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Court : Allahabad

Decided On : Aug-20-1951

Reported in : AIR1952All50

Judge : Desai, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 526 and 526(10)

Appeal No. : Criminal Revn. Nos. 1600, 1602 and 1603 of 1950

Appellant : Sewa Singh

Respondent : The State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Simrikh Muni and ;Kedar Nath Sinha, Advs.

Disposition : Revision application dismissed

Judgement :
ORDER

Desai, J.

1. This and criminal Revisions Nos. 1602 of 1950 and 1603 of 1950 are from judgments of the Sessions Judge of Banaras confirming the convictions and the sentences of the applicant by a First Class Magistrate. In this revision the

applicant has been convicted under Section 19 (e), Arms Act, for being in possession of a Kirpan and a sword without a license on 18-12-1949. In Revision no. 1602 the applicant has been convicted under SECTIONS 323 and 324, Penal Code for causing hurt to Mewa Lal with a spear on 18-12-49. In Revision No. 1603 he has been convicted under Sections 352 and 447, Penal Code for committing trespass upon a piece of land and assaulting Musafir Singh on 15-11-49. I have beard these three applications together because an important question of law, common to all, has been raised. The applicant appealed from his conviction to the Sessions Judge of Banaras. The appeals came up for hearing on 9-10-1950, It is alleged on behalf of the applicant that before the arguments commenced the learned Sessions Judge observed that the applicant had been dealt with leniently. The arguments were then heard and concluded and the judgments were reserved for 12.10-50. The applicant moved an application for transfer in this Court on 1010-1960, and an order staying the hearing of the appeals was passed. On October 12, when the learned Sessions Judge was about to deliver judgments, hewas informed by the applicant that be bad applied for transfer and a stay order bad been passed. The learned Sessions Judge thereupon reserved the delivery of the judgments to October 24 and warned the applicant that he would deliver them if no stay order were received. By 24-10 1950, no stay order had been received by the learned Sessions Judge. When the appeals were taken up on that date the applicant applied again for adjournment for a week stating that this Court having been closed, be could not obtain a copy of the stay order. The learned Sessions Judge seeing that no stay order had been produced, refused to adjourn the appeals and immediately pronounced the judgments dismissing the appeals. This Court bad passed an order of stay on 10-10-1950, and the question is, what is the effect of the judgments delivered by the learned Sessions Judge inspite of the stay order, which however had not been communicated to him before the judgments were delivered It is contended on behalf of the applicant that the stay order became operative from the date on which it was passed, namely, 10-10-1950, while on behalf of the State it is contended that it became operative from the date on which it was communicated that is, after the delivery of the judgments. Section 526, Criminal P. C., just lays down that a High Court may transfer an appeal in certain circumstances ; it does not lay down anything about staying the hearing of

an appeal during the pendency of a transfer application. It certainly contains a provision to the effect that when a party intimates to the appellate Court that he intends to make an application for transfer of the appeal, the appellate Court should postpone the appeal

'for such a period as will afford sufficient time for an application to be made and an order to be obtained thereon.'

This provision is similar to the provision regarding an adjournment to be granted by a trial Court when a party intimates to it ita intention of applying for transfer of a case. It is not clear what order is meant in these provisions--whether the final order on the application sanctioning or refusing transfer or an interlocutory order staying the hearing of the appeal or case. I assume that even an interim order of stay is covered by thia provision. So all that an appellate Court is required to do is to postpone the appeal for such a period as would afford sufficient time for the applicant's obtaining an order of stay from the High Court. So long as an appeal is postponed for a period within which an order of stay can be passed by the High Court, the appellate Court would have made full compliance with the provisions. This may suggest that what is relevant or material is the date on which the High Court passes the order of stay, and not the date on which the order of stay is received by the appellate Court. Had the Legislature intended that the time should suffice not only for an order of stay being obtainedbut also for ita being received by the appellate Court, the words used in Sub-sections (8) and (10) of the section would have been different. The Legislature seems to have been satisfied with the mere passing of an order of stay and it would have been so satisfied only if the order became operative immediately on being passed. But that is not the only interpretation that can be placed upon the words 'an order to be obtained thereon.' It can be argued with equal force that what is really meant is 'an order to be obtained thereon and produced before the appellate Court.' Tbe mere obtaining of an order of stay by an applicant would not be enough ; that order must be produced before the appellate Court for compliance. I do not think any assistance in solving the question can be had from the words 'to be obtained thereon.'

