable.

5. In support of the contentions, learned Advocate Shri S.J. Salunke has placed reliance on following judgments. The propositions urged by the petitioners are noted below each citation. Those are as follows:

[1] Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others,

Proposition relied upon:

The application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This bar does not apply to the cases of illegal detention. It

does not bar a subsequent petition for a writ of habeas corpus on fresh grounds which were not taken in the earlier petition for the same relief.

[2] Shankar Budhaji Moundekar & others V/s State of Maharashtra. 2001 Bom.C.R. (Cri.) 282

Proposition relied upon:

The learned Additional Sessions Judge convicted the accused appellants of the offences u/s 147 I.P.C. as well as u/s 148 I.P.C. The accused cannot be punished simultaneously for both these offences, as the conviction u/s 148 I.P.C. would comprehend the conviction u/s 147 I.P.C. i.e. act of rioting.

[3] Katkam Raajanna Vs. State of A.P.,

Proposition relied upon:

Section 3(2)(v) of the Act is similar in operation to Section 75 of the Indian Penal Code. No separate or additional punishment can be imposed by a Court u/s 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act after imposing sentence of punishment for the offender u/s 75 of the Indian Penal Code, as the offence subject matter is one and the same while former offence provides for different sentence, when the same offence is committed against a person belonging to SC, ST etc.

[4] Salim Alim Shamsher Shaikh Vs. The State of Maharashtra, .

Proposition relied upon:

Accused convicted for offence of rape cannot be convicted for outraging modesty of same woman in same transaction.

6. The petition is opposed by learned APP urging following points:

[a] The sentencing which is double i.e. one for Section 147 and second for Section 148 is for different and distinct offences.

[b] Section 147 is for being a member of an unlawful assembly, while Section 148 is for a person "who is guilty of being a member of an unlawful assembly" when possesses deadly weapon. Thus, these are two distinct offences.

[c] The plea now raised before this Court was not raised before the trial Court, first appellate Court or the High Court while arguing the revision and sentencing has attained finality. Any error in the sentence or illegality therein has to be agitated in accordance with law i.e. by approaching Hon''ble Supreme Court.

[d] A writ petition does not lie for correction of any alleged error of law in enforcement of criminal law i.e. against a decision of one Judge of this Court to a Division in the guise of maintaining a petition for enforcement of fundamental right, in the background of availability of remedy before the Apex Court.

[e] More over, the order for consecutive sentence is basically legitimate and permissible by virtue of Section 31 of the Code of Criminal Procedure.

[f] The consecutive sentencing would not be rendered illegal because of ingenious argument that one punishing provision comprehends another offence.

[g] The consecutive sentencing, therefore, would not amount to an illegal detention capable for recourse to the petition for habeas corpus since the judgment of learned Single Judge of this Court has attained the finality.

[h] A petition under Article 226 of Constitution of India to continue a challenge which is duly adjudicated and has attained finality would not lie.

7. Learned APP has placed reliance on three judgments for propositions as below:

[1] Pyari Devi V/s State of Rajasthan 2003 Law Suit (Raj) 471

Proposition relied upon:

By invoking inherent powers, a judgment, which had attained finality, cannot be reviewed.

[2] Sunil Anandrao Sawant V/s Government of Maharashtra 2010 Law Suit (Bom) 278

Proposition relied upon:

Discretion is vested in the Court u/s 31(1) of the Code of Criminal Procedure to award sentence either concurrently or consecutively depending upon gravity of the offence, the nature of the offence and the circumstances extenuating or aggravating the offence.

[3] Smt. Poonam Vs. Sumit Tanwar,

Proposition relied upon:

It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication a Court of competent jurisdiction, negatives the right claimed, a petition under Article 32 of the Constitution is not maintainable. It is not generally assumed that a judicial decision pronounced by a Court may violate the Fundamental Right of a party. Judicial orders passed by the Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution.

8. The question, which is posed, is as to whether Section 148 comprehends Section 147 or whether Section 148 is an independent offence. This question shall arise for adjudication only if this Court holds that the judgment of learned Single Judge of

this Court has not attained finality.

9. It would, therefore, be necessary to deal with first submission of the learned APP which operates as a preliminary point.

