CRIMINAL MISCELLANEOUS

Before Shamsher Bahadur and Gurdev Singh, JJ.

JASWANT RAI,—*Petitioner*

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents*

Criminal Writ No. 129 of 1966

November 4, 1966

Code of Criminal Procedure (Act V of 1898)—S. 401(2)—Reference under—Object of—State government asking the opinion of the Court—Whether bound to accept such opinion—Constitution of India (1950)—Art. 226—Writ of mandamus *to direct the State Government to obtain the opinion of Court—Whether competent.*

Held, that sub-section (2) of section 401, Code of Criminal Procedure, is meant to cover cases where some additional evidence having a bearing on the conviction or sentence has come to light. The appropriate Government in such a case may ask for the opinion of the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion "as to whether the application should be granted or refused, together with his reasons for such opinion". Such an opinion is to be asked for when the appropriate Government is moved for the suspension or remission of a sentence.

Held, that the power of remission is contained only in sub-section (1) of section 401 of the Code, which precedes sub-section (2). This can only be construed to mean that the Court is required to give an opinion once a reference is made to it. The power of remission is still controlled by sub-section (1) and even after the opinion has been obtained from the Court, the appropriate Government's power to remit a sentence can still be exercised only under sub-section (1). Sub-section (2) does not cast any duty on the Government to accept it. The remission of sentence being in itself discretionary, the exercise of discretion under sub-section (2) does not vest any legal right in any one to justify an invocation to the High Court for the issue of a writ of *mandamus* to enforce it.

Criminal Writ petition under Article 226 of the Constitution of India, read with section 561-A of the Code of Criminal Procedure praying that a writ, order or direction in the nature of Certiorari be issued to the respondent No. 1 to send the records of the case to this Hon'ble Court.

RAJINDER SACHAR WITH RAM MURTI VINAYAK, ADVOCATES, for the Petitioner.

CHETAN DASS DEWAN WITH MANMOHAN SINGH, ADOVCATES, for the Respondents.

ORDER

Shamsher Bahadur, J. —What really falls to be determined in this reference is whether the right to obtain an opinion of the Court under sub-section (2) of section 401 of the Code of Criminal Procedure is one which can be enforced by a writ of *mandamus*?

The relevant facts, as stated by Gurdev Singh, J., in his order of reference of 18th of August, 1966, are indisputable and may briefly be set out. Jaswant Rai petitioner, a goldsmith of Ludhiana along with two others —Ram Dulara and Pritam Singh—was convicted on 29th of June, 1960 by a magistrate under sections 457 and 380 of the Indian Penal Code for having committed on the night between 9th and 10th of September, 1959 a theft of papers from the Income Tax Office, Ludhiana, and sentenced to two years' rigorous imprisonment on each count. The conviction as well as the sentence were affirmed in appeal by the Sessions Judge, but in a revision petition, while the conviction was upheld, the sentence was reduced to rigorous imprisonment for one year in each case by the High Court. The matter was agitated again by way of two separate appeals by the petitioner and Ram Dulara. On 3rd of March, 1964 the appeals were dismissed by the Supreme Court. The petitioner, after his conviction was maintained by the Supreme Court, but before his arrest, applied to the State Government for remission of his sentence under section 401 of the Code of Criminal Procedure. As the petitioner had not surrendered himself, his application was dismissed under the proviso to sub-section (6) of section 401 which says that no petition for remission by a person sentenced "shall be entertained, unless the person sentenced is in jail * * * *". The petitioner then surrendered to the jail authorities on 16th of August, 1965 and on that date his wife moved an application for the suspension of his sentence till "the final decision by the Supreme Court on the reference from the State Government." The State Government then passed an order suspending the sentence of the petitioner pending a reference which was made to the Supreme Court on 29th of September, 1965. The State Government made the reference because it was represented to it that some additional evidence bearing on the case had come to light.

It is important at this stage to set out the provisions of sub-sections (1) and (2) of section 401 dealing with suspension remission and commutation of sentences:—

> "401.(1) When any person has been sentenced to punishment for an offence, the appropriate Government may at any

time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists."

