
(1952) 04 AP CK 0006
In the Andhra Pradesh High Court

Pannalal Lahoti

APPELLANT

Vs

State of Hyderabad

RESPONDENT

Date of Decision : 09-04-1952

Acts Referred:

Constitution of India, 1950 — Article 1, 227, 228, 254, 372

Citation : (1952) CriLJ 1740

Hon'ble Judges : Palnitkar, J; Mohd. Ahmed Ansari, J; A. Srinivasa Chari, J

Bench : Full Bench

Judgement

1. This petition has been filed under Articles 227 and 228 of the Constitution. The petitioner before us is the accused in a case pending before the District Magistrate, Gulbarga (No. 1/3 of 1951) in which he was charged for offences under the Defence of Hyderabad Rules read with Sections 342, 405, 409 and 477, Hyderabad Penal Code. The challan in the case was filed on 12.12.1950. The prosecution examined 18 witnesses and at that stage filed an application on 29.12.1951 before the Court praying that the Magistrate might proceed to frame a charge on the basis of the evidence already led by the prosecution. While doing so, the prosecution expressly reserved its right to examine the rest of the witnesses after the framing of the charge. The prosecution purported to make this prayer u/s 254, Criminal P.C. of India, Act 5 of 1898.

It may be mentioned that the Indian Criminal Procedure Code was applied to the part n States by the Act of 1951. The Code of Criminal Procedure (Amendment) Act 1951 came into force in the Hyderabad State on 1.4.1951. Under the provisions of Section 25 of the above Code, the Hyderabad Criminal Procedure Code was repealed. In this judgment the Indian Criminal Procedure Code will hereinafter be referred to as "The Indian Code" and the Hyderabad Criminal Procedure Code as the "Hyderabad Code". The accused protested against this procedure contending that the case was governed by the Hyderabad Code and that under the provisions of Section 213, Hyderabad Code it was obligatory for the Magistrate before the stage of the framing of the charge to record the

statements of all the witnesses cited by the prosecution and that the said Section did not permit the examining by the prosecution of some of the witnesses and reserving its right to examine the other witnesses after the charge was framed.

Arguments were advanced before the Magistrate on the question as to which Code would apply to this case. The accused also requested the Magistrate to refer the case to the High Court under Article 228 of the Constitution of India for the determination of this constitutional question. The District Magistrate after hearing the arguments came to the conclusion that the Indian Code alone would apply to this case, as the Code came to be applied to Hyderabad on 1st April 1951 when the case was still pending. The Magistrate declined to refer the case to the High Court.

2. Being aggrieved by the said order the Petitioner filed in this Court an application for the withdrawal of the case from the file of the District Magistrate, Gulbarga, with a prayer that the questions of law involved in the case be determined by this Court.

3. The learned Advocate for the Petitioner argued that when the case against the petitioner was launched, the Hyderabad Code was extant and that under the provisions of Section 213 of the said Code, the Magistrate could not have framed a charge unless and until all the witnesses tendered on behalf of the prosecution were examined. He relied upon the words; "all evidence" occurring in the said Section. He further contended that the introduction of the Indian Code by the passing of Act 1 of 1951 by Parliament could not have the effect of repealing the Hyderabad Code and that the latter Code would continue to be in force, and that only in so far as any of its provisions were repugnant to the provisions of the Indian Code would the Hyderabad Code give way to the Indian Code. He urged that Section 25 of Act 1 of 1951 was ultra vires the legislative powers of Parliament.

He elaborated his argument by contending that Criminal Procedure was one of the items in the concurrent list of schedule VII of the Constitution (item 2 of List in) and that being a subject in respect of which the State Legislature is also competent to legislate, Parliament could not have repealed an enactment passed by the State Legislature which it was competent to enact. Where any provision of the State Law is repugnant to any provision of a Central enactment that the State Law would yield to the Central Law under Article 254(1) of the Constitution, there was no repugnancy between Section 213 of the Hyderabad Code and Section 254 of the Indian Code. Generally we would not proceed to decide a question of constitutional law if the decision of such question was not necessary for the disposal of the case. In this respect we usually prefer to follow the wholesome rule enunciated by Cooley that where there are other grounds on which we could rest our judgment, we should not express any opinion on the constitutional question which may incidentally arise vide Cooley vol. I pp. 338 and 339 para 2 which runs as follows:

In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the Court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.

But we think that the decision of the question as regards the applicability of the particular provisions of Indian Code under discussion is necessary.

4. It would be desirable to divide the arguments advanced before us under the following heads:

(a) Was Parliament competent to repeal the Hyderabad Criminal Procedure Code by enacting Act I of 1951?

(b) If not, does the passing of Act 1 of 1951 have the effect of merely nullifying only such of those provisions of the Hyderabad Code which are repugnant to the Indian Code?

