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Court : Kolkata

Decided On : Oct-05-1923

Reported in : 82Ind.Cas.763

Judge : Asutosh Mookerjee and ;N.R. Chatterjea, JJ.

Appellant : Phillipe Billinghamurst

Respondent : Emperor

Judgement :

Asutosh Mookerjee, J.

1. This is an application for leave to appeal to His Majesty in Council from the sentence passed by this Court in a criminal appeal.

2. The petitioner Billinghamurst was tried by the Chief Presidency Magistrate, Calcutta, for offences punishable under Section 120-B read with Section 420, Indian Penal Code, and under Section 420, Indian Penal Code. The accused was arrested on the 1st September 1919; the trial began on the 7th June 1921; the hearing was finished on the 22nd August 1922; and the judgment was delivered on the 28th November 1922. The petitioner was found guilty on each of the two charges and was sentenced to rigorous imprisonment for one year. The petitioner thereupon preferred an appeal to this Court. The appeal was heard by Sanderson, C.J., and Richardson, J; their judgment was pronounced on the 31st May 1923.

The decision of the Magistrate as to the first charge was upheld, while the conviction under the second charge was set aside; and the sentence was reduced from one year to nine calendar months: *Billinghurst v. Emperor* 82 Ind Cas. 445 : 27 C.W.N. 821: (1924) A.I.R. (C) 18. The prisoner has now applied to this Court for leave to appeal to His Majesty in Council from the judgment and sentence pronounced by this Court in the appeal on the 1st May 1923. The petition, which has been forwarded by the Superintendent of the Alipore Central Jail with a covering letter dated the 29th September 1923, does not specify under what provision of the law this Court is invited to grant leave to appeal to His Majesty in Council.

3. Clauses 39-42 of the Letters Patent deal with appeals to the Privy Council. Clauses 39 and 40 deal with matters other than those of criminal jurisdiction. Clause 41 deals with appeals from criminal cases and is in the following terms:

41. And We do further ordain that, from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case, where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of our Privy Council, hereafter make in that behalf.

4. This clause is of no assistance to the petitioner. The judgment and sentence assailed by him were not made in the exercise of original criminal jurisdiction. Nor can it be maintained that the judgment and sentence were made in a criminal case where any point of law had been reserved for the opinion of the High Court, in manner provided in the Letters Patent, by any Court which had exercised original jurisdiction. The substance of the matter is that the judgment and sentence were pronounced in exercise of the power conferred by Clause 27 of the Letters Patent,

which is in the following terms:

27. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

5. This clause has to be read with Section 411 of the Criminal Procedure Code which provides that 'any person convicted on a trial held by a Presidency Magistrate may appeal to the High COURT if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.' Section 430 then provides that judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 (Appeal on behalf of Government from an original or appellate order of acquittal) and Chapter XXXII (which includes Section 432-442 and treats of reference and revision). There is, consequently, no escape from the position that the petitioner is not entitled to invite this Court to grant him leave to appeal to His Majesty in Council from the appellate judgment of this Court, either under Clause 41 of the Letters Patent or under any other provision, of the law. The view we take is supported by four decisions of this Court.

6. In *Chintamon Singh v. Emperor* 21 Ind. Cas. 470 : 18 C.L.J. 119 : 14. Cr. L.J. 598 an application for leave to His Majesty in Council was made in respect of an order of this Court which confirmed an order of the Court below under Section 118 of the Criminal Procedure Code. In the matter of *Chintamon Singh v. Emperor* 35 C. 243 : 12 C.W.N. 299 : 7 C.L.J. 177 : 7 Cr. L.J. 146, leave was refused, and Rampini, C.J., observed that the case did not fall within the scope of Clause 41 of the Letters Patent. A similar view was adopted in the case of *Ataur Singh v. Emperor* 21 Ind. Cas. 912 : 18 C.L.J., 121 : 14 Cr. L.J. 672. In a reference under Section 374 of the Criminal Procedure Code, and a connected appeal, Stephen, J., held that the sentence of death passed upon the appellants should be confirmed. D. Chatterjee, J., on the other hand, held that the appellants should be acquitted. The case was then referred under Section 429 to Carnduff, J., who

