Mohammad Illayas vs State Of Uttar Pradesh on 20 October, 1953

Equivalent citations: 1954CRILJ482, AIR 1954 ALLAHABAD 225

ORDER

Desai, J.

1. These are two applications in revision against an order passed by the Sessions Judge of Saharanpur dismissing the applicants' appeal under Section 476-B, Cr. P. C. on the ground that they were barred by time.

2. In proceedings under Section 476 of the Code of Criminal Procedure a Magistrate found on 27-9-1950 that it was expedient in the interests of Justice to file a complaint for the offence of section 193, I, P. C. which appeared to have been committed by them. What the learned Magistrate actually did was to write that he had seen the file and heard counsel for the parties, that a 'prima facie' case under Section 476 read with section 195, Cr. P. C. was made out and that a complaint would be made against the applicants for their prosecution under Section 193, etc. On the same date he made a complaint against them and it was sent to a court of competent jurisdiction.

The applicants filed an appeal under Section 476-B, Cr. P. C. against the finding of the learned Magistrate. The appeal was dismissed on 6-11-1951 by the Sessions Judge who held that the appeal should have been filed, not against the finding but against the making of the complaint. On 14-11-'51 the applicants applied for a copy of the complaint made against them. They got it on 24-12-51 and filed the appeal on 2-1-52. As by that date the appeal had become barred by time, they applied for extension of the period of limitation under Section 5 of the Limitation Act. The learned Sessions Judge dismissed their application and dismissed the appeal as barred by time.

3. Section 476 lays down that when a court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195(1) (b) or (c), it, may, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the court, and shall forward the same to a Magistrate of the First Class having jurisdiction.

Section 476-B lays down that any person against whom such a complaint has been made, may appeal to the court to which such former court is subordinate and the superior court may thereupon, direct the withdrawal of the complaint, If in a proceeding under Section 476, a court wants to have an inquiry made into an offence referred to in section 195(1) (to) or (c), it has to do two things. (1) to record a finding to the effect that it is expedient to have such an inquiry made and make a complaint thereof, and (2) to forward the complaint to a Magistrate having jurisdiction over the case.

It has not to pass any order; it has not to order any person to be prosecuted for the offence. It has not even to order that a complaint be made against him. It has simply to record a finding that it is expedient to make a complaint and then to make a complaint and forward it to a Magistrate having jurisdiction. An appeal can be filed by a person against whom a complaint has been made and not by a person against whom a finding has been recorded. Even if a court has actually said that a certain person be prosecuted for a certain offence, that gives no right to him to file an appeal against the "order". He can file an appeal only if a complaint has actually been made against him. If there is only a finding to the effect that it is expedient to make a complaint against him or if there is even an order to the effect that a complaint should be made against him, so long as no complaint has actually been made against him he has no right of appeal.

If the appeal is allowed the appellate court has to direct the withdrawal of the com-plaint. Unless a complaint has already been made, there can be nothing to be withdrawn. The appellate court is not required to set aside the finding about the expediency of making a complaint or the order, if any, made by the court, that the person be prosecuted. If in a proceed-big under Section 476 the court refused to make a complaint, the person who had applied for starting the proceeding under Section 476 has been given a right to file an appeal against the refusal and if it is allowed, the appellate court is required to make a complaint. The right of appeal has been given in such a case not to a person on whose application the court has refused to record the finding that it is expedient in the interests of justice to make a complaint, but to a person on whose application it has refused to make a complaint.

If the appeal is allowed the appellate court is not required to record a finding about the expediency before making a complaint. It is clear from these facts that It is not the recording of the finding about the expediency, or the non-recording of a finding about the expediency, that is the subject-matter of appeal; it is the making of, or the refusal to make, a complaint, that is the subject-matter of appeal. That is the matter which gives rise to an appeal and that is the matter to be dealt with by the appellate court. The recording of, or the refusal to record, a finding about the expediency does not give rise to a right of appeal and is not to be dealt with by the appellate court.

