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Court : Kolkata

Decided On : Jan-26-1943

Reported in : AIR1943Cal224

Appellant : Santosh Kumar Bhattacharjee

Respondent : Emperor

Judgement :

Derbyshire, C.J.

1. On 2nd November 1942, Santosh Kumar Bhattacharjee was observed by policemen distributing certain leaflets in Calcutta. He was arrested and, according to the Magistrate who dealt with the matter, two kinds of leaflets were found on him one of which was not regarded as objectionable and the other was said to be a prejudicial report within the meaning of Rule 34, Defence of India Rules. The matter was reported to the police who placed it before Mr. J. Ahmad, Additional Chief Presidency Magistrate of Calcutta. Mr. Ahmad had been designated by the Government of Bengal as a Special Magistrate to exercise powers conferred on Special Magistrates by ordinance No. 2 of 1942. A chalan was issued under Sections 38(5), 38(1)(c), 39(6) and 39(1)(6), Defence of India Rules, and 5th December 1942 was fixed for the hearing of the charge, the accused being granted bail in the meantime. On 5th December 1942, the Magistrate made a note in his file that he took the case up as a Special Magistrate. He heard three prosecution witnesses, explained the charge and recorded the plea of the

accused. Thereafter, the Magistrate adjourned the case to 12th December for cross-examination. On 12th December 1942, prosecution witnesses were cross-examined and certain defence witnesses were examined. The accused put in a written statement and after argument the Magistrate convicted the accused Santosh Kumar Bhattacharjee and sentenced him to undergo rigorous imprisonment for six months. The conviction was under Rule 39(6), Defence of India Rules, which provided a maximum punishment of imprisonment up to three years or a fine or both. The accused thereupon moved this Court under its revisional jurisdiction for a rule and obtained a rule upon the Chief Presidency Magistrate of Calcutta to show cause why the conviction and sentence referred to should not be set aside. It was intimated to the Court that the accused wished to raise a question as to whether Ordinance No. 2 of 1942 was ultra vires the powers of the Governor-General. Accordingly the matter is brought before this Bench on notice to the Government of Bengal and the learned Advocate-General has appeared on behalf of the Crown. The accused is represented by Mr. H.D. Bose.

2. Mr. Bose complained that the Ordinance is ultra vires and also contended that the Magistrate had not acted throughout in the exercise of his jurisdiction as a Special Magistrate, in that it was only when he sat on 5th December 1942, that he recorded that he took the matter up as a Special Magistrate. He contended that the Magistrate ought throughout from the commencement of his dealing with the case have acted' as a Special Magistrate if the Ordinance which created Special Magistrates was valid. The Ordinance was made on 8lst December 1941, and published in the Gazette of India on 2nd January 1942. The Ordinance recites that a, special emergency has arisen which makes it necessary to provide for the setting up of Special Criminal Courts and that in exercise of the powers conferred by Section 72, Government of India Act, as set out in Schedule 9 to the Government of India Act, 1935, the Governor-General makes and promulgates the Ordinance which is called the Special Criminal Courts Ordinance, 1942. Section 1 provides that the ordinance shall come into force in any province only if the Provincial Government, being satisfied of the existence of any emergency arising from a hostile attack on India or from the imminence of such an attack, by notification in the Official Gazette, declares it to be in force in the province.

3. By Section 3 Courts of criminal jurisdiction are constituted as follows : (i) Special Judges; (ii) Special Magistrates; and (iii) Summary Courts. Sections 4, 5, 6 and 7 deal with the appointment, jurisdiction, procedure and powers of the Special Judges. Section 8 deals with the review of such convictions. Section 9 provides that a Presidency Magistrate or Magistrate of the first class who has exercised powers as such for a period of not less than two years may be invested with the powers of a Special Magistrate under the ordinance. Section 10 directs that a Special Magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing direct. Section 11(1) provides that in the trial of any case a Special Magistrate shall follow the procedure laid down in Sub-section (1) of Section 6 for the trial of cases by a Special Judge. It may be noted here that Section 6(1) provides that a Special Judge in trying an accused person shall e follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates. Section 12 provides that a Special Magistrate may pass any sentence authorised by law, except a sentence of death or of transportation or imprisonment exceeding seven years. Section 13(1) provides that where a Special Magistrate passes a sentence of transportation or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge having jurisdiction in the area or if there is no Special Judge for the area, to the High Court in a Presidency town and elsewhere to the Court of Session. Other provisions follow, but the only ones with which we are concerned are Sections 26 and 27. Section 26 provides:

Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this ordinance, be no appeal from any order or sentence of a Court constituted under this ordinance and save as aforesaid no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under Section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court.

4. Section 27 provides:

The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this ordinance shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance.

