P L D 1987 Lahore 633

Before Fazal Karim, J

Sh. SARDAR ALI--Petitioner

versus

The STATE and another--Respondents

Criminal Miscellaneous No.653-M of 1984, heard on 2nd June, 1987.

(a) Criminal Procedure Code (V of 1898)--

---S. 561-A--Constitution of Pakistan (1973), **Art.** 175,(2)--Provisions of 5.561-A, Cr.P.C. examined in the light of Art. 175(2), Constitution of Pakistan (1973)--Scope and application of 5.561-A , Cr. P.. C . traced.

At the date of enactment of section 561-A, Cr.P.C. the concept of "inherent jurisdiction" was well-known. The ~ concept of 'inherent jurisdiction' is a concept of the law of England, where there is no written Constitution. There, most of the. jurisdiction which the Courts exercise, including the supervisory jurisdiction of the High Court to issue writs, is inherent jurisdiction. It appears, therefore, that section 561-A, Cr.P.C. was enacted under the influence of the English law.

Section 561-A does not confer inherent jurisdiction upon the High Court. It merely assumes that there is something as "inherent jurisdiction" and then it saves and preserves it to enable the High Court to make such orders as may be necessary to give effect to an order under Criminal Procedure Code or to prevent the abuse of the process of any Court or otherwise to secure the ends of justice:.

The inherent jurisdiction given by section 561-A, Cr.P.C. is not an .alternative jurisdiction or an additional jurisdiction but it is a jurisdiction preserved in the interest of justice to redress grievances for which no other procedure is available or has been provided by the Code itself.

Whatever be the position in England, in a country governed by a written Constitution, as Pakistan is, a Court has only such jurisdiction as is conferred on it by the Constitution or statute law. This is so provided by Article 175, sub-Article (2) of the Constitution.

The expression "law" in Article 175 of the Constitution means the statute law: The question is, that if the only source of jurisdiction be the Constitution and the statute law, and if no Court has any jurisdiction other than the jurisdiction expressly conferred on it by the Constitution or the law, then can a Court claim to have inherent jurisdiction. In other words, the question is whether the assumption which was the basis of section 561-A, Cr.P.C. when it was enacted in the year 1923 is still valid in view of Article 175 of the Constitution.

The claim to inherent jurisdiction is no longer tenable in view of clause (2) of Article.175 of-the Constitution.

So far as High Courts are concerned, they -have no other powers apart from those conferred upon them by the Constitution or by any law.

Ancillary and incidental power should not be confused with what is claimed as the inherent jurisdiction of the Court. Inherent jurisdiction and ancillary and incidental powers are sometimes confused the one .with the other. Where a statute grants a jurisdiction, it also implied grants powers which are reasonably incidental or ancillary to the main jurisdiction to enable the Court to exercise it more effectively and the fact that there, is no express provision in the statute enabling the Court to exercise such powers does not negative their existence. Where an Act. confers a jurisdiction, it impliedly also grants the power of doing all such acts or applying all such means as are essentially necessary for its execution.

This is. what is known as incidental or ancillary power the other hand, "inherent" means existing in or in something especially as permanent or characteristic attribute; vested in (person etc.) as right or privilege.

.What is inherent is an inseparable incident of a thing or an institution in which it inheres.

The source of the inherent jurisdiction of the Court is derived from its nature as a Court of law.

The expressions "inherent power" and "incidental and ancillary powers" are used interchangeably may be illustrated by section 5611LA, Cr.P.C. itself.

Section 561-A speaks of the inherent power to make orders (i) as may be necessary to give effect to any order under the Code; and (ii) to prevent abuse of the process of the Court or otherwise to secure the orders of justice. Now, there is no question that the power to make such order as may be necessary to give effect to any order under the Code is an incidental or ancillary power but both this power and. the power to prevent abuse of the process of the Court are described in section 561-A, Cr.P.C. as inherent powers.

The power to direct ad interim suspension of the licence of an advocate against whom an inquiry was pending was "really ancillary to the. power of punishment" and "therefore, the High Court should be deemed to have that inherent power". Thus, both the expressions 'ancillary' and 'inherent' were used interchangeably to describe a power, which was in fact as ancillary power flowing from the greater power of punishment after final adjudication.

While judging of the validity of the basis on which section 561-A, Cr.P.C. was enacted with reference to Article 175(2) of the Constitution,. it may, therefore, be possible to read "inherent" in section 561-A, Cr.P.C. in the sense of ancillary or incidental.

