
(2007) 10 GAU CK 0058
In the Gauhati High Court

Longsan Khongngain

APPELLANT

Vs

State of Meghalaya

RESPONDENT

Date of Decision : 01-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1
Constitution of India, 1950 — Article 20, 21, 244
Criminal Procedure Code, 1973 (CrPC) — Section 1
Penal Code, 1860 (IPC) — Section 376

Citation : (2007) 4 GLT 938

Hon'ble Judges : Jasti Chelameswar, C.J.;Hrishikesh Roy, J

Bench : Division Bench

Judgement

Jasti Chelameswar, C.J.—A learned Judge of this Court hearing the Criminal Revision No. 9 (SH)/04 by his order dated 14.11.06 opined that the issue involved in the case requires to be heard by a Bench of appropriate strength in order to settle the issue once and for all. By an order dated 22.11.06 the then Hon"ble Chief Justice directed this matter to be heard by a Division Bench. Therefore, the matter is placed before us.

2. The petitioner is under trial for an offence u/s 376 IPC before the Fast Track Courtcum-Addl. Deputy Commissioner, Shillong. The charge against the petitioner is that he committed the offence of rape of a certain woman. The further details of the case are not relevant for the present purpose except to state that both the petitioner and the alleged victim are tribals belonging to a Scheduled Tribe known as Khasi. Initially the charge sheet was filed before the learned Sub Divisional Judicial Magistrate, Sohra Civil Sub-Division. The case was subsequently transferred to the court of Deputy Commissioner, Shillong who by an order dated 25.7.03 in turn transferred the case to the Fast Track Court at Shillong. The petitioner thereupon filed an application praying that the case be transferred to the court of the learned Judge, District Council Court at Shillong on the ground that in view of the provisions of 6th Schedule of the Constitution, the case, as the one for which the petitioner is facing trial, is exclusively triable by a

court constituted by the District Council functioning under the provisions of the 6th Schedule to the Constitution of India. The learned Judge of the Fast Track Court by his order dated 30.2.04 declined to transfer the case of the petitioner. Therefore, the petitioner has approached this Court by way of the above-mentioned revision.

3. Courts are established for trial of offences created either under the Indian Penal Code or under the various laws made by the Parliament or the appropriate State Legislature under the provisions of the Code of Criminal Procedure, 1973 or under some other law made by either the Parliament or the appropriate State Legislature. It is not in dispute that the Fast Track Court before which the petitioner is facing trial is a court established and functioning under the provisions of the Code of Criminal Procedure, 1973. By virtue of the declaration made u/s 1 Sub-section (2) of the Cr.P.C., the Code of Criminal Procedure has no application to the tribal areas except the Chapters--VIII, X and XI which are not relevant for the present purpose. However, the appropriate State Government is authorized to extend the operation of the Criminal Procedure Code to the tribal areas. Section 1 Sub-section (2) of the Cr.P.C. reads as follows:

1(2) It extends to the whole of India except the State of Jammu and Kashmir:

Provided that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply-

(a) To the State of Nagaland,

(b) To the tribal areas.

But the section authorises the government to extend the provision of the Code to the tribal areas.

But the concerned State Government may, by notification apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification.

A provision of doubtful legal efficacy in view of the prohibition contained in para 5(3):

5(3). Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

of the Sixth Schedule, but we do not wish to record any final conclusion on this question as no arguments in this regard are advanced.

The expression "tribal areas" occurring in the section is to be understood to be the territories which immediately before the 21st day of January, 1972 were included in the tribal areas of Assam as referred to in paragraph 20 of the 6th

Schedule to the Constitution other than those within the local limits of the Municipality of Shillong in view of the explanation appended to Section 1 of Cr.P.C.:

Explanation: In this Section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong.

