

In Re: R. Subbarayan

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Court : Chennai

Decided On : Aug-10-1943

Reported in : AIR1943Mad602; (1943)2MLJ247

Appellant : In Re: R. Subbarayan

Judgement :

Alfred Henry Lionel Leach, C.J.

1. This is an application for the issue of a writ of certiorari for the quashing of the proceedings in Ordinance Case No. 1 of 1943 on the file of the Special Judge, Chingleput. The application involves the decision of the question whether Sub-section (1) of Section 3, of the Special Criminal Courts (Repeal) Ordinance, 1943 (Ordinance No. XIX of 1943) embodies a valid provision of law.

2. The petitioner and seven other persons were charged with having conspired to blow up the Uppanar Railway bridge near Shiyali and with having attempted to destroy the bridge. After their arrest the accused persons were brought before the Stationary Sub-Magistrate of Shiyali, who transferred the case to the Sub-Divisional Magistrate of Mayavaram. Under the provisions of the Special Criminal Courts Ordinance, 1942 (Ordinance No. II of 1942), the Sessions Judge of Nega-patam was appointed by the Government of Madras the Special Judge to try the case. Subsequently the Government of Madras transferred it to the file of the Special Judge for the Presidency Town of Madras. The Special Judge is the Sessions Judge of the Chingleput division. On the 28th April, 1943, by which date

the trial had been almost concluded, the petitioner filed the present application. It came before the Court on the 29th April, the day before the Court rose for the summer vacation. At the request of counsel for the petitioner the hearing was adjourned until the 14th July. On the 14th July, the hearing was adjourned until the 2nd August, again at the request of counsel for the petitioner. The further adjournment was asked for because counsel wished to obtain copies of judgments delivered by the Calcutta High Court on the 12th July in a similar case. The judgments of the Calcutta High Court have not yet been published, but by the courtesy of the learned Chief Justice of that Court copies have been supplied for use in this case. After the decision of the Calcutta High Court the same question was raised in a case before the Patna High Court and the learned Chief Justice of that Court has likewise kindly supplied copies for use here.

3. On the 4th June, 1943, in *The Emperor v. Benoari Lall Sarma* the Federal Court, by a majority, held that Sections 5, 10 and 16 of Ordinance No. II of 1942 were invalid. This meant that the proceedings against the petitioner and his co-accused before the Special Judge were unlawful. When the case was before this Court on the 29th April, a stay of the trial was refused. Consequently the Special Judge continued the hearing and on the 11th May he delivered his judgment. He sentenced the petitioner under one charge to undergo rigorous imprisonment for five years and to pay a fine of Rs. 1,000, with rigorous imprisonment for one year in default; and under another charge he sentenced him to undergo rigorous imprisonment for five years, the sentences to run concurrently. On the 5th June, the day after the Federal Court had decided that Sections 5, 10 and 16 of Ordinance No. II of 1942 were invalid, the Governor-General promulgated Ordinance No. XIX of 1943. It repeals Ordinance No. II of 1942, but Sub-section (1) of Section 3 purports to validate subject to rights of appeal and powers of revision conferred by Sub-section (2), sentences already passed by Special Courts constituted under the earlier Ordinance. The petitioner denies that Sub-section (1) has made the sentences valid. He maintains that the Governor-General had no power to enact this sub-section.

4. Section 3 of Ordinance No. II of 1942 provided that Courts of criminal jurisdiction might be constituted under the Ordinance of the following classes,

namely,

(1) Special Judges,

(2) Special Magistrates and

(3) Summary Courts. Section 4 said that the Provincial Government might appoint to be a Special Judge for such area as it might think fit any person who had acted for a period of not less than two years as a Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898. Section 5 stated that a Special Judge should try such offences or classes of offences or such cases or classes of cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in that behalf, might, by general or special order in writing, direct. Section 10 contained a similar provision with regard to cases to be tried before a Special Magistrate. Section 16 said that a Summary Court should have power to try such offences or classes of offences, or such cases or classes of cases as the District Magistrate, or in a Presidency Town the Chief Presidency Magistrate, or a servant of the Crown authorised in that behalf by the District Magistrate or the Chief Presidency Magistrate might direct. Ordinance No. LXI of 1942, which was promulgated on the 21st November, 1942, inserted into Ordinance No. II of 1942, Section 25-A (1), which provided that the Sessions Judge of the Sessions division within which was situated the area for which a Special Judge had been appointed might, at any stage of the proceedings, transfer a case before him to another Special Judge within the Sessions division.

