PETITIONER:
STATE OF U.P.

Vs.

RESPONDENT:
COL. SUJAN SINGH AND ORS.

DATE OF JUDGMENT:
15/04/1964

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
GUPTA, K.C. DAS
DAYAL, RAGHUBAR

CITATION:
1964 AIR 1897 1964 SCR (7) 734
CITATOR INFO :
E 1968 SC 733 (7)

ACT:
Criminal Trail-sanction by Central Government-Proceeding pending before special Judge-Accused asking for production of document from the Union Government Privilege claimed by Government-Special Judge and High Court in revision rejecting the claim of privilege-Order if a "final order" -Petition for grant of certificate-Maintainability-Petition for special leave barred by limitation-Petition for excusing delay on wrong legal advice-If a sufficient ground-Constitution of India, Art. 134(1)(c)-Supreme Court Rules, 1959, 0.21, r. 1(1).

HEADNOTE:
The respondents were prosecuted in the court of the special Judge after obtaining the sanction of the Central Government, for an offence under s. 6(1)(a) of the Prevention of Corruption Act, They put an objection that the sanctioning authority did not apply his mind properly when sanction was granted. One of the respondents asked the Court to summon the concerned record of the Home Department for, it would substantiate his assertion that the concerned officer did not apply his mind earlier in according sanction for his prosecution. The Secretary Ministry of Home Affairs, claimed privilege. The Special Judge and the High Court in revision rejected the claim of privilege of the Union Government. The appellant than filed a petition in the High Court for grant of a certificate. The High Court held that the order sought to be appealed against was an interlocutory one and, therefore, the petition was not maintainable under Art. 134(1)(c) of the Constitution. Against the order of the High Court in revision the appellant filed a petition for special leave to appeal stating that he applied for a certificate to the High Court but it was refused. The appellant did not bring to the notice of this Court that the petition for special leave ",as out of time. The Registry could not point out the defect as in the petition it was stated that the application under Art. 134(1)(c) was dismissed by the High Court without indicating on what ground it did and this Court assumed that

it was in time and granted special leave. However after obtaining the permission of this Court the appellant filed a petition for excusing the delay on the ground that the Law Officer, who was at the relevant time in charge of the matter in the High Court, advised the Government that the order under appeal was a final order and that an application should be filed under Art. 134(1)(c) of the Constitution and that the appellant acted bonafide. The appellant contended (1) that the order of the High Court in the criminal revision was a final order within the meaning of Art. 134 (1)(c) of the Constitution and (2) that the rule 1(1) of 0. XXI of the Supreme Court Rules does not say in express terms that the order of refusal to give a certificate must be on an application which is maintainable and, therefore, if in fact the High Court refused to give a certificate, whether on merit,, or on the ground that it was not maintainable, the party could take advantage of the said rule.

Held (per K. Subba Rao and K. C. Das Gupta, JJ): (i) The order under appeal was not a final order within the, meaning of Art. 134(1) of the Constitution. It did not purport to decide

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the rights of the parties, namely, the State U.P. and the accused. Assuming that it decided some right of the Union Government, the Union Government was neither a party to the criminal -proceedings nor was it a party either before the High Court or before this Court. The indirect effect of the order of a third party to the proceedings, who did not seek to question that order, did not deprive the order of its interlocutory character.

Seth Premchand Satramdas v. State of Bihar [1950] S.C.R. 799, relied on.

(ii) Rule 1(1) of 0. XXI presupposes that the application for the certificate is maintainable and the Court refuses to give it on the ground that the condition laid down in Art. 134(1) of the Constitution have not been complied with. On a reasonable Interpretation of the rule, it could only mean that the refusal ,of the certificate must be in an application maintainable under the said Article.

(iii)The order ex facie was an interlocutory order and so far as the Government of U.P. was concerned it could not possibly be held that any of its rights had been affected by that order. In the circumstances, it must be held that a wrong legal advice is not a sufficient ground for excusing the delay, and the appeal therefore must be dismissed as barred by limitation.

Per Raghubar Dayal, J. (dissenting),: The appellant should be given the advantage of the opinion of its legal advisers as the error, if any. could not be said to be of such a character which a legal adviser could not have possibly given.

