ALLAHABAD HIGH COURT

Durga Prasad Khosla

Vs.

State of U.P

S.C. Criminal Case No. 1 of 1959
(A.P. Srivastava, J.)

03.03.1959

ORDER

A.P. Srivastava, J.

1. This is an application under Article 134 of the Constitution praying that the case be certified as a fit one for appeal to the Supreme Court.

2. It is not necessary to give the facts in great detail. It will be sufficient to mention that a complaint was filed against the applicant charging him with several offences including one under section 193 Indian Penal Code. Against the order filing the complaint the applicant went up in appeal to the Sessions Judge under section 476-B of the Criminal Procedure Code. The Sessions Judge took the view that the order appealed against was wrong because section 476 Criminal Procedure Code, under which the complaint had been ordered to be filed had been impliedly overruled by section 479-A of the amended Criminal Procedure Code. He therefore allowed the appeal and set aside the complaint so far as the offence under section 193 Indian Penal Code, was concerned. Against that order an application in revision was filed in this Court and the question whether section 479-A of the Criminal Procedure Code had impliedly repealed section 476 of the Code in respect of all cases of witnesses giving or fabricating false evidence in judicial proceedings was raised. The question was referred to a Division Bench and the Division Bench was of opinion that it should be answered in the negative. As a result of that decision the order of the Sessions Judge was set aside and the case was sent back to him for being heard on merits. It is against this last mentioned order sending the case back to the Sessions Judge for being considered on merits that the present application under Article 134 (1) (c) of the Constitution has been made and it is contended that as the question is of substantial importance the case should be certified as a fit one for appeal to the Supreme Court.

3. A preliminary objection is raised on behalf of the opposite party and it is contended that no certificate can be granted as prayed because the order against which an appeal is sought to be preferred in the Supreme Court is not a final order as contemplated by Article 134. In support of

the preliminary objection learned counsel for the opposite party relies on two cases of the Federal Court reported in *S. Kuppuswami Rao v. The*

King[1]*,* and *Sridhar Achari v. The King*[2]*,* These cases, it is pointed out, had been followed subsequently in three other cases by the High Courts, viz., *Sobha Singh v. Jai Singh*[3]*, State v. I. Apprehen*[4]*,* and *Radhey Shiam v. The State*[5]*,* By way of analogy it is also pointed out by the learned counsel for the opposite party that the order sought to be appealed against is similar to an order against the order of remand in a civil case where the main dispute has been left for being decided by the trial Court. It is urged that such an order would not have been a final order for the purposes of Article 133 of the Constitution or section 109 of the Civil Procedure Code. Reference is made in this connection to the cases of *V.M. Abdul Rahman v. D.K. Cassim and Sons*[6]*,* and *Moolji Jaitha, and Co. v. Khandesh Spinning and Weaving Mills Co. Ltd*[7]*.,*

4. The learned counsel for the applicant did not seriously contest the correctness of the proposition that if the case has not actually been decided by the Court but has been left for being decided by the lower Court the order cannot be said to be a final order. His contention is that so far as the application in revision filed in this Court is concerned it has been finally disposed of and therefore for the purposes of Article 134 of the Constitution the order must be held to be a final order. He relies in support of this contention on the cases of *State of Orissa v. Madan Gopal*[8]*,* and *Smt. Inda Devi v. Board of Revenue, U. P. Allahabad*[9]*,*

5. The question therefore is whether the order of this Court allowing the application in revision was really a final order. The words "final order" have been used in Article 133 as well as Article 134 of the Constitution. They were used in section 109 of the Civil Procedure Code and section 205 of the Government of India Act, 1935 also. The term should therefore be interpreted in similar way whether it is used in connection with a civil case or a criminal case. That was the view taken in the cases of S. Kuppuswami Rao. AIR 1949 FC 1 (Supra) by the Federal Court where their Lordships observed :

> "The words 'judgment or final order' used in Section 205(1) impart jurisdiction to the Federal Court to entertain appeals both in civil and criminal matters. As the same words give jurisdiction to the Court in both classes of cases, it will be improper to construe them in a certain way when applicable to appeals in civil matters and give them a wider meaning when considered in connection with appeals from criminal proceedings."

6. As the Privy Council observed in the case of V.M. Abdul Rahman, AIR 1933 PC 58 (supra) the test of finality is whether the order "finally disposes of the rights of the parties." Whore the order does not finally dispose of those rights, but leaves them "to be determined by the Courts in the ordinary way", the order is not final. That the order "went to the root of the suit, namely the jurisdiction to entertain it", is not sufficient. The finality must be a finality in relation to the suit. If, alter the order, the suit is still a live suit in which the rights of the parties have still to be

determined no

[1] AIR 1949 FC 1
[2] AIR 1949 FC 11
[3] AIR 1954 Him Pra 45
[4] AIR 1954 Tran Coc 250
[5] AIR 1955 NUC (All) 4432
[6] AIR 1933 PC 58
[7] AIR 1950 FC 83
[8] AIR 1952 SC 12
[9] AIR 1957 All 116

appeal lies against it under section 109(a) Civil Procedure Code. The same test was applied by the Federal Court in the case of S. Kuppuswami Rao, AIR 1949 FC 1 (supra) where it was observed :

> "To constitute a final order it is not sufficient merely to decide an important or even a vital issue in the case, but the decision must not
> keep the matter alive and provide for its trial in the ordinary way."

This view was reiterated in the case of Sridhar Achari, AIR 1949 FC 11 (supra).

7. If we look at the matter, keeping the above test in mind, there can be no doubt that the order disposing of the application in revision cannot be considered to be a final order. The real dispute which arose in the case was whether the complaint for the offence under section 193 Indian Penal Code, was justified in the circumstances of the case and ought to have been filed. That question is yet to be decided and has been directed to be decided in the ordinary course. This Court only decided an important question of law which arose in connection with the question but in spite of that decision it is still open to the Judge to hold that the complaint should not have been filed. In that case the question which the applicant now seeks to raise before the Supreme Court will not arise at all.

8. The two cases relied upon by the learned counsel for the applicant appear to be clearly distinguishable. In the case of AIR 1952 Supreme Court 12 (supra) the appeal had been filed under Article 132 of the Constitution and it appears that in this respect the provisions of that Article are not identical with those of Article 133. Moreover, in that case the Supreme Court held that the writ of mandamus which had been issued really disposed of finally the case that was before the High Court and nothing further remained to be done in respect of the matter. It was on that basis that it was held that the order appealed against was a final order. In the case of Smt. Inda Devi, AIR 1957 Allahabad 116 (supra), also that writ petition filed in this Court under Article 226 of the Constitution had been dismissed on the ground that an alternative remedy was still open and the review application filed before the Board of Revenue had not till then been disposed of. It was therefore not a case of remand at all.

9. It therefore appears to me that the preliminary objection raised is well founded and must prevail. The present case is not really covered by Article 134 of the Constitution and it is therefore not open to this Court to certify the case to be a fit one for appeal to the Supreme Court. The application is consequently rejected.

Application rejected.