Thomas Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/884627

Court : Kolkata

Decided On : Feb-19-1926

Reported in : AIR1926Cal1203

Appellant : Thomas

Respondent : Emperor

Judgement :

1. This is an application by O.W. Thomas who is a prisoner in the Presidency Jail, for leave to appeal, after determination of his status, against his conviction and against the sentence passed on him by Mr. Justice B.B. Ghose presiding at the Fourth Criminal Sessions held in this Court in July 1925.

2. The prisoner was found guilty by a special jury of having committed an offence punishable under Section 471, and thereafter the learned Judge presiding at the Sessions sentenced him to undergo rigorous imprisonment for a period of two years. This was on the 27th July 1925.

3. The present application was not presented to the learned Acting Chief Justice till the 16th February 1926. The question, therefore, arose whether, if the appeal itself had been presented on the 16th February 1926, it would have been within time. Learned Counsel, who appears in support of the application, suggests that the only matter for our determination at this stage is one under Section 449, Sub-clause 1(c) read with Section 443, Sub-clause 1(a) of the Criminal Procedure, for

the determination of the status of the prisoner, and that the question of limitation does not arise on the present application. We are unable to agree with learned Counsel on this point, and we must examine the question whether the present application itself is on the facts of this case within time. An application such as the present one for the determination of the prisoner's status must necessarily precede an application for leave to appeal. There are, no doubt, three stages in cases of this description--(i) the question of the determination of the status of the prisoner, (ii) application for leave to appeal, and (iii) admission of the appeal itself. If, as will appear from the facts of this case, no application for leave to appeal can now be presented, inasmuch as the time to prefer an appeal has expired, the application for the determination of the prisoner's status so as to enable him to apply for leave to appeal must necessarily be out of time.

4. It appears to us that appeals under Section 449, Sub-clause 1(e), must be governed by Article 155 of the subdivision of the First Schedule to the Limitation Act That Article provides that:

Except in cases provided for by Articles 150 and 157, the period of limitation for an appeal to the High Court is 60 days from the date of the sentence or order appealed from.5. In this case, as appears from the date already mentioned, 60 days from the date of the sentence passed on the prisoner expired long ago; but learned Counsel for the applicant contends that Article 155 has no application to the facts of this case, inasmuch as it is an appeal to the High Court from an order or sentence passed by a Judge of this Court presiding at the Ordinary Original Criminal Sessions of this Court. It appears to us, however, that this contention has no substance in it.

6. When the Code of Criminal Procedure was amended in 1923 by the Legislative Assembly of India, the attention of the Legislature was drawn to the provisions of the Indian Limitation Act (see in this connexion Article 150-A of the Limitation Act), and while the Legislature introduced deliberately the amendments which were embodied in Act 12 of 1923, viz., the Criminal Procedure Code (Amendment Act) they did not choose to amend or modify in any way the provisions of Article 155 of the Limitation Act. The appeal that the prisoner seeks to file is an appeal to the

High Court in the words of Section 449 of the Criminal Procedure Code read with Section 443 of the Criminal Procedure Code, and there is, in our opinion, no reason whatsoever for thinking that Article 155 of the Limitation Act is only limited to appeals to the High Court from the Sessions Courts in the mofussil or from other. Courts from which appeals to the High Court lie direct and has no application to appeals like the present one. We, therefore, hold that appeals of this nature must be governed by Article 155 of the Limitation Act.

7. Now, as will appear from what has been stated above, if the prisoner wanted to file an appeal now, he would be out of time, It follows, therefore, that an application presented now for the determination of the status of the prisoner under Section 449, read with Section 443 of the Criminal Procedure Code, must necessarily be out of time.

8. In our opinion the application must fail on that ground alone; but learned Counsel has contended that in the case of Emperor v. Turner : AIR1925 Cal673 , although the prisoner was out of time as regards his appeal to this Court, the appeal itself was heard and determined by a Bench of two Judges of this Court. Now, we have sent for the record in the case of Emperor v. Turner : AIR1925 Cal673 , and it appears to us, on examination of the record in that case, that the appeal of the prisoner Turner was not out of time; it was presented within time as laid down in Article 155 of the Limitation Act, after allowing time for obtaining copies of the necessary documents in that case.

9. Although, in our opinion, the present application is out of time, we have, however, examined the merits of the application itself. The only material paragraph is para. (2) in affidavit of Marie Thomas, the wife of the prisoner, sworn on the 4th January 1926. In our opinion, the statements contained are purely hearsay, and they are insufficient to enable us to determine the status of the prisoner as toeing that of a European British subject, There are really no materials in the affidavit itself in support of the statements made in para. (2) thereof. We have not had produced before us either the baptismal certificate of the grandfather or the certificate of marriage of the grandfather, which is alleged to have been celebrated in 1861. Attention has been drawn to the provisions of Section 32 of the Indian

Evidence Act. Before we can apply Section 32 of the Indian Evidence Act, there must be statements in the affidavit itself free from all inherent weaknesses. We are not satisfied that fuller and sufficient particulars could not have been procured by the deponent of the affidavit, and in this view of the matter we must hold that it has not been shown to us satisfactorily that the status of the prisoner is that of a European British subject.

10. The result, therefore, is that this application must be dismissed on both the grounds stated above.