The rule does not expressly state that limitation would be counted from the date of refusal of the certificate only when an application for a certificate under Art. 134 would be maintainable. It is true that an application under Art. 134 is contemplated to be an application against the judgment, final order or sentence in a criminal proceeding and that refusal of a certificate under Art. 134, for purposes of rule 1(1) of 0. XXI, refers to the refusal of an application for certificate against the judgment, final order or sentence in a criminal proceeding. But this does not necessarily mean that the rule will not be applicable in cases of refusal of a certificate when one applied for it on the ground that the order sought to be appealed against amounted to a judgment, final order or sentence while the

High Court came to a different opnion, The rule does not specifically state that the date of the refusal of the certificate would be taken to be the starting point of limitation only when the High Court refuses certificate on the ground that it was not a fit case for appeal to the Supreme Court. If it were so, the rule would have been limited to those cases,.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 71 of 1963. Appeal by special leave from the judgment and order dated November 23, 1962 of the Allahabad High Court (Lucknow Bench at Lucknow) in Criminal Revision No. 251 of 1962.

S T. Desai, O. P. Rana, Atiqur Rahman and C. P. Lal, for the appellant.

C. B. Agarwala, Ravinder Narain, O. C. Mathur and J. B. Dadachanji, for respondents nos. 1 and 2.

April 15, 1964. The Judgment of SUBBA RAO and DA,'; GUPTA JJ. was delivered by SUBBA RAO J. RAGHUBAR DAYAL J. delivered a dissenting Opinion.

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SUBBA RAO, J.-This appeal by special leave raises the question of the privilege raised by the Government of India in respect of certain documents called for from its Home Department in a criminal proceeding pending the court of the Special Judge, Anti-Corruption (East), U.P., Lucknow.

The respondents were prosecuted in the said Court, after obtaining the sanction of the Central Government under s. 197 of the Code of Criminal Procedure, for an offence under s. 6(1)(a) of the Prevention of Corruption Act, 1947 (Act 11 of 1947). An objection was taken before the said court on behalf of the respondents that the sanctioning authority did not apply his mind properly when sanction for the prosecution was granted. It was stated on behalf of the respondents that on a representation made by one of the accused, Col. Sujan Singh, for reconsideration of the order of his prosecution, the Deputy Secretary in the Home Department reconsidered the matter and made notings on his application to the effect that the sanction accorded earlier for his prosecution was given on insufficient data. He filed a petition before the Special Judge to summon the concerned record of the Home Department on the ground that the said record would substantiate his assertion that the concerned officer did not apply his mind earlier in according, sanction for his prosecution. The Secretary, Ministry of Home Affairs, claimed privilege on the ground that the production of the record containing the said notings of the Deputy Secretary would not be in the interests of the State. The Special Judge in the first instance and the High Court in revision re-jected the claim of privilege raised by the Union Govern-ment. The State of U.P. has preferred the present appeal by special leave against the order of the High Court.

The respondents filed criminal petition No. 149 of 1964 for condonation of delay in filing appearance and the statement of case. The facts relevant to this application are briefly as follows. Respondents 1 and 2 received the notice granting special leave by this Court on January 16, 1964. After the receipt of the notice they contacted their local advocate at Lucknow and, on his advice, the 1st respondent, along with his local advocate, came to Delhi on January 28, 1964, and made necessary arrangements with Messrs. J. B. Dadachanji & Co., Advocates. On January 16, 1964,

respondents 1 and 2 received a notice from the High Court intimating them that the records of the case had been despatched to the Supreme Court. On February 11, 1964, they filed their appearance and on February 18, 1964, their statement of case. If January 16, 1964, was the date of service on them, there would not be any delay in making their appearance or filing their statement of case. But the notice of the dispatch of the records
was served on the learned counsel for respondents 1 and 2 on November 4, 1963. Under Ch. V, r. 4(1)(c), read with r. 2, of the Rules of the High Court, Allahabad, where a party is represented by an advocate, a service of notice of dispatch of record on such advocate is deemed to be sufficient service. As the present appeal arises out of an interlocutory order it may be said that the advocate representing the respondents in the High Court still continues to represent them. We assume for the purpose of this case that the rule is valid and the notice was duly served on the advocate. If that be so, the respondents should have filed their appearance and lodged their statement of case within a month from the said date. But they filed their appearance on February 11, 1964, which is clearly beyond time. It will be seen from the said facts that the respondents had filed their appearance within one month from the date of service of notice on them, but beyond time from the date the notice was served on their advocate. The said delay is not in the presentation of any appeal but only in following the procedural steps for making the case ready for disposal. We are satisfied by perusing the record that the delay was not due to negligence on the part of the respondents. It is not suggested that the appellant is in any way prejudiced by this delay. In the circumstances we think that this is a fit case for excusing the delay. We excuse the delay in filing respondents' appearance and also in lodging the statement of case.
Whether the daily of the respondents in entering appearance is excused or not. we are at the outset confronted with the situation that this Court gave special leave when the appeal was prima facie barred by limitation without the appellant filing an application for excusing the delay and the Court excusing the same. A few facts would make the position clear. The Judgment of the High Court in the criminal revision is dated November 23, 1962. A certified copy of the Judgment was delivered to the appellant on December 5, 1962. On December 19, 1962, the appellant filed a petition in the High Court of Judicature at Allahabad for a certificate that the case was a fit one, for appeal to the Supreme Court. On February 18, 1963, the High Court held that the order sought to be appealed against was an interlocutory one and, therefore, the petition was not maintainable under Art. 134 (1)(c) of the Constitution of India. On April 16, 1963 the appellant filed a petition in this Court for special leave to appeal against the order of the High Court in the criminal revision. In para. 19 of that petition it was stated that the appellant applied to the High Court for a certificate for leave to appeal to the Supreme Court but the High Court by order dated February 18, 1963, refused to grant the certificate applied for. The appeal
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would be in time if that application was maintainable in the High Court, but would be out of time if that application was not maintainable there, for in the latter event the time would have expired on March 5, 1963, and the appeal would

