
(1950) 08 MP CK 0005

In the Madhya Pradesh High Court

Case No : Criminal Miscellaneous Case No. 61 of 1950

Chiman Singh Balbhadra Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 28-08-1950

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 193

Citation : AIR 1951 MP 44

Hon'ble Judges : S.S. Shinde, J;P.V. Dixit, J

Bench : Division Bench

Advocate : Day and Inamdar, for the Appellant;

Final Decision : Dismissed

Judgement

Dixit, J.—This is an application, under S. 526, Criminal P.C. for the transfer of an enquiry, which, it is said, is being made by Mr. Ghoshal as a special Magistrate, to any other Court of competent jurisdiction.

2. In his application the petitioner alleges that during the course of firing which took place near the Secretariate building, Lashkar, on the afternoon of 9-8-1950, amongst the students who were injured was a nephew of the petitioner and that he subsequently succumbed to the injuries; that on 13-8-1950 the Madhya Bharat Government by Notifn. No 207 dated 13-8-1950, published in the Gazette of the same date appointed Mr. U.K. Ghoshal, I. C. S. as :

Special Magistrate for a period of 15 days with powers of a Magistrate of the First Class and jurisdiction over the Municipal limits of the cities of Lashkar, Morar and Gwalior for the purpose of conducting an inquiry into the firing incident in the Moti Mahal area on 9-8-1950.

and that Mr. Ghoshal has been since then holding the enquiry sitting in one of the rooms of the building of this Court, The applicant further states that on 17-8-1950 he presented an application to Mr. Ghoshal expressing his desire to

lead evidence before him and to be represented by a counsel in the inquiry, but as yet no orders seem to have been passed on that application. It is alleged that as Mr. Ghoshal is holding that inquiry in camera and as the persons against whom accusations have been made in connection with the firing incident including Police Officers, the petitioner apprehends that there would be no fair and impartial inquiry. The petitioner claims that as a party interested in the inquiry he has a right to file this petition.

3. When this petition came up for hearing on 23.8-1950, Mr. Shivadyal, Dy. Government Advocate prayed for time on the ground that in this case the Advocate-General would appear for the State. Mr. Shiva Dayal further stated that he was not in a position to make any statement as to either the nature of the inquiry or the capacity in which Mr. Ghoshal was holding inquiry. A copy of the petition was, therefore, directed to be sent to Mr. Ghoshal enquiring of him the authority under, and the capacity in which he was holding the inquiry, the nature and purpose of the inquiry, and the procedure he was following in the inquiry.

4. In his dear and helpful reply Mr. Ghoshal has drawn our attention to a Notification of the Ministry of the Home Affairs, Government of India, placing his services temporarily at the disposal of the Government of Madhya Bharat with effect from the afternoon of 12-8. 1950, and to a resolution of the Madhya Bharat Government published under the Cabinet department No. 886-c-iii-1950 in the Gazette of 12-8-1950 appointing him as a Spatial Inquiry Officer for holding a preliminary inquiry into the incidents which culminated in the firing by the police on 9-8-1950 and making a report thereof to the Government. Mr. Ghoshal further states that he is holding the inquiry in his administrative capacity and although the Government has invested him with the powers of a Magistrate of First Class, he has not so far exercised any such powers under any of the provisions of the Criminal Procedure Code. He says:

The purpose and the object of the inquiry is to ascertain facts so far as they are capable of being ascertained on the basis of statements given before me by persons who claim to have personal knowledge of the incidents that culminated in the firing on 9-8-1950, and to make my report to the Government to enable them to decide what further action was necessary in consequence of the executive inquiry made by me.....It is submitted that the inquiry made by me, as contemplated by the Government resolution, is not in terms of any provisions of the Criminal Procedure Code and in no sense of the terms have I functioned as a Court conducting an inquiry under the Criminal Procedure Code. On the other hand, I have to make a report to the Government in respect of the facts found by me. It is for the Information of the Government that I have to find, to the best of my ability and within the limitation of the information I succeed in collecting facts.

Mr. Ghoshal has also given the details of the procedure that is being followed by him. He states that the statement that a person makes to him is preceded by a solemn affirmation but that if a particular person declines to make a statement on solemn affirmation such affirmation is waived and his signature is not taken

on the record. As to the statement of the petitioner that no orders appear to have been passed on his application dated 17-8-1950, Mr. Ghoshal has said that orders were passed in the application on 20-8-1950 in terms of what he has stated in his reply.

5. In order to make clear the main issue that arises in this application, it is necessary to state that the condition precedent to the exercise by this Court of the power conferred by S. 526 of the Code, is that the case sought to be transferred must be in a criminal Court subordinate to the High Court. This is plain from sub-s. (1) of S. 526 which states the circumstances in which the power can be exercised and the orders that the High Court can make if these circumstances exist. The crucial question that arises for determination is whether in making the inquiry, which Mr. Ghoshal is making, he is acting as a Court of Special Magistrate and the inquiry is a Judicial proceeding, in a Court. Mr. Ghoshal has stated in his reply that he is holding the inquiry in his administrative capacity as a Special Enquiry Officer and that he has not so far exercised any power of a Magistrate of First Class with which he has been invested by the Government.

