

FULL BENCH (CRIMINAL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Dunkley.

MA MYA KHIN AND ANOTHER

v.

MAUNG PO HTWA AND ANOTHER.*

1933

May 15.

Criminal Procedure Code (Act V of 1898), ss. 145, 148 (3), 423 (1)—Magistrate's decision under s. 145—Omission to order costs—"Incidental order"—High Court's power in revision to order costs.

An order for costs under s. 148 (3) of the Criminal Procedure Code is an order incidental to an order for possession under s. 145. Where a Magistrate has given his decision under s. 145, but has failed to make any order for costs under s. 148 (3), the High Court in revision has power to make an order for the payment of the costs of such proceedings.

Mehi Singh v. Mangal Khandu, I.L.R. 39 Cal. 157; *Veerappa Naidu v. Avudayammal*, I.L.R. 48 Mad. 262—discussed.

Tun Aung for the applicants. S. 148 (3) of the Criminal Procedure Code expressly empowers a Magistrate who passes an order under s. 145 to award costs to the successful party. If he fails to do so the High Court in its revisional powers can make any consequential or incidental order that may be just or proper in the circumstances. See s. 423 (1) (d).

[PAGE, C.J. Are costs consequential upon or incidental to a criminal case?]

Proceedings under ss. 144 and 145 of the Criminal Procedure Code are proceedings of a quasi-civil nature, and that is why express provision for the costs incurred in such proceedings is provided for by s. 148 (3).

The decision in *Veerappa Naidu v. Avudayammal* (1) was to the effect that the award of costs cannot

* Criminal Reference No. 47 of 1933 arising out of Criminal Revision No. 68-B. of 1933 of this Court.

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be regarded as incidental to or consequential upon a revision petition to the High Court ; but in the order of reference in that case it is pointed out that the High Court may pass any order which the Magistrate himself could have passed. All that is claimed in the present case is that costs incurred by the applicant in the original Court should be awarded to him.

In *Mehi Singh v. Mangal Khandu* (1), a case under s. 250 of the Code, the Court drew a distinction between "consequential" and "incidental" orders.

A. Eggar (Government Advocate) for the Crown. S. 423 (1) (d) does not state clearly whether the consequential or incidental order is consequential upon or incidental to the Magistrate's order or the order of the appellate Court. The majority of the Judges in *Mehi Singh v. Mangal Khandu* (1) were of opinion that the appellate Court cannot put itself in the position of the trial Court, and make any order that may be consequential upon or incidental to the order of such trial Court ; the reason for so holding being that express provision was necessary therefor.

[PAGE, C.J. Did the Judges in *Mehi Singh v. Mangal Khandu* intend to lay down that an order for compensation under s. 250 is not in the nature of a consequential or incidental order ?]

That case may be distinguished from the present case, if need be, because all that the decision purported to lay down was that s. 423 (1) (d) only empowers the appellate Court to make any order which is consequential upon or incidental to its own order. If it were otherwise the amendment of the Code in 1923 could have made the intention of the Legislature clear.

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PAGE, C.J.—The question that has been propounded is :

“Whether, in proceedings under s. 145 of the Code of Criminal Procedure where the Magistrate who passed the decision has failed to make any order in regard to the cost of the proceedings, under sub-section (3) of s. 148 of the Code of Criminal Procedure the High Court in revision has power to make an order for the payment of the cost of such proceedings.”

On the 3rd of August, 1932, the Subdivisional Magistrate of Bassein passed an order under s. 145 of the Code of Criminal Procedure in which he declared that the applicants were entitled to possession of the land in dispute until evicted in due course of law. He did not, however, award any costs to either of the parties under s. 148 (3) of the Criminal Procedure Code. On the 12th of August, 1932, the applicants applied to the Subdivisional Magistrate of Bassein for an order that they be awarded their costs under s. 148 (3). Now, it so happened that between the 3rd of August and the 12th of August, 1932, the Subdivisional Magistrate who had passed the order under s. 145 had been transferred, and on the 12th of August the Magistrate to whom the application for an order for costs was made refused to entertain the application upon the ground that, as he was not the Magistrate who had passed the order for possession, he had no jurisdiction under s. 148 (3) of the Criminal Procedure Code to pass any order for costs in connection with the proceedings under s. 145. Thereupon the applicants filed an application in revision to the Court of Session, Bassein, from the order of the 3rd of August, 1932, in which they claimed that in passing an order for possession without passing an order for costs the Magistrate had acted illegally or with material irregularity. The learned Additional Sessions Judge of Bassein referred the case to the High Court with

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a recommendation that an order for costs should be passed. The application for revision was heard by my brother Dunkley, who has referred for our determination the question now under consideration.

S. 148 (3) of the Code of Criminal Procedure runs as follows :

“When any costs have been incurred by any party to a proceeding under this Chapter, *i.e.* (Chapter XII), the Magistrate passing a decision under s. 145, s. 146 or s. 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. Such costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable.”

