

(1979) 08 KL CK 0016

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No's. 771 and 779 of 1979

Mammoo

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 30-08-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 3(4), 397, 6, 7
Electricity Act, 1910 — Section 51
Telegraph Act, 1885 — Section 16(1)

Citation : AIR 1980 Ker 18 : (1980) CriLJ 75 : (1979) 2 ILR (Ker) 721

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J; P. Subramonian Poti, J; G. Balagangadharan Nair, J

Bench : Full Bench

Advocate : T.P.K. Nambiyar, P.G. Rajagopalan and John Joseph, for the Appellant; A.A.G. and N. Raghavan Kurup, for the Respondent

Final Decision : Dismissed

Judgement

Subramonian Poti, J.—Is the District Magistrate exercising powers u/s 16(1) of the Indian Telegraph Act, 1885 an "inferior Criminal Court" and is the order of such District Magistrate re-visable by the Sessions Judge u/s 397 of the Code of Criminal Procedure? This is the issue which calls for determination in these petitions. A learned single Judge before whom the matter came up referred the matter to the Division Bench in view of the importance of the question and on a reference by the Division Bench the matter is now before the Full Bench.

2. The petitioners in these petitions filed u/s 482 of the Code of Criminal Procedure seek to set aside the order passed by the Sessions Judge, Tellicherry in two Criminal Revision Petitions and seek directions from this Court to the Sessions Judge to entertain the petitions on his file and to dispose them on merits.

3. There was a proposal by the Kerala State Electricity Board to construct and lay a 110 K. V. double circuit Transmission line to a private company, tapping the

existing Cannanore-Kasaragode 110 K. V. line at Kattampally. The proposal envisaged the said line crossing over the property of the petitioners in the two cases. Both the petitioners filed petitions before the Assistant Executive Engineer of the Board who was concerned with the said work requesting him to avoid the properties of the petitioners in drawing the line. It was suggested that there were alternate routes through which the line could be taken. In view of such objection by the two petitioners the Assistant Executive Engineer concerned moved the District Magistrate, Cannanore u/s 16(1) of the Indian Telegraph Act for permitting him to exercise powers u/s 10 of the Act. The petitioners objected to this. The District Magistrate passed an order on 19-5-1979 giving permission to the first respondent in these two petitions, the Assistant Executive Engineer, to exercise the powers mentioned in Sec. 10 of the Indian Telegraph Act in respect of the lands of the petitioners.

4. Against the orders of the District Magistrate the petitioners preferred Criminal Revision Petitions to the Sessions Judge, Tellicherry. The Criminal Revision Petitions were not numbered. They were heard on the objection by the first respondent that no Revision lay to the Sessions Judge against an order of the District Magistrate passed u/s 16(1) of the Indian Telegraph Act. The Sessions Judge accepting the said objection held that in both the cases the Revision Petitions were not maintainable and rejected them. This Court has been approached to invoke the exercise of inherent powers to compel the Sessions Judge to re-entertain the petitions on his file, for, according to the petitioners the Revisions were maintainable before the Sessions Judge and by refusing to entertain them prejudice has been caused to the petitioners.

5. Sec. 51 of the Indian Electricity Act, 1910 enables the State Government to confer upon any public officer, licensee or any other person engaged in the business of supplying energy to the public under the Indian Electricity Act, any of the powers which the Telegraph authority possesses under the Indian Telegraph Act, 1885 with respect to the placing of telegraphic lines and posts. That such power has been conferred upon the first respondent in these petitions and in proposing to draw the line and placing the posts he was exercising such power is not in controversy. Though the power exercised by him is as such authority u/s 51 of the Indian Electricity Act read with the provisions of the Indian Telegraph Act, for the sake of convenience we are referring in this judgment to his power as that under the Indian Telegraph Act.

6. Section 10 of the Indian Telegraph Act, 1885 empowers the Telegraph authority to place and maintain a telegraph line under, over, along or across and posts in or upon any Immovable property. It may not be necessary to refer to the proviso in that Section at the moment. Section 16 of the said Act deals with exercise of powers conferred by Section 10. It may not be necessary for our purpose to refer to Sub-secs. (3) to (5) of that Section. Sub-sections (1) and (2) of Section 16 read thus:

"16. Exercise of powers conferred by Section 10, and disputes as to

compensation, in case of property other than that of a local authority-- (1) If the exercise of the powers mentioned in Section 10 in respect of property referred to in Clause (d) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them.

