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IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 30.07.2018
CORAM

THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE N.SESHASAYEE

Review Petition No.698 of 2017
in
WP.No.7650 of 2013

Union of India,
Ministry of Labour and Employment,
Jaisaier House,
Mansingh Road,
New Delhi.

.. Review Petitioner

Vs.

1.Gajendran

2.Tahsildar/Sub-Divisional Executive Magistrate,
Thiruvallur.

3.Sub-Divisional Executive Magistrate/
The Revenue Divisional Officer,
Tiruvallur.

4.The Collector/District Magistrate,
Collectorate, Thiruvallur District.

5.Chief Secretary,
State Secretariat,
St.George Fort, Tamil Nadu.

.. Respondents

Prayer : Review Petition filed under Order 47 Rule 1 CPC to
review the judgement dated 03.06.2014 made in W.P.No.7650 of
2013.

W.P.No.7650 of 2013

Writ Petition filed under Article 226 of the Constitution
of India Praying for issuance of a writ of certiorarified
Mandamus calling for records of GO Ms. No. 1188/1987 the
Government of Tamilnadu Social Welfare Department on 17.7.1987
and quash the same and forbid the 2nd respondent from



conducting further trial in Crime No. 41/2006 Accused 1. Mohamed Bee 2. Kaleel Vs B4 Sevapet Police Station in the file of Revenue Divisional Officer Thiruvallur.

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For Review Petitioner : Mr.Rabu Manohar,
Senior Central Govt. Panel Counsel

For Respondents : David Sundar singh
for R1

O R D E R

(Order of the Court was made by M.Sathyanarayanan, J.)

By consent, this Review Petition is taken up for final disposal.

2. Facts leading to the present litigation have been narrated in detail and in extenso in the impugned order dated 03.06.2014 made in W.P.No.7650 of 2013 and therefore, it is unnecessary to restate the facts once again except to narrate the facts briefly for the disposal of this Review Petition.

2.1. The first respondent in the Review Petition filed W.P.No.7650 of 2013 against the review petitioner as well as against the respondents 2 to 5, praying for a Writ of Certiorarified Mandamus calling for the records in G.O.Ms.No.1188/1987, Social Welfare Department dated 17.07.1987 and quash the same and forbear the third respondent from conducting further trial in Crime No.41/2006 against the concerned accused on the file of the Revenue Divisional Officer, Tiruvallur.

2.2. The Writ Petition was entertained and during the course of arguments, it was brought to the knowledge of this Court that the Bombay High Court, in the decision in Govind Shanwar Chatal v. Dattatraya Waman Bhanushali and another [1992 (2) Bom CR 569], has held that in the light of the provisions of Bombay Separation of Judicial and Executive Functions Act, 1951, conferment of power with Executive Magistrate to try the offences punishable under the said Act would amount to clear interference by the Executive in the administration of justice and therefore, quashed the impugned proceedings pending before the Executive Magistrate and remanded the matter to the Judicial Magistrate Court, I Class, for trial in accordance with law and further declared that all proceedings pending before the Executive Magistrate in the State of Maharashtra for trial of offences under the said Act on the strength of notifications published by the Government of Maharashtra, in exercise of powers under Section 21 of the Act, shall stand transferred to the Court of Judicial Magistrate and the Executive Magistrate



shall not exercise powers to conduct trial of offences under the said Act.

2.3. It was further argued that a Full Bench of Madhya Pradesh High Court in the decision in Hanumantsing Kubersing v. State of Madhya Pradesh and Another [1996 (0) MPLJ 380 (FB)], has also taken a similar view and both the decisions have not been put to challenge and it has become final and therefore, prayed for quashment of the said Government Order.

2.4. This Court, upon hearing the rival submissions, found that the power for trial of offences under the Bombay Separation of Judicial and Executive Functions Act, 1951 can be conferred only upon Judicial Magistrate and the Executive Magistrate cannot exercise such power and therefore, quashed the said Government Order.

2.5. The respondents 2 to 5 in the writ petition did not make further challenge to the said order, which is the subject matter of this Review Petition and therefore, it has become final insofar as they are concerned.

2.6. The Review Petitioner has come forward to file this Review Petition by contending among other things that the validity of a Central Legislation cannot be declared without impleading the Central Government as a party and the Bonded Labour System (Abolition) Act, 1976 is a welfare legislation and the procedure to be adopted is summary in nature and therefore, the Legislature thought fit to confer the said power to the Executive Magistrate in terms of Section 21 of the said Act and therefore, it cannot be faulted with.

3. Mr. B. Rabu Manohar, learned Senior Central Government Panel Counsel appearing for the review petitioner would submit that without impleading the concerned Ministry, namely Ministry of Labour and Employment, Government of India, New Delhi, the impugned order came to be passed in the writ petition, striking down the Government Order by placing reliance upon the decision of the Bombay High Court and Full Bench decision of the Madhya Pradesh High Court cited supra and therefore, prays for reviewing of the order.

