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Court : Allahabad

Decided On : May-18-1925

Reported in : AIR1925All737

Appellant : (Thakur) Bilas Singh

Respondent : Emperor

Judgement :

Sulaiman, J.

1. This appeal was filed in the Court of the District Judge of Bareilly from an order of the election commissioners purporting to act as a civil Court under Section 476, Criminal P.C. As the learned District Judge happened to be one of the Commissioners himself he referred the case to this Court recommending that it should be transferred from his file. Without prejudice to the question whether an appeal lay we directed that the case be transferred to the High Court.

2. A preliminary objection has been taken on behalf of the respondent that if the commissioners had no jurisdiction to proceed under Section 476, Criminal P.C. no appeal lay from their order at all. We think that the preliminary objection cannot prevail. The commissioners have professedly acted as a Civil Court and assumed jurisdiction under Section 476, Criminal P.C. As an appeal is expressly provided from an order passed by a civil Court under Section 476, Criminal P.C., the present appeal does lie even though the commissioners might have acted without

jurisdiction. This principle was laid down as early as 1891 in the case of *Jwala Prasad v. Salig Ram* (1891) 13 All. 575. That this has been the uniform practice of this Court is shown by the judgment in the case of *Walayat Husain v. Ramlal* (1914) 12 A.L.J 1113. A Bench of this Court, of which one of us was a member, has recently held in the case of *Nasir Khan v. Itwari* A.I.R. 1924 All. 144, that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In the cases of *Ranjit Misser v. Ramudar Singh* (1912) 16 C.L.J. 77 and *Kalipada Karmakar v. Shekhar Basini Dasya* (1916) 24 C.L.J. 235, Mukherji, J., laid down that where jurisdiction was usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. These cases have been recently followed in the case of *Bandiram Mooherjee v. Purna Chandra Roy* (1918) 45 Cal. 926. There is therefore ample authority for holding that because an appeal would have lain if the Commissioners had acted with jurisdiction, an appeal lies when they have purported to act as such even though in reality without jurisdiction.

3. Section 476-B, Criminal P.C., provides that an appeal shall lie from an order passed by a civil Court under Section 476 to the Court to which such former Court is subordinate within the meaning of Section 195, Sub-section (3), and this last named section provides that in the case of a civil Court from whose decrees no appeal ordinarily lies, the Court shall be deemed to be subordinate to the principal Court having ordinary civil jurisdiction within the local limits of whose jurisdiction such civil Court is situate. It follows that if the Election Commissioners were such civil Court the appeal from their order passed under Section 476, Criminal P.C., should lie to the District Judge of Bareilly.

4. As a civil appeal was pending before the District Judge, the High Court had jurisdiction under Section 24, Civil P.C., to transfer that appeal to its own file.

5. Even if there had been any difficulty in holding that an appeal lies from an order purporting to have been passed under Section 476, Criminal, P.C., though without authority, we would have no hesitation in treating the appeal as a civil revision and interfering provided we were satisfied that the Election Commissioners had no

jurisdiction to act as a civil Court, which they professed to do.

6. Coming to the merits of the appeal we have to consider whether the Election Commissioners were a civil, revenue or criminal Court within the meaning of Section 476, Criminal P.C.

7. It has not been and cannot be, suggested that the Election Commissioners were either a revenue or a criminal Court. Their function was obviously not that of either of such Courts. The learned Election Commissioners themselves were of opinion that they were a civil Court with power to proceed under Section 476, Criminal P.C. In this view they have relied on the case of *Nanda Lai v. Khetra Mohan* (1918) 45 Cal. 585 as well as on Section 3 of the Indian Evidence Act which defines a 'Court' (not civil Court) as including all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence.

8. The definitions of words and expressions in Section 3 of the Evidence Act, unlike those in the General clauses Act, are exclusively for the purposes of the Indian Evidence Act. But Section 6 of the Indian Elections, Offences and Inquiries Act (No. XXXIX of 1920) makes the provisions of the Indian Evidence Act applicable subject to the provisions of this Act. But even then, the Election Commissioners being 'persons legally authorized to take evidence' would merely be a 'Court' and not necessarily a 'civil Court.' It is, therefore, to be seen whether under Act No. XXXIX of 1920 the Election Commissioners are constituted a 'civil Court' so as to be able to exercise jurisdiction under Section 476, Criminal P.C.