(2) If, after the making of an order under Sub-section (1), any person resists the exercise of those powers, or having control over the property, does not give all facilities for their being exercised, he shall be deemed to have committed an offence u/s 183 of the Indian Penal Code."

At the time the Indian Telegraph Act came into force in 1885 the executive and judicial functions were exercisable by the District Magistrate and there was no classification of Magistrates as Executive and Judicial. Under the Code of Criminal Procedure 1973 which replaced" the Code of 1882 a District Magistrate is an executive Magistrate appointed by the State Government to be the District Magistrate of the District. Article 50 of the Constitution of India envisages steps being taken to separate the judiciary from the executive in the public services of the State. This directive principle was implemented in regard to Magistracy by the provisions of the Code of Criminal Procedure. Section 6 of the Code defined the classes of Criminal Courts in every State. Besides the High Courts and the Courts constituted under any law other than the Criminal Procedure Code there was to be in every State four classes of Criminal Courts and they are:

1. Court of Session,
2. Judicial Magistrates of the First Class, and in metropolitan area. Metropolitan Magistrate,
3. Judicial Magistrates of the Second Class, and
4. Executive Magistrates. A Judicial Magistrate of the First Class was to be appointed in every District to be the Chief Judicial Magistrate. All excepting the Executive Magistrates were to be appointed by the High Court. The Executive Magistrates were to be appointed by the Government. The powers exercisable by the Executive Magistrates and by the other classes of Criminal Courts under the provisions of the Code were also defined in the Code,
7. The functions exercisable by the Executive Magistrates under the Code of 1973 are not necessarily executive. They are invested with judicial functions also under the Code. u/s 133 of the Code Executive Magistrates have the power to order the removal of nuisance. u/s 145 of the Code they have power to determine dispute concerning land or water if such dispute is likely to cause breach of the peace. Evidently therefore the functions of the Executive Magistrates while acting under the Code are not necessarily executive. But when acting under any law other than the Code the Executive Magistrates could exercise only executive or administrative functions. Similarly when Judicial Magistrates were called upon to act under the provisions of any law other than

the Code their functions are to be only judicial in character. This is the new scheme brought about by Section 3(4) of the Code of Criminal Procedure. That reads as follows:

"3 (4). Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate." The sub-section indicates that a Judicial Magistrate when acting under any law other than the Code can exercise functions which (1) involve the appreciation or sifting of evidence (2) involve the formulation of any decision which exposes any person to any punishment or penalty or detention in custody or (3) involve any decision that would have the effect of sending any person for trial before any court. That sub-section also indicates that when an Executive Magistrate exercises powers under any law other than the Code the functions exercisable by him are administrative or executive in nature. This is illustrated by reference to functions such as grant, suspension or cancellation of licences and sanctioning of or withdrawing from prosecutions. An Executive Magistrate cannot, after the commencement of operation of the Code of 1973, exercise any function other than that of an administrative or executive nature while functioning outside the purview of the Code of Criminal Procedure. We have already indicated that his functions under the Code may be executive, administrative or judicial.

8. Section 397 of the Code of 1973 confers revisional power on the High Court and the Sessions Judge. We are concerned in these cases only with the scope of revisional power of the Sessions Judge. Such power may be exercised to call for and examine the regularity of any proceeding before any inferior criminal court within its jurisdiction for certain purposes and the powers also include direction to suspend the execution of any sentence or order. The Sessions Judge could therefore seek to revise the proceeding of inferior criminal courts. Naturally a doubt may arise whether an Executive Magistrate constituted u/s 6 is a court inferior to the Sessions Judge. The explanation to Section 397 of the Code provides that all Magistrates, whether executive or judicial shall be deemed to be inferior to the Sessions Judge for the purpose of Section 397 as also Section 398. Therefore the controversy could only be whether any proceeding is that of a criminal court. Naturally therefore the question that we need concern ourselves with in this case is whether the order of the District Magistrate functioning u/s 16(1) is an order of a criminal court. If it is not no revision lay to the Sessions

Judge u/s 397 of the Code. Of course if it is shown to be a proceeding of the criminal court revision would necessarily be entertainable.

9. The term "criminal court" is not defined in the Code of Criminal Procedure 1973. We have to examine whether the District Magistrate who functioned in this case so functioned as a court and if he did function as a court whether that was as a criminal court.