have been out of time by 42 days.

Learned counsel for the appellant contends that special leave was -ranted on May 10, 1963, and that, as the respondents have not taken objection on the ground that it was barred by limitation till they filed their petition in this Court on February 26, 1964, we shall not permit them to raise this plea at this very late stage. We are not impressed by this argument. This is not a case where the Supreme Court excused the delay in filing the petition for special leave and the respondents with the knowledge of that fact permitted the appellant to incur heavy expenditure and after a long delay raised the objection at the time of hearing of the appeal that the delay should not have been excused. But this is a case where the appellant did not bring to the notice of the Court that the petition for special leave was out of time. The Registry could not point out the defect as in the petition it was stated that the application under Art. 134(1)(c) of the Constitution of India was dismissed by the High Court without indicating on what ground it did and this Court assumed that the petition for special leave was in time and gave special leave. Order XXI, r. 2, of the Supreme Court Rules reads:

> "Where the period of limitation is claimed from the date of refusal of a certificate, it shall not be necessary to file the order refusing a certificate, but the petition for special leave shall be accompanied by an affidavit stating the date of the judgment sought to be appealed from, the date on which the application for a certificate was made to the High Court, the date of the order refusing the certificate and the ground or grounds on which the certificate was refused and in particular whether the application for a certificate was dismissed as being out of time."

Under the said rule it is incumbent upon the petitioner to state in the affidavit filed in support of the petition the date of the order of the High Court refusing the certificate and the ground or grounds on which the certificate was refused. If the appellant had complied with this rule, the Registry of this Court would have noticed the delay in filing the special leave petition and brought that to the notice of the Court. In the circumstances there are two courses open to us: one is to dismiss the appeal on the ground that it was barred by limitation, and the other is to permit the appellant to file

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a petition at this very late stage for excusing the delay in filing the special leave petition and consider that petition on merits. Ordinarily no indulgence should be given to a party when the said party with open eyes filed a petition for special leave without disclosing a material circumstance in the affidavit on the basis of a wrong view of law that the appeal was in time. With some hesitation we gave liberty to the appellant to file a petition for excusing the delay and they have done so.

We shall now consider the petition for excusing the delay on merits, as this Court would have done if that application had been filed along with the special leave petition.

Two reasons are given in the application for excusing the delay, namely, (1) the Law Officer, who was at the relevant time in charge of the matter in the High Court, advised the Government that the order under appeal was a final order and that an application should be filed under Art. 134(1)(c) of

the Constitution in the first instance so that the other side might not contend that the appellant did not approach the High Court for a certificate, and that the said advice was accepted by the Government; and (2) the appellant acted bona fide, as it believed on legal advice that the period of limitation would be counted from February 18, 1963, i.e., the date of the order of the High Court refusing to give certificate and that the order was also filed along with the petition in this Court. The respondents filed a counter affidavit denying that the order was a final order and stating that there was not sufficient reason for excusing the delay.

The learned counsel for the appellant contended that the order of the High Court dated November 23, 1962, in the criminal revision was a final order within the meaning of Art. 134(1) of the Constitution. The material part of the said article reads:

> "An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India.....