Before the reference was made, the Punjab Government on 16th of August, 1965 suspended the sentence of the petitioner and directed his release on his furnishing security for ten thousand rupees with one surety "for immediate surrender if, as a result of reference to the Supreme Court, his sentence is not remitted or is only remitted partially."

The Registrar of the Supreme Court, in response to this reference, wrote to the State Government on 4th of December, 1965 that "their Lordships have carefully considered the question as to whether reference should be made to the Supreme Court by the appropriate Government in matters falling under section 401 (2) of the Code of Criminal Procedure, and they have come to the conclusion that in such matters the Supreme Court *need not and should not* be consulted." The matter remained in a state of suspended animation till 16th of July, 1966 when the Home Secretary to the State Government asked for the file which was submitted to him by the Deputy Sercretary on 2nd of August, 1966. On 3rd of August, 1966 the Home Secretary recommended "the cancellation of the order of the suspension of the petitioners sentence in view of the Supreme Court having declined to give any advice in the matter of remission". The Governor of the Punjab who had assumed the functions of the State Government on behalf of the President, accepted the recommendation on 6th of August, 1966.

The petitioner moved this Court on 6th of August, 1966 under article 226 of the Constitution and section 561-A of the Code of Criminal Procedure for the issue of directions "in the nature of

certiorari to the respondent (the State of Punjab) to send for the records of this case" and to declare the recommendation of the Home Secretary of 3rd of August, 1966 to be illegal, void and *mala fide* and for the issue of a *mandamus* to the State Government to send the case to the High Court under section 401 (2) of the Code of Criminal Procedure for its opinion. Gurdev Singh, J., before whom this writ petition came for hearing, referred this case on 18th of August, 1966 for decision by a Division Bench, and the questions, which were considered of importance, are set out in the referring order as follows:—

(1) Whether the State Government, having decided to refer a case to the Court under the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure, is competent to rescind that order subsequently?

(2) Whether a writ of *mandamus or certiorari* can be issued against such an order?

(3) Whether the impugned order was *male fide*?

After hearing the arguments addressed by Mr. Sachar for the petitioner and Mr. Chetan Dass Dewan for the respondent-State, we are of the opinion that it is not necessary to consider the entire gamut of the controversy raised in the three questions enumerated above, and, as I indicated in the beginning, the fundamental question to be answered is whether the State Government, having once exercised its discretion to ask for an opinion of the Court under sub-section (2) of section 401 of the Code of Criminal Procedure, can be called upon by a writ of *mandamus* to obtain it?

Before dealing with this crucial question, reference may be made to the argument of the learned State counsel that the decision of the Sate Government to ask for an opinion of the Court can be recalled at any time. As is clear from the language of sub-section (2) of section 401, the appropriate Government has a discretion, whenever it is moved so to do, to "require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion". Mr. Sachar has very strenuously urged that the discretion having been exercised, the opinion must be sought from the High Court, the Supreme Court having declined to do it. Mr. Dewan has submitted that the Supreme Court having declined to entertain the reference and having

said that it "need not and should not be consulted", the State Government has discharged whatever obligation devolved on it. It is further submitted by the State counsel that even if the Government had exercised its discretion to require the Court to give its opinion, it may be recalled at any time. The Supreme Court has not given any opinion in the matter, which was submitted by the State Government, and it cannot acceptably be urged that a mere transmission of the reference to the Supreme Court was sufficient compliance of sub-section (2) of section 401. The refusal to entertain the reference does not mean its termination, and, truly speaking, it is still alive. It is argued that as the power to suspend or remit a sentence under sub-section (1) of section 401 is purely discretionary, an order of reference under sub-section (2) may be recalled at any time before it is answered. Though there is a veneer of plausibility in this argument, on closer analysis it breaks down altogether. It would be readily observed that whenever an appropriate Government is moved under sub-section (2) of section 401, it 'may require' the Court to state its opinion as to whether the application should be granted or refused. The presiding Judge of the Court is required in terms of the statute to give his opinion after a reference has been made to the Court. There would be a serious conflict of statutory duty of the presiding Judge with the amplitude with which the discretion is sought to be vested in the Government in the opening words of sub-section (2). Mr. Dewan's concession that the power of recall can be extended only till the reference is pending, is indicative of the weakness of the principle enunciated by him. If the power of recall is deemed to be vested in the Government, it cannot be fettered by any point of time. It would be wholly incongruous to say that while the power of recall is available before the reference is actually answered, it cannot be so exercised once the Court has proceeded to answer it.