(c) Has the petitioner acquired any substantive right under the provisions of Section 213 of the Hyderabad Code read with Section 25(3) of Act 1 of 1951?

The learned Advocate for the petitioner submitted that the repealing of the Hyderabad Code was beyond the scope of the legislative power of Parliament.

5. The legislative relations between Parliament and the State Legislatures and the distribution of their respective legislative powers have been set out in chap. II Part XI of the Constitution. Certain subjects have been set apart for the exclusive legislation by Parliament and certain other subjects have been reserved for exclusive legislation by State Legislatures. There is a list of subjects in regard to which both Parliament and the State Legislature have concurrent powers of legislation. In addition to the prescribed fields of Legislation, a residuary power has been vested in Parliament to make any law with respect to any matter not mentioned in the concurrent or State list (item 97 of List I).

6. It would be useful to make a comparative study of the distribution of Legislative powers in the various other Constitutions. So far as the Constitution of the United States is concerned, the scheme of the Legislative powers is as follows:

(a) Powers which are expressly mentioned in Article 1, Section 8 on particular matters are given to the Congress.

(b) Under the tenth Amendment the powers not delegated to the United States by the Constitution nor prohibited by it in the States are reserved to the States respectively or to the people.

There is no concurrent list of subjects as under the Indian Constitution in regard

to which both the Congress and Legislatures of the States can make laws. But even there the congressional Legislation supersedes State Law where, the same matter is the subject of Legislation by both - vide *Davis v. Beason* (1890) 133 U.S. 333; *Gulf Colorado etc. v. Hafley* (1895) 158 U.S. 98 and *Missouri K. & T.R. Co. Ry. v. Haber* (1898) 169 U.S. 613.

7. In the Constitution of Canada however a clear cut division has been made in the field of legislation, between the Dominion Parliament and the Legislatures of the Provinces. This distribution of the Legislative Powers has been made under chap, vi, British North America Act, 1867 (Victoria C.A.P. 37). u/s 91 the Dominion Legislature has been empowered to legislate exclusively on certain subjects, while the Provincial Legislature has exclusive jurisdiction to pass laws on certain other subjects. There is no concurrent sphere except in respect of agriculture and immigration (Section 95) and in the event of a conflict, Dominion Legislation alone would prevail. In the Dominion Parliament there is vested the "residuary power" and by virtue of this power the Dominion Parliament can legislate for the peace, order and good government of Canada as a whole.

It is abundantly clear that the Dominion Parliament is the paramount authority in regard to the subjects of legislation enumerated in Section 91, British North America Act, its supremacy would be recognized even though the subject legislated upon by Parliament trenches upon any of the matters allotted to the Provincial Legislature u/s 92 of the Act. Thus it has been often expressed that the subjects enumerated in Sections 91 and 92, British North America Act in many cases overlap or interlace - vide *Brophy v. Attorney General of Manitoba* (1895) A.C. 202.

In such cases neither legislation would be ultra vires if the field is clear but if the field is not clear and in such domain the two legislations meet, then the Dominion Legislature must prevail - Canadian Constitution by Lefroy P. 118-19. This is well supported by the decision of the Privy Council in the case of *Attorney General for Canada v. Attorney General for British Columbia* (1930) A.C. 111 in which their Lordships have discussed four guiding principles relating to the Legislative competence of the Canadian Legislatures. So far as the Constitution of Australia is concerned the Parliament of the Commonwealth of Australia has both exclusive and concurrent powers though there is no separate list enumerating the concurrent powers. It is by constitution that some of the powers of the commonwealth have become concurrent. The exclusive powers are enumerated in some of the sections of the Australian Constitution. The legislative powers of the States are residual. The State Parliament may legislate on any subject not exclusively assigned to the powers of Commonwealth but in case of inconsistency the law of Commonwealth should prevail.

In so far as the provisions relating to the distribution of legislative powers of the Indian Parliament and the State Legislatures are concerned the scheme of the arrangement relating to distribution of powers is on the same lines as that provided for in the Government of India Act of 1935. In the Government of India

Act there was a threefold distribution of powers, certain subjects set apart for the exclusive legislative jurisdiction of the Centre (Federal), while certain other subjects were reserved for the Provincial Legislatures to deal with and in addition to the subjects allotted to the Centre and to the States respectively certain specified matters were reserved for both the Centre and the Provinces to legislate about, with concurrent powers. As in the Canadian Constitution, so in India wherever there was overlapping of legislation in the list of subjects predominance was given to the Federal Legislation over the State Legislation. The provisions of the Constitution of India also are similar.