2. An order staying proceedings must be communicated to the Court for compliance. The Court has jurisdiction to go on with the appeal. It would lose the jurisdiction only when it is ordered by the High Court not to proceed with the appeal. So long as it does not receive such an order from the High Court, it has got full liberty to proceed with it. An order staying the proceedings is in its very nature incapable of immediate operation, that is, operation at the moment of its being passed. It requires the subordinate Court to refrain from a certain act and the subordinate Court must be informed of ib before it can refrain from doing the act. A stay order is just like a notice which has no effect unless it is received by the person to whom it is given. 'Date of a notice' has been interpreted in Associated Dominion Assurance Society Proprietary Ltd. v. Balmford, 81 commonwealth L. R. 161, to mean the date of service of the notice. Williams J. said in that case that

'a notice to a person in the ordinary use of language cannot be a notice until it is communicated to him.'

In the same way an order of stay cannot be effective unless it is communicated to the subordinate Court. It has no means of knowing that it must refrain from proceeding with a certain case, other than the receipt of the stay order itself.

3. There is a distinction between an order of stay and an order of transfer. An order of transfer can take immediate effect because nothing is required to be done by the subordinate Court. The transfer is ordered by the High Court and the subordinate Court has simply to take the consequential step of transmitting the record to the other Court. A transfer order is not an order requiring a subordinate Court to do a certain act. Whatever act was to be done has been done by the High Court. Not so in the case of a stay order. Therefore the cases in which it has been held that an order transferring a case takes effect on the date on which it is passed and not on the date when it is commumcated to the Court, are of no guidance in the present case.

4. There are authorities which support my view. I place the greatest reliance upon Parsotam Saran v. Barhma Nand : AIR1927 All401 , a case decided by a Full Bench. The Full Bench unanimously held that a sale held in execution of a decree after, but in ignorance of, an order passed by the High Court under Order 41, Rule

5, Civil P. C., staying exeaution of the decree is valid. The judgment of the Full Bench was delivered by Mukerji J., who said at p. 403:

'Now, when an appellate Court orders stay of execution it gives a direction to somebody. The execution is not in the bands of the appellate Court. It has to tell the Court of first instance that it is to stay its hand in the execution of its decree. It necessarily follows that if the lower Court has no information of the orders of the appellate Court it cannot stay execution and the execution must proceed. What principle, then, there is on which we are bound to hold that what was done in perfect good faith and in possession of clear jurisdiction becomes null and void solely because unknown to the Court below, an order had been passed.'

At p. 404 he continued:

'If, then, I am right in saying that the stay order is nothing but an order directing somebody to do an act, that order can have no effect on the action of the person so directed, till the party haa learnt what his instructions are.'

There is no distinction in principle between a stay order issued under Section 526, Criminal P. C. and a stay order issued under Order 41, Rule 5, Civil P. C. The observations of Mukherji J. would apply equally to a stay order issued under Section 526, Criminal P. C. The distinction between an order of transfer and an order of stay was pointed out by Horwill J., in Borai Goudar v. Ootacamund Municipality A. I. R. (25) 1938 Mad, 832. He said at p. 833:

'The order of prohibition does not take away the jurisdiction of the trial Court; it merely suspends it. If, therefore, the order has been received the Court does lose its jurisdiction because the order has been passed. It, therefore, follows that any act done after the ordar of stay is passed is still valid unless the order of the higher Court has been disobeyed.'

The learned Judge bad to deal with a conviction recorded by a Magistrate after the case had been transferred from his Court by the Subdivisional Magistrate but before he received intimation of the order of transfer. He distinguished Venkatachalapati Rao v. Kameswaramma, 41 Mad. 151, in which it was decided

by a Full Bench that an order staying proceedings in a civil suit operates only from the date on which the order is communicated to the Court whose proceedings are to be stayed. In Queen Empress v. Viraswami, 19 Mad. 375, a conviction recorded by a Sessions Judge even after the case had been transferred by the High Court, but before the receipt of the transfer order, was upheld. That case is a stronger case than the instant one, inasmuch as there even the transfer bad been ordered. A Full Bench of the Lahore High Court laid down that an order by a High Court staying further proceedings in a subordinate Court on an application under Section 526, Criminal P. C., can only be deemed to take effect when it is communicated to thesubordinate Court; see Mahmood Hmsain v.Emperor A. I. R. (30) 1943 Lah. 191. Blacker J.,who delivered the judgment of the Full Bench,gave the following reason:

'The correct view is that as the High Court's interference is external it can only be operative and effectual when its orders are communicated to the Court exercising jurisdiction.'