There still remains the question whether this Court can compel the appropriate Government to actually obtain the opinion after it has exercised its discretion to ask for it. To answer this question, it becomes necessary to scrutinise the scope of sub-sections (1) & (2) of section 401. Under sub-section (1), the appropriate Government has been granted the widest power with or without conditions to suspend or remit a sentence of a convict either partially or wholly. It is important to emphasise that the power of remission is contained only in sub-section (1). Mr. Sachar's contention may be accepted that sub-section (2) is meant to cover cases where some additional evidence having a bearing on the conviction

or sentence has come to light. The appropriate Government in such a case may ask for the opinion of the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion "as to whether the application should be granted or refused, together with his reasons for such opinion." Such an opinion is to be asked for when the appropriate Government is moved for the suspension or remission of a sentence. It is significant that after the opinion has been rendered by the Court concerned, sub-section (2) does not cast any duty on the Government to accept it. In other words, even after the Court has given its opinion, the State Government has to exercise its power of remission or suspension under sub-section (1).

The remaining sub-sections of section 401 deal with other matters connected with suspension or remission of sentences. Sub-section (3) says that if the sentence has been suspended or remitted on certain conditions which have not been fulfilled, the appropriate Government may cancel the suspension or remission and the person, in whose favour the sentence has been suspended or remitted, will at once be arrested to undergo the unexpired portion of the sentence. Sub-section (4) also deals with the question of conditions on which remission or suspension is made. Sub-section (6) empowers the appropriate Government to give directions about the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Mr. Sachar has urged very vigorously that a power like one given under sub-section (2) entails a corresponding duty of acceptance of Court's opinion on the part of the State. It is submitted by him that if there is the discretion vested in Government to require the opinion of the Court, the appropriate Government is bound to abide by it and in that sense it is argued that sub-section (2) is independent of sub-section (1) which undoubtedly gives to, and vests in, the appropriate Government an absolute discretion to remit or suspend sentences. In support of this contention Mr. Sachar has cited a decision of the House of Lords in *Frederic Guilder Julius* v. *Lord Bishop of oxford* (1). It was held in this English case that there may be circumstances which may couple the power with a duty to exercise it and it lies upon those who call for the exercise of the power to show that there is an obligation to exercise it.

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(1) (1880) 5 A.C. 214.

Enabling words are always compulsory where they are words to effectuate a legal right. Our attention has been drawn to a statement of the law enunciated by the Lord Chancellor (Earl Cairns) at page 225 in these words:—

> "My Lords, the cases to which I have referred appear to decide nothing more than this; that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions on which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised".

The question, however, which has always to be considered in such a situation is whether, as observed by Lord Penzanc at page 232, "there are any considerations sufficiently cogent to exclude the idea that the Legislature intended a discretion." It is true that, as observed by Lord Blackburn, enabling words may be compulsory where they are words to effectuate a legal right, but if, as is clear from a reading of sub-sections (1) and (2) of section 401, a discretion is independent of the opinion which may be given by Court under sub-section (2), it is difficult to avoid the conclusion that no statutory duty devolves on the appropriate Government to accept the opinion of the Court. Mr. Sachar has relied further on a Supreme Court decision in the *Chief Controlling Revenue Authority and another* v. *The Maharashtra Sugar Mills Ltd.* (2), where it was held that the power of the Chief Controlling Revenue-authority under sub-section (1) of section 57 of the Indian Stamp Act to state any case referred to it to the High Court, although discretionary in nature as it is prefixed by the word 'may', is coupled with a duty cast on the Revenue-authority to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, the Chief Controlling Revenue-authority as a public servant is bound to make the reference and any omission on his part may oblige the Court to direct him to discharge his duty and make a reference to the Court. It is important to observe that sub-section (2) of section 56 of the Indian Stamp Act lays down that where a Collector feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case and refer it with his opinion for the decision of the Chief Controlling

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(2) A.I.R. 1950 S.C. 218.