8. The sum and substance of the argument of the learned Advocate is that the Parliament in passing Act 1 of 1951 in pursuance of which it purported to repeal the Hyderabad Code had exceeded the bounds of its legislative power and in support of this contention he relied upon the case of the Attorney General for Ontario v. Attorney General for the Dominions (1896) A.C. 348. The decision in that case may not be very useful with regard to the determination of the question before us for the obvious reason that the British North America Act and the Constitution of India are not identical in terms in regard to the distribution of legislative subjects between the Centre and the State. The method of distribution in the Constitution is neither the Canadian nor the Australian. It bears resemblance to the Canadian Constitution in that the powers of the Centre and those of the units of the Federation are enumerated but it differs from that Constitution in this that while the Canadian Constitution does not vest the residue in the Dominion, the Constitution of India expressly reserves the residuary power in the Parliament.

9. In deciding the points of law that, have been canvassed before us, we would follow the dictum of the P.C., viz., that in all questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy - Hodge v. Reg. (1884) 9 A.C. 117.

10. The subject of criminal procedure is a subject occurring in the concurrent list being item No. 2 that is to say, as regards this subject both the Centre as well as the States have powers to legislate. Then the question arises as to where two laws are existing side by side and there is conflict between any one of the provisions of the one and the corresponding provisions of the other which is the law which would hold sway. It is to provide for such a contingency that Article 254 has been enacted. Article 254 makes it clear that in cases, of repugnancy, Parliamentary law would prevail, except where the President assents to the State Law in which case it would survive notwithstanding the repugnancy. While Clause (2) of Article 254 allows a State Law which has been assented to by the President to exist notwithstanding there being a conflict between Parliament made Law and such State Law, the proviso to Clause (2) saves the power of Parliament to enact, amend, vary or repeal such law.

11(a) The position with regard to the existing laws of the Hyderabad State

having particular reference to the provisions of Article 254 of the Constitution may be summarized as under:

(b) Prior to the coming into force of the Constitution, 26.1.1950, the laws passed by the State of Hyderabad and which were extant held the field. After the coming into force of the Constitution under Article 372 read with Article 254 such of those provisions of the State law which are repugnant to the corresponding provisions of parliamentary law or which contravene any other provision of the Constitution would be void, and the provisions of the law passed by Parliament alone would prevail.

12. The law recognises a repeal of an Act by implication on account of repugnancy between two statutes. It is abundantly clear that where the State Law is superseded by the exercise of the Legislative power of Parliament, the sphere of Legislative power of the State so far as that subject is concerned, becomes void. Where, therefore, the Central Legislature evinces its intention to cover the field exclusively, it becomes an "occupied, field" and all State Laws in respect of that matter are rendered invalid. The test applied by Isaac J., in *Clyde Engineering Co., Cowburn* 37 com.w. L.R. 466, appears to us to be a conclusive test. The learned Judge expressed as follows:

It however a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency, where another legislature assumes to enter to any extent upon the same field.

This view is also supported by the observations of Narsing Rao J. in the case of *G.P. Stewart Vs. Brojendra Kishore Roy Chaudhury*, Article 254 clearly makes Parliament the dominant legislature so far as concurrent subjects are concerned because the State Law is compelled to give way to the law passed by Parliament where there is a repugnancy between any of the provisions of the respective enactments. The learned Advocate for the petitioner tried to make out that if his argument that Parliament could not repeal the Hyderabad Criminal Procedure Code found favour with us and the Hyderabad Criminal Procedure Code continued as good law his case would be hit by Article 254 of the Constitution only where there was "repugnancy" between the provisions of the two Codes and it is only in that case would the provisions of the Hyderabad Code yield to the provisions of the Indian Code. We have already given expression to the view that the intention of Act 1 of 1951 is to govern completely the particular matter viz., all matters relating to Criminal Procedure. And when Parliament has disclosed such an intention the provisions in the Hyderabad Code governing the same subject would be regarded as repugnant.

13. It was contended that Parliament could not repeal the Hyderabad Criminal Procedure Code and for this proposition reliance was placed on *Attorney General for Ontario v. Attorney General for the Dominions* (1896) A.C. 348. In the view that we have taken as regards the question of "repugnancy" any pronouncement by us on this portion of argument is in our opinion not necessary.

14. It was urged that the right to insist that all the witnesses of the prosecution should be examined before a charge is framed is a substantive right of the accused. We do not agree with this contention. The provisions of Section 213 of the Hyderabad Code do not confer any substantive right but are procedural. We feel that the proposition is now well established that no person has a vested right in procedural matters and if the mode of procedure is altered a suitor cannot claim that the old procedure should govern his cause.

15. In the above circumstances, we hold that the procedure adopted by the Magistrate in applying the Indian Code was proper. This application is, therefore, dismissed with costs. Advocate's fee Rs. 100.