4. Mr. David Sunder Singh, learned counsel appearing for the first respondent/writ petitioner would submit that, placing reliance upon the decision of the Bombay High Court and Full Bench decision of the Madhya Pradesh High Court cited supra, in similar facts and circumstances, conferment of power to try the said offences by the Executive Magistrate has been struck down and those decisions had become final and therefore, it is not open to the review petitioner to seek review of the present



impugned order and in fact they want to challenge the above cited decisions before making a challenge before the Hon'ble Supreme Court of India and prays for dismissal of this review petition with exemplary costs.

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5. This Court has considered the rival submissions and also perused the materials placed before it.

6. A perusal of the decision rendered by the Full Bench of Madhya Pradesh High Court in Hanumantsing Kubersing v. State of Madhya Pradesh and Another [1996 (0) MPLJ 380 (FB)] would disclose that trial of the offences by the Executive Magistrate under Section 21 of the Bombay Separation of Judicial and Executive Functions Act, 1951 was put to challenge on the ground of violation of Article 50 of the Constitution of India and the Full Bench of the Madhya Pradesh High Court has gone into the legal position in extenso and it is relevant to extract the following portions of the said judgement:

"11. In Union of India v. Sankalchand Himatlal Sheth and Anr., AIR 1977 SC 2328, P.N. Bhagwati, J. (as he then was) has observed in paragraph 52 that Article 50 is the "Conscience of the Constitution" and embodies the social philosophy of the Constitution and its basic under pinnings and values, plainly revealing without any scope for doubt or debate, the intent of the Constitution-makers, to immunise the Judiciary from any form of executive control or interference. The independence of the Judiciary is a fighting faith of our Constitution. Fearless justice is the cardinal creed of our founding document.

12. It was in that light that when the Code of 1973 was enacted, complete separation of Judiciary with Executive was made. Chapter II of the Code deals with the constitution of Criminal Courts and the Offices. Section 6 deals with Classes of Criminal Courts. It says that besides the High Courts and the Courts constituted under any law, other than the Code, there shall be, in every State, the following classes of Criminal Courts,- namely,

- (i) Courts of Session;
- (ii) Judicial Magistrates of the first class and in metropolitan areas, Metropolitan Magistrates;
- (iii) Judicial Magistrates of the second class; and
- (iv) Executive Magistrates.

From the set up of the classes of Criminal Courts, it is apparent that the scheme of separation of the Judiciary from the Executive has been implemented. All Judicial Magistrates are under the control of the



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Sessions Judge and the Executive Magistrates who are very few in number, under the control of the District Magistrate, which would be evident from Section 15 of the Code. On enforcement of the Code, there has been complete separation of Judiciary from the Executive in whole of the country. This has been done to implement the mandate under Article 50 of the Constitution which requires that State shall take steps to separate the Judiciary from Executive. By merging the judicial function in the executive, the basic structure of the Constitution is affected; justice and fair trial cannot be ensured by the Executive Magistrates in as much as they are not required to be legally qualified and trained persons and in actual practice are required to perform various other functions. Their powers under the Code are limited for the purposes of maintenance of law and order or dealing with the cases of the nature as provided in Chapter VIII to Chapter X of the Code; while the Judicial Magistrate, who remains under the exclusive control of the Court of Session and the High Court has to conduct judicial inquiry and trial of cases of various offences by recording judicial decisions. In fact the functions of the Judiciary and Executive are quite different. In other words it is clear that the Executive Magistrate has no role to play in conducting judicial trial and recording judicial decisions. However, in spite of the separation of Judiciary from Executive, Section 21 of the Act enables the State Government to confer judicial power on an Executive Magistrate or the S.D.M. to try offences judicially and to render judicial decisions and by virtue of the conferment of such power on Executive Magistrate, such Executive Magistrate for the purposes of the Code, for the trial of the offences under the Act is deemed to be Judicial Magistrate of first class or second class as the case may be. This is opposed to the policy of separation of Judiciary from the Executive and is against the 'conscience of the Constitution' contained in Article 50 of the Constitution.

13. Besides the fact that some of the Executive Magistrates are not Law Graduates and are not well versed with the practice and procedure and functioning of the judicial system, they are Members/Chairman of Vigilance Committees whose function, inter alia, is to watch the number of offences of which cognizance has been taken and to survey as to whether there is any offence of which cognizance ought to be taken. The trial before such a Magistrate may not always be



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biased, yet the accused may entertain reasonable apprehension on account of attending circumstances that he will not get a fair trial. The cardinal principle of administering justice is that the justice must not only be done but must be seen to be done; here it would be appropriate to refer to the observations of the Supreme Court in paragraph 94 in case of *In re Special Court Bill, 1978* (supra):

"94. Though this is so, the provisions of the Bill appear to us to be unfair and unjust in three important respects. In the first place, there is no provision in the bill for the transfer of cases from one special Court to another. The manner in which a Judge conducts himself may disclose a bias, in which case the interest of justice would require that the trial of the case ought to be withdrawn from him. There are other cases in which a Judge may not in fact be biased and yet the accused may entertain reasonable apprehension on account of attendant circumstances that he will not get a fair trial. It is of the utmost importance that justice must not only be done but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. There are yet other cases in which expediency or convenience may require the transfer of a case, even if no bias is involved. The absence of provision for transfer of trials in appropriate cases may undermine the very confidence of the people in the Special Courts as an institution set up for dispensing justice."

