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Court : Allahabad

Decided On : Dec-13-1948

Reported in : AIR1949All632

Appellant : Hansraj Singh and ors.

Respondent : Rex

Judgement :

ORDER

Wali Ullah, J.

1. This is an application under Section 205, Government of India Act, 1935, for a certificate of leave of appeal to the Federal Court from the order passed by me in criminal Appeal No. 185 of 1947 on 13th September 1948. It was filed on the 30th September 1948. The petitioners were the appellants in the criminal appeal. The ground on which a certificate is prayed for is that the case involves a substantial question of law as to the interpretation of Section 270, Government of India Act of 1935. In Paras. Nos. (4) (as amended by a supplementary affidavit) and (5) of the affidavit filed in support of the application, an attempt has been made to elaborate the ground on which this certificate is prayed for. It is to this effect:

2. In para (4) it is asserted that the appellants 1 to 7 were acting in their official capacity in the discharge of their duties when they committed the acts complained of. In Para. (5) it is stated that in this case a question arises whether Section 270,

Government of India Act applies to the cases of the appellants Nos. 1 to 7 so as to necessitate sanction of the Central Government as well as that of the Provincial Government.

3. The appellants, thirteen in number, of whom no less than seven were police officials including a Sub-Inspector and some constables, were tried by the learned Sessions Judge of offences under Sections 147 and 325 read with Section 149, Penal Code. All of them were convicted of both the offences and were sentenced to varying terms' of imprisonment.

4. Admittedly, no sanction of the Provincial Government or of the Central Government was obtained for the initiation of proceedings against any of the appellants. Again, admittedly no such question, as is sought to be raised at this stage, was raised either in the course of the trial in the lower Court, or in the course of the hearing of the appeal before this Court.

5. I have heard Mr. Sheo Charan Lal, the learned Counsel for the applicants, in support of the application. I have also heard Mr. Kanhaiya Lal Misra, the learned Deputy Government Advocate, who opposes the application. On behalf of the applicants, it has been strenuously contended that the trial of applicants Nos. 1 to 7, without sanction as required by Section 270, Constitution Act, was illegal. It has even been contended that the trial Court had no jurisdiction to hold the trial without such sanction. Further, it has been contended that the proposed appeal from the order passed by this Court dismissing the appeal does, therefore, involve a substantial question of law relating to the interpretation of Section 270, Constitution Act. On the other hand, it has been contended by the learned Deputy Government Advocate that the applicants do not satisfy the conditions under which a certificate under Section 205, Constitution Act, can be issued by this Court. Again, it is contended by him that, on a proper construction of Section 205, Constitution Act, an application like the present, which was filed some two weeks after the decision by this Court, does not lie.

6. Learned Counsel for the parties have invited my attention to the provisions of Section 205, as well as of Section 270, Constitution Act. They have also cited a number of rulings which, according to them, support their respective contentions.

7. Learned Counsel for the applicants has argued that, under Section 205, it is the duty of the High Court in every case to consider whether the case involves a substantial question of law as to the interpretation of the Act, or of any Order-in-Council made thereunder. Learned Counsel has contended that, inasmuch as in the present case this Court failed to consider this question at the time of delivering its judgment, it is open to him to move an application, even after the decision of the appeal, for a certificate for leave to appeal to the Federal Court.

8. The proper interpretation of Section 205, as well as the scope of the authority of a High Court to grant a certificate under this section have been the subject-matter of decision in quite a large number of cases, including cases decided by the Federal Court of India as well as by their Lordships of the Privy Council. That the High Court can grant a certificate of leave to appeal to the Federal Court against a judgment or order passed in a criminal case cannot be questioned now. But before the High Court grants a certificate under Section 205, Constitution Act, it has to be satisfied that the 'case involves a substantial question of law,' of the kind specified in the section. In dealing with an application for leave to appeal to His Majesty in Council, a Bench of two learned Judges of this Court in *Bankey Lal v. Jagat Narain* 23 ALL. 94, had to interpret the word 'involve' in the expression 'must involve some substantial question of law' in Section 110, Civil P.C. It was held that the word 'involves' implies a considerable degree of necessity. The mere circumstance that a question of law is raised in a case would not justify the inference that the proposed appeal involves a substantial question of law, unless it be necessary to decide the question of law for a proper decision of the case. The same construction has been put on the word 'involve', as it occurs in Section 205, Constitution Act, in the case of *Hafiz Mohammad Ahmad Said Khan v. Shiam Lal* : AIR1944 All273 ., by a Full Bench of three Judges of this Court of which I was a member. In that case, it has been made clear that there is no difference in this respect between the provisions of Section 110, Civil P.C., and those of Section 205, Constitution Act. The test for determining whether a substantial question of law is 'involved' in a particular case, has been indicated by the Full Bench in these terms:..that the test is not merely the Importance of the question but its importance to the case itself. If the facts of the case depend upon a consideration of that point, it will be deemed to be 'involved'. If, on the other hand, there is a remote

contingency of its being taken into consideration, it will not answer the test.