Subsection

(2) gave a similar power to the District Magistrate to transfer a case from one Special Magistrate's Court to the Court of another Special Magistrate. Ordinance No. XIX of 1943 consists of five sections. The first section gives its short title and states that it shall come into force at once. Section 2 repeals in its entirety Ordinance No. II of 1942. Section 3 reads as follows:

Confirmation and continuance, subject to appeal, of sentences--(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said

Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898) by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in Sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under Section 8, and whether or not the sentence was the subject of an appeal under Section 13 or Section 19 of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance.

(3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence.

5. Section 4 deals with the disposal of pending cases. It says that when the trial of a case, pending before a Court constituted under Ordinance No. II of 1942 has not been concluded before the date of commencement of Ordinance No. XIX of 1943, the proceedings shall be void and the case shall be deemed to be transferred, in a Presidency town to the Chief Presidency Magistrate, or elsewhere, to the Sub-Divisional Magistrate, who may either inquire into or try the case himself, or transfer the case for inquiry or trial to any Magistrate subordinate to him, in accordance with the Code of Criminal Procedure. Section 5 provides for an indemnity. It says that no suit, prosecution or other legal proceedings shall lie against a servant of the Crown for or on account of or in respect of a sentence passed by him under the repealed Ordinance or in carrying out a sentence passed by a Court in exercise of the jurisdiction conferred by that Ordinance.

6. It will now be convenient to refer to the decision of the Federal Court in Emperor v. Benoari Lall Sarma Varadachariar, J., who was officiating as the Chief Justice of

the Federal Court and Zafrulla Khan, J., were of the opinion that Sections 5, 10 and 16 of Ordinance No. II of 1942 were ultra vires the Governor-General as the legislative authority. Rowland, J., disagreed with this opinion. It is not necessary for the purpose of deciding the present case to discuss the dissenting opinion. The majority opinion, of course, prevails, and, as we have already pointed out, the decision was immediately followed by the repeal of the Ordinance. The power of the Governor-General to legislate by Ordinance and to provide for Special Courts of the nature of those contemplated by the Ordinance was not disputed, but the learned Officiating Chief Justice and Zafrulla Khan, J., were of the opinion that it had not effected its purpose because the Ordinance had not repealed Sections 28 and 29 of the Code of Criminal Procedure. They also held that the Governor-General had no power to leave to executive officers an absolute and unrestricted discretion without legislative provision or direction laying down the policy or conditions with regard to classes of cases to be decided by the Special Courts. In this connection the learned Officiating Chief Justice said:

In the present case, it is impossible to deny that the Ordinance-making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary Criminal Courts and to the Special Courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the law--as counsel for the Crown would make it appear--but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the executive authorities by Sections 5, 10 and 16 of the Ordinance.

7. Mr. T.R. Venkatarama Sastriar, on behalf of the petitioner, has contended that it follows from this decision that the Governor-General had no power to enact subsection 1 of Section 3 of Ordinance No. XIX of 1943. In order to decide the validity of this sub-section the Court must examine the legislative powers which have been conferred upon the Governor-General by the Government of India Act, 1935.

