CALCUTTA HIGH COURT

Mehi Singh

Vs

Mangal Khandu

(Lawrence H. Jenkins, K.C.I.E., C.J., Woodroffe, Mookerjee, Carnduff and D. Chatterjee, JJ.)

06.09.1911

JUDGMENT

Lawrence H. Jenkins, K.C.I.E., C.J.,

1. The question referred to the Full Bench is whether an Appellate Court can order compensation such as is contemplated by Section 250 of the Code of Criminal Procedure, 1898.

2. Section 250, being confined by its terms to the Courts of Magistrates trying cases in the first instance, does not confer the requisite power. But it is suggested that Clause (d) of Section 423(1) does.

3. Section 423(1), which defines the powers of an Appellate Court in disposing of an appeal, begins by setting forth those powers in precise terms, and concludes with Clause (d), which enables it to " make any consequential or incidental order that may be just or proper."

4. Now, in a Criminal Court, this phrase cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as "consequential or incidental." Otherwise an Appellate Court, affirming, for instance, a conviction of kidnapping a woman, mightadd, and enforce, a direction that the offender should pay her, by way of maintenance, a monthly allowance. This can hardly be.

5. It would seem, therefore, that "consequential or incidental" orders within the purview of the provision, must fall under one or other of two heads.

6. First, there are orders which follow as a matter of course, being 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 realised from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under Section 250; and for these no separate authority is needed.

7. Secondly, there are orders which, though ancillary in character, require more than the support of a Criminal Court's inherent jurisdiction, and could not be passed without express authority.

8. An order mulcting a complainant to compensate an accused for having been frivolously or vexatiously charged seems to fall under the second head. It does not necessarily follow or arise out of an order of discharge or acquittal, and it is not, per se, an order "consequential or incidental" thereto. For 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 therefor is not "consequential or incidental" to an order of discharge or acquittal, unless the discharging or acquitting Court has, aliunde, power to make it. In an original Court it is, by virtue of Section 250, "consequential or incidental" to an order of discharge or acquittal made there; but it is not quoad a like order passed on appeal.

9. If this be so, then the clause can be relied upon only if it be sufficient to extend to an Appellate Court, to be exercised by it, mutatis mutandis, the special power given to an. original Magisterial Court alone by Section 250. But it falls short of this, and, so far as appears, it never occurred to the learned Judges who decided *Harichand v. Fakir Sadrudin*[1] that it could be appealed to in this connection. It does not, like Section 2 of the Supreme Court of Judicature (Jurisdiction) Act, 1894 (57 and 58 Vict., Clause 16), or Order XLI, Rule 33, of the Code of Civil Procedure, 1908, invest an Appellate Court with authority "to make any order which ought to have been given or made" by the Court below: nor does it, like Section 107 of the latter, confer upon Appellate Courts "the same powers" as Courts of original jurisdiction. It does not amplify the powers of Appellate Courts: but what it does is to modify the exhaustive character which, without it, Section 423(1) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, e.g., Section 517 or Section 522.

10. And, as the exercise of the power in question by an Appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned, that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worthwhile if, indeed, it did not think it actually inexpedient, to extend it to such a Court.

11. For these reasons, the majority of the Full Bench are of opinion that the answer to the question referred should be in the negative.

Cases Referred.

1(1901) 3 Bom. L.R. 841