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SECRETARY OF STATE FOR INDIA IN COUNCIL v. SONKALI

The view taken in the Patna High Court is also the view taken by the learned Chief Justice of the Lahore High Court in *Basant Kuar* v. *Chandulal* (1).

This being our view, the order of the learned Subordinate Judge allowing the opposite party, Musammat Sonkali, to appeal as a pauper, dated the 30th of November, 1932, should be set aside. We order accordingly, set aside that order and send back the case to the learned Subordinate Judge at Jaunpur and direct him to hear the respondent if he appears and the Government Pleader and after hearing them to pass such orders as may be in accordance with law. We make no order as to costs.

MISCELLANEOUS CRIMINAL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice King

HAIDARI BEGAM *v.* JAWAD ALI SHAH*

1934
January, 4

Criminal Procedure Code, section 491—Order not appealable under Letters Patent—Appeal—Letters Patent, clause 10—Costs—Costs of appeal can be awarded though no question of costs could arise on the original matter.

No appeal lies under clause 10 of the Letters Patent of the Allahabad High Court (as amended in 1919) from an order passed upon an application made under section 491 of the Criminal Procedure Code, inasmuch as the order is made in the exercise of criminal jurisdiction.

The High Court can make an order awarding the costs to the respondent of such an appeal, which purported to have been filed under clause 10 of the Letters Patent, though it might be that no question of costs could arise in the original proceeding which was on the criminal side.

Sir *Tej Bahadur Sapru* and Messrs. *S. M. Husain* and *Kalim Jafri*, for the appellant.

Messrs. *Muhammad Ismail* and *Masud Hasan*, for the respondent.

*Appeal No. 34 of 1933, under section 10 of the Letters Patent.

(1) A.I.R., 1929 Lah., 514.

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MUKERJI and KING, JJ.:—This is an appeal which purports to have been brought under clause 10 of the Letters Patent of this Court under the following circumstances. A minor, Mazhar Ali Shah, is the child of Syed Jawad Ali Shah as the father and Mst. Haidari Begam as the mother. A dispute arose between the father and the mother as to the custody of the minor. An application was made before this Court under section 491 of the Criminal Procedure Code by Mst. Haidari Begam against Syed Jawad Ali Shah, and it prayed that Mazhar Ali Shah should be brought before the court and delivered to the applicant. That application was heard by one of the learned Judges of this Court and was dismissed on the 20th of September, 1933. The present appeal is against that order.

A preliminary point is taken by Mr. *Ismail*, the learned counsel for the respondent Syed Jawad Ali Shah. It is to the effect that no appeal is maintainable under clause 10 of the Letters Patent. Briefly, his argument is as follows. Clause 10 of the Letters Patent of the Allahabad High Court allows an appeal from a judgment of a single Judge of the Court provided such judgment is not, *inter alia*, "in the exercise of criminal jurisdiction." It is urged on behalf of the respondent that the order was passed by the learned single Judge in the exercise of criminal jurisdiction. We have to consider whether this contention is right. Mr. *Ismail* argues that section 491 of the Criminal Procedure Code allows an application to be made before the High Court in respect of a person residing within the limits of the appellate criminal jurisdiction of the court. Then, Mr. *Ismail* points out that the provision under which the application was made is to be found in the Criminal Procedure Code, and further he points out that the High Court which is to exercise the jurisdiction invoked under section 491 is defined in section 4(*j*) of the Criminal Procedure Code as "the highest court of criminal appeal or revision for any local area." If the

learned single Judge of this Court acted as the High Court, it is urged, he must have acted as a court of criminal appeal or revision. If this argument be sound the order complained of was passed "in the exercise of criminal jurisdiction" within the meaning of clause 10 of the Letters Patent of this Court.

As against this argument the learned counsel for the appellant has argued that it matters little whether the order was passed in the exercise of criminal jurisdiction or not, that the matter was essentially of a civil nature and, therefore, an appeal should be allowed to be maintained. It was further argued that the mere fact that the provision relating to the production of a person is contained in the Criminal Procedure Code was by itself not conclusive. The learned counsel relied on several cases decided by the Madras and the Calcutta High Courts. It is conceded by learned counsel for the parties that no direct decision of this Court is available on the point. We shall now proceed to consider the cases which were cited by the learned counsel for the respondent in support of his argument. He conceded that he has got no direct decision in his favour, but he contends that in three cases, at least, the Calcutta High Court has held that the power given under section 491 of the Criminal Procedure Code is exercised on the criminal side of the court.

It will be remembered that the clause relating to an appeal in the Letters Patent of several High Courts underwent a change in the year 1919. Before that year, the material words which prohibited an appeal ran as follows: "not being a sentence or order passed or made in any criminal trial." The change that was brought about by the amendment of 1919 has already been quoted by us, and the material words now are as follows: "in the exercise of criminal jurisdiction." This change should be borne in mind in reading the several decisions to be noticed later.

