1945

Basdeo Agarwalla v. *King Emperor.*

Spens C. J.

The appeal must accordingly be allowed and we direct the case to be remitted to the High Court, and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

Appeal allowed.

Agent for the Appellant: *N. R. Bose.*
Agent for the Respondent: *B. Banerji.*

BISWANATH KHEMKA

v.

THE KING EMPEROR.

1945

April 4, 9.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Government of India Act, 1935, s. 256—Appointment of Magistrate of a Province as Additional Presidency Magistrate—Consultation with Chief Presidency Magistrate, whether necessary—Omission to consult—Validity of appointment.

Section 256 of the Government of India Act, 1935, does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not, at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the district in which the person concerned is working at the time when the recommendation is made, or the Chief Presidency Magistrate if the person concerned is at that time working under him.

The direction laid down in s. 256 is directory and not mandatory, and non-compliance with it would not render an appointment otherwise regularly and validly made, ineffective or inoperative.

APPEAL from the High Court of Judicature at Calcutta. Criminal Appeal No. I of 1945.

The material facts of the case are set out in the judgment.

1945. April 4. *B. Banerji* and *N. K. Sen* for the respondent raised a preliminary objection. The appeal is

1945

Biswanath Khemka v. *King Emperor.*

not maintainable as the order appealed against is not a judgment or 'final order' within s. 205 of the Constitution Act. No appeal lies from an interlocutory order: *Venugopala Reddiar and Another* v. *Krishnaswami Reddiar*(1). The word 'judgment' does not include judgment in a criminal case. Nor does it cover an interlocutory order: *per* Sulaiman J. in *Hori Ram Singh* v. *The Crown*(2). A decision on the question of jurisdiction of the Court is not a decision relating to the rights of the parties. The finality must be in relation to the rights of the parties to the suit: *Abdul Rahman and Others* v. *Cassim & Sons*(3).

Sardar Sant Singh for the appellant. The order in this case is a judgment; at any rate it is a final order. The objection as to jurisdiction goes to the root of the case. Section 369, Cr. P. C., affords a test. In *Hori Ram Singh's* case (4) Gwyer C.J. and Varadachariar J. did not fully agree with Sulaiman J.

Their Lordships heard counsel on the merits of the case.

Sardar Sant Singh. Under s. 256 of the Constitution Act no appointment as a Presidency Magistrate can be made without consulting the Chief Presidency Magistrate. The fact that the person appointed was working as a Magistrate in another Province does not make such consultation unnecessary. As s. 256 confers a power, the provisions relating thereto must be treated as mandatory. (Counsel referred to Maxwell's Interpretation of Statutes, 8th ed., p. 320; Criminal Procedure Code, s. 18; and Joint Parliamentary Committee Report, paragraphs 340, 341.)

B. Banerji. Under s. 241 (1) (b) the appointing authority is the Governor. The correct interpretation of s. 256 is that if the person appointed is working in a district it is the District Magistrate of that district who is to be consulted. There is nothing on the record to show that the District Magistrate was not consulted. In any event the direction as to consultation is only directory. Omission to consult cannot invalidate the

(1) [1943] F.C.R. 39 at pp. 48-49.
(2) [1939] F.C.R. 159.
(3) A.I.R. 1933 P.C. 58.
(4) [1939] F.C.

appointment: *Montreal State Railway Company* v. *Normandin*(1).

1945

Biswanath Khemka v. *King Emperor.*

Cur. adv. vult.

April 9. The judgment of the Court was delivered by

Zafrulla Khan J.

ZAFRULLA KHAN J.—The appellant along with six other persons is being tried before an Additional Presidency Magistrate, Calcutta, on charges of hoarding and profiteering under r. 81 (4) read with r. 122 of the Defence of India Rules. During the course of the trial he applied to the Chief Presidency Magistrate, Calcutta, for transfer of the cases from the file of the trying Magistrate. One of the grounds urged in support of the application for transfer was that the appointment of the Magistrate was irregular and therefore ineffective, as it had not been made in accordance with the conditions prescribed by s. 256 of the Constitution Act, and that, therefore, the Magistrate had no jurisdiction to try these cases or indeed any case at all. The application was dismissed by the Chief Presidency Magistrate. The appellant thereupon moved the Calcutta High Court in revision with no better result. This appeal was preferred against the order of the Calcutta High Court supported by the requisite certificate under s. 205 of the Constitution Act.

The sole question argued before us related to the interpretation and effect of s. 256 of the Constitution Act which runs as follows:

"No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to, or the withdrawal of any magisterial powers from, any person save after consultation with the district magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be."

It was contended that the appointment of the Additional Presidency Magistrate trying these cases was made without consulting the Chief Presidency Magistrate, and was therefore ineffective and inoperative. In our judgment, the section does not direct consultation

(1) [1917] A.C. 170.

1945

Biswanath Khemka v. *King Emperor.*

Zafrulla Khan J.

with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not at the time when the recommendation is made, working as a Presidency or Additional Persidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the district magistrate of the district in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at that time working under him. In this case the services of the magistrate concerned were borrowed from another Province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. In these circumstances we are of the opinion that the consultation prescribed by s. 256 should have been made with the district magistrate of the district in which the magistrate was working in his own Province at the time when the question of his appointment as Additional Presidency Magistrate, Calcutta, came under consideration. There is nothing on the record to indicate that such consultation did not take place. There is thus no foundation for the contention that the direction contained in s. 256 was not complied with.

We are further of the opinion that the direction laid down in s. 256 is directory and not mandatory, and that non-compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative. It seems to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendations for the grant of magisterial powers: see *Montreal State Railway Company* v. *Normandin*(1).

A preliminary objection was taken on behalf of the Crown that the appeal was incompetent inasmuch as the order of the High Court appealed against was not a judgment or final order within the meaning of s. 205

(1) [1917] A.C. 170 at pp. 174, 175.

1945

Biswanath Khemka v. King Emperor.

Zafrulla Khan J.

of the Constitution Act. Reliance was in support of the objection placed on the observations of Sulaiman J. in *Hori Ram Singh* v. *The Crown*(1). Reference was also made to *Venugopala Reddiar and Another* v. *Krishnaswami Reddiar*(2). As we have come to the conclusion that there is no substance in the appeal on the merits, we do not consider it necessary to deal with the preliminary objection. No other question was sought to be raised before us.

The appeal fails and is dismissed.

Appeal dismissed.

Agent for the Appellant: *Ganpat Rai.*

Agent for the Respondent: *P. K. Bose.*

1945

April 9, 10, 11, 12, 16, 17, 18, 19. May 4.

SECRETARY OF STATE FOR INDIA

v.

I. M. LALL.

[SIR PATRICK SPENS C.J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Government of India Act, 1935, s. 240—Civil Services (Classification, Control and Appeal) Rules, rr. 50, 55—Member of Indian Civil Service appointed before Part III of Constitution Act came into force—Dismissal by Secretary of State—Validity—Power of Secretary of State to act on behalf of Crown—Duty to give reasonable opportunity to show cause against action proposed to be taken—What constitutes reasonable opportunity—Omission to comply with s. 240, sub-s. (3)—Validity of dismissal—Remedy of dismissed servant—Declaration—Damages.

Held, by the full Court (SPENS C. J., VARADACHARIAR J. and ZAFRULLA KHAN J.)—The power of the Secretary of State for India to dismiss after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act itself. Even if there be nothing in the Constitution Act indicating such a power in the Secretary of State, an exercise of the power of dismissal by the Secretary of State is the constitutional manner in which the powers of the Crown should be exercised.

(1) [1939] F.C.R. 159. (2) [1943] F.C.R. 39.