9. The Election Commissioners have not all the powers which are vested in a civil Court under the Code of Civil Procedure of 1908, but their powers under that Court are restricted to the matters mentioned in Section 5. It is true that they have power to take oral and documentary evidence and examine witnesses on oath, but that fact by itself does not necessarily constitute them a 'civil' Court. For it is easy to conceive of tribunals vested with such powers though not a civil Court administering justice. I may instance the case of the Commissioner sitting as an election authority under the Municipalities Act which came up for consideration before the Full Bench in *Abdul Rahman v. Abdul Rahman* : AIR1925 All380 .

10. I may further mention that to say that the Commissioners are to have certain powers vested in a civil Court is one thing and to say that they constitute a civil Court is quite another, that they are not deemed to be a civil Court for all purposes is abundantly clear from the concluding portion of Section 5 which says that the Commissioner 'shall be deemed to be a civil Court within the meaning of 'Sections 480 and 482 of the Code of Criminal, Procedure, 1898.' Had they been a civil Court for all purposes it would have been superfluous to make such a special provision. The very fact that Section 476 is not mentioned here shows that they are not to be deemed to be a civil Court within the meaning of that section.

11. The matter is made still further clear if we examine the rules for the election and nomination of members to the United Provinces Legislative Council made by the local Government. No doubt Rule 36 provides that the Commissioners are to be appointed for the trial of the election petitions, and Rule 37 says that every election petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, provided that it shall only be necessary to make a memorandum of the substance of the evidence, and no doubt under Rule 44, Sub-clause (1) 'the election of the returned candidate shall be void' if in the opinion of the Commissioners the contingencies mentioned in the sub clause have occurred, and under Sub-clause (2) they may 'find' that the election is not void. But under Rule 45 at the conclusion of the enquiry the Commissioners shall report whether a party has been duly elected, and the Governor, on receipt thereof, shall issue orders in accordance with the report, and publish the report in the Gazette, and the orders of Governor shall be final.

12. The whole scheme appears to be to appoint a special tribunal which should enquire into the election petition and follow the ordinary rules of procedure and evidence and then report its findings to the Governor who shall pass final orders thereon, though those orders have to be in accordance with the report, That tribunal in itself is not a 'civil Court' which administers justice directly even though it is a 'Court' in its wider meaning. Its purpose is to enquire into the petition, record its findings and report, though its recommendation has to be acted upon by the Governor.

13. In re Maharajah Madhava Singh (1905) 32 Cal. 1 their Lordships of the Privy Council had to consider the character of the constitution of a tribunal of commissioners appointed for the purpose of enquiring into the truth of (a certain) imputation and of reporting to the Viceroy and Governor General in Council how far the same is true to the best of their judgment, and belief. They had full power conferred on them to call for and receive or reject evidence, documentary or other, and to hear such persons as they should think fit, and they also were invested with like powers to try any person other than the petitioner on any charge which might be presented against such person in connection with that enquiry, and in case of the conviction of such person to pass upon him such sentence as might be passed in a like case by a Court of criminal jurisdiction in British India. Their Lordships held that the commission in question was one appointed by the Viceroy himself for the information of his own mind in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lay to His Majesty in Council. That was a special tribunal constituted for a special purpose and vested with special powers and was certainly not a civil Court from which an appeal could lie to their Lordships.

14. The Madras High Court In re Nataraja Iyer (1912) 36 Mad. 72 had to consider whether a Divisional Officer acting under the Incometax Act had acted as a revenue Court and had jurisdiction to pass an order under Section 476, Criminal P.C. It came to the conclusion that he was a revenue Court. Sundara Ayyar, J. at p. 86, conceded that a mere authority to receive evidence would not make the officer recording it a Court, but thought that the test for deciding whether the officer was a Court or not was whether he was empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable him to arrive at a determination. Sadasiva Ayyar, J., at page 89, was of opinion that the test for deciding whether a particular officer was a Court did not depend upon whether he was empowered to take evidence but whether he had been given jurisdiction by the constituted authorities to deal out justice in any particular defined class of cases. The facts of that case are quite different from the case before us. I would however point out that the word 'Court' may be of a wider meaning than the expression a 'civil, revenue or criminal Court.'