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The cases relied on by Mr. *Ismail* are all cases decided after the amendment of 1919. In *Rameswar* v. *Emperor* (1) occurs the following sentence: "The High Court, which by section 491 is invested with certain powers, is defined by section 4(*j*) to mean 'the highest court of criminal appeal or revision for any local area'." This sentence implies that the learned Judges who decided the case thought that an application under section 491 was to be dealt with by a Bench constituted to hear criminal matters. It was pointed out in that case that it was also possible that a single Judge hearing criminal cases might hear an application under section 491 of the Criminal Procedure Code. The point that directly arose before their Lordships was whether a bail bond which had been cancelled by a learned single Judge of the Court sitting as the sessions court could be restored by a Bench hearing criminal appeals or revisions. As already stated, this case is no direct authority for the proposition which arises before us, but it certainly does indicate that the power to be exercised under section 491 is a power to be exercised on the criminal side of the jurisdiction of the Court.

The next case is that of *Subodh Chandra Roy* v. *Emperor* (2). The passages relied on by Mr. *Ismail* are to be found at pages 324 and 325 of the report. The matter before the court was being heard by a criminal Bench, as the heading of the report shows, and WALMSLEY, J., makes the following remark at page 324: "It appears to me that the Amending Act of last year, Act XII of 1923, (amending the Criminal Procedure Code) made such a great change that the rules framed under the Code as it stood before the amendment, and the practice that formerly obtained, have now become out of date, and in my opinion the terms of section 491 of the Criminal Procedure Code as it now stands give this Bench jurisdiction to entertain and dispose of the

(1) A.I.R., 1928 Cal., 367 (368). (2) (1924) I.L.R., 52 Cal., 319.

application." It appears that the practice in the Calcutta High Court before the Amending Act XII of 1923 was passed was that the application was made on the original criminal side and not before a Division Bench hearing criminal matters. MUKERJI, J., at pages 324 and 325 expressed himself to the same effect.

The last case relied on by Mr. *Ismail* is that of *Girindra Nath Banerjee* v. *Birendra Nath Pal* (1). The relevant passage is at page 752. It runs as follows, in the judgment of RANKIN, C.J.: "In my judgment the right to the relief sought in this case would have been solely under the Criminal Procedure Code. This would have been an exercise of criminal jurisdiction and no appeal would lie under clause 15 of the Letters Patent." This quotation shows that the learned CHIEF JUSTICE was of opinion that an application under section 491 would be on the criminal jurisdiction of the High Court and in view of the amendment of section 15 of the Letters Patent of the Calcutta High Court no appeal would be competent.

Sir *Tej Bahadur Sapru,* appearing on behalf of the appellant, has relied on five cases. Three of these were decided before the amendment of the Letters Patent in 1919, and two subsequently to the amended Letters Patent.

The first case is that of *In the matter of Narrondas Dhanji* (2). The question there related to the custody of a minor, and the point to be decided was whether an appeal was maintainable against the order of a learned single Judge of the High Court under the Letters Patent. At page 558 the learned Judges remark as follows: "We think that this order of discharge (of the rule) was a judgment within the meaning of the words in clause 15 of the Letters Patent, 1865." It will be remembered that before the amendment the material words in clause 15 of the Letters Patent which prohibited an appeal were, "not being a sentence or order passed

(1) (1927) I.L.R., 54 Cal., 727. (2) (1890) I.L.R., 14 Bom., 555.

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or made in any criminal trial." Now, an order passed on an application under section 491 was not an order in any criminal trial and was not a sentence, and therefore obviously an appeal was maintainable.

This case was followed in *In the matter of Horace Lyall* (1) which is a Full Bench decision. At pages 293—295 MACLEAN, C.J., is reported to have said:

"In dealing with the question whether an appeal does or does not lie, we must first consider whether the decision of Mr. Justice STEVENS was a 'judgment' (not being a sentence or order passed or made in any criminal trial) within the meaning of section 15 of the Letters Patent. In my opinion the decision was certainly a judgment . . . It is contended by the learned Advocate General that the appeal provided for by section 15 of the Letters Patent is confined to judgments passed in civil cases, and that there is no appeal under this section from any judgment passed in any criminal matter, or by a Judge exercising the ordinary original criminal jurisdiction of the court . . . For the appellant, on the other hand, it is contended that the expression 'judgment' must mean every judgment which is not a sentence or order passed or made in any criminal trial, and that the order in the present case dismissing the application was not one made in a criminal trial . . . It is clear that by making his application before Mr. Justice STEVENS the applicant regarded it as one made in a criminal proceeding, and in this he would appear to be right . . . I do not see why, in the present case, we should not construe section 15 literally, and upon the best consideration I can give to this part of the case, I think the argument of the appellant should prevail, and that an appeal will lie."

It is clear from the sentences quoted above that the learned CHIEF JUSTICE considered that although the matter before STEVENS, J., was a criminal one, an appeal was competent because the order was not passed in a criminal trial. BANERJEE, J., in the same case at page 301 is reported to have said: "Nor can it be said that the order comes within the exception in clause 15, for it is not a 'sentence or order passed or made in a criminal trial'." It is evident that the Full Bench allowed an appeal to

(1) (1902) I.L.R., 29 Cal., 286.

be maintained, although the proceeding was of a criminal nature, on the ground that an appeal was permitted, and that an appeal was prohibited in a criminal matter only when it arose out of a criminal trial.