Mardan Shah v. Sattara P L D 1954 Lah. 87; Ghulam Muhammad v.- Muzammil Khan P L D 1967 S C 317; Sind Employees Social Security v. Adamjee Cotton Mills P L D 1975 S C 32; Shahnaz Begum's case PLD 1971 S C 677 pp.8, 9; Maxwell on the Interpretation of Statutes, 1962 Edition, p. 350; Commissioner, Khairpur Division, Khairpur v. Ali Sher Sarki P L D 1971 S C 242; Concise Oxford Dictionary; and Sardar Shah Bukhari's case -P L D 1965 S C 479 ref.

(b) Constitution of Pakistan (1973)--

---Arts. 198 & 201--Categories of precedent cases which were binding on subordinate Courts illustrated.

Precedent cases fall in two. distinct categories. In the first category fall the decisions .which decide a question of law or are based upon or enunciate a principle of law within the meaning of Articles 198 and 201 of the Constitution and are, therefore, binding, if the decision be by the Supreme Court, on all Courts in Pakistan, and if the decision be by a High Court, on all Courts subordinate to it. In the second category fall the cases which are not so binding but are merely illustrations of the application of the principles of law enunciated in the first category of precedent cases.

(c) Criminal Procedure Code (V of 1898)--

--; S. 561-A--Powers .of High Court under 5.561-A--Extent--Powers of Court under S.561-A, Cr.P.C., not new powers but those which the Court already inherently possessed--Jurisdiction exercisable under section 561-A,° Cr.P.C. being of an extra ordinary nature was intended to be used only in extraordinary cases where there was no other remedy available.

It has sometimes been thought that section 56-1-A, Cr.P.C. has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, lest it should be considered that the only- powers possessed by the Courts are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act.

The inherent jurisdiction given by section 561-A, Cr.P. C. is not an alternative jurisdiction or an additional jurisdiction but it is a jurisdiction preserved in the interest of justice to redress grievances for which no other procedure is available or has been provided by the Code itself, the jurisdiction exercisable under this section is of an extraordinary nature intended to be used only in extraordinary cases where there is no other remedy available.

It is preserved to meet a lacuna in the Criminal Procedure Code in extraordinary. cases and is not intended for vesting a High Court with powers to make any order which they are pleased to consider to be in the interest of ,justice. These powers are as much controlled by principles and precedents as are its express statutory powers.

The power given by section 561-A, Cr.P.C. can certainly not be so utilized as to interrupt or divert the ordinary course of criminal procedure as laid down in the procedural statute; and it is generally accepted that the inherent jurisdiction should not normally be invoked where another remedy is available.

Emperor v. Nazir Ahmad A I R 1945 PC 18; Ghulam Muhammad v. Muzammil Khan P L D 1967 SC 317; Muhammad Samee Ullah Khan v. State P L D 1963 SC 237 and Khawaja Fazal Karim v. The State and another P L D 1976 SC 461 ref.

(d) Criminal Procedure Code (V of 1898)--

---Ss. 561-A, 435 & 439--Invocation of 5.561-A, Cr.P.C. when possible-----Revisional jurisdiction exerciseable by High Court under Ss. 435 & 439, Cr.P.C. and High Court's jurisdiction under 5.561-A, Cr.P. C.--Comparison--Provisions of 5.561-A, Cr.P. C. and 5.439-A, Cr.P.C. could easily stand together if provisions of 5.561-A, Cr.P.C. are so read as not to be applicable to matters which were "proceedings" in revision with respect to an order made by the Sessions Judge under S. 439-A.

While the High, Court has, under Ss. 435 and 439 of the Criminal Procedure Code, the power to examine the correctness, legality or propriety of any finding, sentence or order passed by an inferior Court; that the revisional jurisdiction of the High - Court is indeed wide and is not confined merely to errors of law; that in the exercise of its revisional jurisdiction the High Court can even in appropriate cases disturb findings of fact, as, for example, where the subordinate Court has wrongly placed the onus of proof or. has not applied the correct principle relating to the assessment of evidence or important piece of evidence has been ignored, yet these things the High Court cannot do under section 561-A, Cr.P.C. The two jurisdictions, are fundamentally different; indeed, as a rule, the inherent jurisdiction of the Court to correct an abuse of the process of the Court or a patent injustice cannot be invoked where there is an express provision in the Code under which the case can be adequately dealt with.