The State of Meghalaya came into existence in the year 1969 by virtue of an enactment of the Parliament the Assam Re-organisation (Meghalaya) Act, 1969. Till such reorganisation the Khasi Hills District was part of the erstwhile undivided State of Assam. Therefore, the only possible meaning that can be attributed to the expression "tribal areas" occurring u/s 1(2) proviso (b) of the Criminal Procedure Code is the meaning given to it under the provisions of the Fifth and Sixth Schedule of the Constitution. Therefore, the provisions of the Code of Criminal Procedure, except the three chapters referred to above, are not applicable to the tribal areas in the State of Meghalaya more specifically the Khasi Hills District where the petitioner and the alleged victim admittedly resided at the point of time when the offence, of which the petitioner is accused, is alleged to have been committed. Therefore, the courts constituted and functioning under the provisions of the Code of Criminal Procedure would not have jurisdiction to try the petitioner for the offence of which is charged.

4. Paragraph 3 of the 6th Schedule empowers the District and Regional Councils, if any, to make laws with respect to various matters enumerated thereunder:

5. Under Para-4(4) of the Sixth Schedule a Regional Council or the District Council, as the case may be, is empowered to make rules for the constitution of courts and the powers to be exercised by such courts:

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating-

(a) The Constitution of village councils and courts and the powers to be exercised by them under this paragraph.

Hereinafter in this judgment referred to as the "(Tribal Courts)". In exercise of such poweri Rules were framed by the United Khasi & Jaintia Hills District Council called "The Khasi Hills Autonomous District (Administration of Justice) Rules, 1953". Under Rule 4, three categories of courts are contemplated--(1) Village Court, (2) Sub-ordinate District Council Court and Additional Sub-ordinate District Council Court and (3) District Council Court and Additional District Council Court. The same Rule also prescribes the composition of the court. The territorial jurisdiction of such courts is also specified under Sub-rule (6), (7) and (8). The constitution of the District Council Court and the Additional District Council Court is dealt under Rule 9, the details of the abovementioned rules may

not be necessary for the present purpose.

The nature of the cases that can be tried by such court is specified under Rule 11 onwards. Under Rule 18, the Sub-ordinate District Council Court is authorized to try all criminal cases not triable by a Village Court. Under Rule 11 the village courts are authorized to try-

offences of petty nature such as petty theft and pilfering, mischief and trespass of petty nature, simple assault and hurt, affront and affray of whatever kind, drunkenness or disorderly brawling, public nuisance and simple causes of wrongful restrain.

Rule 43 stipulates that in trying criminal cases the Sub-ordinate District Council Court, Additional Sub-ordinate District Council Court or the District Council Court shall exercise such powers subject to the provisions of this rule, to be in the spirit of the Criminal Procedure Code insofar as such procedure is not inconsistent with the Rules.

6. Article 244 of the Constitution of India mandates that the provisions of 6th Schedule shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Mizoram and Tripura. Under paragraph 1 of the 6th Schedule, the tribal areas specified under the table appended to paragraph 20 of the 6th Schedule of each one of the above mentioned four States are declared to be Autonomous Districts. The table contains four Parts and Part-11 thereof deals with the tribal areas pertaining to the State of Meghalaya, thereby constituting three Autonomous Districts comprising of Khasi Hills District, Jaintia Hills District and Garo Hills District. In Sub-para (2) the territorial limits of each one of these districts are specified. However, under the proviso to Sub-para (2) it is further declared that no part of the area comprised within the Municipality of Shillong shall be deemed to be within the Khasi Hills District; a legal fiction contrary to the factual position.

7. Under paragraph 1 Sub-para (2) it is stipulated that if more than one Scheduled Tribe inhabits in any one of those Autonomous Districts referred to in Sub-para (1) of paragraph 1, the Governor may by notification divide the areas inhabited by different Scheduled Tribes into Autonomous Regions.

8. Under paragraph 2 of the 6th Schedule it is mandated that there shall be a District Council for each Autonomous District and under sub-para (2) it is mandated that there shall be a separate Regional Council for each area constituted to be an Autonomous Region mentioned earlier. Under sub-para (3) it is declared that each of the District or Regional Councils shall be a body corporate with perpetual succession and a common seal. The composition of such Autonomous Bodies and the manner of choosing persons for being Members of such Autonomous Councils is also specified. Sub-para (4) declares that the administration of each of these Autonomous Districts or Regions shall vest in those bodies corporate respectively to the exclusion of each other. Sub-para (5) deals with the distribution of powers between the Regional and District Councils.

