

EDWARD EZRA AND ANOTHER

v.

THE STATE OF WEST BENGAL

[MUKHERJEA, S. R. DAS and VIVIAN BOSE JJ.]

1954

November 30

West Bengal Criminal Law Amendment (Special Courts) Amendment Act, 1952 (West Bengal Act XII of 1952), S. 12—Conviction under Criminal Law Amendment Ordinance No. XXIX of 1943 set aside by High Court—High Court directing the retrial of the accused by a competent court if Government chose to proceed against them—Retrial under West Bengal Act XII of 1952—Validity of.

Section 12 of the West Bengal Act XII of 1952 provides:

“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”.

On appeal taken by the appellants to the High Court of Calcutta against their conviction by the First Special Tribunal Calcutta constituted under the Criminal Law Amendment Ordinance of 1943, the High Court set aside the conviction on the ground, *inter alia*, that the Special Tribunal was not properly constituted. The High Court directed that the accused should be retried in accordance with law by a court of competent jurisdiction, it being left to the State Government to decide whether actually the trial should be proceeded with or not. On the 30th July 1952 the West Bengal Act XII of 1952 came into force following an Ordinance laying down similar provisions which amended in certain respects the provisions of the West Bengal Criminal Law Amendments (Special Courts) Act of 1949. In August 1952 three Special Courts were constituted by a notification of the Government of West Bengal, one of them being described as West Bengal Second Special Court. The case against the appellants was allotted to this second court for trial.

It was contended on behalf of the appellants that s. 12 of the West Bengal Act XII of 1952 was a bar to the trial of the present case under the Act and that under the orders of the High Court passed in the appeals it was the original case which was commenced before the First Special Tribunal Calcutta under Central Ordinance XXIX of 1943 which was being retried by the Special Court constituted under West Bengal Act of 1952. The present case was pending before the High Court on the 9th April 1952 which was the date of the commencement of the West Bengal Ordinance preceding the Act and to such cases the provisions of the Act had been made expressly inapplicable by s. 12 and that the present case was nothing but a continuation of the original case which was tried by the First Spe-

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cial Tribunal Calcutta under the Ordinance of 1943 and against the decisions of which appeals were taken to the High Court.

Held, (repelling the contention) that what was pending before the High Court on the 9th April, 1952 were the appeals taken by the appellants (and their co-accused) against the judgment of the First Special Tribunal Calcutta constituted under the Central Ordinance XXIX of 1943 and in order to attract the operation of s. 12 it was necessary to show that the proceedings which were pending before the Special Court under West Bengal Act XII of 1952, were pending before a Court other than a Special Court on 9th April 1952. The expression "proceedings in a court other than a Special Court" occurring in s. 12 means and refers to proceedings relating to the trial of a case in the original court and not to proceedings in appeal. The object of the legislature in enacting s. 12 was that cases pending before an ordinary or a non-special court at the date when the Ordinance came into existence and which were being tried in the ordinary way should not be brought to trial or tried by the Special Court in spite of the provisions of the new section 4(1) introduced by the Ordinance into the Act. This reason manifestly could have no application to appellate proceedings for there could be no question of cases pending in appeals being allotted to special courts for trial. How the case was to proceed further if the appellate court directed a rehearing would depend entirely on the order which the appellate court passed and was competent in law to pass.

Accordingly, as the High Court did not acquit the accused or make an order of discharge but simply set aside the conviction and sentence directing the retrial of the cases by a competent court, the only court which was competent to try these cases would be the Special Court under Act XII of 1952 and its jurisdiction could not be ousted as the order of the High Court itself proceeded on the footing that no trial could be held by the Tribunal constituted under Ordinance XXIX of 1943.

CRIMINAL APPELLATE JURISDICTION : Criminal
Appeal No. 83 of 1954.

Appeal by Special Leave granted by the Supreme Court by its Order dated the 14th September, 1953 from the Judgment and Order dated the 5th June, 1953 of the High Court of Judicature for the State of West Bengal at Calcutta in Criminal Revisions Nos. 1205 and 1204 of 1952.

Ajit Kumar Dutta, (*A. K. Dutt* and *S. Ghose*, with him), for the appellants.

C. K. Daphtary, *Solicitor-General of India*, (*P. A. Mehta*, *P. G. Gokhale* and *N. C. Chakravarty*, with him), for the respondent.

