

State of West Bengal

Vs

Hemant Kumar Bhattacharjee and Others

Criminal Appeal No. 207 of 1959

(Syed Jafar Imam, K. Subha Rao, N. Rajgopala Ayyangar, J.R. Mudholkar JJ)

27.11.1962

JUDGMENT

AYYANGAR, J. –

This is an appeal by special leave preferred by the State of West Bengal against the judgment of the High Court of Calcutta dated 9.5.1958 in Criminal Revision Case No. 1128 of 1957.

The three respondents are alleged to have committed the offences with which they are charged in September 1950 and though 12 years have passed by since then no step has been taken beyond the issue of notices to them. This delay has been caused by conflicting views which have been entertained from time to time about the Court having jurisdiction to try the respondents - whether it is the Court of the Chief Presidency Magistrate, Calcutta, or the Judge of the Special Court constituted under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949. The judgment of the High Court now under appeal has held that the judge of the Special Court had no jurisdiction to proceed with the trial but that the Chief Presidency Magistrate before whom a charge-sheet in respect of the offences alleged against the respondents had been laid in January 1951 had alone jurisdiction to try the case. The State which has come up in appeal against this order contends that on a construction of the relevant statutes and other matters to which we shall refer, it was the Special Judge who had the jurisdiction to try the case.

To appreciate the contentions raised in the appeal it would be necessary to state at least in broad outline the several stages of this proceeding.

The first respondent was at the relevant date, which was some time towards the latter part of 1950, the Sub Postmaster in a post office in the town of Calcutta. The Special Police Establishment, Calcutta, received information that in certain post offices in Calcutta, including that in which the first respondent was the Sub Postmaster, systematic misappropriation of Government monies was taking place by, inter alia, the affixing of used postage stamps. The police devised a plan by which they had a foot-constable appointed as a Packer in the Sub Post Office in order to watch the happenings there, and thereafter on information furnished by him a raid was conducted in September 1950 and the first respondent as well as respondents 2 and 3 who were respectively the Money Order clerk and the Registration clerk in the said Post Office were arrested.

It is not necessary to set out the details of the charges against the accused except to state that they included offences under s. 409 and s. 120-B/409 of the Indian Penal Code but we shall proceed to narrate briefly the matters that transpired which have contributed to keep these proceedings pending these 12 years. After the police completed the investigation, a charge-sheet was submitted on 16-1-

1951 to the Chief Presidency Magistrate, Calcutta, charging the three accused with offences under s. 120-B read with s. 409 of the Indian Penal Code etc. and s. 5(2) of the Prevention of Corruption Act. The case was registered in his Court as Crime Case No. 136 of 1951 and the Magistrate took cognizance of the offence but before he proceeded any further a notification was issued by the Government of West Bengal on 1-2-1959 under s. 4(1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (which for convenience we shall refer to as the Act) allotting the case for trial to the Special Judge presiding over the Special Court at Alipore. When the Magistrate was informed of this allotment, he passed an order on 16-2-1951 in these terms :

"Under Government Notification dated 1-2-1951 this case has been allotted to the Special Judge, Alipore. The accused are to appear before him on 5-3-1951 at 10-30 A.M. Send this record to the Special Judge in the meantime."

Before the Special Judge took any step in proceeding with the case, the first respondent made an application before the High Court under Art. 226 of the Constitution impugning the constitutional validity of s. 4(1) of the Act on the ground that it was violative of Art. 14 of the Constitution and that for this reason the Special Judge had no jurisdiction to hear the case, but that the case had to be disposed of by the regular Criminal Courts. This petition as well as certain others which raised the same point were heard by a Full Bench of the Court and by judgment dated 4-4-1952 the Writ Petition filed by the first respondent was allowed and s. 4(1) of the Act was struck down as unconstitutional. The learned Judges held that the Special Judge had no jurisdiction to try the case and they directed : "That the accused be held as under-trial prisoners pending a retrial according to law".