It may be noted, in passing, that in this case an application for a certificate was made sometime after the decision of the appeal itself. This point was not, however, either raised or discussed by the Full Bench. To the same effect is the decision by a Bench of two Judges of this Court of which also I was a member, in the case of *Ganesh Prasad v. Mt. Makhana and An* : AIR1948 All375 . While dealing with an application for leave to appeal to His Majesty in Council under Sections 109 and 110, Civil P.C., the Bench had to consider whether there was a substantial question of law involved in the proposed appeal. It was held that no such question of law was involved in the appeal and the application was dismissed.

9. In two recent cases, viz., *Errol Mackay v. Oswal Forbes and Punjab Co-operative Bank, Ltd.* *Amritsar v. Income-tax Commissioner* , their Lordships of the Privy Council have considered the scope of Section 205, Constitution Act. In the case of *Errol Mackay* , their Lordships, on a consideration of the provisions of Section 205, observed:

This section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but-a matter of equal importance-also for the certification of this Board and the Federal Court as to their jurisdiction to entertain an appeal.

After laying down the law as indicated above, their Lordships proceeded to make an observation which clearly implied that it was possible for the High Court, even after the delivery of its judgment, to grant a certificate at a later stage. Next, their Lordships had occasion to consider the scope of Section 205 and the nature of the duty imposed upon the High Court in the case of *Punjab Co-operative Bank, Ltd. Amritsar v. Commissioner of Income-tax, Lahore* . In this case, their Lordships explained that the remarks of the Board in *Errol Mackay's* case A.I.R. (27) 1940

P.C. 16, as regards the duties of the Judges of the High Court, must be read as confined to cases of nature which arose in that case and in this connection reference was made by their Lordships to the remarks of Lord Halsbury, *Quinn v. Leatham* (1901) A.C. 495 at p. 506 that:

Every judgment must be read as applicable to particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found.

In the case of *Punjab Co-operative Bank*, their Lordships, in the first place, laid down that the provisions of Section 205 which impose a duty on the High Court to consider the specified question are merely directory and not mandatory. Then their Lordships proceeded to state:

It is a well settled general rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

Their Lordships then observed:

The section on its true construction is dealing with cases where there is a reasonable 'possibility that the specified question may arise, and the duty is imposed on the Judges of the High Court only in those cases.

It will be observed that the Privy Council did not indicate how great the degree of probability of the point arising must exist to justify the grant of a certificate. It has, however, been made clear that it is not the duty of the High Court in every case, whether such a question be involved or not, to consider it and to give or withhold a certificate.

10. The next point for consideration is whether it is open to the High Court to grant a certificate under Section 205 on an application made after it has delivered its judgment or final order. Intimately connected with this question is the further question whether a substantial question of law of the kind specified in Section 205, if it is not raised, or, if raised but not decided, by the High Court, can be raised at

the time when such an application comes to be filed. As indicated above, no doubt, the Judicial Committee of the Privy Council in the case of *Errol Mackay* (ubi supra) and *Punjab Co-operative Bank Ltd.* A.I.R. (27) 1940 P.C. 280 (ubi supra) have envisaged the possibility of the grant of a certificate by the High Court under Section 205, Constitution Act even after the decision of the case, but it seems to me that their Lordships have given a clear indication that this is to happen only when the High Court has failed in its duty to consider the question, at the time of the decision of the case, and this can happen only when, in the words of their Lordships, there was something to consider and the High Court failed in its duty to consider it. In short, therefore, the position is that such a subsequent application for a certificate would lie only when there is a reasonable possibility that the specified question arises or may arise. In this connexion, I may refer to the case of *Jagdam Sahai v. Emperor* : AIR1948 All12 , decided by two learned Judges of this Court. In this case, the specific question referred to the Bench was whether Section 205, Government of India Act contemplates that an application for a certificate of the nature mentioned thereunder can be filed some time after the date of the decision by the High Court. It was held:

The duty cast under the Government of India Act, 1935, is to give or withhold a certificate at the time when the High Court delivers its judgment, although there is nothing in Section 205 which would prevent a High Court from rectifying its own mistake. But though an application for a certificate of the nature mentioned in Section 205 can be filed even after the judgment has been pronounced in the case by the High Court, it can be filed only when the High Court has erred in not considering the question of the granting or withholding of the certificate, that is where the High Court has not considered the matter even though there was a reasonable possibility of a substantial question arising as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder.

At p. 485 the learned Judges observed:

The last clause of Sub-section (1) of Section 205 would even seem to pre-suppose that the question was raised before the High Court, as otherwise it is difficult to see how it would be possible for that Court of its own motion to give or withhold a

certificate such as is referred to in the section.

