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Court : Kolkata

Decided On : Jun-02-1961

Reported in : AIR1962Cal417

Judge : S.C. Lahiri, C.J. and ;H.K. Bose, J.

Acts : Constitution of India - Article 134(1)

Appeal No. : Revision No. 2 of 1960

Appellant : Dilip Kumar Ghosh

Respondent : State

Advocate for Def. : Sambhunath Banerjee, Deputy Legal Remembrancer

Advocate for Pet/Ap. : Chinta Haran Roy and ;Arun Kishore Das Gupta, Advs.;Dilip Kumar Dutta, Adv.

Disposition : Application dismissed

Judgement :

Lahiri, C.J.

1. The petitioner who asks for a certificate under Article 134(1) (c) of the Constitution was placed on his trial on a charge under Section 366 of the Indian Penal Code and tried by the Assistant Sessions Judge of 24-Paraganas with the

help of a jury. As a result of the trial the jury brought in unanimous verdict of not guilty in favour of the petitioner and the learned Judge accepting the said verdict acquitted him. Against the order of acquittal one Indu Bhusan Roy Choudhury who describes himself as the father of the girl alleged to have been abducted filed a petition under Section 430 of the Code of Criminal Procedure in this Court for setting aside the order of acquittal and obtained a Rule. The Rule was heard by a Division Bench which by a judgment dated January 25, 1961, has set aside the order of acquittal and directed that the petitioner be retried by an Additional Sessions Judge to be selected by the Sessions Judge of 24-Paraganas. Against this order of the Division Bench the petitioner now intends to take a further appeal to the Supreme Court.

2. According to the established view of this Court based upon several decisions of the Privy Council, the Federal Court and the Supreme Court an order like this is neither a judgment nor a final order within the meaning of Article 134(1) of the. Constitution, but the learned Advocate appearing for the petitioner relies upon a judgment of a Division Bench of this Court in the matter of an application under Article 134(1)(c) of the Constitution in Appeal No. 423 of 1958, Abinas Chandra Bose v. Bimal Krishna Sen, D/- 12-5-1961 (unreported) (now reported in : AIR1962 Cal113), in support of the proposition that such an order is a judgment and final order within the meaning of Article 134(1) of the Constitution. I have, therefore, to review briefly the state of authorities bearing on the point

3. The words 'judgment and final order' which occur in Article 134(1) also occur in Article 133(1) of the Constitution and Section 109 of the Code of Civil procedure and they also occurred in Section 205 of the Government of India Act, 1935. In the case of Firm Ramchand Manjimal v. Firm Goverdhandas Vishandas, 47 Ind App 124 : (AIR 1920 PC 86), the Privy Council had to consider whether an order refusing to stay a suit under the Arbitration Act was a judgment or final order within the meaning of Section 109 of the Code of Civil Procedure, and answered that question in the negative. That decision was followed by Sir George Lowndes ia the case, of Abdul Rahman v D.K. Cassim and Sons where the Privy Council had to consider the question whether an order of remand was a judgment or final order within the meaning of Section 109 of the Code of Civil Procedure and again

answered that question in the negative. These two decisions of the Privy Council were followed by Sulaiman J., in the case of Dr. Hari Ram Singh' v. Emperor . In this case the appellant before the Federal Court was placed on his trial under Section 477A of the Indian Penal Code, and the appellant took the plea in the Trial Court that the prosecution was not maintainable in the absence of the sanction of the Governor under Section 270 of the Government of India Act 1935. The Trial Court upheld that plea and dismissed the prosecution case. Against that order of the Trial Count the Crown filed an appeal before the Lahore High Court which held that no sanction of the Governor was necessary and directed a retrial. The High Court, however, granted a certificate under Section 205 of the Government of India Act. The point as to whether an appeal lay to the Federal Court against an order or retrial was not raised by the respondent to the appeal but Sulaiman, J., raised the point for himself and considered the question whether the order appealed from was a judgment or final order within the meaning of Section 205 of the Government of India Act After referring to the Privy Council Judgments and certain other English Authorities His Lordship made the following observations at page 48:

'Thus neither under the English nor the Indian Law the term 'judgment' in a criminal case includes an interlocutory order. In Section 205(1) of the Act, the word 'judgment' does not occur by itself, but. is used in conjunction with the final order. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category 'final order' wholly superfluous and unnecessary ...... I am of the opinion that the order of the High Court directing a rehearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of Section 205, Government of India Act'.

4. The next case which went up before the Federal Court on this point was the case of S. Kuppuswami Rao v. King . In that case the appellant was charged under Section 120-B of the Indian Penal Code, and he raised a preliminary objection that the prosecution was not maintainable as the sanction under Section 270 of the Government of India Act and sanction under section. 197 of the Code of

Criminal Procedure had not been obtained. The objection was overruled by the trying Magistrate and the appellant's application for revision of the 'trial Court's order was rejected by the High Court, and against that order of the High Court the appellant appealed to the Federal Court. The Federal Court held that the order of the High Court was not a judgment or final order within the meaning of Section 205 of the Government of India Act; The Federal Court went elaborately into the meaning of the word 'Judgment' and came to the conclusion that the order appealed from did not satisfy the test laid down by English authorities and the Privy Council as to the requirements of a judgment., and Kania, C. J., observed as follows:-

'The order is clearly not a decree. It is not also a judgment as it is only an interlocutory order made on a preliminary objection. It is also not a final order as the order is not on a point which decided either way would terminate the matter before the Court finally'.

I may point out that in this last sentence Kania, C. J., was accepting the test laid down by the Privy Council in the case of . That test is that in order to be a judgment or a final order, the decision must be on a point which decided either way would finally determine the proceeding.