1954. November 30. The Judgment of the Court was delivered by

MUKHERJEA, J.—This appeal, which has come before us on special leave, is directed against a judgment of Chunder, J. of the Calcutta High Court dated the 5th of June, 1952, rejecting the appellants' application for quashing of certain criminal proceedings started against them and pending before a special court constituted under a notification of the Government of West Bengal issued under West Bengal Act XII of 1952. To appreciate the contentions raised on behalf of the appellants it would be necessary to narrate a few antecedent facts. The two appellants along with four other persons, one of whom has died since then, were placed on trial before the First Special Tribunal, Calcutta, which was one of the Tribunals constituted under the Criminal Law Amendment Ordinance XXIX of 1943 passed by the Governor-General of India under section 72 of the Government of India Act, 1935, on charges of bribery as also of conspiracy under section 120-B of the Indian Penal Code, read with section 420 of the Code which was later on replaced by section 409. The trial ended in conviction of all the accused, though not on all the charges brought against them and by its judgment dated the 26th May, 1952, the Tribunal sentenced them to various terms of imprisonment and fine.

It may be convenient to refer here to two of the provisions of Ordinance XXIX of 1943 under which the trial was held and which are material for our present purpose. One of these relates to the composition of the special tribunal and section 4(1) of the Ordinance lays down that "a special tribunal constituted under this Ordinance shall consist of three members". This provision was modified by section 3 of Ordinance I of 1950 which lays down that so far as the First Special Tribunal at Calcutta is concerned, for the words "three members" occurring in section 4(1), the words "two members" shall be substituted. The other material provision is contained in section 5(1) of the Ordinance as it stood after the amendment of 1946,

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read with sub-section (2) of the same section. Section 5(1) provides that "the Central Government may from time to time, by notification in the official Gazette, allot cases for trial to each special tribunal"; and section 5(2) lays down that "the special tribunal shall have jurisdiction to try the cases for the time being respectively allotted to them under sub-section (1) in respect of such of the charges for offences specified in the schedule as may be preferred against the several accused". The result, therefore, is that although a number of offences are specified in the schedule, it is not all cases of these offences which are to be tried by the special tribunal but only such of them as the Central Government may, in its discretion, allot to the tribunal.

To proceed with the narrative of facts, there were separate appeals taken by all the five accused against the judgment of the special tribunal, mentioned above, to the High Court of Calcutta under the provisions of the Ordinance itself. The appeals were heard by a Division Bench consisting of Chakravarti, C. J. and Sinha, J. The learned Judges did not enter into the merits of the cases but allowed the appeals on two points of law which, according to them, vitiated the entire trial. It was held in the first place that the special tribunal, which consisted of three members *to wit* Mr. Barucha, Mr. Joshi and Mr. Bose at the material time, legally ceased to exist on and from the 16th of December, 1949, when Mr. Bose, one of the members, resigned. It is true that the Amending Ordinance I of 1950 was passed on the 11th of January, 1950, but as the tribunal was not reconstituted as a fresh tribunal by means of a fresh notification in the gazette as required by section 3 of the new Ordinance, the two remaining members could not be regarded as a legally constituted tribunal within the meaning of the Ordinance and all the proceedings before it after the resignation of the third member, including the judgment delivered by it were void.

It was held in the second place that as section 5(1) of the Ordinance XXIX of 1943 as it stood after the amendment of 1946, read with section 5(2) autho-

risers a special court to try not all cases of offences specified in the schedule but only those which the State Government may in its discretion direct it, became repugnant to Article 14 of the Constitution as soon as the Constitution came into force. The trial held after the 26th of January, 1950, was therefore bad and although no evidence was taken after that date the discriminations in the shape of departures from normal procedure were involved even in the stage of arguments and pronouncement of judgment against the accused, and the conviction and sentence must consequently be set aside.

After holding the trial to be bad by reason of the illegalities mentioned above, the learned Judges proceeded to consider what should be the final order passed in the appeals. Having regard to the voluminous evidence on the record, they did not consider it proper to make an order of acquittal in these cases. They indeed felt distressed by the fact that the accused had already undergone the strain of a protracted and harassing trial for nearly four years but held that such considerations could not weigh with a court so as to restrain it from making an order which the law requires. The order passed by the High Court was that the accused should be retried in accordance with law by a court of competent jurisdiction, it being left to the State Government to decide whether actually the trial should be proceeded with or not. This order was pronounced on the 29th of April, 1952. On the 30th of July, 1952, the West Bengal Act XII of 1952 came into force following an ordinance laying down similar provisions which amended in certain respects the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act of 1949. On the 22nd August, 1952, three special courts were constituted by a notification of the Government of West Bengal under section 4(2) of this Act of 1949, one of them being described as the West Bengal Second Special Court; and by a notification dated the 19th of September, 1952, Mr. N. L. Some was appointed Special Judge to preside over this Court. On the 8th of October, 1952, a notification was issued allotting the case against the