The West Bengal Government thereupon amended the enactment seeking to bring it in accordance with the Constitution and for that purpose Ordinance 8 of 1952 was promulgated on April 9, 1952 that being also the date on which it was to commence to operate. Immediately thereafter the charge-sheets against the respondents were re-filed in the Court of Special Judge at Alipore, who issued summons on June 2, 1952 to the respondents to appear before him. The first respondent thereupon preferred a revision petition to the High Court praying that the proceedings before the Special Judge and the summons issued by him be quashed. It is unnecessary to state the grounds of this petition, but what is of relevance for the present purpose is that before the petition came on for hearing the Ordinance lapsed, and was moreover replaced by West Bengal Act 12 of 1952 which re-enacted the provisions of the Ordinance and was to come into force on the expiry of the Ordinance. Neither the Ordinance nor the permanent legislation which replaced it contained any provision providing that on the lapse of the Ordinance anything done or any action taken or commenced in the exercise of powers conferred by the Ordinance shall continue in force after its expiry. Besides the negative feature just now pointed out, Act 12 of 1952 further contained a provision in s. 12 reading :

"Section 12. Pending proceedings in other courts not to be affected :-

Nothing in this Act shall apply to any proceedings pending on the date of the commencement of the West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance, 1952, in any court other than a Special Court."

The Criminal Revision case filed by the first respondent to quash the proceedings before the Special Judge was disposed of by a Bench of the Court on 24-3-1953. The learned Judges held that in the absence of a provision in the Ordinance (8 of 1952) or in the Act replacing it (Act 12 of 1952) to keep alive things done or action taken or proceedings had in exercise of powers conferred by or

under the Ordinance, there was a termination of proceedings commenced under the Ordinance, and so the summons issued by the Special Judge on 2-6-1952 during the pendency of the Ordinance as also the proceedings before him were held to have become dead on the expiry of the Ordinance and so were able to be quashed. Either because of the view which they entertained on the point just now mentioned and that was considered sufficient to dispose of the case, or because their attention was not drawn to the terms of s. 12 of Act XII of 1952, the learned Judges did not pronounce upon the effect of that provision on the jurisdiction of the Special Judge.

Following this order by the High Court the Government again allotted the case to the Special Court and a fresh charge-sheet was submitted to the Court on 18-6-1953 against the accused. The first respondent again questioned the jurisdiction of the Special Judge and invoked the revisional powers of the High Court. The precise points that he urged on this occasion in support of this petition are not very clear but nothing turns on them because the revision was withdrawn and was dismissed by an order dated 24-5-1954.

When, however, after the termination of the revision before the High Court the Special Judge issued notice to the accused and commenced proceedings, the first respondent filed a petition before him questioning his jurisdiction to try the case on the ground that by reason of the provision contained in s. 12 of Act XII of 1952, it was the Chief Presidency Magistrate alone that had jurisdiction over the case and that it could not legally be allotted by the State Government to the Special Judge for trial. The Special Judge over-ruled this objection and dismissed the petition. The respondent challenged this order by a Criminal Revision Petition filed in the High Court. This petition was dismissed on 12-1-1956. Several points were urged before the learned Judges which have been dealt with in the judgment, but what is relevant to the present context is the one relating to the applicability of s. 12 to the facts of the present case. The learned Judges held that s. 12 did not bar the jurisdiction of the Special Court because those proceedings had been initiated long after 9-4-1952 by the allotment by the State Government notified in the Gazette in December 1952 and the fresh charge-sheet filed in pursuance thereof on 18-6-1953. In this connection, the learned judges pointed out that the original allotment to the Special Judge in February 1951 had been quashed by the High Court by its order dated 4-4-1952 with the result that on the day the Ordinance came into force (9-4-1952) there was no proceeding pending before the Special Judge, and that the proceedings subsequently initiated by allotment and charge-sheet were fresh proceedings which were not hit by the terms of s. 12.

Against this order of the High Court the first respondent filed a petition for special leave to appeal to this Court urging, inter alia, that the construction by the High Court of s. 12 the Act of 1952 was erroneous but this Court dismissed the petition stating that it did not feel called upon to interfere at that stage and adding : "The petition is dismissed without prejudice to the petitioners raising this point in a proper Court at a proper time."

Purporting apparently to act on the observations of this Court in dismissing the petition the respondents objected to the jurisdiction of the Special Judge as being barred by s. 12 when the matter went back again to him and filed a formal petition..... raising the objection. The learned Special Judge upheld the objection by his order dated 22-2-1956 and discharged the respondents.