The third case decided before the amendment of the Letters Patent in 1919 is that of *Raja of Kalahasti* v. *Narasimha Nayani Varu* (1). This case does not throw any greater light than the two previous cases already quoted.

Coming to the decisions given after the amendment, we have got two cases. One is *Mahomedalli Allabux* v. *Ismailji Abdulali* (2). In this case, originally an application was made under section 491 of the Criminal Procedure Code in the year 1926, which is a year falling after the Criminal Procedure Code was amended in 1923. It was discovered that two of the three minors were residing outside the local limits of the criminal appellate jurisdiction of the High Court. An application therefore was made inviting the High Court to exercise its jurisdiction under its Charter of 1823 and for issuing a writ of *habeas corpus*. It will therefore be noticed that the appeal was entertained, not in spite of the fact that the application was under section 491 of the Criminal Procedure Code, but because the application was one for issue of a writ of *habeas corpus* and section 15 of the Charter of the Bombay High Court did not stand in the way of the maintenance of an appeal. At page 619 the following sentence occurs in the judgment of MCLEOD, C.J.: "However that may be, I do not think that it can be said that the order of the Judge directing a writ of *habeas corpus* to issue was an order made in the exercise of criminal jurisdiction'." This case is therefore quite distinguishable from the case before us.

The last case is that of *Satya Narain Mohata* v. *Emperor* (3). In this case it appears that the learned

(1) (1907) 17 M.L.J., 158. (2) (1926) I.L.R., 50 Bom., 616.
(3) (1927) I.L.R., 55 Cal., 858.

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Judges of the criminal appellate Bench, in entertaining the appeal before them, had to construe the rules framed by the court under the Letters Patent of 1865. It does not appear that the learned Judges discussed the amendments brought about in 1923 (Criminal Procedure Code) and 1919 (of the Letters Patent) except in the last paragraph of their judgment. The following occurs in that paragraph: "It may be noticed that so far as appeals from applications under section 491 of the Code are concerned, the Letters Patent of 1865 was amended in 1919, so as to prohibit any Letters Patent appeal in a case of criminal jurisdiction, and since 1923 section 491 itself has been drastically altered. It may well be that these legislative changes make it necessary for the Court to bring these rules up to date. I desire to make it quite clear that nothing that I have said touches in any way upon any question as to what rules should be made. *I am concerned only with the correct interpretation of the rules as they are.*" It is important to note that the case before the court was *not* an appeal under clause 15 of the Letters Patent of the Calcutta High Court, but it was a criminal appeal arising out of a sessions trial on the original side. The question to be decided was whether a vakil could represent the appellant. It was held that he could not, in view of the then existing rules.

Considering the entire law on the point and the authorities before us, we are of opinion that the present appeal which purports to have been filed under section 10 of the Letters Patent of the Allahabad High Court is not maintainable. It is accordingly dismissed.

As regards the question of costs, it is urged on behalf of the respondent that if the matter arose out of an application made on the criminal side of the High Court, no costs should be allowed. It may be that in the original proceedings the question of costs could not arise, but the present proceedings are in the nature of

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an appeal which purports to have been filed under section 10 of the Letters Patent of this Court and we do not see any reason why we should be debarred from awarding costs. We hold that costs may be awarded by this Court and we direct that the appellant shall pay the costs of the respondent in the appeal. For the purpose of taxation we fix the counsel's fee at Rs.250. Counsel for the respondent is permitted to file his certificate of fees in the course of today.

MISCELLANEOUS CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice King

ATMA RAM (APPLICANT) *v.* BENI PRASAD AND OTHERS (OPPOSITE PARTIES)*

1934 *January*, 5

Civil Procedure Code, order XLV, rule 13—Stay of proceedings in suit pending decision of appeal to Privy Council from an order—Jurisdiction—Civil Procedure Code, section 151—Inherent powers—Government of India Act, 1915, section 107—Powers of superintendence—Staying suit pending in lower court.

Order XLV, rule 13 of the Civil Procedure Code has no application where a party applies for the stay of proceedings in the suit in the court below, as distinct from the stay of execution of a decree, pending the decision of an appeal to the Privy Council from an order in the suit; and the High Court has no jurisdiction, therefore, under that rule to stay the proceedings in such a case.

Nor is there an inherent jurisdiction in the High Court to make such an order of stay, i.e. to direct courts subordinate to it to proceed in a particular manner. Section 151 of the Civil Procedure Code does not confer any jurisdiction on the court which did not already exist. It merely preserves the inherent powers of the court which it may possess. Varieties of inherent jurisdiction are well recognized, and new categories cannot be invented. Ordinarily such a power would be limited to its jurisdiction to deal with proceedings pending before it and would not include a wide jurisdiction over inferior courts.

*Application in Privy Council Appeal No. 36 of 1933.