9. The other paragraphs, which are relevant for the present purpose, are paragraphs 11 and 12A. While paragraph 11 mandates that all laws made by either the District Council or the Regional Council shall come into force on being published in the official gazette of the concerned State. While paragraph 12A declares that in the event of there being any conflict between the law made either by the District Council or the Regional Council and the law made by the Legislature of Meghalaya, the law made by the Legislature of Meghalaya shall prevail over the law made by the District or Regional Councils, as the case may be, to the extent of inconsistency.

It is further declared under paragraph 12A that insofar as the law made by the Parliament is concerned, the President of India is invested with the power to direct that such law shall not apply either to the Autonomous District or the Autonomous Region in the State of Meghalaya. The authority of the President to give such a direction takes within its sweep the authority to apply the law with some modifications as may be specified by the president by notification and also to restrict the application of the law made by the Parliament to only a part of the Autonomous District or Region. Paragraph 12A of the 6th Schedule reads as follows:

12. A. Application of Acts of Parliament and of the Legislature of the State of Meghalaya to autonomous districts and autonomous regions in the State of Meghalaya--Notwithstanding anything in this Constitution-

(a) If any provision of a law made by a District or Regional Council in the State of Meghalaya with respect to any matter specified in sub-paragraph (1) of paragraph 3 of this Schedule or if any provision of any regulation made by a District Council or a Regional Council in that State under paragraph 8 or paragraph 10 of this Schedule, is repugnant to any provision of a law made by the Legislature of the State of Meghalaya with respect to that matter, then, the law or regulation made by the district Council or, as the case may be, the Regional Council whether made before or after the law made by the Legislature of the State of Meghalaya, shall, to the extent of repugnancy, be void and the law made by the legislature of the State of Meghalaya shall prevail;

(b) The President may, with respect to any Act of Parliament, by notification, direct that it shall not apply to an autonomous district or an autonomous region in the State of Meghalaya, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given so as to have retrospective effect.

10. Paragraphs 4 and 5 of the 6th Schedule deal with the administration of justice in Autonomous Districts and Autonomous Regions referred to in paragraph 2 of the 6th Schedule. We have already noticed that under Paragraph 4 authorises the District Council and Regional Council, as the case maybe, to constitute courts for the trial of "suits and cases between the parties all of whom

belong to Scheduled Tribe within such areas". However, paragraph 4(1) carves out an exception to the suits and cases that can be hied by such Village Courts, that exception being the suits and cases to which the provisions of sub-para (1) of paragraph 5 applies. It is further declared in paragraph 4 that the jurisdiction of such village courts is to the exclusion of any court in the State. In other words, the courts functioning either under the laws of the Parliament or the laws of the State of Meghalaya are ousted of their jurisdiction to try any suit or case between the parties all of whom happen to be tribals residing within the jurisdiction of such Village Court. Paragraph 4 also authorizes the District or Regional Councils to appoint suitable persons for presiding over such Village Courts. Under sub-para (2) of paragraph 4 appeals are provided against the judgments of the Village Courts to the Regional Council or the District Council, as the case may be, the details of which may not be necessary for the present purpose. Paragraph 4(1) of the 6th Schedule reads as follows:

4. Administration of justice in autonomous districts and autonomous regions--(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any court in. the State, and may appoint suitable persons to be members of such village councils or presiding officers of such courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

11. Paragraph 5 of the 6th Schedule authorizes the Governor of the State to confer on the District or Regional Council, as the case maybe, or the "Tribal Courts" or an officer appointed by the Governor in that behalf such powers under the Code of Criminal Procedure or the Code or Civil Procedure as the Governor deems appropriate. Upon conferment of such power such a Council, Court or officer on whom the powers are conferred is required to try the suits and cases or offences in exercise of the power so conferred. In other words, the Council, Court or the officer invested with the power by the Governor shall have a limited jurisdiction in terms of the decision of the Governor but do not acquire all the powers which the courts constituted under the provisions of the above mentioned two Codes would otherwise have. This position is made more explicit in sub-para (3) of Paragraph 5, which reads as follows:

5. (3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

12. The authority of the Governor to confer the powers of trial either in

accordance with the CPC or the Code of Criminal Procedure is also limited to the trial of suits or cases arising out of any law in force in any Autonomous District or Region. It is worthwhile remember that the laws in force in any Autonomous District, could be laws made by either the Parliament or the appropriate State Legislature or the laws made by the District or Regional Council, as the case may be, in exercise of the power under paragraph 3 of the 6th Schedule.

5. Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences--(1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

13. We have already noticed that the Code of Criminal Procedure has no application to the tribal areas unless made applicable by the appropriate State Government by a notification. A similar declaration is contained u/s 1 of the CPC also. Therefore, the courts constituted under paragraph 4 of the 6th Schedule either by the District Council or the Regional Council, as the case may be, are not bound by the procedures prescribed under either of the Codes referred to above. Para 4(4):

A regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating--

(a)?

(b) The procedure to be followed by village councils or courts in the trial of suits and cases under sub-paragraph (1) of this paragraph.

Stipulates that those courts are to function in accordance with the procedure evolved by the rules made by the District Council or Regional Council as the case may be with the previous approval of the Governor. Such procedures may or may not be available for adjudicating some of the complicated questions arising out of the various laws in force in the tribal areas. The purpose of creating special provisions under the 6th Schedule of the Constitution for the administration of tribal areas is the perception that the tribals are less "sophisticated" than the non-tribals and, therefore, the normal gamut of laws would be too complicated for the tribals to understand and obey. But the tribals are not wholly exempted from the entire body of law made either by the Parliament or the appropriate

State Legislature. Some of those laws still operate either wholly or part on the tribals, for example, the Indian Penal Code and the Passports Act which do not recognize any exception in their operation in favour of the tribals. Should an issue arise regarding the rights and obligations created under the Passports Act between a tribal and an authority created under the Passports Act or should a tribal is accused of offence under the provisions of the Passports Act. The procedure evolved by the Village Courts might become inadequate for an appropriate adjudication of the issues involved in such litigation having regard to the complexity of the matter. In order to meet such a situation, in our view, the Governor is authorized under paragraph 5 of the 6th Schedule to invest such powers as he deems fit, available either in CPC or Code of Criminal Procedure, either on the District Council or Regional Council or a court constituted by the District Council (Village Court).

Paragraph 5 also authorises the Governor to invest an officer with such powers available under the Cr.P.C. or CPC, as the Governor may deem fit, having regard to the situation that is required to be dealt. Obviously such a power is entrusted by the Governor to meet a situation where the Governor comes to the conclusion that the Village Courts may not be able to meet the requirement of a given situation.

14. Another class of cases recognized under paragraph 5 for which a special treatment by the Governor of conferring powers under the Code of Criminal Procedure is the trial of offences punishable with death, transportation for life or imprisonment for a term not less than 5 years punishable either under the Indian Penal Code or any other law for the time being applicable to such an Autonomous District or Region, as the case may be. Obviously, the punishment such as the one mentioned above are such that would constitute a serious curtailment of the personal liberty guaranteed under Articles 20 and 21 of the Constitution of India, therefore, are required to be imposed in accordance with law both substantive or procedural which should accord with the profound standards of due process, which is guaranteed under the Constitution.

15. The question is whether issues with such serious consequences are triable exclusively by the Village Courts and in accordance with the procedures evolved by the District Council--having regard to the scheme and language of the paragraphs 4 and 5 of the 6th Schedule.

16. The learned Counsel for the petitioner submitted that in view of the fact that both the accused and the alleged victim belong to a Scheduled Tribe the petitioner is ought to be tried only by a Village Court in view of the language of paragraph 4 and the existence of a Village Court in the Khasi Hills district for the trial of "all suits and cases between the parties". The learned Counsel for the petitioner submits that the parties to the Us, (the petitioner and the alleged victim of the rape) both being tribals the case is exclusively triable by such Village Court.