The Government were apparently not inclined to question the correctness of this order and they did not move the High Court in that behalf. Thereafter, a charge-sheet was presented to the Chief Presidency Magistrate which could only be on the basis that the Government accepted the position that when the allotment to the Special Judge and his assumption of jurisdiction was quashed by the High Court on 4-4-1952, the proceedings initiated before the Chief Presidency Magistrate by a

complaint filed on 16-1-1951 continued to be pending before him. When the Chief Presidency Magistrate directed the issue of process against the respondents to take their trial before his Court, the first respondent filed a revision to the High Court objecting to his jurisdiction. The revision petition was disposed of by the High Court on 19-12-1956 by the petition being allowed. The reason for the decision can be gathered from the following passage in the judgment of Das Gupta, J., (as he then was) :

"But for the decision of this Court on 24-3-1953, I would have no hesitation in holding that the consequence of s. 12 of the Act was that the different allotments whether to Mr. J.C. Lodh's Court or to Mr B.C. Ghose's Court were wrong and neither of these Courts had any jurisdiction in the matter, so that the correct position in law would be that the case was still pending in the Chief Presidency Magistrate's Court, the position that was reached after this Court's order passed on April 4, 1952. I cannot see any way however of escaping from the conclusion that by its decision of the March 24, 1953, this Court must be taken to have held that Sri J.C. Lodh (Special Judge) had jurisdiction in the matter. It seems clear that the effect of s. 12 of the Act was not raised before the Court and the argument proceeded on the basis that Mr. Lodh's Court had jurisdiction, the only point being whether having had jurisdiction under the Ordinance, the jurisdiction continued after the Ordinance came to an end and the Act took its place."

The Rule was accordingly made absolute and the order of the Chief Presidency Magistrate directing the issue of process against the respondents was set aside.

Thereafter, the Government again took action under s. 4 of the Act by allotting the case to a Special Judge and a fresh charge-sheet was filed in that Court. The respondents again objected to the jurisdiction of the Special Court. That objection being over-ruled the matter was for the sixth time brought up to the High Court by a Criminal Revision Petition. The learned Judges of the High Court accepted the petition and quashed the orders of the Special Judge and held that by reason of the order of the High Court dated 4-4-1952 quashing the allotment as well as the charge-sheet filed before the special judge, the proceedings were pending before the Chief Presidency Magistrate on 9.4.52. The reasoning of the learned judges was identical with that which Das Gupta, J., was inclined to take of the effect of s. 12 to the facts of the case, but which he considered he was precluded from giving effect to, by reason of an earlier judgment of the Court. It is the correctness of this order of the High Court that is challenged by the State in this appeal. Learned counsel for the appellant principally urged before us four grounds :

- (1) Properly understood, the legal effect of the order of the High Court dated 4-4-1952 was not to revive the proceedings in the court of the Chief Presidency Magistrate, so as to be pending there on 9-4-52.
- (2) The order of the High Court dated 4-4-52 quashing the proceedings before the Special Judge on the ground that s. 4 was unconstitutional as violative of s. 14 of the Constitution was wrong since the law as there laid down has been disapproved by this Court in its decision in *Kedar Nath Bajoria v. The State of West Bengal* [(1954) S.C.R. 30.].
- (3) That there was not identity between the proceedings initiated before the Chief Presidency Magistrate by the complaint and charge-sheet in January, 1951, and the

proceedings before the special judge which have been directed to be quashed by the learned judges of the High Court and in consequence of s. 12, have been wrongly applied by the learned Judges.

(4) That the earlier decisions of the High Court dated 12-1-56 and 19-12-1956 were correct and besides bound the Court and so should have been followed.

Before proceeding with these arguments in detail, we can dispose of the second contention very shortly. This argument proceeds on a fundamental misconception, as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4-4-1952 had ample jurisdiction to decide the case and the facts that their decision was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court dated 4-4-52 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not.

The other points urged by the learned counsel may be considered under two heads :-

1. What is the effect of the order of the High Court dated 4-4-1952 ? By quashing the proceedings before the special judge, did it or did it not automatically re-invest the Chief Presidency Magistrate with jurisdiction over the case and the offence of which he had taken cognizance ? If it has this result, then on the terms of s. 12, the special judge would have no jurisdiction, unless by reason of later decisions binding on the parties, effect cannot be given to this position.
2. Are the present proceedings which have been initiated by an order of allotment passed by Government in respect of which a charge-sheet was filed on 18-6-1963 hit by the terms of s. 12 ?