8. The Ninth Schedule to the Government of India Act, 1935, contains the provisions of the Government of India Act which are to continue in force with amendments until the establishment of the Federation. Section 72 of this Schedule, as it originally stood, stated that the Governor-General might in cases of emergency, make and promulgate ordinances for the peace and good Government of British India or any part thereof, and an ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature. By 3 and 4 George VI, Chapter 33, the time limit of six months was deleted. Section 102 of the Government of India Act, 1935, gives power to the Federal Legislature to make laws for a Province, or any part thereof, with respect to any of the matters enumerated in the Provincial Legislative list if a state of grave emergency is proclaimed. By a notification, dated the 3rd September, 1939, and issued by the Governor-General under Section 102 of the Act it was declared that a grave emergency existed, and the Governor-General has now the power by Ordinance to legislate on all matters referred to in the Federal, Provincial and Concurrent Legislative lists, which are set out in the Seventh Schedule to the Act. The relevant entries in these lists are as follows:

Federal Legislative list.--Entry No. 42:--Offences against laws with respect to any of the matters in this list.

Provincial Legislative List.--Entry No. 1 :--Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of Public Order; persons subject to such detention.

Entry No. 2 :--Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

Concurrent Legislative list.--Entry No. 1 :--Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in

aid of the civil power.

Entry No. 2:--Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

9. It will be observed that the Governor-General can now by Ordinance legislate on all matters relating to criminal law and procedure.

10. The Calcutta case to which reference has been made is *Sushil Kumar Bose V. Emperor* 47 C.W.N. 757. The Bench consisted of Derbyshire, C.J. and Khundkar and Sen, JJ. Derbyshire, C.J. and Khundkar, J., did not hold-section 3 of Ordinance No. XIX of 1943 to be beyond the legislative powers of the Governor-General but they gave it an interpretation which seems to us, with great respect, to be 'inconsistent with its wording. Derbyshire, C.J., considered that the effect of Section 3 was that sentences already passed should continue to have effect as if they had been validly passed until they could be dealt with in appeal or reviewed under the provisions of the Code of Criminal Procedure. He held that it was the duty of the proper Court which had appellate or revisional jurisdiction in the areas in which the sentences were passed to have those convictions brought up before it and quashed and, further, to direct that the persons concerned should be dealt with according to law in the ordinary Courts according to the ordinary process of law, with the exception that where the sentence passed by a Special Court had been substantially served the Court should direct that no further proceedings be taken. He pointed to Section 268 of the Code of Criminal Procedure which directs that all trials before a Court of Session shall be either by jury or with the aid of assessors and said that if the Crown's contention was right, there must be a notional jury and a notional body of assessors. Where the trial is by jury an appeal lies only on a matter of law and therefore, in his opinion, a person tried by a notional jury only got an illusory right of appeal. Khundkar, J., substantially agreed.

11. Sen, J. did not think that it was necessary to decide what interpretation should be placed on Section 3 because in his opinion the section was ultra vires. He considered that as the Federal Court had held that the Governor-General, as a Legislature, had no power to confer jurisdiction on the Special Courts in the manner in which he had tried to confer it, it was not open to him as a Subordinate

or non-sovereign legislature to enact either directly or indirectly that that jurisdiction was good. In this connection he referred to certain Canadian cases decided by the Privy Council where it was held that a Provincial Legislature could not do indirectly what it could not do directly. In the course of his argument, the learned Advocate-General, who appeared on behalf of the Crown, said that Sen, J., had not kept distinct the absence of power from the question whether power which existed had been properly exercised. We think that this criticism is justified.

12. The judgment of the Patna High Court was delivered on the 20th July, 1943, by Brough, J., who said that he found Section 3 perfectly clear and but for the argument which had been addressed to them and the decision of the Calcutta High Court he would have contented himself with saying that it meant what it says. The Federal Court had not decided that it was ultra vires to set up Special Courts and give them jurisdiction. It was the method of giving them jurisdiction which was ultra vires. He could see no reason, therefore, why the Legislature could not ratify invalid acts if it could avoid the error of method. The legislative authority had in this case applied its own mind to the cases covered by the new Ordinance and these cases were ascertainable. He held that the new Ordinance could not be declared to be invalid by reason of the decision of the Federal Court on the old one and that the ratification was effective.