We find it difficult to hold that the order under appeal is a final order within the meaning of the said article. In Seth Premchand Satramdas v. The State of Bihar(1) it was held that an order of the Patna High Court dismissing an application under s. 21(3) of the Bihar Sales Tax Act, 1944, to direct the Board of Revenue, Bihar, to state a case and to refer it to the

[1950] S.C.R. 799,, 804.

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High Court was not a "final order". This Court, speaking through Fazl Ali, J., defined the expression 'final order" thus:

> "It seems to us that the order appealed against in this case. cannot be regarded as a final order, because it does not of its own force bind or affect the rights of the parties".

Though this definition is given in a different context, it will equally apply to that expression in Art. 134 of the Constitution. Can it be said that the Special Judge in allowing the petition of the respondents to call for the production of a document from the Union Government is a final order in the criminal proceeding'? The criminal proceedings were taken against the respondents for an offence under s. 6(1)(a) of the Prevention of Corruption Act, 1947. The proceedings are now pending in the court of the Special Judge. In the course of those proceedings the respondents filed an application for the production of a document by the Union Government and that was allowed by the court. The said order is only an interlocutory order pending the proceedings. It does not purport to decide the rights of the parties, namely, the State of U.P. and the accused. It enables the accused to have the said document duly proved and exhibited in the case. It relates only to a procedural step for adducing evidence. The High Court confirmed that order in revision. But the learned counsel contents that it negatives the claim of privilege made by the Union Government and, therefore, it decides against the right of the Union Government to withhold the production of the document. Assuming that the order decides some right of the Union Government, on which we do not express any opinion, the Union Government is neither a party to the criminal proceedings nor is it a party either before the High

Court or before us. The indirect effect of that order on a third party to the proceedings, who does not seek to question that order, does not deprive the order of its interlocutory character. We, therefore, bold that the order made by the High Court is not a final order within the meaning of Art. 134(1) of the Constitution.

That apart the order of the High Court holding that the order sought to be appealed from was not a final order within the meaning of Art. 134(1) of the Constitution has become final. The appellant has not filed any appeal against that order. It cannot ignore that order for the purpose of special leave and contend that the application before the High Court was maintainable and the order made by the High Court must be deemed to have been made on merits, though in express terms it rejected the petition for the reason that it was not maintainable. In either view the period of limitation for filing the special leave petition could not be computed from

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the date of the order of the High Court refusing to give a certificate to appeal to the Supreme Court. It is then contended that the rule does not say in express terms that the said order of refusal to give a certificate must be on an application which is maintainable and, therefore, if in fact the High Court refused to give a certificate, whether on merits or on the -round that it was not maintainable, the party can take advantage of the said rule. We cannot accede to this argument. The rule presupposes that the application for the certificate is maintainable, and the court refuse to give it on the -round that the conditions laid down in Art. 134(1) of the Constitution have not been complied with. If the construction put forth by the appellant be accepted, it will give room for fraud and ,evasion of the rule. A party whose appeal has become barred can file a petition with the knowledge that it is not maintainable, get an order of dismissal and then seek to take advantage of the additional period of limitation provided by the rule. The rule, therefore, must be interpreted reasonably and if so interpreted. it could only mean that the refusal of the ,certificate must be in an application maintainable under the said Article.

Now we shall proceed to consider the application for excusing delay on its merits. The reason for the delay given in the affidavit is that the Law Officer was of the opinion that the application for a certificate was maintainable under Art. 134(1) of the Constitution. We do not see any justification for this opinion. There is no conflict of judicial opinion on this question. The only question that was before the Law Officer was whether the order sought to be appealed from was a final order. The order ex facie was an interlocutory order and so far as the Government of U.P. was concerned it could not possibly be held that any of its rights bad been affected by that order. In the circumstances we cannot hold that a wrong legal advice is a sufficient ground for excusing the delay. What is more, on February 18, 1963, the High Court in a considered order held that the order sought to be appealed from was not a final order and, therefore, an application under Art. 134(1) of the Constitution was not maintainable. The time for preferring an appeal from the main order of the High Court would expire only on March 5. 1963, that is to say, the appellant had 15 days time more for taking steps for preferring the appeal. Even so no steps were taken to file the appeal and instead an appeal was filed on the basis of the original opinion of the Law officer that the time can

be computed from the date of the order refusing to issue the certificate. From the information supplied by the counsel for the appellant it appears that the Government decided to file the appeal only on March 8, 1963, i.e., after the time for filing the appeal bad

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expired. After further correspondence between the Government of U.P. and the counsel representing it in the Supreme, Court the special leave petition was filed only on April 16,. 1963, completely ignoring the reasons given by the High Court in dismissing the application for certificate of fitness. On the -,said facts we do not see any justification for excusing the long delay of 42 days. So. the appeal is clearly barred by limitation and should be dismissed. Accordingly the appeal is dismissed.