So far as the first point is concerned, we are in entire agreement with the view that Das Gupta, J., was inclined to take and to which he would have given effect but for the earlier decision of that Court in April, 1953. With reference to this matter, it would be convenient if the effect of the order dated 4-4-52 was considered first and then the further question as to whether the later decisions of the High Court precluded effect being given to that construction of the order which we are disposed to take. The position stands thus :

A charge-sheet was filed by the police before the Chief Presidency Magistrate who had jurisdiction to entertain the complaint and proceed with the enquiry and trial. He took cognizance of the offence and thus became seized of the proceedings. It was at that stage that the Government issued the notification under s. 4 of the Act allotting the case to the Special Judge at Alipore and directed a trial by him. That order of allotment and transfer of the proceedings was held to be unconstitutional by the High Court and that decision has become final with the parties. The result would therefore be as if there had never been any allotment of the case to the Special Judge and therefore there had been no assumption of jurisdiction by him, the allotment being non est. It is true that when the Chief Presidency Magistrate was appraised of the

notification of the Government, allotting the case to the Special Judge, he directed by his order dated 16-2-51 a despatch of the records from his court to that of the Special Judge. That was obviously merely a ministerial or a mechanical order giving effect to an order of Government which did not exist in the eye of the law and that order cannot have any significance or effect on his previously existing jurisdiction over the case. When the order under s. 4 of the Act was quashed by the High Court on 4-4-52 its effect in law was, we are satisfied to restore the position as it was before the allotment, namely, the revival of the jurisdiction of the Chief Presidency Magistrate over the case of which he had in compliance with law taken cognizance. It appears to us to be clear therefore that on the terms of s. 12 the proceeding against the respondent was pending in the court of the Chief Presidency Magistrate on 9-4-52, the date of the commencement of the Ordinance.

The question next to be considered is whether any of the proceedings which took place subsequent to the order of the High Court dated 4-4-1952 affect this situation. The allotment to the special judge, in May, 1952, during the continuance of the Ordinance having been set aside by the High Court by its order dated 24-3-1953 on the ground that on its strength the proceedings could not be continued after the lapse of the Ordinance, left the position as it was before that allotment. Next we have the allotment in December, 1952, and a fresh charge-sheet on its basis before the special judge on 18-6-53. No doubt the legality of this allotment was upheld by the High Court by its order dated 12-1-1956 when the learned Judges declined to quash the proceedings before the special judge and that judgment has become final. As against this however it must be pointed out that this judgment of the High Court was brought up by special leave and we have already extracted the observations of this Court in dismissing the petition for special leave which appear to favour the view that the respondents were at liberty to raise again objections to the jurisdiction of the Special Judge. No doubt if the respondents had to rely on these observations alone, the plea that the judgment of the High Court continued to bind the parties to the proceedings by reason of the dismissal of the petition for leave under Art. 136, would be available to the State. But the matter does not rest here. The first respondent notwithstanding the judgment of the High Court, but apparently encouraged by the observations of this Court while dismissing his Special leave petition, raised an objection before the Special Judge to his jurisdiction based on s. 12 of the Act and that judge upheld it and directed the discharge of the accused indicating as well that the inquiry into and trial for the offences should be by the Chief Presidency Magistrate. This order of the Special Judge dated 22-2-56 was accepted by the State by not challenging it in revision before the High Court and consequently it must be held that this later order supersedes the High Court's order dated 12-1-1956.

We have next to consider the situation arising from the quashing by the High Court by its order dated 19-12-56 of the proceedings before the Presidency Magistrate when he attempted to exercise jurisdiction over the case acceding to the prayer of the State that the proceedings before him be revised, and it is this which in our opinion is crucial for the disposal of this appeal. Das Gupta, J., who spoke for the Court recorded two findings. (1) That unhampered by previous decisions he would have held that the case was pending before the Chief Presidency Magistrate on 9-4-52 so as to exclude because of s. 12 of the Act, jurisdiction to try being vested in the Special Court; (2) that the previous decision of the Court dated 24-3-53 precluded him from giving effect to this opinion, since that decision had impliedly if not expressly decided that the Special Court had jurisdiction over the case. Giving effect to the previous decision the Court quashed the proceedings before the Magistrate.

From what we have stated earlier, as regards the effect of the decision dated 24-3-53, it would be