Where the remedy of revision under section 439 of the Code of Criminal Procedure is available, the High Court would not interfere under section 561-A, Cr.P.C. Where a person or authority has been vested with statutory powers, it would be "an unfortunate result if it should be possible to interfere with those -statutory rights by an exercise of the inherent jurisdiction of the Court". Where the actual dispute between the. parties can be settled only if the rights of the parties in the property are properly and finally adjudicated upon, the resort to the High Court with the view that it should exercise its inherent jurisdiction and quash the orders of the Sessions Court, so that an interim order regarding the custody of the property is revived, .is hardly justifiable, for, in such cases the appropriate remedy available to the parties is by way of proceedings in the Civil Court.

Turning to the language of section 561-A, Cr.P.C. itself, the inherent power that it saves is the power to "make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice". The power to give effect to any order under this Code is in the nature of ancillary or incidental power. The power most frequently prayed in aid is the power "to prevent abuse of process of any Court or otherwise to secure the ends of justice". The word "abuse" is a strong word. It can only be in a very rare case that the superior Court acting under its inherent power to prevent the abuse of process of any Court or otherwise to secure the ends of justice would deem it appropriate to act so as to place an alleged offence outside the operation of the Criminal law, on incidental grounds, such as that of delay, or for any reasons other than "reasons going to the question

whether the allegation is sufficient to constitute an accusation of an offence in law". Further, the ends of justice "to secure which the inherent power may be invoked, have reference to the purposes which the inherent powers is intended to secure. To quash a judicial proceeding in order to secure the ends of justice would involve a finding that if permitted to continue that proceeding would defeat the ends of justice or in other words would either operate or perpetuate an injustice. To find an "abuse" it would be necessary to see in the proceedings a perversion of the purpose of the law such as to cause harassment to an innocent party, to bring about the delay or where the machinery of justice is engaged in an operation from which no result in furtherance of justice can accrue and similar perverse results. The ends of justice, necessarily means justice as administered by the Courts and not justice in the abstract sense or justice administered by agencies other than Courts. It further appears that words "otherwise to secure the ends of justice", also have to be read subject to the well-known noscitur a sociis rule namely that where two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the loss general. These words have to be read alongwith the earlier objects mentioned in this section and must have some co-relation with them and it is in this sense that the ends of justice to secure which the inherent power may be invoked "have reference to the purposes which the judicial process is introduced to secure and it is difficult to include actions of the investigating agencies within the scope of judicial process.

The enactment of section 439(4)(b), Cr.P.C. was necessitated due to the vesting, by section 439-A, of the revisional powers in the Sessions Court.

The plain meaning of the plain words used by the subsection is that when the Sessions Judge has made an order in the exercise of his revisional jurisdiction, it is not open to the High Court to entertain proceedings by way of revision against the order of the Sessions Judge. And as the power of the Sessions Judge in the exercise of the revisional jurisdiction is the same as that of. the High Court, it means that if the Sessions Judge has, after examining the correctness, legality or propriety of the 'order of the subordinate Court, altered or reversed it, the order of the Sessions Judge is final. To hold that no further revision lies to the High Court against the order of the Sessions Judge, yet, the High Court can, in the exercise of its inherent power, under section 561-A, differ with the Sessions Judge on a finding of fact or law and cancel or quash his order or proceedings would amount to. defeating the legislative intent which is, that what the Sessions Judge is empowered to do with respect to an order of the Magistrate, the High Court is not empowered to do with respect to the order of the Sessions Judge competently made. The intention being clear, the residuary section 561-A cannot be so invoked as to frustrate it.

If two sections of the same statute are repugnant the known rule. is that the last must prevail; and that one way in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations.

Section 561-A, Cr.P.C. does not confer, but saves, inherent powers and if a subsequent enactment makes an express provision providing for a particular situation; the inherent power must give way to that express provision. Therefore, the two provisions can easily stand together if the provisions of section 561-A are so read as not to be applicable to matters which are "proceeding., in revision with respect to an order made by the Sessions Judge under section 439-A".

If there is inherent jurisdiction in the High Court to correct errors "to prevent abuse of process" of the subordinate Courts, then, one need not strain one's imagination to conjure up cases in which the High Court will do so.

