
(1941) 05 MAD CK 0005
In the Madras High Court

In Re: S. Subramanya Sarma and Others

Date of Decision : 02-05-1941

Acts Referred:

Citation : AIR 1941 Mad 808 : (1942) ILR (Mad) 1019 : (1941) 54 LW 133 : (1941) 2 MLJ 156

Hon'ble Judges : Alfred Henry Lionel Leach, C.J.;Gentle, J

Bench : Full Bench

Judgement

Alfred Henry Lionel Leach, C.J.—These criminal revision petitions raise the question whether an advocate who is accused with others of a

criminal offence can appear at the trial as counsel for his co-accused. The petitioner in CrI. R.C. No. 443 of 1941 is a member of the English Bar

and has been enrolled as an advocate of this Court. He and six others, two of whom are the petitioners in CrI. R.C. No. 442 of 1941, are accused

of having been parties to a criminal conspiracy, the object of which was inter alia to commit or abet the commission of certain illegal acts by the

public generally or by a class of persons exceeding ten. The illegal acts are specified in the charge sheet. They number six. It will be sufficient to

quote the first and the last of these allegations:

(1) Influencing the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India

or to the efficient prosecution of the war.

(6) to unite into one organisation the extremist elements in India, revolutionaries, labour and other unions with the object of setting up a state which

would be controlled by the workers and peasants.

2. The proceedings commenced on the 14th March of this year before the Third

Presidency Magistrate. The Court sat de die in diem from the

14th March until the 24th April, when the second and fourth accused (the petitioners in Crl. R.C. No. 442 of 1941) fell ill. On the 25th April the

first accused filed a memorandum stating that he had been instructed to appear on behalf of the second and fourth accused and that he wished to

enter an appearance on their behalf. The Magistrate considered that it would be improper to allow him to do so and consequently refused

permission. His order has led to the filing of the applications now before the Court.

3. The accused are all in custody and have been in custody throughout. The Court is asked to sanction the first accused stepping from the dock to

the place reserved for counsel and appearing there as counsel for two of his co-accused. It has been suggested by Mr. Bhashyam Aiyangar, who

appears on behalf of the first accused, that there could be no objection to the first accused being in the dock a part of the time and in counsel's

seat for the remainder of the time. This is a startling proposition. I have no hesitation in holding that the Magistrate has passed a correct order.

Counsel cannot appear in the same matter both as counsel and party. There is no objection to an advocate who is accused of a criminal offence or

is a party in a Civil Court conducting his own defence or his own case. He is fully entitled to do so. But he cannot be in Court in the same matter in

the two capacities. Mr. Bhashyam Aiyangar has not been able to produce any authority in support of the proposition that the first accused should

be allowed to appear before the Third Presidency Magistrate for his co-accused, and this is not surprising. There is, however, authority that the

first accused cannot be allowed to appear as counsel for his co-accused. In *New Brunswick & Canada Railway Co. v. Conybeare* (1862) 9

H.L.C. 711 : 11 E.R. 907 the respondent was a barrister. On the first day of hearing the leading counsel for the respondent suggested that the

respondent might appear as his junior in the cause. The Lord Chancellor (Lord Westbury) said:

Certainly. But not both as party and counsel. The respondent must elect to argue in person or not. There cannot be a mixture of the two

characters.

4. In *Nuton v. Chaplin* 19 L.J. (P.C.) 374 the Court of Common Pleas held that a

barrister, who was a party in an action, civil or criminal, is in the same position as any other party. Wilde, C.J., observed:

I do not think that a party in a civil or criminal case, who is also counsel, is in a different position from any other party. In a criminal (matter, a party would not be entitled to sit in wig and gown among the bar as his own counsel.

5. It is abundantly clear that the first accused cannot be allowed to appear as counsel in the proceedings before the Magistrate.

6. It has been said, and I do not doubt it, that these petitions have been filed because it would facilitate an early disposal of the case, if the first accused were allowed to appear on behalf of the two accused who have fallen ill. The question however, is not one of expediency; it is one of

principle. Rule 82 of the Criminal Rules of Practice states that Criminal Courts should, as a rule in cases where there are more accused than one,

permit one of them to be authorised by another to appear, plead or act for him in the proceeding, provided that the authority is in writing and

signed or contains the thumb impression of the party giving it and is filed in Court. The application to the Magistrate was not made under this rule.

In fact the Court has been informed that it was expressly stated to the Magistrate that the application made by the first accused to be allowed to

appear as counsel for the second and fourth accused was not intended to be made under this rule. If and when any such application is made it will

be heard; but this rule certainly does not authorise a co-accused to appear as counsel in the case.

7. For these reasons I consider that these petitions should be dismissed.

Gentle, J.

8. I agree and have nothing to add.