Revenue-authority and, likewise, sub-section (1) of section 57 vests powers in the Chief Controlling Revenue-authority to state a case referred to it under sub-section (2) of section 56 or otherwise to the High Court of a State. It may be observed that Chief Justice Kania, who gave the judgment of the Supreme Court, relied on another passage of Lord Cairns in the House of Lords case (*Fredric Guilder Julius* v. *Lord Bishop of oxford*) (1) which runs as follows:—

> "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

This argument, which was applied in treating the discretion of the Chief Controlling Revenue-authority as something in the nature of an obligation, is not available in the case in point as sub-section (2) of section 401 does not stand by itself. In the instant case the power of remission is contained only in sub-section (1) which precedes sub-section (2) which can only be construed to mean that the Court is required to give an opinion once a reference is made to it. The power of remission is still controlled by sub-section (1) and it must, therefore, be held that even after an opinion has been obtained from the Court, the appropriate Government's power to remit a sentence can still be exercised only under sub-section (1). If that is so, it might well be asked whether the petitioner is vested with any legal right to justify an invocation to this Court for the issue of a writ of *mandamus* to enforce it.

To answer this question it is necessary to consider the nature of the right of the petitioner which he seeks to enforce under article 226 of the Constitution. Even if it is assumed that an opinion is given in favour of the petitioner by the Court concerned, can the petitioner enforce an order of remission under section 401, for, truly speaking, in the last analysis the petitioner would be asking for nothing more than the order of remission which must follow if Mr. Sachar's contention is accepted that the appropriate Government is under an obligation to accept the opinion of the Court. In *the*

State of Madhya Pradesh v. *G. C. Madawar* (3) it was held that a *mandamus* can be granted only when there is in the applicant a right to compel the performance of some duty cast on the opponent. Thus, if there is no right in the applicant which is capable of being protected or enforced, no writ of *mandamus* can issue. To the same effect is the observation of P. N. Mookerjee, J., in the Special Bench case of *Jyoti Prakash Mitter* v. *The Hon'able Mr. Justice H. K. Bose, Chief Justice of High Court, Calcutta* (4) at page 492, which is as follows:—

> "The existence of a legal right or obligation, it is well-known, is the foundation of every writ of *mandamus*: *Ex-parte, Napier* (5) at page 695. The applicant for an order of *mandamus* must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought."

Mr. Dewan has argued that sub-section (1), being the controlling provision with regard to the exercise of the discretion and the matter of asking for an opinion under sub-section (2) being merely ancillary, the Court must look to the legal right of the petitioner even if it reaches the conclusion that the State Government is obliged to seek an opinion from the Court. It seems to us that Mr. Dewan is right in his contention that when remission of sentence is in itself discretionary, the opinion of the Court—even if it is in favour of the applicant—can bestow no right on the petitioner to have it enforced. The right under sub-section (2) of section 401, if indeed it may be called a 'right' is a lesser claim and is circumscribed by the discretion vested in the State Government under sub-section (1).

Mr. Sachar has invited our attention to a ruling of the Supreme Court in *State of Bihar* v. *D. N. Ganguly and others* (6), in which it was held that where a reference is made under sub-section (1) of section 10 of the Industrial Disputes Act, 1947, the appropriate Government has no authority to cancel or revoke a notification even though there is good and *bona fide* ground to do so. Under sub-section (1) of section 10 of the

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(3) A.I.R. 1954 S.C. 493.
(4) A.I.R. 1963 Cal. 483.
(5) (1852) 18 Q.B.D. 692.
(6) A.I.R. 1958 S.C. 1018.