10. Section 6 of the Code defines the classes of courts and Executive Magistrate is one such. Should that mean that in any and every case where he functions he does function only as a court. Should it be said that even where he functions administratively and passes an order which is not judicial he functions as a court. We think not. When an Executive Magistrate exercises functions which are purely of an administrative or executive character he does not perform the role of a court. We cannot accede to the extreme position canvassed by learned counsel for the petitioners in these cases that irrespective of the nature of the functions exercised by the District Magistrate under the Indian Telegraph Act, he must be taken to be exercising functions of a court since the District Magistrate is one of the Executive Magistrates constituted under the Code of Criminal Procedure. Refuting such a contention which seems to have been urged before it the Madras High Court in *R. Subramaniam Vs. Commissioner of Police*, observed at para 7 of its judgment thus:

"To constitute a criminal Court it is not sufficient that it is one of the Courts mentioned in Section 6, Criminal Procedure Code. It must be acting as a criminal court. The Magistrate may be acting under his executive or administrative capacity or under the powers conferred on him by some other law. These proceedings are not that of a Court and are not revisable. The Magistrate should be acting as a Court and the proceeding that is sought to be revised should be a judicial proceeding. Under the Code, the Magistrate is empowered to act judicially as well as in his administrative capacity. The orders that can be revised are those that are passed in judicial proceedings, "judicial proceedings" is defined in Section 4(m) Criminal Procedure Code as including any proceeding in the course of which evidence is or may be legally taken on oath. The definition is an inclusive one. Under "judicial proceeding" the acts of the Court are passed judicially, that is after hearing the parties, and which affect the rights of parties will be included."

The Supreme Court had occasion to consider whether a Magistrate acting u/s 234 of the Ajmer Mpr-wara Municipalities Regulation, 1925 was acting as an inferior Criminal Court to the High Court within the meaning of Section 439 of the Code of Criminal Procedure 1898 corresponding to Section 397 of the 1973 Code. The proceedings that were initiated before the Magistrate were merely proceedings for recovery of expenses incurred by reason of the refusal to comply with the requisition issued to a party by the Municipal Committee. The nature of the enquiry contemplated by Section 234 was therefore very limited and partook only of the character of ministerial enquiry and not a judicial enquiry. Dealing

with this the Supreme Court in *The Dargah Committee, Ajmer Vs. State of Rajasthan*, observed in para 6 of its judgment thus:

"In any event it is difficult to hold that the Magistrate who entertains the application is an inferior criminal court. The claim made before him is for the recovery of a tax and the order prayed for is for the recovery of the tax by distress and sale of the moveable property of the defaulter. If at all, this would at best be a proceeding of a civil nature and not criminal. That is why, we think, whatever may be the character of the proceeding, whether it is purely ministerial or judicial or quasi-judicial, the Magistrate who entertains the application and holds the enquiry does so because he is designated in that behalf and so he must be treated as a *persona designata* and not as a Magistrate functioning and exercising his authority under the Code of Criminal Procedure. He cannot therefore be regarded as an inferior criminal court. That is the view taken by the High Court and we see no reason to differ from it."

Evidently the Supreme Court was not prepared to hold that in every case where a Magistrate constituted under the Code of Criminal Procedure functions he functions as a court.

11. The Criminal Procedure Code 1872 contained a definition of the term "criminal court" though in the later Codes such definition does not appear. In Act 10 of 1872 "criminal court" is defined to mean and include every Judge or Magistrate or body of Judges or Magistrates inquiring into or trying cases or engaged in any judicial proceedings. "Judicial proceeding" is defined in Section 4(m) of the Code of Criminal Procedure, 1898 thus:

"4 (m) "Judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath."

That if a court exercise judicial functions it acts as a Court is indicated in *Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another*, . The question the Supreme Court was called upon to decide in that case was whether the judicial authority constituted by the State Government u/s 60 of the Essential Commodities Act to hear appeals against the order of confiscation that may be made by the licensing authority u/s 6-A is an inferior criminal court subordinate to the High Court and amenable to the Revisional jurisdiction of the High Court, Referring to this question the Supreme Court observed:

"The Full Bench answered the first question in the affirmative. While summing up its conclusion, the Court held that when a judicial authority like an officer who presides over a court is appointed to perform the functions, to judge and decide in accordance with law and as nothing has been mentioned about the finality or otherwise of the decisions made by that authority, it is an indication that the authority is to act as a court in which case it is not necessary to mention whether they are final or not as all the incidents of exercising jurisdiction as a Court would necessarily follow. We are in broad agreement with this conclusion,"

12. We think it may not be necessary for the purpose of this case to define in what all circumstances an authority functioning under a statute must be taken to function as a court. Suffice to say that if the authority is not to exercise his functions judicially and is acting as an executive or administrative authority it would not be a court. Thus if in this case we find that the functions exercisable by the District Magistrate are not Judicial and the process by which such authority reaches the decision is not any judicial process he would not be functioning as a court.