15. The conferment of the powers under Section 21 of the Act on an Executive Magistrate is for trial of the offences under the Act and not to attend pre-trial steps. There is difference between the inquiry, investigation and trial. The Executive Magistrate on whom the power is conferred can try offences under the Act. They are warrant cases. If a case is instituted otherwise than on a police report, the Court is required to hold an inquiry before framing of the charge. This cannot be done unless the expression "trial" is considered in its widest sense so as to include inquiry at pre-charge stage. Ordinarily trial



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in a warrant case commences after a charge is drawn up under Section 246 of the Code. Trial is a judicial proceeding before the Court which ends in conviction or acquittal. In warrant cases instituted on a police report proceedings starting with Section 238 including discharge or framing of charges under Section 239 or Section 240 amount to a trial. See - V.C. Shukla v. State, AIR 1980 SC 962. But when a case is instituted on a private complaint the Magistrate conducts inquiry till the framing of the charge and then the inquiry is turned into a trial. As the power is conferred only for trial of the offences under the Act, it is difficult to hold that the Executive Magistrate can exercise powers under Section 167 of the Code regarding a remand etc. or conduct pre-charge inquiry.

17. As the Sub-Divisional Magistrate or the Executive Magistrate plays an important role under the scheme of the Act and S.D.M. remains the Chairman of the Vigilance Committee, there is a force in the contention that the trial of the offences under the Act will be biased or there will be reasonable apprehension of bias in the trial by an Executive Magistrate which is violative of the principles of natural justice and denial of fair play.

18. Counsel for the respondents could not point out the benefit which would be derived by vesting judicial powers on the Executive Magistrates by the enabling provision under Section 21 of the Act which is not only against Article 50 of the Constitution but also against the Articles 14 and 21 and also the scheme of the Code. Therefore, we are of the opinion that Section 21 of the Act which enables the State Government to confer on an Executive Magistrate the powers of a Judicial Magistrate of first class or second class for the trial of the offences under the Act, offends Articles 21, 14 and 50 of the Constitution. The Full Bench decision of Punjab and Haryana High Court in the case of Sukhdev Singh v. State of Punjab (supra) supports our view.

20. As a result of the aforesaid discussion, we declare that the enabling provision contained in Section 21 of the Act violates Articles 21, 14 and 50 of the Constitution. Consequently trial against the petitioners for the offences under the Act by the Sub-Divisional Magistrate cannot proceed. All the cases referred to in paragraph 2 above shall stand transferred to the Court of concerned Judicial Magistrate, First Class, records shall be transmitted. As the cases are pending since 1983, the cases shall



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be disposed of in accordance with law expeditiously within the outer limit of six months. The parties to the cases shall appear before Judicial Magistrate, First Class, Petalwad on 1st November, 1995. If the petitioners fail to appear, their presence shall be secured by process of law."

The Madhya Pradesh High Court ultimately held that since Section 21 of the said Act has been struck down, the cases pending before the Executive Magistrates or Sub-Divisional Magistrates shall stand transferred to concerned Judicial Magistrates with a further direction directing the Executive Magistrates or Sub-Divisional Magistrates to take necessary steps and transmit the records to the appropriate Judicial Magistrates.

7. Similar view was also taken by the Bombay High Court in the decision in Govind Shanwar Chatal v. Dattatraya Waman Banushali and Another [1992 (2) Bom CR 569].

8. As rightly pointed out by the learned counsel appearing for the appellant, the decision was rendered by the Bombay High Court in the year 1992 and the Full Bench judgement was decided by the Madhya Pradesh High Court on 28.09.1995 and despite the fact that the Union of India was a party in the Miscellaneous Petition No.2522 of 1984 decided by the Full Bench of Madhya Pradesh High Court, no further challenge has been made and it has become final.

9. The Review Petitioner, under the guise of filing this Review Petition, in effect wants to make a challenge to the above cited decisions and in the considered opinion of the Court, the same is impermissible under law. It is also a settled position of law that once the Central Legislation or particular portion of the Central Legislation has been struck down by any High Court, it applies throughout the country. As rightly pointed out by the learned counsel appearing for the first respondent/writ petitioner, in the light of non-making of challenge to the decision of the Bombay High Court and Full Bench decision of the Madhya Pradesh High Court, it has become final.

10. In the considered opinion of the Court, the present Review Application lacks merit and substance and accordingly, dismissed at the admission stage itself. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar



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To

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1. Tahsildar/Sub-Divisional Executive Magistrate,
Thiruvallur.
2. Sub-Divisional Executive Magistrate/
The Revenue Divisional Officer,
Tiruvallur.
3. The Collector/District Magistrate,
Collectorate, Thiruvallur District.
4. Chief Secretary,
State Secretariat, St. George Fort, Tamil Nadu.

+1cc to Mr.B.Rabu Manohar, Advocate, S.R.No.51494

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WP.No.7650 of 2013

SS(CO)
GSP(16/08/2018)