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In Re: Jonathan Samuel Solomon

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Court : Mumbai

Decided On : Sep-15-1972

Reported in : 1974CriLJ15; 1973MhLJ584

Judge : Deshpande, J.

Appellant : In Re: Jonathan Samuel Solomon

Judgement :
ORDER

Deshpande, J.

1. When the judgment in Criminal Appeal No. 1303 of 1970 was pronounced by me on 13th September, 1972 : ' (Reported in), Mr. Andhyarujina, the learned Counsel appearing for the respondent-complainant made an oral application immediately thereafter for certificate granting leave to appeal to the Supreme Court against the said judgment under Article 134 (1) (c) of the Constitution certifying that the case was a fit one for appeal to the Supreme Court. Mr. P. S. Nadkarni, learned advocate appearing for the appellant raised a preliminary, objection on that day against such entertainment of such application as, according to him, such applications can be entertained only by the Division Bench and as such I had no jurisdiction to entertain the same. Though the practice followed so far supported Mr. Nadkarni's contention, the point raised was found to be not free from doubt. The hearing of his oral application was, therefore, adjourned by me till

today to enable the learned advocates to look into the matter and assist me in disposing of the said objection. The point has been now argued today threadbare.

2. Now, right of appeal to the Supreme Court from any judgment, final order or sentence in criminal proceedings of a High Court is conferred on a litigant by Article 134 of the Constitution. This right of appeal, however, is not available as a matter of course. It can be availed of by any litigant only if any one of the conditions enumerated in Clauses (a) to (c) of Article 134 (1) is satisfied. The case of the respondent is admittedly not covered by Clause (a) or (b). He. therefore, prayed for certificate under Clause (c) of the said sub-article There is however, no specific provision in the Constitution, requiring such leave petitions to be heard by the same Judge or Judges, though as a matter of practice, ordinarily such leave petitions are placed before the same Bench or a Bench of Judges one of whom was party to the impugned Judgment. This Article, however, refers to the judgment or order of the High Court and does not make any distinction between judgments delivered by a Division Bench or a Single Bench.

3. The proviso to Sub-Article (1) of Article 134, of course, subjects such right of appeal to such provisions as may be made under Clause (1) of Article 145. The said Article 145 empowers the Supreme Court to frame Rules in this behalf, which has no relevance to the applications for certificate made before the High Court.

4. Such right of appeal also is subject to 'such conditions as the High Court may establish or require'. Our High Court has framed Rules laying down the conditions, and are part of the Rules known as 'Bombay High Court, Appellate Side Rules of 1960'. Chapters 29 and 29-A deal with the procedure in this behalf. But these rules by themselves do not shed light on the point raised. Proposed appeals coming under Clause (a) or (b) of Article 134 in the ordinary course are liable to be placed before the Division Bench as matters, out of which such appeals arise, are cognisable by the Division Bench only according to these rules. Till the amendment of the Rules in the year 1968, there was no provision for making oral application for such leave to appeal excepting when death sentence was passed. But such sentence being only within the jurisdiction of the Division Bench, oral application could be made to that Division Bench itself. Till this amendment, leave

petition in proposed appeals coming under Article 134 (1) (c) could only be made in writing and the same also were placed before the Division Bench so far, even when the judgment was of the Single Judge. This was presumably because the Rules did not specifically provide for those being heard by a Single Judge.

4A. Reference therefore shall have to be made to the Rules regulating the jurisdiction of a Single Judge and Judges in Division Bench. Rules 1 and 2 of Chapter I, Part I go to specify their respective jurisdictions. Rule 1 of Chapter I is to the following effect:

The Civil and Criminal Jurisdiction of the Court on the Appellate Side shall, except in cases where it is otherwise provided for by these rules, be exercised by a Division Court consisting of two or more Judges.

5. Matters liable to be heard and disposed of by a Single Judge are enumerated in Rule 2 thereof. Rule 2 consists of two parts. I am concerned with II part, which deals with criminal matters. It is unnecessary to specify the details of items under this Part II. It will be enough if reference is made to Clause (g) thereof, which is in the following words:

All miscellaneous applications, including applications for bail or stay in or out of or relating to matters under Items (a) to (e) above.

Thus the scheme of the Rules in regard to the conduct of the business in the High Court is that, hearing matters by a Division Bench consisting of two or more Judges is a rule, while hearing any matters by a Single Judge is an exception to be specifically provided for Mr. Andhyarujina drew my attention to some other Rules in this behalf where specifically the matters are made cognizable by a Single Judge. Reference in this context can be made to amended Rule 18 in Chapter XVII.

6. Contention of Mr. Andhyarujina is that, such an oral application can be made only to the Judge who pronounces the judgment without regard to whether matter is disposed of by a Single Judge or Division Bench as in any other case, it can never be made immediately after pronouncing of the judgment and if it is not so

made, right to make oral application would never be available to him. According to him, power to hear such oral application by a Single Judge is implicit in the very scheme of Rule 28 (ii) of Chapter 29-A. Contention of Mr. Nadkarni for the appellant and Mr. Gambhirwala, the learned Assistant Government Pleader, for the State is that all applications for leave to appeal to the Supreme Court can be entertained only by a Division Bench in terms of Rule 1 of Chapter I including against judgment of Single Judge inasmuch as such applications are not specifically enumerated in the exceptions carved out under Rule 2 (ii) and some other sub-rules such as Rule 18 of Chapter XVII. Apparently this contention is attractive and presumably it was due to this that till this day all applications for leave to appeal to the Supreme Court even against the judgment of a Single Judge in criminal matters were, as a matter of practice, placed for hearing before the Division Bench.