Where the Court had the jurisdiction and had in making the order is in question, acted within its-jurisdiction, can it be said that the order is an "abuse" of its process? The answer plainly is in the negative. There is a trite saying that the power to decide includes the power to decide wrongly. A Court has jurisdiction to decide wrong as well as right; the fact that the Court may have come to a wrong decision does not make an excess of jurisdiction. It is a common mistake to suppose that it does; but when a Court has jurisdiction to entertain an application (or other proceedings), it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or fact. Secondly, the power which section 561-A saves is not anything in

the nature of the power of appeal or revision, indeed, it is not, as wide as the power of revision or for that matter, the power of appeal is.

Emperor v. Nazir Ahmad A I R 1945 P C 18; Ghulam Muhammad v. Muzammil Khan P L D 1967 S C 317; Muhammad Samee Ullah Khan v. State P L D 1963 S C 237 at 241; Ghulam Muhammad's case P L D 1967 S C 317; Khawaja Fazal Karim v. The State and another P L D 1976 S C 461; Shahoaz Begum's case P L D 1971. S C 677; Ghulam Sadiq v. Mukhtar Ahmad 1984 S C M R 1446; M.S. Khawaja v. State P L D 1965 S C 287; Maxwell on the Interpretation of Statutes, 12th Ed., at P. 289; Gulab Din v. Muhammad Salim 1985 P Cr. L J 721; Maxwell on the Interpretation of Statutes, 12th Edition at page 187; Gulzar Hasan v. Ghulam Murtaza P. L D 1970 S C 335 and Malkarjun v. Narhari (1900) 25 Bom. 337 P.C. ref.

(e) Interpretation of statutes--

--- Where two or more words in a provision which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense--Such words take, as it . were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

See Maxwell on the Interpretation of statutes, 12th Ed. at P 289 ref. '

(f) Interpretation of statutes--

--- When two sections of same statute are repugnant, the last must prevail and that one way in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations.

See Maxwell on the Interpretation of Statutes, 12th Edition at page 187 ref.

(g) Criminal Procedure Code (V of 1898)--

---Ss. 561-A & 145--Elements essential for foundation of jurisdiction under S. 145, Cr.P.C. and the mode in which such jurisdiction has to be exercised--Distinction--Where said elements exist, they are sufficient to ,vest the Magistrate with the jurisdiction to make the preliminary order in the mode prescribed therein--Where the **Magistrate, after acquiring jurisdiction** did not strictly comply with the other requirements of S. 145, Cr.P.C. as to the form of the order and did not state the ground of his being so satisfied, such order, no doubt, was defective but that did not mean that order was also without jurisdiction--Mere omission to state ground upon which the Court was satisfied in the initial order under 5.145, Cr.P.C. would not necessarily make the order also without jurisdiction as failure to do so was a non-compliance with a rule of procedure and mere non-compliance with a rule of procedure generally was not am illegality vitiating entire proceedings--Sessions Judge, therefore, was not deprived of his jurisdiction to make any order--Sessions Judge's order directing Magistrate to take steps to restore possession of the disputed property to the respondent concerned, was not open to any valid exception and was not liable to be interfered with under 5.561-A, Cr.P.C. in circumstances. ---[Jurisdiction].

Mst Syeda Bano v Muhammad Salim 1987 P Cr. L J 2349 **ref**

(h) Criminal Procedure Code (V of 1898)--

---Ss. 561-A & 145--Jurisdiction of Court under S. 145, Cr.P.C.-Extent--Expression "land"--Definition--Price of commodity lying in the house being not land or its produce, order of Sessions Judge directing restoration of commodity or its price to the respondent was set aside.--[Words and phrases--Jurisdiction].

The jurisdiction vesting in the Court under section 145, Cr.P.C. is in regard to a dispute likely to cause a breach of the peace "concerning any land or water or the boundaries thereof". The expression "land" is defined in subsection (2) of section 145 to include buildings, markets, fisheries, crops or other produce of land. The house is, therefore, land within the meaning of section 145, subsection (2). But as the land commodity in question was a house, the commodity lying therein could not be said to be its produce. It was contended that after the first order of the Magistrate, the commodity was disposed of; this was, it appears, the reason why the Sessions

Judge had thought it fit to direct the restoration of the commodity or its price to the respondent. Indeed, the price of the commodity was, by no means, land or its produce. The order of Sessions Judge was set aside in so far as it directed the restoration of commodity or its price to the respondent.

Muhammad Bashir Khan for Petitioners.

Khan Ata Ullah Khan for the State.

S.M. Latif Khan Khosa for Respondent No. 2:

Dates of hearing: 28th April and 2nd June, 1987.