

In Re Public Prosecutor

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Court : Andhra Pradesh

Decided On : Jul-10-1974

Reported in : 1975CriLJ141

Judge : Kondaiah, J.

Appellant : In Re Public Prosecutor

Judgement :

Kondaiah, J.

1. This matter has been posted before me for orders on the sus-tainability or otherwise of the office objection.
2. A memorandum of appeal against the order of acquittal of the accused-respondent has been filed by the State of Andhra Pradesh on 9th-1974 beyond the period of limitation prescribed therefor. An application under Section 5 of the Limitation Act, 1963 to condone the delay in preferring the appeal was also filed. The office insisted upon the filing of a duly stamped petition for leave to prefer the said appeal under Section 378(3) of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) which came into force from 1-4-1974. The question therefore for determination is whether or not a duly stamped petition by the State for leave to appeal against the order of acquittal of the respondent-accused is necessary. The learned Additional Public Prosecutor pressed upon me that such an application for granting special leave to appeal from the order of acquittal is necessary only in the

case of a private complainant as such procedure is contemplated in subsection (4) to Section 378 of the new Criminal Procedure Code but not in the case of State Appeals. According to him, if the intendment of the framers of the Code was to apply the same procedure to State appeals, the language of Sub-section (3) of Section 378 would have been in pari materia with that of Sub-section (4) and further Sub-section (3) was not contemplated by the Law Commission as seen from its 41st report on the Code of Criminal Procedure, 1898, Vol. I, (p. 262).

3. The answer to the question depends upon the provisions of Section 378 of the new Code of Criminal Procedure. Sub-sections d), (2) (4) (5) and (6) of Section 378 of the new Code are analogous to Sub-sections i(l), (2), (3), (4) and (5) respectively of Section 417 of the old Code, Sub-section (3) of Section 378 is admittedly a new provision. Sub-section (1) of Section 378 empowers the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than the High Court. Such power is subject to the provisions of Sub-sections (3) and (5), Sub-section (2) similarly empowers the Central Government to direct the Public Prosecutor to present an appeal against an order of acquittal where the offence has been investigated by the Delhi Special Police Establishment and such power is subject to the provisions of subsection (3). It is pertinent to notice that the power vested in the State Government under Sub-section (1) and the Central Government under Sub-section (2) to direct the Public Prosecutor to present an appeal to the High Court is subject to the provisions of Sub-section (3). There was no such restriction under the old Code of Criminal Procedure in so far as the appeals preferred by the State and Central Governments are concerned. Sub-section (3) clearly prohibits the entertainment of an appeal by the State Government or the Central Government under Sub-section (1) or Sub-section (2) except with the leave of the High Court, in other words, the power to prefer an appeal by the State Government or Central Government against an order of acquittal is not absolute. Before such appeal is entertained by the High Court, it must obtain the leave of the High Court.

4. The submission advanced on behalf of the State that the term 'entertained' used in Sub-section

(3) of Section 378 of the new Code means 'admitted' and therefore, no leave petition is necessary in State Appeals, cannot be acceded to. The word 'entertained' cannot be equated to 'admitted' nor does it mean 'admitted'. If that were the intendment of the sovereign Parliament, there is no reason for the use of the term 'entertained'. The sovereign Parliament must have designedly used the term 'entertained' in Sub-section (3). The word 'entertained' is not defined in the Code of Criminal Procedure. Hence, the ordinary meanings given in dictionaries may be noticed. They are 'maintain', 'admit to consideration'. The word 'entertain' means 'proceed to consider on merits or adjudicate upon'. The presentation of the memorandum of appeal or preferring of an appeal in the form of memorandum of appeal is different from entertaining an appeal. The presentation of an appeal or preferring of an appeal would be by the party concerned whereas the entertainment of the appeal has to be made by the Court. The word 'entertain' should not also be meant as 'receive' or 'accept'. The presentation of an appeal by the State as provided by Sub-section

(1) or Sub-section

(2) of Section 378 to the High Court from an original or appellate order of acquittal passed by any court other than the High Court does not ipso facto amount to entertainment of the appeal by the High Court. After presentation of the appeal in proper form as required by the rules, the provisions of Sub-section

(3) would come into play. The entertainment of the appeal would also denote the point of time when it would be taken up for consideration. There may be proper presentation or defective presentation of an appeal. The maintainability of the appeal would arise for the first time when the matter is taken up by the court for consideration. Unless there is an application for leave of the High Court, the appeal would not be posted before the court. This view of mine gains support from decided cases to which I shall presently refer, A Division Bench of the Allahabad High Court, in *Dhoom Chand Jain v, Chamanlal Gupta* (AIR 1962 All 543), while interpreting the word 'entertained' in the proviso to Sub-rule

(1) of Rule 90 of Order 21 of the Code of Civil Procedure {which has been renumbered and substituted by the Allahabad High Court's amendment), viz.,