17. On the other hand the learned Advocate General appearing for the State submitted that the alleged victim is not a party to the case in which the petitioner is being tried and that it is settled in Anglo-Saxon jurisprudence that in a criminal case the prosecutor is always the State as the offence is considered to be an offence against the entire society but not against an individual and, therefore, the fact that the de facto complainant/victim happens to be also a tribal is irrelevant. He further submitted that the State which is the de jure complainant and party to the prosecution, can never be classified as a tribal. He, therefore, submitted that the petitioner being a tribal for offence punishable u/s 376 IPC and the punishment prescribed by law being ten years is triable only by a criminal court functioning under the Criminal Procedure Code.

18. Para-4 of the Sixth Schedule no doubt contemplates the trial of suits and cases between parties all of whom belong to Scheduled Tribes, by the "Village Court" to the exclusion of any other court in the State. The expression "suits and cases" are not defined in the Constitution, but by an established practice and legal history of this country of the last 150 years approximately the expression "suit" has acquired a definite legal connotation i.e. legal proceedings where the rights and obligations of the parties to the proceedings are purely civil in nature. The expression "case" is wide enough to include both a civil suit and criminal proceeding. Reading para-4 in isolation in the light of language employed and the long established jurisprudential principle that in a criminal proceeding it is the State which is de jure complainant and party to the proceeding, but de facto complainant is never a party to the proceeding should normally lead to a conclusion that criminal cases are not comprehended within the expression "cases" occurring under Para-4. But, such a jurisprudential principle or settled practice, in our view, is not immutable. Para-4 itself refers to suits and cases to which provisions of sub-para (1) of Para-5 apply. Therefore, necessarily we have to examine the content of Para-5 for deciding whether the abovementioned jurisprudential principle stood modified by the Constitutional mandate.

19. Para-5 no doubt refers to suits or cases and the trial of offence in respect of which the Governor can empower powers either under the CPC or Criminal Procedure Code on various bodies, which are already referred to earlier in this judgment. Therefore, we are of the view that the expression "case" occurring under para-4 of the Sixth Schedule takes within its sweep the criminal proceedings also. Consequentially, by virtue of operation of Para-4 even criminal cases are required to be tried by the village courts. Careful reading of Para-5, in our view, lends a further support to our conclusion for the following reasons.

Under Para-5, the Governor is not invested with the power to constitute any court, but only invested with a power to authorize either the District Council or Regional Council or a Court created by either of them (village court) to try cases in accordance with the procedure established by either the Criminal Procedure Code or the Code of Civil Procedure, as the case may be, to the extent indicated by the Governor. Insofar as trial of a criminal offence is concerned, Para-5 also

limits the power of the Governor by authorizing the Governor to make applicable the procedure under Criminal Procedure Code only to that classes of cases where the punishment for the offence is not less than 5 (five) years and above. Therefore, by necessary implication, for offence where punishment is less than five years, the Governor is not authorized to invest any one of the abovementioned bodies with the powers under the Criminal Procedure Code. Therefore, the inevitable conclusion is that all criminal cases irrespective of the fact the de jure complainant is the State, are required to be tried by the "Village Courts" constituted under Para-4 of the Sixth Schedule if both the accused and the victim of the offence also belong to same Scheduled Tribe. Such a construction, in our view, is implied in view of the language and scheme of Paras-4 and 5 as explained earlier.

20. The only exception to the abovementioned rule appears to be that Para-5 in express terms recognize's the Governor's authority to appoint an officer for the purpose of trial of suits, cases or offences. As and when such an officer is appointed by the Governor for a specific purpose to the extent of the power conferred on him, such an officer appointed by the Governor would have jurisdiction to try such case as specified by the Governor to the exclusion of the Village Courts. Even such an officer is required to exercise only such powers of the Criminal Procedure Code or the CPC as conferred by the Governor superficially (Sic. : specifically)].

21. In the light of the above discussion, the question whether the petitioner is required to be tried only by a "Tribal Court" or any other court/person, such as Presiding Officer of the Fast Track Court, depends on the existence of any specific conferment of power by the Governor on the Fast Track Court or the Presiding Officer of Fast Track Court. In the absence of any such conferment, the petitioner is required to be tried only by the appropriate "Tribal Court".

The reference is disposed of accordingly. Registry is directed to list the revision before appropriate Bench for disposal in accordance with and in the light of this order.