

(1962) 09 KAR CK 0001
In the Karnataka High Court

State of Mysore

APPELLANT

Vs

Kashambi and Another

RESPONDENT

Date of Decision : 25-09-1962

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 39, 438

Suppression of Immoral Traffic in Women and Girls Act, 1956 — Section 2 (c), 8 (a)

Citation : (1963) CriLJ 226

Hon'ble Judges : Mir Iqbal Husain, J;K.S. Hegde, J

Bench : Division Bench

Judgement

K.S. Hegde, J.—This is a reference u/s 438 Cr. P. C. made by the learned Judicial Magistrate, First Class, Saundatti, requesting this Court to decide whether the Notification issued by the Government of Mysore under its Order No, H. D. 24 C I. P. 48 dated 18-12-1958 is valid or not. The learned trial Magistrate is of the opinion that the said Notification is not valid in law.

2. The facts material for the purpose of deciding the reference in question are as follows: One Kashambi and another Mohadinbi were prosecuted u/s 8 (a) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, which will be hereinafter referred to as the "Act" in Criminal Cases No Section 337 and 339 of 1961 on the file of the learned Judicial Magistrate First Class, Saundatti. When those cases were taken up for trial, the learned Counsel for the accused contended that the learned Magistrate had no jurisdiction to try the cases in question. After hearing arguments on that point, the learned Magistrate has made the above reference.

3. The Magistrates who can try cases arising under the "Act" are mentioned in Section 2 (c) of the "Act", which says:

Magistrate" means a District Magistrate, a Sub Divisional Magistrate, a Presidency Magistrate, or a Magistrate of the First Class specially cm-powered by the State Government by notification in the official gazette, to exercise jurisdiction under this Act.

4. In view of this provision all District Magistrates, Sub Divisional Magistrates and Presidency Magistrates are competent to try cases arising under the "Act" without any further conferment of power. But so far as the other First Class Magistrates are concerned, they can try cases under the "Act" only if they are "specially empowered". Then there is Section 22 which says that no Court inferior to that of a Magistrate as defined in Clause (c) of Section 2 shall try any offence under Sections 3 to 8. The Government of Mysore, acting u/s 2 (c) of the "Act" has notified in the Official Gazette the Order No. H. D. 24 C. I. P. 48 dated 18-12-1958 which reads:

In the exercise of the powers conferred by Clause (c) of Section 2 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Central Act 104 of 1956) the Government of Mysore hereby specially empowers all the First Class Magistrates in the State, to exercise jurisdiction under the said Act.

5. It was contended before the learned trial Magistrate, which contention has found favour with him, that the Notification in question did not "specially empower" any First Class Magistrate to try cases under the "Act" but it has conferred power to try cases under the "Act" on all first Class Magistrates, which amounts to a general conferment of power as opposed to special conferment of power as required by Section 2 (c). It was contended that the order of the Government results in enlarging the scope of Section 2 (c) and "therefore the same is beyond the competence of the Government.

6. The language of Section 2 (c) of the "Act" does not justify the contention in question. It speaks of "Magistrate of First Class specially empowered". Herein the word "specially" is an adjective to the verb "empowered" and not to the noun "Magistrate". The word "specially" therein means "specifically" or "for a particular purpose" as explained at page 822 of Corpus Juris.

7. The view taken by the learned Magistrate was largely influenced by the decision of the Madras High Court in Mahomad Kasim v. Emperor AIR 1915 Mad 1159 wherein the scope of Section 3 of the Opium Act came up for consideration. For interpreting the scope of Section 3 of the Opium Act, the learned Judges of the Madras High Court took the aid of Section 39 Cr. P. C. As regards the true scope of Section 39 Cr. P. C. there is sharp conflict of judicial opinion.