13. In the first place Mr. T.R. Venkatarama Sastriar asked us to accept the opinion expressed by Sen, J., and in the alternative to accept the interpretation which Derbyshire, C:J., placed on Section 3.' We find ourselves unable to take either of these courses.

14. It is not correct to describe the Governor-General as being a subordinate or non-sovereign legislature in this connection. He has all the powers which the Federal Legislature would have had if federation had been adopted and he has all the powers of a Provincial Legislature. It is true that Parliament has power to amend the Government of India Act, 1935, but while it stands as at present, the Governor-General constitutes a sovereign legislature with regard to the matters referred to in the three Legislative 11sts, and as we have seen, full power has been given to the Governor-General to legislate without restriction in matters of

Criminal law and of the procedure to be adopted in trying criminal cases. The Federal Court acknowledged that the Governor-General had the power to appoint Special Courts of the nature of those mentioned in Ordinance No. II of 1942 and the Ordinance was held to be invalid only because the precaution of repealing certain sections of the Code of Criminal Procedure had not been taken and there were no rules governing the allocation of cases. The errors or omissions which rendered Ordinance No. II of 1942 invalid, cannot, in our opinion, restrict the Governor-General in promulgating a new Ordinance.

15. Section 3(1) of the later Ordinance says that sentences which had been passed under the repealed Ordinance before its repeal shall continue to have effect as if the trials at which they were passed had been held in accordance with the Code of Criminal Procedure. If the Governor-General's powers are unrestricted, as we hold them to be, he must have power to make such a provision. Of course, the Governor-General has not power to do indirectly what he cannot do directly. This principle has been definitely established in the cases to which Sen, J., referred, but the Governor-General, in our opinion, is not attempting to do something indirectly which he had not power to do directly. He could, if he had thought fit, have amended Ordinance No. II of 1942 to remedy the defects which the Federal Court had pointed out, and we think that he has full power to say that trials which were not held under a particular law shall be deemed to have been held under that law.

16. Mr. Venkatarama Sastriar has agreed that the question to be decided, put shortly, is whether the Governor-General has power to declare by Ordinance that sentences passed by Special Courts should be deemed to have been passed in trials properly held under the Code of Criminal Procedure and the short answer which he has given to this question is that the Governor-General has not the power because the cases which gave rise to the sentences were placed before the Special Courts by officials to whom there had been no proper delegation of power in this behalf. We cannot accept this as a sound reason for declaring the later Ordinance to be invalid. As we have already indicated the fact that there was a defect in the earlier Ordinance cannot lessen the very wide powers which the Governor-General possesses when he decides to legislate further. The powers

only arise when a grave emergency exists, but the Governor-General alone can decide whether an emergency has arisen and a declaration by him to this effect cannot be questioned. (See *Bhagat Singh v. King-Emperor* (1931) 61 M.L.J. 279 : 1931 L.R. 58 IndAp 169 : I.L.R. 12 Lah. 280 (P.C.)

17. The judgment of Lord Halsbury in *Tolonkov. The Attorney-General of the Colony of Natal* (1907) A.C. 93 seems to us to have direct bearing on the question now under discussion. There the petitioner was indicted for the crimes of sedition and public violence before a Court martial after a declaration of martial law. He wished to appeal to the Privy Council against his conviction and the sentence which had been passed against him. His objections to the trial were, he was not a military man, he had not been taken in the field, he had never taken up arms against the Government, the state of the country was not such as to justify his being tried before a Court martial and the Civil Courts before whom he had a right to be tried had in no way been interrupted in their functions and were then sitting. The Natal Parliament passed an Indemnity Act, Section 6 of which said:

All sentences passed by any Courts martial or by any Court or Person administering martial law under the authority of the Governor or the commandant of militia in Natal, or by any military officer purporting to exercise authority in that behalf, since the date of the aforesaid proclamation of 9th February, 1906, including fines and other punishments inflicted by military officers in the field, are hereby confirmed and made and declared to be lawful, and in so far as the same shall not have been already carried into effect, shall be deemed to be final sentences passed by duly and legally constituted Courts of this colony, and no appeal shall lie in respect of the same, but they shall be and remain in force and shall be carried out in the same manner as the sentences of the Courts of law in this Colony.