5. The learned Judges of the Division Bench who decided the case of Appeal No. 423 of 1958, D/- 12-5-1961 : AIR1962 Cal113 (supra), based their judgment on another passage in the judgment of Kania, C. J., which runs as follows and which is to be found at page 189 of the FC Report : (at p. 4 of AIR):

'In criminal proceedings an examination of the discussion in paras 260-54 of Vol. IX of Halsbury's Laws of England (Hailsham Edition) shows that the word 'judgment' is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused'.

With great respect to the learned Judges who decided that case I am bound to say that this passage in no way supports the conclusion that an order directing retrial is a judgment within the meaning of Article 134(1) of the Constitution. The passage clearly indicates that in order to be a judgment the order must terminate either in

conviction or in acquittal and an order of retrial does not certainly conform to that test If it had been necessary for us we would have referred this question to a Full Bench, because we are dissenting from the view taken by another Division Bench, but it is unnecessary, because, in our view, the decision in that case is contrary to the decisions of the Privy Council and also to the several decisions of the Federal Court and also of the Supreme Court.

6. To resume my review of the authorities the nest case decided by the Federal Court as to the meaning of the word 'judgment' is that of Sridhar Achari v. King . The order challenged in that case was an order by which the High Count decided that the prosecution then pending of two persons of an offence against Demonetisation Ordinance was bad for the reason that before the charge sheet was submitted the Ordinance had expired. The Federal Court held that the order appealed from was not a judgment within the meaning of Section 205 of the Government ot India Act and the Federal Court followed the earlier decisions of that Court in Dr. Hpriram's rase. and Kuppuswami's case .

7. The next case where the meaning of the word 'judgment' was considered by the Supreme Court was in an appeal filed before the Federal Court, Md. Amin Bros v. Dominion of India, (1950) SC 166 (CWN) : 1949 FCR 842 : (AIR 1950 FC 77). The order appealed from in tha't case was an order by which the Appellate Bench of this Court set aside a winding up order made on the Original Side and directed the application for winding up to be kept On the file and to be put up for hearing after the decision of certain income tax appeals filed by the Company. It was again held that the order appealed from was not a judgment or final order within the meaning of Section 205 of the Government of India Act.

8. In the case of Madanraj v Jalamchand Lodha : 1960 CriLJ1151 the Supreme Court was dealing with an appeal by special leave under Article 136 of the Constitution against an order directing a retrial. In dealing with that appeal the Supreme Court observed:

'All that the High Court has done is to direct that the case should be tried afresh. In its very nature the order of remand passed by the High Court does not finally decide the points in the case and it is essentially of an interlocutory character'.

9. The question whether an order of remand is a judgment or a final order within the meaning of Article 133(1) of the Constitution was considered by a Division Bench of this Court in the case of West Jamuria Coal Co. v Bholanath Roy : AIR1954 Cal424 to which I was a party. After an exhaustive: review of the authorities of the Federal Court and of the Supreme Court then available, the Division Bench held that an order of remand is not a final order or judgment within the meaning of Article 133(1) of the Constitution.

10. Again in the case of Mukunda Das v. Bidhan Chandra Roy : AIR1960 Cal77 another Division Bench to which also I was a party had to consider the question whether an order directing the memorandum of appeal to be returned to the filing Advocate for presentation to the proper Court was a judgment or final order within the meaning of Article 133(1) of the Constitution. The Division Bench again held that it was not a judgment or a final order.

11. Mr. Banerjee appearing for the State has drawn our attention to a judgment of this Bench in the matter of an application under Article 134(1) of the Constitution in Revision No. 1578 of 1958, Bhagani Lunia y. Purshottam Sahasria, D/- 19-8-1960 (Cal) (unreported) where it was held that in order of this Court setting aside in revision an order of acquittal and directing retrial is not a judgment or final order within the meaning of Article 134(1) of the Constitution.

12. Unfortunately the attention of the learned Judges' of the Division Bench which decided Abinash Chandra Bose's case Appeal No. 423 of 1958, D/- 12-5-61 : AIR1962 Cal113 (supra) was not drawn to the authorities of the Federal Court or of the Supreme Court bearing on the point. Their attention was not also drawn to the earlier decisions of the Privy Council in Ram Chandra's case, 47 Ind App 124 : (AIR 1920 PC 86) and Abdul Rahman's case . Their attention does not also appear to have been drawn to the observations of Sulaiman J., in Dr. Hori Ram's case , nor to the Division Bench Judgments of this Court in West Jamurai Coal Co.'s case : AIR1954 Cal424 and Mukunda Das's case : AIR1960 Cal77 . For these reasons with the utmost respect to the learned Judges of the Division Bench I am mot prepared to follow that decision because it is contrary to the principles laid down by the Privy Council and by the Federal Court and the Supreme Court of

our country.

13. The order sought to be appealed from in the present case does not terminate the case started against the petitioner as a result of the setting aside of the order of acquittal. The case against the petitioner revives and the trial will proceed in accordance with law. Such an order keeps alive the case and cannot, in my judgment, be said to be a judgment or final order within the meaning of Article 134(1) of the Constitution.

14. If I have dealt with the earlier authorities in some detail in the present case, it is only for the purpose of expressing our respectful dissent from the view taken by the Division Bench in Abinash Chandra Bose's case, Appeal No. 423 of 1958 D/- 12-5-1961 : AIR1962 Cal113 . Otherwise I should have thought that the master was concluded by the two Division Bench Judgments in the cases of West Jamuria Coal Co. : AIR1954 Cal424 and Mukunda Das : AIR1960 Cal77 (supra),

15. For the reasons given above I am afraid that I cannot grant the certificate asked for by the petitioner and I dismiss his application.

Bose, J.

16. I agree.

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