RAGHUBAR DYAL, J.-I respondents' appearance and also in lodging the statement of case be excused.

I am however, of opinion that the appellant's application for excusing the delay in the presentation of the petition for special leave to appeal be allowed.

It has to be assumed, for the purposes of disposing of this application, that the order under appeal was not a final order within the meaning of that expression in art. 134(1) of the Constitution. The High Court held so and refused the certificate. The appellant has neither preferred an appeal against that order nor questioned its correctness in its petition for special leave. The reason urged for condoning the delay is that the legal advisers of the appellant were of opinion that limitation for the presentation of the petition for special leave would be governed by the provisions of r. (1) of O.XXI, Supreme Court Rules, hereinafter called the rules, and that in accordance with those provisions the period of limitation would be 60 days from the date of refusal of the certificate by the High Court. If that rule applied, the petition for -,special leave would be in time. The certificate was refused on February 18, 1963, and the special leave petition was filed' on April 16. The question then is whether the appellant can take advantage of the opinion of its legal advisers, assuming that this opinion was erroneous. I am of opinion that it should be given that advantage, as the error. if any, cannot be said to be of such a character which a legal adviser could not have possibly given.

The rule does not expressly state that limitation would be counted from the date of refusal of the certificate only when an application for a certificate under Art. 134 would be maintainable as an application against an order which is held by the High Court to be a 'judgment, final order or sentence in a criminal proceeding'. It is true that an application under art. 134 is contemplated to be an application against the judgment. final order or sentence in a criminal proceeding, and that refusal of a certificate under art. 134. for purposes, of rule 1 (1) of O.XXI. refers to the refusal of an application

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for certificate against the judgment, final order or sentence in a criminal proceeding. But this does not necessarily mean that the rule will not be applicable in cases of refusal of a certificate when one applied for it on the ground that the order sought to be appealed against amounted to a judgment, final order or sentence while the High Court came to a different opinion. The rule does not specifically -,state that the date of the refusal of the certificate would be taken to be the starting point of limitation only when the High Court refuses certificate on

the -round that it was not a fit case for appeal to the Supreme Court. If it were so, the rule would have been limited to those cases.

Further, there is indication in sub-r. (2) itself that such was not contemplated by sub-r. (1) of r. 1.. Sub-rule (2) of r. 1 requires the petitioner, in case he desires limitation to be counted from the date of refusal of the certificate, to mention the -rounds for the refusal of the certificate and, in particular, Whether the application for certificate was rejected as being out of time. An application presented after the expiry of limitation is not maintainable till the Court allows the application for the condonation of delay. There must be a reason for providing, in sub-r. (2), that the fact of the refusal of the certificate on -round of limitation must be expressed. The reason is that proviso (iii) to sub-r. (1) of r. 1 provides that when an application for a certificate is dismissed on the -round of its being out of time, limitation for the petition for special leave to appeal will not be counted from the date of the dismissal of the application. There is no corresponding provision with respect to the limitation being not counted from the date of refusal. if the refusal be on the ground that the order sought to be appealed against did not amount to a 'judgment, final order or sentence' in a criminal proceedings.

In view of these considerations, the advice of the appel-lant's counsel, even if it be erroneous, should not go against the appellant to the extent that the delay in filing of the special leave petition be not condoned. I do not think that the omission to state the ground of refusal in the petition for special leave was deliberate in order to keep back from the Court that the application had been presented after the expiry of the period of limitation.

it would not be irrelevant to consider the nature of the point sought to be urged in the appeal. The question is whether the High Court was right in considering the order of the trial Court rejecting the claim of privilege raised by the Union Government in accordance with s. 123 of the Evidence Act with respect to the production of certain documents summoned. on the -,round that the disclosure would not be in public

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interest. If the view of the Courts below is wrong, the result of refusing to condone the delay would be that public interest will suffer and that consideration should, in my opinion, outweigh the lapse on the part of the appellant in not filing the petition for special leave to appeal within time and that too,, in view of the wrong advice or opinion given by its legal advisers.

I would therefore allow the application and condone the appellant's delay in presentation of the petition for special leave.

ORDER

In accordance with the opinion of the majority, the delay in filing the special leave petition is not condoned. The appeal is barred by limitation and is dismissed.

Appeal dismissed.

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