7. To my mind, this contention is fallacious and the practice followed so far seems to have been based on the total disregard of two aspects. Firstly, implication of Clause (g) of Rule 2 (ii) seems to have been lost sight of. Clause (a) has been quoted above by me verbatim. Application for leave to appeal is incidental to the disposal of the main appeal or any other matter and cannot have any substantive existence apart from it. I do not see why such an application cannot be treated as a 'miscellaneous application relating to matters under items (a) to (e) above' within the meaning of Clause (g) above. It does not cease to be so merely because it is not styled so or given any heading to that effect. Where, therefore, criminal appeals or matters are liable to be heard by a Single Judge because of these falling under items (a) to (e) of Rule 2 (ii), application for leave to appeal under Article 134 (i) also is liable to be heard by hint by virtue of Clause (g).

8. Secondly, under Rule 28 (ii) of Chapter XXIX-A, a litigant is enabled even to make an oral application for such certificate 'immediately after the pronouncement of the judgment by the Court'. Under Sub-rule (i) of Rule 28 a litigant is required to make a petition for certificate granting leave to appeal to the Supreme Court, Sub-rule (ii) of Rule 28 really is an exception to Sub-rule (i). It is an enabling provision. If, therefore, in a criminal matter disposed of by a Single Judge covered by Clauses (a) to (e) of Sub-rule (II) of Rule 2 a litigant is enabled to make an oral

application for such certificate under Article 134 of the Constitution 'immediately after the pronouncement of the judgment by the Court', he can do so only by making an application to the same Single Judge who pronounced the judgment. It is impossible to conceive of any situation where he can approach the Division Bench for such certificate 'immediately after the pronouncement of the judgment' by any Single Judge. No Single Judge has power to constitute Benches of Judges, unless the hearing Judge happens to be the Chief Justice and even if the Single Judge disposing of the appeal happens to be the Chief Justice, it would not be possible for him to constitute any Division Bench immediately on the pronouncement of his judgment in such appeal. Benches are ordinarily constituted by the learned Chief Justice and matters are allotted to the Benches for hearing only after the matters are notified as ready for hearing and petitions for leave to appeal cannot become ready for hearing even for admission stage unless they are made in writing and comply with other requirements of Rules. The framers of the Rule 28 (ii) could not have intended to deprive the litigants, whose matters come up for disposal before a Single Judge in accordance with Rule 2-II of their right to make such oral application for leave to appeal to the Supreme Court 'immediately after the pronouncement of the judgment by the Court.' Hardly any reason can be imagined for their exclusion from such right. Rule 28 (ii) of Chapter 29-A is of much advantage to the litigants and the Court. This rule enables the Judge disposing of the matter to make up his mind immediately with regard to the application so made, as the facts and the contents of the judgment are fresh in his mind. It also saves time and labour of the office of the Court as also it is highly convenient to the litigant and his advocate, who is keen to approach the Supreme Court for getting his cause heard by it. This Rule 28 (ii) goes to further fortify the construction placed by me, on Rule 2 (II) (g) of Chapter I and indicates that applications for leave to appeal to the Supreme Court against the judgment of a Single Judge in criminal matters lie to the Single Judge and are not required to be placed before Division Bench, whether such applications are made in writing under Rule 28 (i) or orally under Rule 28 (ii) of Chapter 29-A.

9. It is pertinent to note that even Rule 2 of Chapter I opens with the words 'Save as otherwise expressly provided by these rules, a Single Judge may dispose of the following matters.' To my mind, even if the above construction of Rule 2 (II) (g) is

held to be wrong. Mr. Andhyarujina is right in contending that provision of Sub-rule (ii) of Rule 28 in Chapter XXIX-A is such otherwise provision. Mr. Nadkarni and Mr. Gambhirwala contended that the said Sub-rule (ii) does not expressly say so. To my mind, contrary provision is explicit enough though not direct and express and as vocal as it should be, The words of Sub-rule (ii) of Rule 28 'immediately after the pronouncement of the judgment by the Court' would really become redundant and meaningless, at any rate, in regard to the judgments, final orders and sentences pronounced by a Single Judge of this Court, if it is not held to be an express provision to the contrary within the meaning of the opening Clause of Rule 2. If Rule 28 (ii) of Chapter XXIX-A is read with Rule 2 intentions of the framers of the Rule to my mind become very clear, Applications for leave to appeal to the Supreme Court under Article 134 of the Constitution against the judgment of any Single Judge whether written or oral are liable to be disposed of by the Single Judge alone. Oral application made by Mr. Andhyarujina before me for leave to appeal is, therefore, competent.

10. On merits, however, I do not think that this is a fit case within the meaning of Article 134 (1) (c) of the Constitution. It is true that the appeal did raise a question as to the true interpretation of Section 24. of the Bombay Rents, Hotel and Lodging House Rates Control Act. 1947 (hereinafter referred to as the 'Rent Act'). But I have only based my approach on the observations made in the two judgments of the Supreme Court referred to in my judgment. None of the cases relied on by Mr. Andhyarujina go to support the line of argument adopted by him before me, excepting the one reported in : (1960)62BOMLR380 (Bombay Bullion Assen. v. Jivatlal). I have indicated in my judgment how the ratio of the said judgment has not been approved by the Supreme Court. I have also found in this case that there was just and sufficient cause for the landlord not to restore that lift in the building and even if I were to accept the interpretation of Mr. Andhyarujina, my finding on this second point also was sufficient to dispose of the appeal. The question of the existence of just and sufficient cause after all is a question of fact or at best may be a question of inferences from the primary facts established in this case. In these circumstances. I do not find it possible to entertain this application for leave to appeal to the Supreme Court under Article 134 (1) (c) of the Constitution.

11. Leave is accordingly refused.

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