To the same effect is the decision of a Bench of two learned Judges of the Nagpur High Court in *Kondo Tukaram v. Emperor* A.I.R. (83) 1946 Nag. 144. After referring to the case of *Errol Mackay* (ubi supra) and Order 17, Rule 1 of the Federal Court Rules (1942), the learned Judges came to the conclusion which they expressed thus at p. 145:

In exceptional cases the certificate may be given at a later date.

The crucial question, however, remains for consideration viz, the proper construction of the expression, 'the case involves,' in Section 205, Sub-clause (1) of the Act. As already indicated above, in the case of *Hafiz Mohd. Ahmad Said Khan v. Shiam Lal* : AIR1944 All273 , it has been made clear by a Full Bench of this Court, of which I was a member, that there is no difference in this respect between the provisions of Section 110, Civil P.C. and those of Section 205, Constitution Act. Further, as noted already, the test for determining whether a substantial question of law is 'involved' in a particular case, has been indicated by the Full Bench in these terms:..that the test is not merely the importance of the question but its importance to the case itself. If the facts of the case depend upon a consideration of that point, it will be deemed to be 'involved'. If, on the other hand, there is a remote contingency of its being taken into consideration, it will not answer the test.

Similarly, in *Emperor v. Saver Mannuel Dantes* A.I.R. (28) 1941 Bom. 245, a Full Bench of the High Court had to consider the scope of Section 205, particularly in relation to the question which arises in this case. It was held:

The wording of Section 205 (2) indicates that the Legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act. The test for determining whether an appeal under Section 205 lies is whether the 'case involves' and not whether the 'judgment decides' or 'the case may involve' a substantial question of law as to the interpretation of the Government of India Act. When the actual decision does not determine any substantial question of law as to the interpretation of the

Government of India Act, the mere possibility of some such question of law arising in a remote contingency before the Federal Court cannot be enough to justify the granting of the certificate.

Reference may also be made to the case of *Goddam Padmanabham v. Pasupuleti Kamaraju* A.I.R. (30) 1943 Mad. 481, where at p. 482 Patanjali Sastri J. expressed himself thus:

Section 205, Sub-section (2) allows an appeal to the Federal Court on 'defined grounds' where a certificate under Sub-section (1) is given. One of such grounds which is material here is that a question of the kind specified in the section 'has been wrongly decided,' which, I take it, means wrongly decided by the Court from whose judgment, decree or final order the appeal is sought to be preferred.

It was held:

Where a question has not been raised and decided in the proceedings in the High Court, no certificate under Section 205 can be granted.

The same view was affirmed in *Tripasura Venkata Narsinga Rao v. Vysyaraju Surayya Raju* A.I.R. (34) 1947 Mad. 151, where Patanjali Sastri J. sitting with another learned Judge, had to consider the question of issuing a certificate under Section 205, Constitution Act. In that case, one of the questions raised and argued in the appeal before the High Court was a substantial question as to the interpretation of Sections 99 and 100, Constitution Act, but it was considered unnecessary to decide it and the appeal was disposed of on another point. It was held that:

Where a substantial question of law is raised and argued before the High Court but the High Court considers it unnecessary to decide the point and disposes of the appeal on another point, no certificate can be granted under Section 205.

The learned Judges made a reference to the Full Bench decision of this Court in the case of *Muhammad Said Khan v. Shiam Lal* A.I.R. (31) 1944 ALL. 273, as also to the case of *Emperor v. Saver Mannuel Dantes* A.I.R. (28) 1941 Bom. 248 and observed that the expression 'involves' could not mean the mere possibility of

some question of law arising in a remote contingency.

11. I may note here, in passing, that the view expressed by Patanjali Sastri J. in the case of *Goddam Padmanabham v. Pasupuleti Kamaraju* A.I.R. (30) 1943 Mad. 481, has been approved by a Division Bench of our own Court in the case of *Jagdam Sahai v. Emperor* : AIR1948 All12 . The same view has been taken by two learned Judges of the Sind Chief Court in *Emperor v. Tara Chand* A.I.R. (33) 1946 Sind 154. Again in the case of *Kondo Tukaram v. Emperor* A.I.R. (33) 1946 Nag. 144, decided by two learned Judges of the Nagpur High Court, the learned Judges had to consider, at p. 146, the question : Is the applicant entitled to ask for a certificate under Section 205 when the material question of law was neither raised by him in the case nor decided by the High Court? The learned Judges observed:

The terms of Section 205 (1) itself postulate that the question is raised in the case and determined by the High Court. If it imposes a duty on the High Court to act on its own motion, it must be assumed that the High Court shall have an opportunity to consider the question in the case, As their Lordship⁹ of the Privy Council observed in *Punjab Co-operative Bank Ltd. v. Income-tax Commissioner* . 'Their first duty is 'to consider'; but only, it would seem when there is in fact 'something to consider'. If there is no point raised for consideration in the case, there would be no decision and the giving of certificate by the High Court suo motu would be inconceivable'.