4. There are several authorities in support of what I have said above. One of the earliest cases is - 'Fitzholmes v. Emperor' AIR 1927 Lah 54 (A), in which Jailal J. accepted the contentions that section 476-B contemplates that an appeal is to be filed after a complaint has actually been made and not before";

and that - "an appeal is allowed not from the finding of the court that a complaint should be made but from the complaint itself.

That case was followed in - 'Labha Mal v. Wasawa Mal' 106 Ind Cas 584 (Lah) (B) and - 'Daga Devji v. Emperor' AIR 1928 Bom 64 (C). In the Bombay case Fawcett J. (with whom Mirza J. concurred) observed:

> An appeal in such a case is, in f act, one against the order of the court directing a complaint to be made. Under section 476 Criminal P. C., the court making the

complaint has 'to record a finding' that enquiry, etc., should be made; and this 'finding' clearly comes under the word 'order' in Article 154, Limitation Act. Section 476-B gives the person affected a right of appeal from this order, but only after the complaint has been actually made.

While I respectfully agree with the statement that the right of appeal accrues only after the complaint has been actually made, I find it difficult to accept that the finding itself is an "order" and that the appeal is from that finding or order and not from the making of the complaint. In -'Bamjan Ali v. Moolji Seeka and Co.' AIR 1929 Cal 521 (D), Rankin C. J. and Buckland J. laid down that "until a complaint has been made no appeal can be preferred" under Section 476-B. They followed - 'Fiteholmes v. Emperor', (A) and - 'Daga Devji v. Emperor', (C), Buckland J. also stated that though the order to be appealed against is that directing a complaint to be made, nevertheless, for the reasons stated and contrary to the usual rule, time does not begin to run until the complaint has actually been made.

Section 476, as already explained, does not require at all that there should be any order by the Court directing a complaint to be made. Buck-land J. has not explained how the finding about the expediency is to be treated as an order. He has assumed that there would be an order directing a complaint to be made, but the law does not require such an order. In - 'Naraindas v. Emperor' AIR 1943 Sind 157 (E), Lobo J. treated the recording of a finding and the making of a complaint as one act, an act distinct from that of forwarding the complaint to a Magistrate having jurisdiction. The question before the Court was whether limitation for an appeal runs from the date on which the complaint is made or the date on which it reaches the Magistrate having jurisdiction. In - 'Balgovind v. Jamnabai' AIR 1935 Nag 199 (P) the Judicial Commissioner's Court followed the cases of 'Fitzholmes (A)' and 'Daga Devji (C)'. In - 'K. C. Reddy v. Emperor' AIR 1930 Rang 201 (G) it was remarked that section 476-B does not say that an appeal has to be filed against the finding and that it has to be filed against the filing of the complaint.

5. The limitation for an appeal under Section 476-B is governed by Article 154 of the Limitation Act. The description of appeal -

under the Code of Criminal Procedure, 1898, to any court other than a High Court -

given in the first column of the Article applies to such an appeal when the complaint is made by a Court which is subject to the appellate jurisdiction of a court other than a High Court. There is no dispute on this score. The prescribed limitation is thirty days and it runs from the date of the sentence or order appealed from.

There is no "sentence or order" in a proceeding under Section 476. The appeal under Section 476-B is filed not from any "sentence or order" but from the making of a complaint. This Article 154 is the only Article that governs such an appeal and since there must be a starting point for the limitation of

thirty days, it must be held that the making of a complaint is the "sentence or order" within the meaning of the Article. In other words, the period of limitation starts from the date on which the complaint is made; it does not start on the date on which the finding is recorded or from the date on which the" complaint reaches the court of a Magistrate having jurisdiction to try it. In the cases of 'Fitzholmes (A)', 'Labha Mal (B)', 'Daga Devji (C)' and 'Ramjan Ali (D)' it was held that the limitation begins to run from the date on which the complaint is made. I respectfully differ from the view of Fawcett J. that the finding come under the word "order" in Article 154.