15. I have already said that I do not think that the Election Commissioners are intended to administer justice themselves. Their function is to hold an enquiry and report and it is not their report but the Order of the Governor in accordance with the report which has a finality. Even if having regard to their powers and procedure they are to be deemed to be a 'Court' they certainly do not constitute a 'civil Court' for the administration of civil justice.

16. The learned Commissioners have relied on the case of *Nanda Lal Ganguli v. Khetra Mohan Ghose* (1918) 45 Cal. 585 where the question turned on the character of the tribunal constituted by the Calcutta Improvement Act, 1911. But Section 71(a) of the Calcutta Improvement Act provided that the tribunal should be deemed to be the Court and the president the Judge. The Bench pointed out that the word 'Court' had a wider meaning than, for instance, 'a Court of justice.' They had not to consider the expression 'civil Court' as occurs in Section 476 but only the expression 'Court' which occurs in Section 195, Or. P.C. and they held that the tribunal was a 'Court.'

17. I have already pointed out that the question before us is not merely whether the Election Commissioners are a 'Court' within the meaning of Section 195, but whether they are a 'civil, revenue or criminal Court' within the meaning of Section 476. It is noteworthy that by Section 47 of the Code of Criminal Procedure Amendment Act (No. XVIII of 1923) the word 'means' in Section 195, Sub-clause (2) has been substituted by the word 'includes,' which suggests that the term 'Court' is intended to be a wider expression than a 'civil, revenue or criminal Court.' If it had not a wider meaning, it was wholly unnecessary to say 'but does not include a Registrar or Sub-Registrar, etc.' Even if therefore the Commissioners, in view of Section 3 of the Indian Evidence Act and Section 6 of Act XXXIX of 1920 and their powers to hold an enquiry, take evidence and record a finding, are taken to be a 'Court', it does not follow that they necessarily are a 'civil revenue or criminal Court.' They really constitute a special tribunal, out of the ordinary course, appointed by a special Act and rules made by Government to hold an enquiry, arrive at a conclusion and report. They are not necessarily a 'civil Court' trying a matter of a civil nature and administering justice.

18. I find it impossible to hold that the Election Commissioners are a 'civil Court' within the meaning of Section 476, Or. P.C. and must therefore hold that they had no jurisdiction to proceed under that section. The complaint which they purport to make under Section 476 must be deemed to be one under Section 195(1)(b) by a Court in its wider meaning excluding a 'civil, revenue or criminal Court.' But even then they would not be considered to be subordinate to the principal Court of ordinary original civil jurisdiction under sub-clause (3) because neither appeals ordinarily lie thereto nor are the Commissioners a civil Court.

19. The Magistrate who receives the complaint will have jurisdiction to proceed under Section 190(1)(a) treating it as a complaint made under Section 195(1)(b) by a Court, in which case the examination of the complainant will not be required in view of the provisions of Section 200(aa). It will also of course be open to the Magistrate to proceed under Section 190(1)(c) upon information received from persons other than a police officer in which case he would pay due regard to the provisions of Section 191, Cr. P.C. The question whether the complaint can be said to be one made by public servants as referred to in Section 200(aa), Cr. P.C. depends on whether the Commissioners can be said to be 'acting or purporting to act in the discharge of their official duties.' It is certainly within their power, but is it also a part of their official duty to file such a complaint? Whatever view is taken it is obvious that an examination of the complainants will not be required.

Daniels, J.

20. I agree with my learned brother that the Election Commissioners are not a Civil Court within the meaning of Sections 476, 476-A and 476-B of the Code of Criminal Procedure. Apart from the other considerations referred to by him, the language of Section 5 of the Indian Elections Offences and Inquiries Act is, in my opinion, decisive. It is specially provided that they shall be deemed to be a civil Court within the meaning of Sections 480 and 482 of the Code, There is no corresponding provision that they shall be deemed to be a Court within the meaning of Section 476. If a special provision is necessary to constitute them, a Court under Section 480, it is equally necessary to constitute them a Court under Section 476. The two sets of provisions stand on the same footing. They occur in

the same chapter of the Criminal Procedure Code which deals with offences affecting the administration of justice. It is a clear case of the application of the principle *inclusio unius est exclusio alterius*.