seen that the learned judges had not in their order dated 19-12-56 taken into account the events which transpired after the order of the High Court dated 24-3-53, and in particular the effect as between the parties of the order of the Special Judge dated 22-2-56 upholding an objection to his jurisdiction, becoming final by no challenge being made to it by the State. Properly viewed that nullified the effect of the earlier decisions of the High Court taking expressly or impliedly the view that the special judge had jurisdiction over the case. But what is relevant to the present purpose is not whether the opinion expressed in the decision of the High Court dated 19-12-56 is correct or otherwise, but whether it does not constitute a binding adjudication between the parties as to the forum in which the trial could competently take place. No doubt the learned judges added in their judgment that they expressed "no opinion on the question whether it was still possible for the State to institute legal proceedings against the petitioner on the facts alleged". But this in our opinion does not detract from the express statement that the effect of the previous decision of 1953 was that the proceedings were pending before the special judge subsequent to 9-4-52. The position that emerges therefore is that though the effect of the order of the High Court dated 4-4-52 was to leave the proceedings against the accused pending before the Chief Presidency Magistrate, so as to attract the ban enacted by s. 12 of the Act, still by the decision of the High Court dated 19-12-1956 which is binding as between the parties, the special court had been held to have jurisdiction over the case, sec. 12 being held not to be in the way. There is thus no escape from the position that effect has to be given to this state of affairs and that the respondent can derive no advantage by canvassing before us the correct result of the order of the High Court dated 4-4-1952 unhampered by the subsequent decisions which are binding on him. We, therefore, reach the conclusion that the special court must be deemed to have jurisdiction over the case, and that the learned judges whose judgment is now under appeal were in error in reversing the order of the Special Judge.

In this view it would not be necessary to consider the other submission of the learned Counsel for the State but as the same was pressed before us with earnestness we shall express our opinion on it. We need hardly add that this discussion is on the basis that the effect of the order of the High Court dated 19-12-56 may be put aside.

The second point urged by learned Counsel for the State may be formulated thus :

Assume, that a proceeding was pending in the court of the Chief Presidency Magistrate on 9-4-52. That however does not preclude the State Government from initiating fresh proceedings in respect of the same offences against the accused and allotting that case for trial to the Special Judge under s. 4(2) and from filing a fresh charge sheet based thereon. It was this that was done when the present proceedings were initiated on 23-7-57 after the failure of the proceedings before the Chief Presidency Magistrate by reason of the order of the High Court dated 19-12-1956.

A point in this form was not urged before the High Court but we do not consider that the appellant is precluded from raising it before us. We however consider that it cannot prevail. There is no dispute that the charge against the accused is in respect of the same offences regarding which proceedings were initiated before the Chief Presidency Magistrate in January 1951. West Bengal Act XII of 1952 enacted a new s. 4 in the parent Act of 1949 and by the second sub-s. enabled the State Government to effect a distribution amongst the Special Courts of cases falling within the Schedule, such cases to be tried by the Special Courts. This is the provision under which the allotment to the Special Judge has been made in July 1957. But s. 12 however enacts that nothing in the Act shall apply to any proceedings pending on the date of the commencement of the Ordinance, i.e., on 9-4-52. If effect has to be given to the prohibition contained in s. 12, it must necessarily be held that where a proceeding is pending on 9-4-52, there cannot be an allotment of that case to a

Special Judge under s. 4. We consider that to hold that there could be an allotment of a case in respect of an offence for which a complaint before a Magistrate is pending on 9-4-52, would be a plain evasion of the bar contained in s. 12. The manifest object of s. 12 appears to be that where a proceeding is pending in the ordinary courts the power of the Government to allot the trial for that offence to a special court constituted under s. 2 of the Amending Act and the allotment to the judge of that court under sec. 4 shall not be effected, but that those proceedings shall continue and be concluded before the ordinary courts. We consider that to accede to the arguments that notwithstanding the prohibition enacted in s. 12 the State Government could still allot a case which deals with the same offence, arising out of identical facts against the same accused to a Special Judge would be a patent infringement of the terms of s. 12 and in derogation of the protection which that provision was meant to confer. The mere fact that a different number is given to the allotment or it is effected on a later date is wholly irrelevant for considering whether there is or is not a substantial identity between the proceedings which were pending before the Chief Presidency Magistrate on 9-4-52 and the case which was the subject of future allotment. It was not in dispute that the case allotted to the special court related to the same occurrence, charged the same accused with substantially the same offences as were involved in the proceedings in the case before the Magistrate. The appellant therefore gains no advantage by a fresh allotment in July 1957 or the earlier allotments on which reliance was placed. It is precisely such an allotment that is within the prohibition in s. 12 and the protection which that section affords is not to be nullified by considering the fresh allotment as the initiation of a fresh proceeding. This point has therefore no substance and is rejected.

The result is that the appeal is allowed and the order of the High Court set aside.

We hope that with the decision of this Court, there will be an end to the objections as to forum and the case will be proceeded with expeditiously by the judge of the Special Court we have held has jurisdiction to proceed with the matter.

Appeal allowed.

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