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Appellants and their co-accused to this second court for trial and on the 12th of November, 1952, a fresh petition of complaint was filed by one Kalidas Burman, Inspector of Police, Delhi Special Establishment, against the accused under section 120-B, read with section 409 and sections 409 and 109 of the Indian Penal Code. On the 21st of November following, summonses were issued in pursuance of the complaint and within 6 days from that date all the five accused moved the High Court of Calcutta and rules were issued in their favour calling upon the State Government to show cause why the process issued on the basis of the petition of complaint filed by Kalidas Burman should not be quashed. All these rules came up for hearing before Chunder, J. sitting singly and the rules were discharged on the 5th of June, 1953. The appellants, who were the petitioners in Revision Cases Nos. 1204 and 1205 of 1952, prayed for leave to appeal to this court against this order of the single Judge which was rejected. They subsequently obtained special leave from this court, on the strength of which the case has come before us.

The substantial point raised by Mr. Dutt, who appeared in support of the appeal, is, that section 12 of the West Bengal Act XII of 1952 operates as a bar to the trial of this case under the Act. It is argued that under orders of the High Court passed in the appeals, it is the original case, which was commenced before the First Special Tribunal, Calcutta, under the Central Ordinance XXIX of 1943 which is being retried by the special court constituted under the West Bengal Act XII of 1952. This case, it is pointed out, was pending before the High Court on the 9th April, 1952, which was the date of the commencement of the West Bengal Ordinance preceding the Act and to such cases the provisions of the Act have been expressly made inapplicable by section 12.

It is to be noted that the West Bengal Criminal Law Amendment (Special Courts) Act, (Act XXI of 1939) was amended by the West Bengal Ordinance VIII of 1952 which came into force on the 9th of April, 1952, and this Ordinance was subsequently replaced by

West Bengal Act XII of 1952. Section 12 of the Act provides as follows :

"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".

Mr. Dutt contends that the present case is nothing but a continuation of the original case which was tried by the First Special Tribunal of Calcutta under the Central Government Ordinance XXIX of 1943 and against the decision of which Tribunal appeals were taken to the High Court. The appeals were pending before the High Court when Ordinance VIII of 1952 was passed and consequently section 12 of Act XII of 1952 would exclude the application of the provisions of the Act to the present case.

For a proper determination of the question it would be necessary first of all to examine the precise scope and object of section 12 of the West Bengal Act XII of 1952. This, as said above, has only amended certain provisions of the earlier Act XXI of 1949. Act XXI of 1949 provides for the establishment of special courts presided over by special Judges and they are to follow a particular procedure in the trial of cases assigned to them which differs in certain respects from the procedure laid down in the Code of Criminal Procedure and to that extent is prejudicial to the accused. Section 4(1) of Act XXI of 1949, as it stood before the amendment of 1952, provided that "the Provincial Government may from time to time by notification in the official gazette allot cases for trial to a special Judge"; and sub-section (2) of the section laid down that "the special Judge shall have jurisdiction to try cases for the time being allotted to him under sub-section (1) in respect of such of the charges for the offences specified in the schedule as may be preferred against the several accused, and any such case which is at the commencement of this Act or at the time of such allotment pending before any court or any other special Judge shall be deemed to be transferred to the special Judge to whom it is allotted". The result of

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the combined operation of the two sub-sections therefore was that all the cases of offences specified in the schedule were not to be tried by a special court but those only could be tried, which the Provincial Government in its discretion might allot to it. Further there was nothing to prevent the Provincial Government from allotting a case already pending before an ordinary court to a special court constituted under this Act. A provision which allows the Government an unfettered discretion to choose from amongst the cases of offences, specified in the schedule to the Act, which of them, it would allot to the special tribunal for trial according to the special procedure, the rest being left to be tried in the ordinary way, became, after the coming into force of the Constitution, open to the charge of being obnoxious to the equal protection clause embodied in Article 14 of the Constitution.

This defect was removed and the chance of discrimination eliminated by the Amending Ordinance VIII of 1952, which was afterwards enacted into Act XII of 1952. Section 4 of the Ordinance replaced section 4 of the Act and sub-section (1) of this section laid down that "notwithstanding anything contained in the Code of Criminal Procedure, 1898 or in any other law, the offences specified in the schedule shall be triable by special courts only". There was no provision in this new section of the Ordinance, corresponding to section 4(2) of the Act under which cases of offences specified in the schedule pending before ordinary courts could be transferred to special courts. This in sense was anomalous and as the position created by section 4(1) of the Ordinance was that offences specified in the schedule were compulsorily triable by special courts, a difficulty could legitimately arise with regard to cases pending before ordinary courts and the question could be raised whether the ordinary courts would have jurisdiction at all to proceed with trial of these cases after the enactment of section 4(1) of the Ordinance. It seems clear that in order to obviate this difficulty section 12 was introduced in Act XII of 1950, which replaced Ordinance

VIII of 1952, and the section expressly provides that the Act would not apply to proceedings pending before any court other than a special court on the date that Ordinance VIII of 1952 came into force. All these pending cases, therefore, could not be allotted to or tried by a special court under the Act. The question, for our consideration is whether the prohibition created by section 12 is attracted to the facts of the present case.