'provided that no application to set aside the sale shall be entertained', observed that the word 'entertain' in its application bears the meaning 'admitting to consideration'. In *Haji Rahim Bux and Sons v. Firm Samiullah and Sons* : AIR1963 All320 another Division Bench of the Allahabad High Court held that the word 'entertain' in the proviso referred to above meant not 'receive' or 'accept' but 'proceed to consider on merits' or 'adjudicate upon'. (See also *Kundan Lal v. Jagannath Sharma* : AIR1962 All547 and *Bawan Ram v. Kunj Beharilal* : AIR1962 All42

5. We may now notice the decision of the Supreme Court in *L. E. Works v. Assistant Commr. , Sales Tax* (AIR 1958 SC 488) wherein the court had to consider the meaning of the word 'entertained' used in the proviso to Section 9 of the U.P. Sales Tax Act, 1948. The learned Judge, Hidayatullah'J. (as he then was) who spoke for the court, observed (at pages 491 and 492) thus:.. the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word 'entertained' in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The Dictionary meaning of the word 'entertain' was brought to our notice by the parties; and both sides agreed that it means either 'to deal with or admit to consideration'. We are also of the same opinion. The question therefore is at what stage can the appeal be said to be entertained for the purpose of the application. of the proviso? is it 'entertained' when it is filed or is it 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of... For the present, we must say that if the legislature intended that the word 'filed' or 'received' was to be used, there was no difficulty in using those words... It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State-It has used the word 'entertain' and it must be accepted that it has used it advisedly.

The learned Judge, after considering the decided cases of the Allahabad High Court cited supra, ruled (at page 492) thus:

In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would therefore appear that the direction to the court in the proviso to Section 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the court, for the first time.

6. I may add that a criminal appeal or a criminal revision petition has to be posted for admission before the Court under Rule 186 of the Criminal Rules of Practice and Circular Orders, 1966 prescribed by the High Court in exercise of the powers conferred under Section 554 of the old Code of Criminal Procedures and Article 227 of the Constitution of India, which are still in force by virtue of the provisions of Section 484(2)(b) of the new Code. Under the old Code, criminal appeals under Section 417 (1) and (2) were posted for admission before the court as contemplated by Rule 186 of the Criminal Rules of Practice and Circular Orders, 1966. The framers of the new Code must be deemed to have thought fit and proper that the procedure prescribed for the appeals by private complainants and the State must be one and the same. The submission of the Public Prosecutor that the words 'on an application made to it by the complainant in this behalf occurring in Sub-section (4) are missing in Sub-section (3) and therefore, no application for leave to entertain the appeal is necessary, cannot be given effect to. If the interpretation sought to be placed by the State is acceded to, the provisions of Sub-section (3) would be redundant. That apart, Sub-section (3) controls Sub-sections (1) and (2). Sub-sections (1) and (2) clearly indicate that the power vested thereunder is subject to the provisions of Sub-section (3). Hence, the State Government or Central Government, as the case may be, must obtain the leave of the High Court before appeals are preferred against acquittals, by them, just as in the case of a private complainant.

7. This view of mine gains support from a reading of Sub-sections (5) and (6) of Section 378. Sub-section (5) bars an application under Sub-section (4) for the grant of special leave to appeal beyond the period of 6 months in the case of a public servant being the complainant and 60 days in every other case from the date of the order of acquittal. Under that Sub-section, no application under Sub-

section (4) shall be entertained by the High Court after the expiry of the period indicated therein. The term 'entertain' used in this Sub-section means 'maintain' or 'proceed to admit to consideration upon, merits'. Similarly Sub-section (3) bars the consideration of any appeal preferred by the State under Sub-section (1) or subsection (2) without obtaining the leave of the High Court.

8. The right of appeal in case of acquittal of the accused has been conferred both upon the State as well as the complainant. Either of the two or both may choose to exercise such right. But, however, a limitation under Sub-section (6) has been made in this regard. Subsection (6) prohibits an appeal from an order of acquittal, under Sub-section (1) or Sub-section (2) if the application under Sub-section (4) for the grant of special leave from the same order of acquittal has been rejected by the High Court. To put it differently, an appeal by the State under Sub-section (1) or Sub-section (2) is barred in case the private complainant has failed to obtain special leave to appeal under Sub-section (4). This Sub-section protects the interests of the accused as it prohibits the second round of attack against the accused by the State in respect of the same relief which could not be obtained by the private complainant. In other words, where the private complainant's application for special leave to appeal from the order of acquittal was rejected, the order of acquittal became final by virtue of the provisions of subsection (6).

9. The fact that the 41st report of the Law Commission on the Code of Criminal Procedure, 1898, does not contemplate the insertion of Sub-section (3) would not in any way alter the legal position. The court has to look to the very language of Section 378 where Sub-section (3) has been added by the sovereign Parliament, The court can look into the report of the Law Commission only for the purpose of finding the historical back-ground. The sovereign Parliament must. have designedly inserted this new provision.

10. For all the reasons stated, the objection raised by the office is sustained.