

(1977) 08 CAL CK 0029
In the Calcutta High Court
Case No : F.M.A.T. No. 1494 of 1977

Lancelot Melvils D'cruz

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 17-08-1977

Acts Referred:

Constitution of India, 1950 — Article 131A, 132(1), 217, 228A, 233(1)
Penal Code, 1860 (IPC) — Section 120B, 161, 165
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)
West Bengal Criminal Law Amendment (Special Courts) Act, 1949 — Section 2, 2(2), 9(1)

Citation : (1977) 1 CALLT 356 : 82 CWN 19 : (1977) 2 ILR (Cal) 238

Hon'ble Judges : Sharma, J;M.M. Dutt, J

Bench : Division Bench

Advocate : Nalin Chandra Banerjee and M. Mazumdar, for the Appellant;J.N. Ghosh, A. Mukherjee and P.N. Palit, for State, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—The Appellant was a Deputy Controller under the Ministry of Mines and Fuel, Government of India. He is being tried in a criminal case being Case No. 2 of 1964 of the Additional Special Court, Calcutta, on charges u/s 5(2) of the Prevention of Corruption Act and Section 120B read with Sections 161 and 165 of the Indian Penal Code. The Additional Special Court in which the Appellant is having his trial has been constituted u/s 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, hereinafter referred to as the Act. From time to time, the Presiding Officer of that Court was appointed. By a notification No. 117-J dated January 7, 1974, the Government of West Bengal appointed Shri H. Kar as a Judge of the Additional Special Court, Calcutta, under Sub-section (2) of Section 2 read with Sub-section (1) of Section 9 of the Act.

2. The Appellant moved a writ petition challenging the constitutional validity of Sub-section (2) of Section 2 of the Act under which the said Shri H. Kar was appointed. A Rule nisi was issued on that petition. It was contended on behalf of

the Appellant that Sub-section (2) of Section 2 was ultra vires the provision of Article 233(1) of the Constitution of India. The Rule was heard by A.K. Mookerji J. and his Lordship by his judgment dated May 19, 1977, held that the question of ultra vires of Section 2 of the Act did not arise. In that view of the matter, he discharged the Rule. Hence, this appeal.

3. Mr. Banerjee, learned Advocate appearing on behalf of the Appellant, has strenuously urged before us that the learned Judge had no jurisdiction to determine the question of constitutional validity of Sub-section (2) of Section 2 of the Act. It is contended by him that in view of Article 228A of the Constitution as incorporated therein by the Constitution (Forty second Amendment) Act, 1976 the learned Judge should have referred the matter to a Bench of five Judges of this Court for the determination of that question. In order to consider the contentions made on behalf of the Appellant, it is necessary to refer to Article 228A which is as follows:

228A. (1) No High Court shall have jurisdiction to declare any Central law to be constitutionally invalid.

(2) Subject to the provisions of Article 131A, the High Court may determine all questions relating to the constitutional validity of any State law.

(3) The minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five.

Provided that where the High Court consists of less than five Judges, all the Judges of the High Court may sit and determine such question.

(4) A State law shall not be declared to be constitutionally invalid by the High Court unless

(a) where the High Court consists of five Judges or more, not less than two-thirds of the Judges sitting for the purpose of determining the validity of such law, hold it to be constitutionally invalid; and

(b) where the High Court consists of less than five Judges, all the Judges of the High Court sitting for the purpose hold it to be constitutionally invalid.

(5) The provisions of this Article shall have effect notwithstanding anything contained in this Part.

Explanation : In computing the number of Judges of a High Court for the purpose of this Article, a Judge who is disqualified by reason of personal or pecuniary bias shall be excluded.

4. In challenging the jurisdiction of the learned Judge to dispose of the Rule without referring the same to a Bench of five Judges, much reliance has been placed on behalf of the Appellant on Clause (3) of Article 228A. It is contended that the determination of the question involves a decision either in favour or against the constitutional validity of any State law. It is submitted that in holding

that no question of constitutional validity of Section 2 of the Act arose, the learned Judge virtually upheld the constitutional validity of that section which could only be done by a Bench of five Judges. On behalf of the Appellant, strong reliance has been placed on a decision of the Full Bench of the Allahabad High Court in Chandra Kanta Devi and Others Vs. State of U.P. and Others, . In that case, the question was whether a writ petition challenging the constitutional validity of a State law could be heard by a Division Bench of the High Court at the admission stage. It was held by the Full Bench that at the admission stage a Division Bench of the High Court was competent to hear the writ petition. Further, it was observed that there was no difficulty in holding that the "determining" required by Clause (3) of Article 228A would be the decision of five Judges reached after hearing both the parties and not merely the opinion formed at the admission hearing. Relying on the said observation of the Full Bench of the Allahabad High Court, it is contended on behalf of the Appellant that the final hearing of the writ petition should have been by a Bench of five Judges for the purpose of determining the question as to the constitutional validity of Section 2 of the Act.