8. At the very outset, it is necessary to mention that the conferment of power u/s 2 (c) of the "Act" is not made by having recourse to Section 39 Cr. P. C. Section 39 Cr. P. C. deal with confer-merit of additional powers under the Cr. P. C. and these powers are set out in such. IV of that Code, In order to understand the true scope of Section 39, one has to bear in mind the other provisions found in Chapter III which deals with powers of Courts. Section 36 of the Code says that "all District Magistrates, Sub-Divisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule; such powers are called their

ordinary powers". Section 37 deals with additional powers conferrable on

Magistrates and that provision says that "in addition to his ordinary powers,. any Sub-Divisional Magistrate or any Magistrate of the first, second or third class may be invested-by the State Government or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the State Government of the District Magistrate.

Then comes Section 39 which prescribes the mode of conferring powers. That provision prescribes three ways by which additional powers can be conferred on the Magistrates. They are: (i) empower persons (obviously referring to Magistrates as Chapter III deals with powers of Courts, Sections 36, 37 and 38 deal with powers of Magistrates and Section 39 is a corollary to Section 37) by name; (ii) empower them by virtue of their office; and (iii) empower classes of officials generally by their official titles. In other words, the section says that whenever additional powers are to be conferred, it is for the State Government to decide whether they should empower a class or classes of Magistrates generally or one or more Magistrates specially or one or more Magistrates by virtue of their office. In other words, wide power is given to the State Governments to confer additional powers on the Magistrates, under the Criminal Procedure Code. The word "specially" in Section 39 Cr. P. C. means "specifically" and "generally" means to a whole class. To put it differently the State Government can confer additional powers either specifically on some . Magistrates by name or specifically on some Magistrates presiding over some Courts or generally to a class or classes of Magistrates. In whatever manner the State may confer powers, there would be no difference in the contents of the powers conferred. To my mind the word "specially" does not convey the idea of picking and choosing of the Magistrates and whether additional powers should be conferred on some or all depend on the exigencies of the situation and not on any other test, as Section 39 speaks of empowering powers on Magistrates by virtue of their office and of empowering powers on a class or classes of Magistrates.

9. I shall now proceed to consider the several decisions cited at the Bar. The earliest decision to which our attention was invited is that of the Madras High Court in AIR 1915 Mad 1159. Therein a Bench of that High Court consisting of Spencer and Seshagiri Aiyar, JJ., considered the scope of the expression "Magistrate" found in Section 3 of the Opium Act (1 of 1878), which says that "Magistrate" " means in the present context "a Presidency Magistrate, a Magistrate of the First Class or when specially empowered by the Local Government to try cases under this Act, a Magistrate of the Second Class". The question that arose for decision was whether the State Government had power to empower all Second Class Magistrates to try cases under the Opium Act.

For finding out the true scope of the definition of "Magistrate" found in the Opium Act, their Lordships took the aid of Section 39 Cr. P. C. This is what Spencer, J., observed in that connection:

Section 39 Cr. P. C. throws light on what is meant by specially empowering

persons.

It declares that the Local Government may empower classes of officials generally by their official titles or persons specially by name or in virtue of their office. When therefore a class of officials is invested with powers to try certain offences, it would appear that they are "generally" empowered. The word "generally" is in contrast to the word "specially" which is used in speaking of individuals.

The same view was expressed by Seshagiri Aiyar, J. It may be seen that the definition of "Magistrate" found in Section 3 of the Opium Act is not ad idem with the definition of "Magistrate" in Section 2 (c) of the "Act". Therefore, the decision as such is not relevant for our present purpose. But I am unable to agree, for the reasons already mentioned, with the interpretation placed by the learned Judges on the language of Section 39 Cr. P. C.

10. The next case to which reference was made at the Bar is Allaga Pillai Vs. Emperor, . This decision is of no assistance for our present purpose. The Notification which their Lordships considered in that case empowered some Second Class Magistrates by virtue of their offices to try cases under the Opium Act. The Second Class Magistrate of Thirumangalam was mentioned in the list appended to that Notification, The Court held that the Magistrate was specially empowered to try cases under the Opium Act.