6. The argument of the learned counsel for the petitioner is that under the Indian Criminal Procedure Code, 1898, as adapted in Madhya Bharat, an Executive Officer cannot be vested with magisterial powers and that if he is so invested he cannot exercise any administrative or executive functions and that therefore Mr. Ghoshal cannot hold an inquiry in his administrative capacity as a Special Enquiry Officer after his appointment as a Special Magistrate. It is further contended that as Mr. Ghoshal is in fact holding the very inquiry for which he has been appointed Special Magistrate, it must follow that the inquiry is a judicial proceeding and, is by a Court. We are unable to accept this argument. The proposition that under the Criminal Procedure Code adapted in Madhya Bharat an executive Officer cannot be vested with magisterial powers or that a Magistrate cannot have executive duties is altogether untenable. It is true that as a matter of prudence executive officers in Madhya Bharat are not generally invested with magisterial powers and Magistrates have no executive duties. But this rule of prudence does not alter the legal position that even under the Code as adapted in Madhya Bharat a person can perform executive as well as magisterial duties. That being so, it cannot be maintained that Mr. Ghoshal after his appointment as a Special Magistrate cannot discharge the functions assigned to him as Special Enquiry Officer. Again the magisterial and administrative functions of Mr. Ghoshal do not overlap so as to debar him legally from holding any inquiry into the firing incident in his administrative capacity. The extent and scope of a magisterial inquiry would necessarily be limited to that of an inquiry or a trial envisaged under the Code. An inquiry may relate to the firing incident, yet it may not be one falling under the Code, and it would appear that there is nothing to prevent Mr. Ghoshal from holding such an inquiry in his administrative capacity as a Special Enquiry Officer, although he has been appointed as Special Magistrate in some what ambiguous language "for the purpose or conducting an inquiry into the firing

incident". One may, well question the propriety of an executive officer holding an inquiry of any type relating to the firing incident when he is appointed as a Special Magistrate, "for the purpose of conducting, an inquiry into the firing incident". But here, we are not concerned with this question. Nor are we concerned with the question whether a Special Magistrate if he has taken cognizance of an offence should be allowed to inquire, or try the accused, as he had previously made some inquiry relating to the matter in his administrative capacity. We were pressed by an argument that the inquiry which Mr. Ghoshal is holding is in fact an inquiry under S. 176 or 190 of the Code. On the facts and circumstances disclosed by Mr. Ghoshal there can be no doubt that the inquiry which he is making is not what is contended to be by the counsel for the petitioner. Mr. Ghoshal has not taken cognizance of any offence and for this reason S. 190 can have no applicability in the present case. He is also not holding an inquest under S. 176 (2) of the Code.

7. In our view, it is to the object to which an inquiry is pointed the nature of it and the powers that the person holding the inquiry has in relation thereto, that we must look for determining the question whether the inquiry is a judicial proceeding and by a Court. The Code of Criminal Procedure does not give a definition of the word "Court". Section 3, Evidence Act, defines a Court as including all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence. But this definition is only for the purposes of the Evidence Act. It cannot be applied generally in all contexts; see *Queen-Empress v. Tulja*, 12 Bom. 36. Under S. 4 (1) (m). Criminal P.C. any proceeding in the, course of which evidence is or may be legally taken on oath is for the purposes of the Code included in the term, "Judicial proceedings". But as was observed by West J., in *Queen-Empress v. Tulja*, 12 Bom. 36 this does not involve the consequence that other inquiries are judicial proceedings, and that the functionaries holding them are Judges or Courts. In the Bombay case West J., pointed out the distinction between a judicial and an administrative inquiry and relied on the observations of Blackburn J., in *The Queen v. Price*, (1863) 6 Q.B. 418, which may be usefully reproduced here. The observations are:

Where the common law or the legislature has cast on a person the obligation, where certain facts exist, not to form his opinion or exercise a discretion, but to do a certain thing, then, no doubt, there is a preliminary inquiry whether those facts exist, and no doubt the person called upon to perform the obligation must, to some extent, exercise common sense, and see whether the facts do exist.

8. West J., pointed out that such a preliminary inquiry is an administrative inquiry and not a judicial inquiry and proceeded to say that :

An inquiry is judicial if the object of it is to determine a legal relation between one person and another or a group of persons; or between him and the community generally; but even a Judge, acting without such an object in view is not acting judicially.

9. If a body or authority does not exercise judicial power, it cannot be a Court at all. In recent years judicial power has been defined as a power to examine a given set of facts submitted for consideration with a view to pronouncing an authoritative decision as to the respective rights and liabilities of one or more parties and to carry the decision into effect. In an Australian case. *Hiddart Parker and Co. v. Moorehead*, Griffith C.J. observed that the exercise of judicial power

does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

A full report of the case is given in Swaer's "cases on the Constitution of the Commonwealth of Australia". According to this definition it is only when a body has the power not only to give a binding and authoritative decision but also the power to enforce that decision, that it can be said that all the attributes of judicial power are present.