He adopted the view taken by the Full Benches of this Court and of the Madras High Court in the abovementioned cases. A later Full Bench of the same Court ruled that a stay order passed under Order 41, Rule 5, Civil P. C., operates from the time when it is made and not from the time when it is communicated to the executing Court; see Karam Ali v. Raja, A. I. R. (36) 1949 Lah. 108. The judgment of the Full Bench was delivered by Munir C. J., who recognised the distinction between a stay order simpliciter and an injunction or prohibitory order; he conceded that an injunction or prohibitory order restrains a party from doing something and is necessarily addressed to the person whose act is intended to be restrained and is, therefore, not effective before it is communicated. He, however, distinguished a stay order issued under Rule 5, Civil P. C., from an injunction or prohibitory order and held that it stays proceedings at once even without communication to the executing Court. He relied upon the language used in Rule 5. In this case 'I am not concerned with a stay order issued under Order 41, Rule 6, Civil P. C., but, even if I were, I would have been bound by the Fall Bench decision of this Court. The late Chief Court of Oudh was of the view that an order of stay issued under Order 41, Rule 5, Civil P. C., takes effect from the date of its

making and not that of its communication; vide Raja Bahadur Singh v. Pirthvipal Singh A.I.R. (29) 1942 Oudh 24. The same view has recently been taken by the High Court of Patna in Liakat Mian v. Padampat Singhania, A.I.R. (38) 1951 Pat. 130. If an order of stay made under Section 526, Cri minal P. C., is to be governed by the principles governing an order of stay passed under Order 41, Rule 5, Civil P. C., I respectfully differ from the view of the Patna High Court and the late Chief Court of Oudh. It is not known why in the instant case the order of stay was not received by the learned Sessions Judge even by 24-10-1950. But whatever might have been the reason, the fact is that he had not been told by that date not to proceed with the appeals and consequently his delivering the judgments cannot be said to be without jurisdiction or illegal.

5. Mr. Simrikh Muni contended, in the alternative, that it was imprudent on the part of the learned Sessions Judge to deliver the judgments when he was informed through an application supported by an affidavit that this Court had stayed the hearing of the appeals. Though the learned Sessions Judge might have been well advisedto grant further postponement, I am not prepared to say that he acted so imprudently in refusing to grant further postponement that I must set aside his judgments. The applicant had intimated to him his intention of getting the appeals transferred after the arguments had been heard. So he was not bound to stay the hearing of the appeals. Still on 12.10.1950, he postponed the delivery of the judgments for twelve days in order to enable the applicant to produce a copy of the stay order and warned him that he would not grant any further postponement. The stay order had already been passed on 10th October and it was the duty of the applicant to produce a certified copy of it before the learned Sessions Judge so that he could act upon it. The learned Sessions Judge could not imagine that it would take more than fourteen days for this Court to communicate the stay order to him. The applicant also might have thought that the stay order would be communicated by 24th October but as a matter of prudence and caution he ought to have got a certified copy of the order and produced it before the learned Sessions Judge. When he failed to do so, I cannot blame the learned Sessions Judge for immediately proceeding to deliver the judgments. It is not a case of his refusing to take notice of an intimation of the stay order given to him by the applicant's counsel. He acted upon it once and the applicant could not insist upon

his acting upon it again and again.

6. In the cage of Borai Goudar (A. I. R. (25) 1938 Mad, 832) the High Court of Madras held that the judgment of the Magistrate was not rendered illegal by the fact that he delivered it after the case had been transferred from his Court but before receipt of the order of transfer. The FullBench applied the provisions of Section 531, Criminal P. C. I am not sure if those provisions would apply when a Magistrate tries a case inspite of an order transferring ill from his Court. The objection in such a case is that the Magistrate had no jurisdiction to decide the case at all and not that it was decided in a wrong 'sessions division, district, sub-division or other local area.' Section 531 only cures the want of territorial jurisdiction and no other defect. It is, however, unnecessary to pursue this point because I have already found that the learned Sessions Judge did not act illegally or irregularly in delivering the judgments.

7. Coming to the merits of the application,there is nothing to be said in favour of the applicant. The findings of the Courts below that he was in possession of an unlicensed sword and kirpan are correct. There is no substance in Application No. 1602 as well; the findings of the Courts below are correct. In the third Application N a. 1603 of 1930 the applicant was convicted under sections 447 and 352, Penal Code on 31-8-1950 by a First Magistrate. Both the offences are triable by a Panchayati Adalat and the learned Magistrate had no jurisdiction to try the case. He had framed acharge only under these two sections against him Even if he bad rightly taken cognisance of the offence because the complaint disclosed other offences not triable by a Panchayati Adalat, as soon as he found that the only offences made out against the applicant were those punishable under Sections 447 and 352, Penal Code, he was required by Section 56, Panchayat Raj Act to transfer the case to a Panchayati Adalat having jurisdiction. The conviction is, therefore, null and void.

8. In the result I dismiss this application.

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