21. The term 'civil Courts' as used in Section 476 is restricted to Courts constituted under the Bengal N.W.P. and Assam Civil Courts Act, 1887 and similar enactments and Courts specially declared to be civil Courts within the meaning of the section.

22. The above finding does not, however, compel us to hold that the complaint was not validly made. It is not really necessary to decide in this case whether the Election Commissioners are a Court within the meaning of Section 195, Criminal P.C. My learned brother has given the considerations in favour of holding that they are. The considerations on the other side are as follows: They are not described as a Court in the Act under which they are constituted. They are described as Commissioners appointed to hold, an enquiry. They do not pronounce any judgment. They merely report to the Governor, and though it is true that the Governor is bound to accept their recommendations, the final orders are those of the Governor and not of the Commissioners. It may be said that the highest tribunal in the Empire, the Privy Council, equally frames its judgment in the form of a recommendation to His Majesty, but there is no real analogy between the two cases. The jurisdiction of the Privy Council is, in fact, the jurisdiction of His Majesty in Council, and it is therefore His Majesty, and not the Council alone, by whose authority the judgment must be pronounced, Section 5 of the Indian Elections Offences and Inquiries Act invests the Commissioners with certain of the powers of a Court under the Code of Civil Procedure, but does not declare them to be a Court except for certain purposes. It is no doubt true that Section 195 uses the word 'Court' without the qualifying words 'civil, revenue, or criminal, which occur in Section 476, but in this respect the amending Act merely retains the language of Act V of 1898, and under the former Act the two expressions were equivalent in their scope. It seems to me doubtful whether the Legislature, in substituting the word 'includes' for 'means' in Section 195(2), really intended to widen the definition. They may have thought that to say that the term 'Court' means a 'civil, revenue or criminal Court but does not include a Registrar or Sub-Registrar,'

implies that Registrar or Sub-Registrar would be a Court unless specially excepted from the definition, If it were permissible to refer to the report of the committee which was responsible for the draft of the amending Act, it would seem that they imagined the amendment to be a mere drafting amendment involving no alteration of substance. That the word 'includes' in an enactment is not always of a wider significance than the word 'means,' is established by the judgment of the Privy Council in *Dihvorth v. The Newzealand Commissioners of Stamps* (1899) A.C. 99. If the term 'Court' in Section 195 is really wider than the civil, revenue or criminal Court in Section 476, the curious result follows that whereas the order of the civil, revenue, or criminal Court making or refusing to make, a complaint is subject to appeal and to a special procedure prescribed by Section 476, a similar order passed by a Court constituted is not subject to any appeal. The marginal note to Section 476 read with the language of the section shows that it was enacted in order to prescribe the procedure to be followed in cases coming under Section 195, Clauses (b) and (c) and presumably in all such cases.

23. On the other hand, it may be urged with considerable force that it is unlikely that the legislature, which has made such elaborate provision against prosecution for perjury in connexion with judicial proceedings being commenced except on the complaint of responsible authority, should have left it open to any one to initiate a prosecution for perjury committed on the trial of an election petition a class of cases which is likely to rouse violent party feeling. It must also be conceded that in ordinary usage where the word 'includes' is used the enumeration which follows is not intended to be exhaustive.

24. On the whole therefore, if it were necessary to decide the point, I should not be prepared to differ from my learned brother. The question will, however, only arise if and when an attempt is made to start a prosecution of this kind without a complaint by the commissioners. In this case if the commissioners are a Court the requirements of Section 195 have been fulfilled. I am not prepared to entertain the suggestion that they ceased to have jurisdiction to make a complaint the moment their report was signed. If on the other hand they are not a Court then this is a complaint made under the ordinary law by public servants in whose presence the alleged offence was committed, and any Magistrate having jurisdiction can take

cognizance of it under Section 190, Criminal P.C. As the complaint is made by public servants purporting to act in the discharge of their official duties Section 200, Clause (a) applies to it.

25. For these reasons I concur in the order proposed.

26. We accordingly allow this appeal and set aside the order of the Election Commissioners, dated 28th August, 1923, in so far as it purports to be an order under Section 476, Criminal P.C., but leave it in fact as a complaint entertainable under Section 190, Criminal P.C.

27. We make no order as to costs.

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