10. Learned Advocate for the petitioners has advanced a submission that, as a petition for enforcement of fundamental right under Article 32 of the Constitution of India can lie on the points which were not agitated in earlier writ petitions, while learned APP has urged that the challenge to judgment of any Court has to be done only before the superior Court and this point is considered, discussed and ruled by the Hon''ble Supreme Court in Smt. Poonam Vs. Sumit Tanwar, .

11. We carry no doubt in our mind that a petition under Article 226 of the Constitution of India, for same relief (refused) can lie on fresh grounds or on the grounds which were not raised and ruled in earlier petition. We are also conscious and alive to the position that a petition under Article 226 would be available for "Any Other Purpose", and this term "Any Other Purpose" has a focus on "justice". This enhanced compass of writs for Any Other Purpose would extend to any species of generic concept of traditional writs. In our humble view, it would not mean to include in the compass of Article 226, the jurisdiction to correct errors, if any, allegedly or actually occurring in the judgments delivered by any Bench presided over singly or by Division of our own Court.

12. We are conscious that prayer for review of an order by own Court on the ground of fraud or any other appropriate ground, would stand on totally different footing. This Court being a Court of record, is undoubtedly empowered to correct its own errors. This inherent jurisdiction has potential and inherent limitations and this power to review and correct own errors does not cover the power to issue writ against and/or purportedly to correct or modify a judgment of a collateral Bench which has attained finality.

13. It would be useful to take brief resume of submissions, which is done as follows:

[a] The petitioners contend that the judgment of this Court violates Constitutional guarantee because the petitioners are punished twice, for act of rioting, which amounts to double jeopardy.

[b] This submission is based on the observations contained in paragraph 11 of the judgment reported at 2001 Bom.C.R. (Cri.) 282 Shankar Budhaji Moundekar''s case (supra) delivered by this Court (Coram: Hon''ble Mr. Justice S.G. Mahajan).

[c] This argument is based on the interpretation that the offence u/s 148 of IPC comprehends the offence u/s 147. We are of the view that these penal provisions i.e. Sections 147 and 148 of IPC have lived in the book of law for a long duration.

[d] Plain reading of these two Sections i.e. Sections 147 and 148 of IPC, may create an impression that these are two different and distinct offences.

[e] Petitioners have then relied upon another judgment of this Court in case of Salim Alim Shamsher Shaikh (supra). This is done for citing a simile. It is urged that offence defined u/s 354 of the Indian Penal Code is included when an accused is convicted for offence u/s 376 of IPC. This comprehension of Section 354 in Section 376 of the same Code does not operate as a simile because commission of the former offence i.e. u/s 354 is a path which when climbed up to Section 376 culminates into an offence u/s 376.

14. This Court (Hon''ble Mr. Justice S.G. Mahajan) has clearly observed that:

However, this discussion is not material in view of the fact that the offences under Sections 147, 148 and 149 I.P.C. do not survive since the same are not attracted.

Thus, the observations of Hon''ble Mr. Justice S.G. Mahajan are obiter in the language of the same Court. We too decline to rule on the point of double jeopardy.

15. It is seen that Section 147 of I.P.C. is an offence for being a member of unlawful assembly, and one who is guilty of that offence i.e. u/s 147, and is found to be with "deadly weapons", he attracts penalty for offence of possessing deadly weapon as a device of commission of offence while being a member of unlawful assembly. This offence i.e. u/s 148, therefore, is a distinct offence.

16. This Court is expressing the observations as prima facie view for obvious reason that we are not inclined to entertain the writ petition on the ground that the sentence has attained finality.

17. We hold that the present petition which indirectly calls in question the legality of judgment of learned Single Judge of this Court to be not maintainable in view that the said judgment has attained finality.

18. The sentence of imprisonment which has to run one after other is an "act of Court". Therefore, we hold that it does not and cannot amount to "wrongful detention or confinement". Therefore, a petition for habeas corpus does not lie for the relief sought in present petition.

19. It would have been open for the petitioners to approach the Apex Court and call in question the legality of the judgment of ordering consecutive sentencing on account of comprehension of Section 147 within Section 148. In these premises, we find that the petition does not deserve any indulgence just because it is titled as a petition for habeas corpus. We, therefore, dismiss the petition and discharge the Rule.