agreed with Stephen, J., that the guilt of the appellants had been established but held that the sentence should be one of transportation of life. The prisoners thereupon applied for leave to appeal to His Majesty in Council. The application was refused. Jenkins, C.J., observed: 'We reject the application, not because we express any opinion on the merits, but because our only power to grant leave is under Clause 41 of the Letters Patent, and the present case does not come within that clause.' A similar course was adopted in *Thakur Madho Singh v. Emperor* (Unreported) where an application for leave to appeal to His Majesty in Council was presented against an order made in a Criminal Reference. Greaves and Walmsley, JJ., observed: 'We must reject the application as it does not come within Clause 41 of the Letters Patent which is the only clause Which gives the Court power to entertain appeals in criminal matters' (Privy Council No. 3 of 1916 in Criminal Reference No. 24 of 1915, unreported, decided on 19th January 1916). To the same effect is the decision in *Joges Chandra Sarkar v. Legal Remembrancer of Bengal* (Unreported) where an application for leave to appeal to His Majesty in Council was made on behalf of the accused who had been acquitted by the Sessions Judge of Tipperah on appeal from a conviction by the Deputy Magistrate of Chandpur but were on the 5th September 1919 convicted and sentenced to imprisonment by this Court as the result of an appeal preferred by the Government. The application was refused by Shamsul Huda and, Rankin, JJ. (Privy Council No. 41 of 1919 in Government Criminal Application No. 1 of 1919, unreported, decided on 30th September 1919).

7. Reference may in this connection be made to the decision of the Bombay High Court in *Reg. v. Reay* 7 B.H.C.R. 77 C.C. Lt. Reay, a European born British subject, was convicted by a Magistrate at Ahmedabad under Section 31 of the Bombay District Police Act, of driving in that city at night without sufficient lights and was fined one rupee. The District Magistrate of Ahmedabad entertained doubts as to the legality of the conviction and referred the case for the orders of the High Court. Gibbs and Sargent, JJ., pronounced elaborate judgments and held that the Bombay District Police Act was ultra vires in so far as it conferred criminal jurisdiction upon Magistrates, beyond the limits of the Presidency Town, over, British-born subjects. The consequence was that the conviction was annulled and the fine levied was restored to the accused: *Reg. v. Reay* 7 B.H.C.R. 6 C.C. The

Government Prosecutor thereupon applied for leave to appeal to Her Majesty in Council from the order of acquittal, and the question of the power of the High Court to grant leave was fully argued by the Advocate-General (Scoble) before Westropp, C.J., Gibbs and Melvill, JJ. The Full Bench rejected the petition. Sir Michael Westropp, C.J., observed that the decision which was impeached had not been made in the exercise of original criminal jurisdiction nor in a criminal case where a point of law had been reserved within the meaning of Clause 41 which seemed to refer to Clauses 25 and 26. The Chief Justice conceded that the question as to the scope of the powers of the Bombay Legislature, involved in the case, was of considerable importance, and one which it was desirable should be brought before the Tribunal of final resort. But he added that in a case so circumstanced as the one then before the Court, the Court, however willing, had no power to grant leave under Clause 41 the Letters Patent.

8. We are of opinion that the application now before us has been misconceived, that this Court has no power to grant leave to appeal to His Majesty in Council from the judgment and sentence pronounced in the appeal preferred by the petitioner. In saying this, we must not be understood as in any wise throwing doubt upon that judgment; in fact we have not formed any opinion upon the merits of the case and we say nothing as to the probable result, if an application should be made directly to His Majesty in Council for leave to appeal.

9. We may add finally that we are not unmindful that the application has been presented to this Court after the lapse of more than ninety days from the date of the judgment and sentence. The period of ninety days prescribed by Article 179 of the Schedule to the Indian Limitation Act is restricted by its terms to an application for leave to appeal, made by a person desiring to appeal to His Majesty in Council under the Code of Civil Procedure. We need not express a final opinion upon the question, whether, in such circumstances, the period applicable to the present application may not be that prescribed by Article 181, which ordains that all applications for which no period of limitation is provided elsewhere in the Schedule, may be made within three years from the date when the right to apply accrues. In any event, for reasons, already stated, the application must be refused and it is ordered accordingly.