The learned Judges agreed with the view expressed by Patanjali Sastri J. in *Goddam Padmanabham v. Pasupuleti Kamaraju* A.I.R. (30) 1943 Mad. 481 the learned Judges continued:

It is clear that the case did not involve any question of interpretation of the Government of India Act and the High Court cannot involve such a question by importing into the case hypothetical considerations.

12. Lastly, I must refer to the decision of two learned Judges of our own Court, viz., the case of *Jagdam Sahai* : AIR1948 All12 (ubi supra). As mentioned already, the two learned Judges of this Court expressed their full agreement with the views

expressed by Patanjali Sastri J. in the case of *Goddam Padmanabham* A.I.R. (30) 1943 Mad. 481 (*ubi supra*). After deciding the main question referred to the Bench, the learned Judges dealt with the cases before them and dismissed the applications pending before them on the ground that the points attempted to be raised before the Federal Court had not been raised before the High Court and that the points did not raise any substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder. This decision was followed very recently in the case of *Sri Ram and Anr. v. Emperor* A.I.R. (35) 1948 All. 106, by a Bench of two learned Judges and the certificate under Section 205 was refused on the ground that the constitutional question not having been taken before the High Court or in the two Courts below, it could not be said that there was any reasonable possibility that the specified question arose and that the High Court, when it did not consider the question of the granting or withholding of certificate in the first instance, had failed in the performance of its duty under Section 205. In this view of the matter, it was held that a subsequent application did not lie.

13. To sum up the result of all the judicial decisions, briefly referred to above, is that in a case like the present where admittedly the constitutional question which is sought to be raised before the Federal Court was never raised while proceedings were pending either in this Court or in the Court below, it cannot be said that a substantial question of the nature specified in Section 205 was involved in the case. The so-called question of law relating to the interpretation of Section 270, Constitution Act is an entirely new question which is raised for the first time at the hearing of the application for a certificate of leave to appeal to the Federal Court.

14. In the end, I may consider whether there is any force in the contention that a substantial question of law is involved in this case, simply because of the point raised now that Section 270, Constitution Act was not complied with. In the course of the trial inasmuch as the requisite sanction was not obtained before the initiation of proceedings. Section 270 has been the subject of interpretation in several cases by the Federal Court of India as well as by the Judicial Committee of the Privy Council. It is hardly necessary to do more than to refer very briefly to two very recent cases decided by their Lordships of the Privy Council. In the case of *H. H.*

B. Gill and Anr. v. The King, reported in the Judicial Committee had occasion to interpret the expression 'in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown' in Section 270, Constitution Act. It was held that these words had precisely the same connotation as the words in Section 197 (1), Criminal P.C. (as amended): 'in an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.' Their Lordships 'then proceed to observe:

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.

Applying the test to the facts of the case before them-the appellant had been charged with accepting or conspiring to accept bribes-their Lordships held that the appellant could not justify the act in respect of which he was charged as an act done by him by virtue of the office that he held.

15. Again, in the case of Albert West Meads v. The King , their Lordships had to consider whether Section 270 (1), Constitution Act applied to the case before them. It was a case where the appellant had been prosecuted for fraudulently misapplying money entrusted to his care as a public servant. Their Lordships relied on what they had said in the earlier case. Applying the principle to the case before them, they held that it was equally clear that the appellant could not justify the act in respect of which he was charged i.e., the act of fraudulently misapplying money entrusted to his care as a public servant as an act done by him by virtue of the office he held.

16. In the light of these principles, it may be considered whether the act alleged against the appellants 1 to 7, viz., that they, along with others, formed an unlawful assembly and committed a riot and also caused grievous hurt to some persons

can be reasonably considered to be an act done by them as public servants acting in the discharge of their duty. It seems to me that the test laid down by their Lordships of the Privy Council is not satisfied in this case; hence sanction of the proper authority was not necessary before the institution of the proceedings. Further, it seems to me that the so-called substantial question of law in regard to the interpretation of Section 270 of the Act is not really a question of law at all, but merely a proposition of law. Whether in a particular case, on the facts found, a particular proposition of law would or would not be applicable is not, to my mind, a question of law relating to the interpretation of Section 270 (1) of the Act. It is merely a question of the application of the principles of law to the facts of a particular case. For this reason also, it seems to me that there is no substance in the argument raised by the learned Counsel for the applicants to the effect that there is a substantial question of law involved in the case within the meaning of that expression as used in Section 205, Constitution Act. The result is that I dismiss the application.

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