13. The scheme of the Indian Telegraph Act may now be adverted to. Section 10 of the Act, as already indicated gives the Telegraph authority power to place and maintain telegraph line in or upon any immovable property. The proviso indicates that such power is to be exercised only for telegraph established or maintained by the Central Government or to be so established and maintained, that the Central Government acquires only the right of user, that in the case of local authority the exercise has to be with permission of that authority and that in the exercise of such power as little damage as possible is to be caused. These are in the nature of restrictions in the exercise of the power and do not restrict the discretion to determine the property over which the lines are to pass or posts are to be erected. That discretion is in the telegraph authority. If he is resisted or restricted he seeks permission from the District Magistrate whose adjudication does not cover the question whether a line is to be drawn over any specific item of property or whether posts are to be erected or not in any specific item of property. Section 16 does not indicate that as within the power of the District Magistrate. The enquiry by the District Magistrate would be in the nature of a ministerial enquiry. There is no question of calling for evidence, sifting such evidence and coming to a judicial decision thereon. In the event such judicial decision on issues was contemplated by Section 16(1) there would necessarily have been indication in the section as to the issues that could be so considered and judicially disposed of by the District Magistrate. No doubt Section 16(1) provides that in granting permission to the Telegraph Authority the District Magistrate is to exercise his discretion. Of course even in passing an executive order there is need for exercise of discretion and that need not render his proceedings judicial in character. The discretion has to be judicially exercised, but that is different from judicially deciding an issue. We are referring to this particularly because learned counsel for the petitioners in these cases Sri T.P. Kelu Nambiyar relies on the Full Bench decision of this Court in Bharath Plywood and Timber (Pvt.) Ltd. Products v. Kerala State Electricity Board. 1970 KLT 872, in support of his case that the District Magistrate functioning u/s 16(1) has to reach a judicial decision. The provisions of the Indian Telegraph Act read with Section. 51 of the Electricity Act were challenged as unconstitutional before the Full Bench, answering the contention that Section 16 enables the District Magistrate to arbitrarily act the court noticed in para 23 of its judgment thus:

"It is clear from the wording of Section 18 and particularly from the expression "the District Magistrate may, in his discretion", that an order will not be

forthcoming automatically. A District Magistrate may in his discretion in a given case refuse or decline to pass an order that the telegraph authority shall be permitted to exercise the powers. The wording is significant. The District Magistrate does not grant permission to the authority. But he orders that the authority "shall be permitted". The discretion conferred by the section on the District Magistrate is certainly a judicial discretion and in cases where the District Magistrate refuses to pass an order that the telegraph authority shall be permitted to exercise the powers mentioned in Section 10, it is inconceivable that the telegraph authority may, notwithstanding such refusal, continue to exercise such powers. The wording of the section is thus itself indicative of the fact that in cases of resistance or obstruction the District Magistrate will have to decide whether the authority should be permitted or not to exercise the powers u/s 16 of the Telegraph Act. This necessarily means that the Telegraph authority cannot override or ignore the resistance or obstruction and continue to exercise the powers u/s 10 notwithstanding such resistance or obstruction. It follows that, when an owner or occupier resists or obstructs the exercise of the power u/s 10, the telegraph authority will have to approach the District Magistrate for an order under Sub-section (1) of Section 16 and can exercise the power u/s 10 only in cases where the District Magistrate deems it fit to pass an order that he shall be permitted to do so. The power conferred by Section 10 is thus a conditional power; conditional on an order being passed u/s 16(1) by the District Magistrate that the authority may be permitted, in case of resistance or obstruction, to exercise the power. This is so not only in regard to a telegraph authority but to the public officer or any other person authorised under the Electricity Act.

We are fortified in this view by what is provided by Sub-section (1) of Section 16. If the telegraph authority has the power, notwithstanding the resistance or obstruction, to exercise the powers u/s 10, the resistance or obstruction by the owner or occupier, we conceive, would be an offence u/s 186 of the Indian Penal Code. That section makes voluntary obstruction to any public servant in the discharge of his public functions an offence, and such an offence is punishable with imprisonment of either description for a term which may extend to three months or with fine which may extend to five hundred rupees, or with both."