18. Leave to appeal was refused and in delivering the judgment of the Privy Council, Lord Halsbury said:

It is by this time a very familiar observation that what is called 'martial law' is no law at all. The notion that 'martial law' exists by reason of the proclamation--an expression which the learned Counsel has more than once used is an entire

delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorise what are called 'Courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called 'Courts martial' administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory.

19. Later on in his judgment, Lord Halsbury observed:

An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question, and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction, This Board has no power to review these sentences, or to inquire into the propriety or impropriety of passing such an Act of Parliament. The only thing for persons who are subject to such an Act of Parliament to do is to obey. The question in this case arises under the Natal Act of Parliament in respect of offences committed in Natal, which Act has been assented to by the Governor and, having the force of law, is binding on their Lordships. The language of the Act appears to their Lordships to be subject to no question of doubt or ambiguity at all.

20. The Special Courts set up by Ordinance No. II of 1942 were no Courts at all, as they had not been validly constituted. They had no more legality than the Courts-martial to which Lord Halsbury referred. If the Natal Government had power to pass an Act validating sentences imposed by Courts which had no legal existence, then the Governor-General has the power, and the Privy Council held that the Natal Parliament had the power.

21. There is a Madras Act which may be aptly referred to here. It is the East and West Tanjore Sessions Divisions (Validation) Act, 1931, which, was passed in

order to legalise trials and sentences which it was feared had been held and passed without jurisdiction. Section 3 of this Act reads as follows:

Notwithstanding anything contained in Sub-section (1) of Section 7, of the Criminal Procedure Code, 1898, the Sessions Division of East Tanjore and the Sessions Division of West Tanjore in the Revenue District of Tanjore and the Courts of Session established for each one of the said Sessions Divisions, shall be deemed to have been and to be validly constituted and no proceeding of the Courts of Session of the said Sessions Divisions shall be questioned merely on the ground that the limits of neither of the said Sessions Divisions were or are conterminous with the limits of a District.

22. It has not been suggested that the Madras Legislature had no power to pass this Act. Is not the present position analogous?

23. Derbyshire, C.J., considered that there was much room for criticism of Section 3 of Ordinance No. XIX of 1943, because the Governor-General had not adopted the language to be found in the Decrees and Orders Validating Act, 1936 (Act V of 1937), but the fact that the section does not speak specifically of validation is, in our judgment, no reason for not giving effect to the words used. We are also unable to share the opinion that the provision with regard to appeals is illusory. In this case the Court is not called upon to decide what are the full powers conferred by Sub-section (2) on appellate and revisional Courts. The Court is merely concerned with whether the Governor-General had the power to declare that sentences passed by Special Courts shall be deemed to have been passed in trials held under the Code of Criminal Procedure. But supposing that a case tried by a Special Court would have been tried with a jury, if the Code of Criminal Procedure had applied, and that the appellate Court functioning under Sub-section (2) of Section 3 of Ordinance No. XIX of 1943 has no right to inquire into the finding of fact, beyond ascertaining whether there is evidence to support it, the appeal would not necessarily be illusory. It would still lie on questions of law. It may be that the intention of the Ordinance making authority was to allow an appeal on the facts in such cases.' We express no opinion on this question, but all doubt would be removed and much judicial time would be saved if an Ordinance

were promulgated clarifying the position in this respect.

24. For the reasons given we hold that Sub-section (1) of Section 3 is not invalid and that the section means what it says. The result is that the application for the issue of a writ of certiorari is dismissed and the petitioner is left to an appeal under Section 3. (2).

25. A certificate will issue section 205 of the Government of India Act, 1935.

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