Industrial Disputes Act, "where the appropriate Government is of opinion that any industrial dispute exists or is apprehended", it may refer the dispute for either promoting a settlement thereof or the adjudication of the dispute itself by a Labour Court or Tribunal. Like a reference under the Indian Stamp Act, this authority does not provide an appropriate precedent for this case. The Government, having once made up its mind to refer a dispute for adjudication or settlement, according to the Supreme Court, is not in a position to cancel or revoke this decision on the strength of section 21 of the General Clauses Act. It is to be observed that section 10 (1) of the Industrial Disputes Act empowers a Tribunal, before whom a dispute is referred, to adjudicate upon it. In the opinion, which is sought under sub-section (2) of section 401, there is no obligation in the words of the Statute on the appropriate Government to follow it. If we are correct in holding that sub-section (1) alone gives discretion to the State Government to remit a sentence and it controls the provisions of sub-section (2), then the case cited by Mr. Sachar is clearly distinguishable. The machinery provided in section 10 of the Industrial Disputes Act is independent of any other provision and the power to refer is coupled with the duty of adjudication and the promotion of the dispute by a settlement by the Board or the Tribunal, as the case may be. Mr. Sachar has further sought the support of the Full Bench decision of the Nagpur High Court in *Venkatesh Yashwant Despande* v. *Emperor* (7), where it was held that it is not open to Government, after remitting a sentence unconditionally and in absence of fraud or mistake, to cancel the order and restore the sentence. It has not been seriously disputed by Mr. Dewan that after an order of remission is made, the Government is powerless to cancel the order unless there is a breach of conditions on which the sentence was remitted or suspended. Mr. Sachar argues that this proposition can be projected in support of his submission that a discretion to ask for the opinion of the Court cannot likewise be cancelled or withdrawn. Mr. Sachar, however, can only succeed in this petition if he can satisfy us further that the opinion of the Court—even assuming that it would be favourable to the petitioner— would be binding on the appropriate Government, and, unless the State Government is bound by this opinion, there can be no foundation of a writ on which the petition can be based. It, therefore, becomes unnecessary to decide whether the principle of

(7) A.I.R. 1938 Nag. 513 (F.B.).

law in *Venkatesh Yashwant Despande's case* would be applicable in the case of a discretion to ask for an opinion under sub-section (2) of section 401.

In this view of the matter, it is fruitless to consider the argument that the order of the State Government to refer the matter to the Court for opinion could not have been revised or reviewed. Nor is it necessary to consider the question whether the first order passed by the Ministry was revoked *mala fide* by the Governor incharge of the administrative machinery of the Government as the delegate of the President. We are, therefore, of the opinion that the petitioner, not having a legal right to have a remission, cannot in a writ petition enforce the decision once taken by the Government to obtain an opinion of the Court under sub-section (2) of section 401.

GURDEV SINGH, J.—I agree entirely.

K.S.K.

FULL BENCH

Before Mehar Singh, C.J., A. N. Grover and Prem Chand Pandit, JJ.

SHER SINGH,—*Petitioner*

versus

R. P. KAPUR AN ANOTHER,—*Respondents*

Criminal Original No. 87 of 1965

April 3, 1967

Contempt of Courts Act (XXXII of 1952)—S. 3—Contempt of Court—Nature of the offence of—Proceedings for contempt of Court initiated by a private Person—Whether cease to be competent on the death of the applicant—Summary procedure provided for trial of contempt of Court proceedings—Whether violative of Articles 14 and 19 of the Constitution of India (1950)—Production of an anonymous letter in the Court containing allegations that the trial judge is being influenced by others and requesting for enquiry being made—Whether constitutes contempt—Anonymity of letter—Whether a defence available to contemner—Production of an anonymous letter in the High Court containing allegation that "pressure is being put through the High Court" on the trial judge—Whether constitutes contempt of Court—Contemner—Whether entitled to produce evidence