We cannot read this to mean that in reaching the decision the District Magistrate acts as a Court or that his proceedings are judicial proceedings.

14. Reference may be made in this context to the decision in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1892) 1 QB 431, Fry L. J. said thus:

"It seems to me that the sense in which the word "judicial" is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterise proceedings in courts of justice, and are proper to the functions of a Judge, not that the members of the supposed body are members of a Court." In the same decision Lopes L J. said thus:

"The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a Judge or by Justices in Court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind -- that is, a mind to determine what is fair and just in respect of the matters under consideration."

15. Apart from what we have indicated in the above discussion there is a weightier reason why we cannot hold that the District Magistrate acting under the Indian Telegraph Act is acting as a court. We have already adverted to Section 3(4) of the Code of Criminal Procedure. Under the Code the exercise of "any power other than executive or administrative is not envisaged in the case of an executive Magistrate functioning under any statute other than the Code. If so the District Magistrate functions in this case only as an administrative or executive authority and the exercise of his discretion u/s 16(1) is only that incidental to an executive or administrative exercise. His decision is not that of a court much less that of a Criminal Court as we will presently show.

16. We have already indicated that the term "criminal court" has not been defined. Section 211 of the Indian Penal Code concerns filing of false charge of offence made with intent to injure. That section provides that whoever with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against that person, or falsely charges any person with having committed an offence knowing that there is no just or lawful ground for such proceedings or against that person, shall be punished with imprisonment, of either description for a term which may extend to two years or with fine, or with both. "Criminal Proceeding" in that context necessarily refers to proceeding concerning the commission of an offence. In *Albert v. State of Kerala* AIR 1966 Ker 11 (FB), this Court observed that when a man sets the criminal law in motion against a person by giving information to the police that that person has committed a cognizable offence he institutes a criminal proceeding against that person within the meaning of Section 211 of the Indian Penal Code. Section 397 of the Code of Criminal Procedure itself indicates that pursuant to the taking up of a revision under that section the court may direct that the execution of any order or sentence be suspended, and if the accused is in confinement, that he be released on bail or on his own bond. It further indicates that the revision is taken up for the purpose of satisfying itself as to the correctness, legality or propriety of any finding or order. In the decision of the Supreme Court in *The Dargah Committee, Ajmer Vs. State of Rajasthan*, , the Supreme Court considered the proceedings by a Magistrate u/s 234 to be proceedings of a civil nature. That was because though it was a Magistrate constituted as a Court under the Code of Criminal Procedure that was functioning such function was not of a criminal nature. On a consideration of all facts and circumstances we find that the functions of the District Magistrate u/s 16(1) of the Indian Telegraph Act is also not of a criminal character as the District Magistrate is only granting permission to the authority to proceed with its work and does not by himself impose any punishment or penalty. Therefore apart from the fact that the District Magistrate

does not function as a court even assuming that he was so functioning he cannot be said to be functioning as a Criminal Court.

17. Had we found that the District Magistrate was functioning as a Criminal Court we would have had to examine the further question whether, if so, it could nevertheless be said that he was functioning as persona designate and for that reason no revision would lie to the Sessions Judge. But in view of our finding that the District Magistrate was not functioning as an inferior Criminal Court it necessarily follows that Section 397 would not enable the party said to be aggrieved by the proceedings of the District Magistrate to invoke the revisional power of the Sessions Judge. Therefore, we are not pronouncing on the question whether in the exercise of his functions the District Magistrate was acting as persona designata.

18. It has been urged before us by the learned Additional Advocate General Sri. T.C.N. Menon that these petitions must fail also for the reason that in these cases there is no justification to exercise the inherent power of this Court u/s 482 of the code of Criminal Procedure for more reasons than one. It is said that resort has been made to the Sessions Judge invoking his revisional power and when once that has been done resort to the High Court by way of revision is not (competent?). It is said that the court would not normally exercise its inherent power under such circumstances. It is further contended by the learned Additional Advocate General that inherent power could be invoked only if the court is satisfied that there is abuse of process of court or the court feels the ends of justice would call for interference by this Court, According to counsel there is no scope to find so in the circumstances of the case. Now that we are one with the learned Sessions Judge in holding that the revision would not lie u/s 397 of the Code there is no need to go into the question of propriety of exercise u/s 482 of the Code of Criminal Procedure.

The result is that the petitions are dismissed. But in the circumstances of the case we direct the parties to suffer costs.