Now, the jurisdiction which a Court possesses for purposes of revision must be expressly granted to it, and it is common ground that no authority has been expressly granted to the High Court in its revisional jurisdiction to award costs under s. 148 (3). Under s. 423 (1) of the Code of Criminal Procedure, however, an appellate Court in revision may :

“(c) in an appeal from any other order, alter or reverse such order ;

(d) make any amendment or any consequential or incidental order that may be just or proper.”

The question that falls for determination, therefore, is whether an order for costs under s. 148 (3) is “consequential” or “incidental” to an order for possession under s. 145. If it is, the Court in revision has jurisdiction to pass an order for costs under s. 148 (3), otherwise it has not. Whether an order for costs under s. 148 (3) is an order consequential or incidental to an order for possession under s. 145 must be determined upon a construction of the terms of these two sections. *Primâ facie* an order awarding costs under s. 148 (3) would appear to be “incidental” to an order for possession under s. 145, because unless

an order under s. 145 is passed the Court has no jurisdiction to pass an order for costs under s. 148 (3). It is unnecessary to determine whether such an order is "consequential" to or upon an order for possession under s. 145; the question is not free from difficulty, and I refrain from expressing an opinion upon it. But I am firmly of opinion that such an order is "incidental" to an order for possession under s. 145. What does "incidental" mean? In Murray's Dictionary "incidental" is defined as something "occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part;"

Now, it cannot be pretended, and it has not been argued, that an order for costs under s. 148 (3) forms an essential part of the order for possession; but, in my opinion, both as a matter of law and of common sense, where the Legislature has enacted that when passing an order for possession under s. 145 the Magistrate is entitled to pass an order for costs under s. 148, the order for costs is "incidental" to the main order for possession. That must be so, I think, because it is an order which in all human probability will be passed in conjunction with the order for possession; and there can be no doubt that, if an application had been made to the Subdivisional Magistrate of Bassein who passed the order for possession that an order for costs should be passed in favour of the applicants, such an order would have been made. I am fortified in the view that I take of the construction of ss. 145 and 148 (3) by the decision of a Full Bench of the Madras High Court in *Veerappa Naidu v. Avudayammal* (1). In that case the question that fell for determination was whether in proceedings for revising an order

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passed by a Magistrate under Chapter XII of the Criminal Procedure Code the High Court had jurisdiction to pass an order in respect of the costs incurred at the hearing of the revisional proceedings before the High Court, and it was held in that case that the High Court possessed no jurisdiction to pass an order in respect of such costs. In the referring order in that case, however, Wallace J. observed ;

“ I am clear that the High Court, in revision, could pass any order which the Magistrate himself could have passed ; that is, the High Court could, in revision, direct the costs before the Magistrate himself to be paid by one party to another. But that is not the same thing as the High Court directing costs before it in revision to be paid by one party to another.”

In the opinion which was delivered by the Full Bench the learned Judges observed ;

“ Magistrates have power under s. 148 to direct by whom any costs incurred by parties in proceedings before them under Chapter XII are to be paid, but the costs referred to in this section are evidently the costs incurred in the magisterial proceedings. When the High Court sits in revision it is not exercising the powers of a Magistrate under this Chapter, and therefore the costs in the revision proceedings cannot be included under this head.”

On the other hand, our attention has been drawn to a decision of the Full Bench of the Calcutta High Court in *Mehi Singh v. Mangal Khandu* (1). The decision of the Full Bench in that case was a decision by the majority of the Judges who took part in it, and it appears from the record of the case that Jenkins C.J. did not sign the judgment, and did not assent to the reasoning upon which the decision was based.

Now, the question that arose in *Mehi Singh v. Mangal Khandu* (1), was whether the appellate

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Court in revision could pass an order awarding compensation to an accused person after his discharge or acquittal under s. 250 of the Code of Criminal Procedure. With all respect to the learned Judges who formed the majority of the Court I should have thought that the issue raised in that case was a simple one, namely, whether as a matter of construction an order for compensation under s. 250 of the Criminal Procedure Code was an order "consequential" or "incidental" to the order of discharge or acquittal. If it was, with all respect, I should have thought that the High Court would have possessed power to pass an order for compensation in the course of revisional proceedings against the order of the Magistrate. If it was not, *cadit questio*, for the appellate Court would clearly have no jurisdiction to order that compensation should be paid. I refrain from expressing any opinion upon the merits of the decision in that case, and I desire to reserve for a future occasion when s. 250 is under consideration the determination of the question whether an order awarding compensation under that section is an order "consequential" or "incidental" to the order of discharge or acquittal. With diffidence and respect, however, I am bound to say that I do not appreciate what was the *ratio decidendi* of *Mehi Singh v. Mangal Khandu* (1). It appears to me that the learned Judges who formed the majority of the Full Bench in that case drew no distinction between orders that are "consequential" and orders that are "incidental", and endeavoured to define as a *genus* what orders were "consequential" and "incidental" and what orders were not. It is, I think, inadvisable that an attempt should be made by the Court to define such terms as "consequential orders" and "incidental orders", for whether an order is a

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“consequential” or an “incidental” order depends upon the terms of the order under consideration in each particular case, and the circumstances in which it was made.