11. In Sundar LaL and Others Vs. Emperor , the jurisdiction of the Magistrate concerned to try a case u/s no Cr, P. C. was questioned on the ground that the Government had authorised all First Class Magistrates to take action u/s no and therefore it could not be said that the First Class Magistrate in question was "specially empowered". Kendall, J., rejected that contention, though no reasons were given in support of his conclusion.

12. At this stage it may be mentioned that the expression "specially empowered" is found in several sections of the Criminal Procedure Code, viz., Sections 108, no, 144, 164 and 260. The practice of conferring powers under these provisions to a class of Magistrates is wide-spread.

13. In The State Vs. Judhabir Chetri, a Full Bench of the Assam High Court held that the Notification empowering all Magistrates of the First Class in the State of Assam to exercise power u/s 17 of the Assam Opium Prohibition Act of 1947 is a valid Notification. The learned Judges differed from the view taken by the Madras High Court in Mahomed Kasim's case AIR 1915 Mad 1159, This decision does not conflict with the view taken by me. But I am unable to subscribe to the view expressed by Thadani C. J., that Magistrates are not a "class of officials" within the meaning of that expression found in Section 39 Cr. P. C,

14. The last decision cited before us is the decision of the Saurashtra High Court in Polubha Vajubha v. Tapu Ruda AIR 1956 Sau 73. Therein a Bench of that High Court held that the language of Section 39 plainly indicates that special empowering can take place only where some individuals are empowered and,

that where a class of officials is invested with powers, for trying certain offences, the empowering is general. It held that powers conferred by the Notification No. H/Spl/ 25-2- dated 14-5-53 on all Taluka Magistrates to try cases u/s 145 Cr. P. C. does not amount to specially empowering them within the meaning of Section 39 and therefore a Taluka Magistrate is not empowered to hold proceedings u/s 145; hence the order made by him is without jurisdiction. In arriving at that conclusion the learned Judges followed the decision of the Madras High Court in Mahomed Kasim's case AIR 1915 Mad 1159.

Dealing with Section 39 Cr. P. C. this is what Shah, C. J., who spoke for the Bench stated:

The contrast in Section 39 is really between empowering; persons on the one hand, and empowering classes (of officials) on the other hand, the underlying ideas being that it is Courts which are to be empowered. What the section provides is that where persons (that is to say Magistrates or judges) are to be empowered the empowering shall be by name or in virtue of their office and this empowering will be special empowering, as against general empowering, which empowering is to be of the whole class of officials (who would also be Magistrates or Judges) by their official titles.

Thus for I am in agreement with the learned Judge.

But I am unable to agree with the learned Judge when he says in paragraph 6 of the judgment.

Agreeing with Mohamad Kasim's case AIR 1915 Mad 1159, therefore, we hold that the powers conferred by the Notification in the present case on all Taluka Magistrates does not amount to specially empowering them within the meaning of Section 39 Cr. P. C. and therefore the Taluka Magistrate of Talaja was not empowered to hold proceedings u/s 145 Cr. P. C, and that the order made by him was without jurisdiction.

I see no justification for the view that u/s 39 Cr. P. C. a class of Magistrate cannot be conferred with additional powers. To repeat myself, when power is conferred on one or some Magistrates only it is a special conferment of power or a specific conferment of power, when it is conferred on a class or classes of Magistrates it is general conferment of power. In either case it is a mode of conferment as the marginal note to Section 39 shows. Section 39 Cr. P. C. in my" opinion does not limit the power of the State Government, On the other hand it gives a wide discretion to the State Government.

15. For the reasons mentioned above, I hold that the Notification referred to in the order of reference has been validly made and therefore the learned Magistrate has jurisdiction to try the case in question.

16. Before closing this judgment, it is necessary to place on record our appreciation of the valuable assistance rendered by Sri G. Shankars Chetty the learned Additional Asst., Advocate-General and Sri T. Radhakrishna, who has

appeared as amicus curiae in this case.

17. The papers will now go back to the learned Magistrate for disposal of the cases according to law.