Now what was pending before the High Court on the 9th April, 1952, were the appeals taken by the appellants and their co-accused against the judgment of the First Special Tribunal, Calcutta, constituted under the Central Ordinance XXIX of 1943. We may agree with the learned counsel for the appellants that the High Court not being a special court, the provisions of section 12 of the Act could not apply to these proceedings, but this by itself would be of no assistance to the appellants. To attract the operation of section 12, it is necessary to show that the proceedings which are now before the Special Court under West Bengal Act XII of 1952 were pending before a court other than a special court on the 9th April, 1952. In our opinion the expression "proceedings in a court other than a special court" occurring in section 12 means and refers to proceedings relating to trial of a case in the original court and not to proceedings in appeal. If we look to the provisions of Act XII of 1952, we would find that all of them relate to matters concerning constitution, jurisdiction, and powers of the special courts and the special rules of procedure which they are to apply in the trial of cases, and not one of them has any reference to an appeal. The object of the legislature in enacting section 12, as stated above, was that cases pending before an ordinary or a non-special court at the date when the Ordinance came into existence and which were being tried in the ordinary way, should not be brought on to or tried by the special courts in spite of the provision of the new section 4(1) introduced by the Ordinance into the Act. This reason manifestly could have no application to appellate proceedings, for there

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could be no question of cases pending in appeals being allotted to special courts for trial. How the case is to proceed further if the appellate court directs a rehearing would depend entirely on the order which the appellate court passes and is competent in law to pass. If the appeal court directs retrial by an ordinary court, as the court competent to try the case or that is the implication of the order, the jurisdiction of the special court would be barred not by reason of section 12 of the Special Act but by reason of the order made by the appeal court. In our opinion the pendency of the appeals before the High Court on the relevant date could not attract the operation of section 12, but as the appeals were taken to the High Court from the decision of a court other than a special court as contemplated by Act XII of 1952, whether the retrial directed by the High Court could be held by a court under Act XII of 1952, would depend on the nature and effect of the order which the High Court has made.

The High Court did not acquit the accused, nor make any order of discharge in their favour. They set aside the conviction and sentence and directed the retrial of the accused by a competent court in accordance with law if the Government chose to proceed against them. We agree with Mr. Dutt that ordinarily an order of retrial means a further trial by the same Tribunal which took cognizance of the case and before which the case must be deemed to be pending until it is finally disposed of in one way or other recognized by law. In this case the accused were neither acquitted, nor discharged, but the High Court set aside the proceedings of the special court on the ground that the trial held by it became void on and from the 26th January, 1950, as section 5(1) of the Ordinance under which the allotment of the case was made and the Tribunal acquired jurisdiction to try it became void and inoperative as soon as the Constitution came into force, by reason of its being in conflict with Article 14 of the Constitution. The Special Tribunal, therefore, from which the appeals came to the High Court must be held according to the decision of

the High Court itself to have lost seisin of these cases after the 26th January, 1950, and they had no jurisdiction to proceed with the trial. As the High Court directed these cases to be tried by a competent court, they could not possibly be sent back for trial to the Special Tribunal assuming that any such Tribunal existed or could be constituted by the Central Government. The only court which was competent to try these cases would be the special court under Act XII of 1952 and its jurisdiction could not be ousted as the order of the High Court itself proceeded on the footing that no trial could be held by the Tribunal constituted under Ordinance XXIX of 1943. The jurisdiction of the special court not being ousted by section 12 of the Act or by the order of the High Court, we are unable to hold that the proceedings before it should be quashed.

The result is that the appeal is dismissed.

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[MEHR CHAND MAHAJAN C.J., BHAGWATI, JAGAN-
NADHADAS and VENKATARAMA AYYAR JJ.]

Will—Executed with due solemnities by a person of competent understanding—Onus of proving undue influence—Undue influence—Meaning of—Indian Succession Act, 1925 (XXXIX of 1925), s. 63—Due attestation—Proof of.

When once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the person who alleges it.

It is well-settled that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his cause before the testator and to persuade him to make a disposition in his favour. And if the testator