10. This definition of judicial power given by Griffith C.J., was approved by the Privy Council in *Shell Co. of Australia v. Federal Commissioners of Taxation*, (1931) A.C. 275 : (100 L.J. P.C. 55). Lord Sankey delivering the judgment of the Board observed in this case:

The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial powers. In that connection it may be useful to enumerate some negative propositions on the subject; (1) A tribunal is not necessarily a Court in this strict sense because it gives a final decision, (2) nor because it hears witnesses on oath, (3) nor because two or more contending parties appear before it between whom it has to decide, (4) nor because it gives decisions which affect the rights of subjects, (5) nor because there is an appeal to a Court, (6) nor because it is a body to which a matter is referred by another body.

11. Again the Privy Council in the *Labour Relations Board v. J. John East Iron Works Ltd.*, AIR 1940 P.C. 129 : (53 C.W.N. 389) after referring to the definition of judicial power given by Griffith, C.J. and to the decision of the Privy Council in *Shell Co.*, (1931 A.C. 275: 100 L.J.P. 65) stated that:

.....that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertain facts but by considerations of policy also.

12. Applying these principles here, we think there can be no doubt that in holding the inquiry which Mr. Ghoshal is making, he is not exercising any judicial power or acting as a Court. For, it is plain from his statement as well as from the Government resolution that the scope of the inquiry is limited to finding facts. Mr.

Ghoshal has not the power to give a binding and authoritative decision on the facts found by him or the power to carry the decision into effect. He has to make a report to the Government in respect of the facts that may be found by him and the ultimate decision of the Government of the report may be determined not merely by the application of legal principles to the facts ascertained but by a consideration of policy also. The inquiry is in form and substance a departmental inquiry and in holding that inquiry Mr. Ghoshal is merely acting as a Special Enquiry Officer and not as a Court of Special Magistrate. There are numerous authorities to show that an inquiry into the conduct of a public official made by an executive officer even if he happens to be a Magistrate or even if he administers oath to the witnesses during the course of the inquiry, is not a judicial proceeding and the office of the authority holding the inquiry would not be a Court. A reference need only be made to *In re, Chotalal Mathuradas*, 22 Bom 936 and to *Queen-Empress v. Venkataramanna*, 23 Mad. 323 in the latter case a preliminary inquiry was held by a Sub Divisional Magistrate at the direction of the District Magistrate into the circumstances of a complaint of bribery against an Inspector of Police. In the course of the inquiry a witness made a false statement on oath before the Sub-Divisional Magistrate, held that the witness was bound to tell the truth at the inquiry and granted sanction for his prosecution under S. 193, Penal Code. In setting aside the order of the Sub-Divisional Magistrate sanctioning the prosecution of the witness, the Madras High Court observed:

Under S. 197, Criminal P.C., the Government or some officer empowered in that behalf by the Government can alone grant the sanction required thereby and for that purpose the Government or the Officer to whom the power is delegated must in some way inform his mind as to whether or not he ought to grant sanction, but there is no provision in the Criminal Procedure Code or Penal Code indicating how he is to do so. Unless he is authorised by some provision of law to inform his mind by holding a judicial inquiry himself or by another there is no authority in him or the person acting for him to administer an oath and the inquiry is merely a departmental inquiry. There is no such provision of law, and therefore, the inquiry before the deputy Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within S. 193, Penal Code, and the petitioner cannot be convicted under that section.

13. Here also, as was suggested by the learned Advocate-General, one of the objects of the inquiry that is being held by Mr. Ghoshal may be to enable the Government to take, if and when necessary a decision as to sanction under S. 197 of the Code.

14. We are, therefore, clear both on authority and in principle, that the inquiry which Mr. Ghoshal is holding is an administrative inquiry and that it is not an inquiry under the Code by a Court. This petition, therefore, for the transfer of that inquiry to a Court must be dismissed.

15. In the end we desire to add that we are inclined to think that the petitioner

would have had no ground for making this application if the notification conferring magisterial powers on Mr. Ghoshal had mentioned specifically in terms of S. 14, Criminal P.C., "particular cases or a particular class or particular classes of cases", in regard to which the magisterial power was to be exercised. We confess we have found it difficult to understand the object of the Government in conferring these magisterial powers on Mr. Ghoshal. To a question put by the Bench, the learned Advocate-General stated that the purpose for which these magisterial powers were conferred on Mr. Ghoshal does not affect the issue raised in this petition. That is no doubt true; but the fact remains that the notification did contribute largely to the confusion and apprehension in the mind of the petitioner as to the nature of the inquiry which Mr. Ghoshal is holding and as to the capacity in which he is making the enquiry.

16. In the result this petition is dismissed.

Shinde, J.

17. I agree.