5. The accused has been sentenced to six months' imprisonment by a Presidency Magistrate, and, therefore, he has no right of appeal under the provisions of Sections 18 and 26 of the Ordinance. Under Section 411, Criminal P.C., he would have no right of appeal to the ordinary Courts against his conviction as it does not exceed six months. He therefore has moved this Court in its revisional jurisdiction in order to have his case considered both as to conviction and sentence; but there is the bar to revisional jurisdiction being exercised by this Court contained in Section 26. The accused however contends that the provisions of the Ordinance are invalid and that the jurisdiction of Special Magistrate and the prohibitions against recourse to the ordinary Courts are illegal; that being so he is entitled to come to this Court in its revisional jurisdiction. Mr. Bose has drawn our attention to the provisions of the Defence of India Act (Act 85 of 1939), which provides in Section 8 of chap. 3 for the setting up of Special Tribunals which shall consist of three members appointed by the Provincial Government, and also to Section 10 of that Act which deals with the procedure of Special Tribunals. He relies especially upon the provisions of Section 14, Defence of India Act, which are as follows:

Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.

6. He says that Special Magistrates are not set up and provided for under the Defence of India Act and that therefore ordinary criminal Courts alone have jurisdiction to deal with the offence with which the accused has been charged and of which he has been convicted. Mr. Bose also referred to the provisions of Section 317, Government of India Act, 1935, under which the Ordinance was made. Section 317 continues the powers given to the Government in certain sections of the Government of India Act, 1915, and provides that the provisions of the Government of India Act set out with amendments consequential on the

provisions of this Act in Schedule 9 to this Act, shall, subject to those amendments, continue to have effect notwithstanding the repeal of the 1915 Act by the Act of 1935. In Schedule 9, Government of India Act, 1935, Section 72, Government of India. Act, 1915, is set out and it provides as follows:

The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof; and any 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; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act.

7. It is conceded that by the Act of Parliament styled India and Burma (Emergency Provisions) Act of 1940 - Section 1(3) - that particular provision is to be read as if the words 'for the space of not more than six months from its promulgation' were omitted. That removes the time limit to the Ordinance. Mr. Bose refers to the last passage in Section 72, namely, the words 'and may be controlled or superseded by any such Act.' Such an Act is an Act of the Indian Legislature and Mr. Bose says that Section 14, Defence of India Act, 1939 controls the powers of the Ordinance and that except as regards Special Tribunals of three persons set up under the Defence of India Act the ordinary criminal Courts shall continue to exercise their jurisdiction. He says that that is the control over the Ordinance that is referred to in Section 72, Government of India Act, 1915. It is quite true that in the Defence of India Act no mention is made of Special Magistrate sitting alone. However that is not the whole matter. In my view the words 'may be controlled by such Act' may mean 'may be controlled by such an Act as is passed with an evident intention to control the Ordinance.' It cannot be that an Act passed in 1939 dealing with a position which had arisen in 1939 can be deemed to control a piece of legislation, which for the time being is of equal authority, passed to meet another different and more serious set of circumstances arising some 2 1/4 years afterwards in 1941.

8. The position when the Defence of India Act was passed was that Great Britain and India were at war with Germany. It was necessary to take precautions to deal with that situation. The situation which existed after 9th December 1941 when Japan declared war on Great Britain and marched into Burma, territory adjoining India, was vastly different. There was in the country contiguous to India - a part of the country which had formerly been governed along with India and considered as one with India - a hostile army which was invading that territory (Burma) and marching towards the Indian frontier. There was also possibility of an attack both from sea and from the air upon Indian territory and the reactions to those hostile conditions upon India might be and were vastly different from the reaction to the declaration of war in September 1939. Apart from matters of strict legal construction, it is clear to me that the ordinance No. 2 of 1942 was passed to meet a situation vastly different from and never contemplated in 1939 when the Defence of India Act was passed. Under those circumstances, in my view, it is impossible to say that Section 14, Defence of India Act, controls in any way Ordinance No. 2 of 1942 which as far as it goes is of equal authority and arose from circumstances quite different from those in 1939. In my opinion, the making of' Ordinance No. 2 of 1942 was within the legislative competence of the Governor. General and the contention of ultra vires must fail. As regards the second point raised by Mr. Bose that the Magistrate did not throughout these proceedings act as a Special Magistrate under the Ordinance, I am of the opinion that that too fails. Section 10 of the Ordinance provides that a Special Magistrate shall try such offences or classes of offences...as the Provincial Government...may, by general or special order in writing, direct.

9. There is no question here that the Magistrate was appointed a Special Magistrate. There is no question that the offence with which the accused was charged and of which he was convicted was one that the Special Magistrate was directed to deal with. All that the Ordinance says is that the Special Magistrate shall try such offences. It is his duty when he takes up his duties of Special Magistrate to make it clear to everyone including the accused that he is doing so, and then no question can arise of the accused person not knowing what his rights are. It follows from what I have said that I am of the opinion that the Ordinance is valid and that the proceedings of the Magistrate were valid within that Ordinance

that under the Ordinance the accused has no right to appeal [as his sentence was six months only and that the revisional jurisdiction of this Court is taken away by the provisions of Section 26 of the Ordinance. I am therefore of the opinion that this rule must be discharged. I am of the opinion that we have no authority to deal with the question of bail. Certificate is granted under Section 205, Government of India Act, in this case.

Lodge, J.

10. I agree.

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