Actually neither the finding nor the making of complaint is an order. But one of them has to be given the meaning of "order" in order to give effect to the third column of the Article which has got to be applied, and there is no reason for treating the finding, and not the making of complaint, as the order, particularly when the appeal is preferred from the making of a complaint and not the finding. In the case of 'Narain Das (E)' it was held that the limitation runs from the date on which the complaint is signed and not that on which it reaches the Magistrate having jurisdiction. In - 'Balgovind v. Jamnabal', (P) the finding was recorded on 20-9-1934, the complaint was made on 6-10-1934 and the appeal filed on 5-11-1934 was held to be within time.

6. In the present case the complaint was made on 27-9-1950 and the appeal should have been filed on or before 27-10-1950 regardless of whether the finding about the expediency was of that date or earlier. The appeal, however, was filed on 2-1-1952. The applicants applied for extending the period of limitation under Section 5. They contended that the law was not clearly established that the appeal was to be filed from the making of a complaint and not from the recording of the finding. The previous appeal was within time but was dismissed because it was not from the making of the complaint but from the recording of the finding. Though no authority actually laying down that an appeal lies from the recording of a finding has been cited, there is no doubt there does exist some confusion on the point. Sometimes the confusion is created by the courts; instead of simply recording a finding about the expediency, they pass specific orders for the prosecution or for the making of a complaint.

The persons concerned are misled into thinking that the appeal is to be filed from those orders and not from the making of the complaint. Having regard to this confusion it can be said that the applicants acted in good faith in prosecuting their previous appeal from the finding and the period spent by them should be deducted when calculating the period of limitation. In any case the bona fides of the applicants would be a sufficient ground for ignoring the delay caused by their prosecuting the previous appeal. On 6-11-1951, when their appeal was dismissed they learnt that the appeal had to be filed from the making of the complaint. They spent little more than a month in obtaining a copy of the complaint. Under section 419 of the Code every appeal must be accompanied by a copy of the judgment or order appealed against.

This provision is general and governs all appeals whether they are preferred under Chapter XXXI or under Section 476-B. Strictly speaking, a complaint is not a judgment or order and an appeal under Section 476-B would not be required to be accompanied by a copy of the complaint. But the petition of appeal must be accompanied by some document. The complaint has been treated as a "sentence or order" within the meaning of Article 154, Limitation Act. Similarly, it can be treated as an "order"

within the meaning of section 419. Since the Article governs the limitation for an appeal from an order, the right to an appeal is governed by section 476-B, and the procedure for the filing of an appeal is governed by section 419, the complaint, which is treated as an "order" within the meaning of any of these provisions, must be treated as an "order" within the meaning of the other provisions also.

I would, therefore, hold that an appeal under Section 476-B must be accompanied by a copy of the complaint. The time that was spent by the applicants in obtaining the copy must be deducted when computing the period of limitation; section 12, Limitation Act, applies and the complaint is the "order" within its meaning also. They preferred the appeal as soon as they received the copy. They certainly spent eight days before applying for the copy. But they might not have been present in the Court of the Sessions Judge on 6-11-1951 when he dismissed their first appeal. Their counsel would have spent some time in informing them that they should file another appeal from the making of the complaint. I do not think that the period of eight days can be said to be too long.

There was thus a good case made out for extending the period of limitation under Section 5 and the learned Sessions Judge acted improperly in rejecting their application. He did not take into consideration all the circumstances. He dismissed their application simply saying that the period of limitation could not be extended. He did not explain why it could not be extended. He did not clearly say that no sufficient case was made out for extending it. It may be that he thought that he had no jurisdiction to extend it in which case he was quite wrong.

7. I allow this application, set aside the orders passed by the learned Sessions Judge and direct him to readmit the appeals to their original numbers and hear them on merits.