5. There can be no doubt that the question as to the constitutional validity of any State law can only be determined finally by a Bench of five Judges. But before a case is referred to a larger Bench, a single Judge or a Division Bench of the High Court should be established *prima facie* that such a question arises. When no such question arises in any case, it cannot be referred to a larger Bench. The condition precedent to the reference of any case to a Bench of five Judges is that a question as contemplated by Article 228A of the Constitution is involved. At the admission stage of a writ petition challenging the constitutional validity of any State law the Bench, if it is *prima facie* satisfied that such a question arises, will issue a Rule nisi. When the Rule comes up for hearing before a Bench and if after hearing the parties it takes the view that no such question arises, it will not be required to refer the case to a Bench of five Judges. It will not be enough to justify the reference of a case to a larger Bench, merely because in the writ petition the constitutional validity of a State law has been challenged. Both at the admission stage and at the final hearing, if the Bench hearing the matter considers that a question as to the constitutional validity of a State law is involved, it will then refer the matter to a Bench of five Judges. When a Judge refuses to refer a matter to a Bench of five Judges on the ground that no question as to the constitutional validity of any State law arises, he does not thereby act contrary to the provision of Clause (55) of Article 228A, for the simple reason that he does not determine any question as to the constitutional validity of any State law. In the instant case, the learned Judge came to the finding that no such question was involved in the Rule and in our view, the learned Judge was perfectly within his jurisdiction in making that finding. There is, therefore, no substance in the contention of the Appellant that the learned Judge had no jurisdiction to dispose of the Rule on the ground that no question as to the constitutional validity of Section 2 of the Act was involved in the case.

6. Now we may consider whether any question as to the constitutional validity of Section 2 of the Act arises. Section 2 is as follows:

2. (1) The State Government shall from time to time, as it deems necessary, constitute by notification in the Official Gazette, one or more Special Courts and may by like notification abolish any such Court, if it deems such Court to be no longer necessary.

(2) The State Government shall appoint, as a Judge to preside over a Special Court, any person who

(a) is or has been, or is qualified under Clause (2) of Article 217 of the Constitution of India for appointment as a Judge of a High Court, or

(b) has, for a period of not less than one year, been a Sessions Judge or an Additional Sessions Judge.

(3) Every Special Court shall have jurisdiction throughout the whole of West Bengal and shall sit at such place or places as the State Government may, by notification in the Official Gazette, specify in this behalf.

It is contended on behalf of the Appellant that Section 2 is ultra vires Article 233(1) of the Constitution. Article 233(1) provides as follows:

233(1). Appointments of persons to be and the posting and promotion of District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

Under Article 233(1), the appointments, posting and promotion of District Judges shall be made by the Governor of the State in consultation with the High Court of that State. In view of Article 236(a) of the Constitution the expression "District Judge" includes also Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge. It is argued on behalf of the Appellant that as Sub-section (2) of Section 2 of the Act provides for the appointment of a Judge to preside over a Special Court by the State Government without any further provision that such appointment shall be made in consultation with the High Court, it is ultra vires Article 233(1) of the Constitution.

7. Sub-section (2) does not empower the State Government to appoint a District Judge, Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge, as such, to preside over a Special Court although under Clause (b) of Sub-section (2) such a Judge may be a Sessions Judge or an Additional Sessions Judge. Clauses (a) and (b) of Sub-section (2) specify the qualifications of a person to be appointed a Judge of a Special Court, but such appointment of a Judge under subs (2) is not that of a Sessions Judge or an Additional Sessions Judge. It is, therefore, apparent that a Judge referred to in Sub-section (2) is not a District Judge, a Sessions Judge, or an Additional Sessions Judge. In this connection, we may refer to Sub-section (2) of Section 5 of the Act which provides as follows:

(2) Save as provided in Sub-section (1) or Sub-section (1a), the provisions of the Code or Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings of a Special Court; and for the purposes of the said provisions, a Special Court shall be deemed to be a Court of Session trying cases without a jury and a person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

By virtue of the provision of Sub-section (2) of Section 5 a Special Court shall be deemed to be a Court of Sessions trying cases without a jury. The deeming provision is a clear admission of the fact that a Judge appointed under Sub-section (2) of Section 2 of the Act is not a Sessions Judge within the meaning of Article 233(1) read with Article 236(a) of the Constitution. If under Sub-section (2) of Section 2 a Sessions Judge is to be appointed, there would not have been any necessity for the deeming provision under Sub-section (2) of Section 5 of the Act. There is a good deal of difference between the appointment of a Sessions Judge and the appointment of a Judge of the Special Court from amongst the Sessions Judges or Additional Sessions Judges. Section 2 of the Act does not contemplate the appointment of a Sessions Judge as such. It provides for the appointment of a Judge of the Special Court. The Judge referred to in Sub-section (2) of Section 2 is not one of those as mentioned in Article 233(1) read with Article 236(a) of the Constitution. Sub-section (2) of Section 2 of the Act is not, therefore, repugnant to the provision of Article 233(1) of the Constitution. So, the question of constitutional validity of Sub-section (2) does not at all arise. In our view, the learned Judge was perfectly justified in holding that no question as to the constitutional validity of Section 2 of the Act was involved in the case. No other point has been argued on behalf of the Appellant.

8. For the reasons aforesaid, this appeal fails and it is dismissed ; but in view of the facts and circumstances of the case, there will be no order for costs. All interim orders are vacated.

9. Mr. Banerjee, learned Advocate appearing on behalf of the Appellant, prays for leave to appeal to the Supreme Court under Article 132(1) of the Constitution. The prayer is rejected.

Sharma, J.

10. I agree.