Now, in *Mehi Singh v. Mangal Khandu (1)*, the majority of the Full Bench observed that “consequential” or “incidental” orders must fall under one of two heads, either they were orders that were “the necessary complements to the main order passed without which the latter would be incomplete or ineffective (such are directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under s. 250”); or they were orders in respect of which the Court had been invested with express authority in that behalf by the Legislature. As to the first category laid down by their Lordships I have nothing to say except that I respectfully agree with the view that they took. But with respect to the second category of orders I confess that I feel some doubt as to what their Lordships intended to convey by the observations that they passed. In the course of the judgment the majority of the Full Bench observed ;

“The issue primarily before the Court is whether the accused has been proved to be guilty or not, and the question whether the complaint against him was merely frivolous or vexatious is another matter importing fresh considerations. The making of an award for compensation would, consequently, seem to need express authority, and an order therefore is not ‘consequential or incidental’ to an order of discharge or acquittal, unless the discharging or acquitting Court has *aliunde* power to make it.”

These observations, if I may say so with all respect, appear to be based upon an *argumentum in circulo*,

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namely, that the order under consideration was not an order "consequential" or "incidental" to the order of discharge or acquittal within the meaning of s. 423 (d) of the Criminal Procedure Code unless the discharging or acquitting Court had *aliunde* power to make it. But if "express authority" had been given to the Court to pass such an order, then, by reason of the Court being expressly vested by the Legislature with jurisdiction in that behalf the order became a "consequential" or "incidental" order. I confess that I do not feel able to appreciate the reasoning upon which this part of the judgment is based. Reading the judgment as a whole, however, I collect that the majority of the Full Bench intended to lay down that an order awarding compensation was not an order "consequential" or "incidental" to an order of acquittal or discharge under s. 250, and, therefore, that neither the Magistrate, nor the appellate Court would have any jurisdiction to pass such an order unless it had received express authority from the Legislature in that behalf. Their Lordships then proceeded to hold, as I read the judgment, that whereas express legislative authority to pass such an order was conferred on the Magistrate by s. 250, but no such statutory jurisdiction was confided to the appellate Court, the appellate Court had no jurisdiction to pass an order for compensation under s. 250.

For the purpose of disposing of the question referred, however, it is unnecessary to determine whether, having regard to the section of the Criminal Procedure Code then under consideration, in our opinion, *Mehi Singh's* case was correctly decided.

I am of opinion that the question that falls for determination in the present case is free from difficulty. Once it is held, as I think that it should

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be held, that an order for costs under s. 148(3) is an order "incidental" to an order for possession under s. 145, it follows, in my opinion, that such an order may be passed by the High Court in revision of an order passed by a Magistrate under s. 145, Criminal Procedure Code.

For these reasons I would answer the question propounded in the affirmative.

DAS, J.—I agree.

DUNKLEY, J.—I am of the same opinion as my Lord the Chief Justice. In this case, there were two applications for revision before the Sessions Court, one by the respondents praying that the order granting possession of the land to the applicants be set aside, and one by the applicants praying that they be awarded their costs of the proceedings before the Magistrate. The learned Sessions Judge rejected the former application and referred the latter application to this Court, but, nevertheless, this Court in revision now has *seizin* of the whole case and can adjudicate on its merits. It must be conceded that, if the Magistrate had, in addition to directing that the applicants be put into possession of the property, specifically declined to make an order in regard to the costs, it would have been open to this Court in revision, while upholding the first part of his order, to reverse the second part and grant the applicants their costs. This is plain from the provisions of ss. 435 and 439 (1) of the Code of Criminal Procedure, read together. And it would certainly be contrary to good sense to hold that the authority of the High Court to deal with the costs is dependent on whether the Magistrate has or has not given consideration to that question. With all due respect,

I still feel that the *dictum* of Wallace J. in *Veerappa Naidu v. Audayammal* (1), that the High Court in revision can pass any order which the Magistrate himself could have passed, probably goes too far, but I must, with the utmost respect, dissent from the proposition laid down by the learned Judges of the Calcutta High Court in *Mehi Singh's case* (2), that clause (d) of s. 423 (1) of the Code of Criminal Procedure does not amplify the powers of appellate Courts, but merely modifies the exhaustive character (in a restrictive sense) which s. 423 (1) would otherwise apparently have. If that be so, then there was no reason for the retention of clause (d) after the amendments of the Code made in 1923, for the particular sections mentioned by the learned Judges, as conflicting with s. 423 (1), were then amended so as to avoid any such possible conflict. If I may say so, with the greatest respect, it seems to me that the classification by the learned Judges of all "consequential or incidental" orders into two clearly defined classes cannot in the nature of things be comprehensive. Their first class includes only consequential orders, *i.e.*, orders which are the logical result of the main order in the case and necessary to render it effective. An incidental order is something different; it is an order which is liable or likely to follow as a result of the main order, as distinguished from one that necessarily follows; and in neither of the two classes have such orders been included.

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