

(1978) 07 AHC CK 0012
In the Allahabad High Court
Case No : Sp. A. No. 302 of 1975

State of Uttar Pradesh and Others

APPELLANT

Vs

Jaipal Singh Naresh and Others

RESPONDENT

Date of Decision : 18-07-1978

Acts Referred:

Constitution of India, 1950 — Article 254, 254(1), 254(2), 309
Criminal Procedure Code, 1973 (CrPC) — Section 25, 25(2), 25(3)

Citation : (1978) AWC 601

Hon'ble Judges : Satish Chandra, C.J.;Yashoda Nandan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Satish Chandra, C.J.—The State of Uttar Pradesh appeals against the judgment of a learned Single Judge quashing a notification dated March 15, 1975. This notification was challenged by some Assistant Public Prosecutors on the ground that by placing them under the administrative and disciplinary control of the police authorities, the notification violated Section 25(2) of the Code of Criminal Procedure. A learned Single Judge accepted this Sub-section and quashed the said notification.

2. Section 25 of the Code of Criminal Procedure provides:

25(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(2) Save as otherwise provided in Sub-section (3) no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

Provided that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through police officers.

(3) Where no Assistant Public Prosecutor is available for the purposes of any

particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case.

Provided that a police officer shall not be so appointed-

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

3. The learned Single Judge, after a review of the various materials touching the subject, held that the scheme behind the enactment of Sub-section (2) was to make the enforcement agency independent of the police department. To achieve this policy, the State Government on March 27, 1974 issued a notification declaring that all appointments of Senior Public Prosecutors and Assistant Public Prosecutors made under the Police Act, 1861 shall cease from April 1, 1974 and the said posts of the police establishments shall stand abolished. The provisions contained in the Police Regulations in respect of Public Prosecutors were repealed. The same day, the Government issued another notification under Article 309 of the Constitution forming the U.P. (Assistant Public Prosecutors) Appointment Rules, 1974. On June 15, 1974, the State Government issued a notification stating that the Senior Public Prosecutors, Public Prosecutors and Assistant Public Prosecutors would henceforth be under the administrative and disciplinary control of the District Magistrate at the district level. In pursuance of that policy, another Government order was issued on August 21, 1974 directing that the Character Rolls and other service records of the Public Prosecutors should be transferred by the police department to the District Magistrate.

4. Later on, it appears that the State Government had second thoughts and reversed its policy. It issued a notification on March 15, 1975 rescinding its earlier order dated June 15, 1974 and directing that henceforth the Public Prosecutors, Senior Public Prosecutors and Assistant Public Prosecutors shall be under the control of the Superintendent of police at the district level and the Inspector General of Police at the State level for purposes of administrative and disciplinary matters.

5. As already observed, this latter notification was quashed on the view that it was in conflict with the scheme of Section 25(2) of the Code of Criminal Procedure.

6. During the pendency of the present appeal, the Governor promulgated the Code of Criminal Procedure (Uttar Pradesh Amendment) Ordinance, 1975 (U.P. Ordinance No. 38 of 1975). This Ordinance was replaced by U.P. Act No. 16 of 1976 bearing the same name. By this ordinance and the resulting Act, a proviso was added to Section 25(2) of the Code of Criminal Procedure. That proviso was added retrospectively. It stated:

Provided that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through

police officers.

After this amendment, Sub-section (2) of Section 25 read as follows:

(2) Save as otherwise provided in Sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

Provided that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through police officers.

7. It is evident that the proviso cut across the scheme of the policy behind Sub-section (2) of Section 25 of the Code of Criminal Procedure as adumbrated by the learned Single Judge Assuming that the view point expressed by the learned Single Judge was correct and justified, the question is whether the notification dated March 15, 1975 would be invalid even though the proviso has been added with retrospective effect. Under the proviso, the State Government has been authorised to exercise its control over the Assistant Public Prosecutors through police officers. The notification dated March 15, 1975 transferring the administrative and disciplinary control over the Assistant Public Prosecutors to the police department was in conformity with the language as well as the underlying scheme of the proviso. After the enactment of the proviso, it cannot be said that the notification is inconsistent with Sub-section (2) of Section 25.

8. Learned Counsel for the Respondents argued that the proviso was invalid on the following grounds:

(i) the proviso has been enacted by the State Legislature which was incompetent to do so.

(ii) the proviso cannot, in law, render the main provision wholly illusory.

(iii) the proviso is a piece of colourable legislation.

9. Coming to the first point, it is not disputed that the Ordinance as well as the Act No. 16 of 1976 which introduced the proviso received the assent of the President on April 30, 1976 and it came into force on May 1, 1976. In this manner, it satisfied the requirements of Article 254 of the Constitution. The Code of Criminal Procedure is in the Concurrent List (Entry No. 2). Article 254(2) provides that in respect of a matter enumerated in the Concurrent List, a law made by the Legislature of a State which is repugnant to the earlier law made by Parliament or an existing law with respect to that matter, the law so made by the State Legislature shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. The Code of Criminal Procedure was enacted by the Parliament. Section 25(2) thereof was in a way inconsistent with the proviso. In spite of this inconsistency, the proviso will prevail because the Amending Act had received the assent of the President.

10. Learned Counsel sought to place reliance on Article 254(1). This provision is clearly inapplicable. Sub-clause (1) expressly has been made operative subject to

the provisions of Clause (2). If a law passes the test of Clause (2), it will make Clause (1) inapplicable to it. There is hence no inconsistency.

11. It was then argued that the proviso renders futile or illusory the scheme of Section 25(2) of the Code of Criminal Procedure. Since that is not the function of a proviso as ordinarily understood, the proviso was incompetent. In the first place, the rules of interpretation are applicable only so far as a contrary intention does not appear from the language of a statute. They cannot override the legislative intent specifically expressed in the enactment. The proviso is equivocal. It authorised the State Government to exercise control over the Assistant Public Prosecutors through police officers. Even though it may be inconsistent with the policy behind the main Sub-section (2) of Section 25 yet it will not be an incompetent piece of legislation

12. In the second place, Sub-section (2) of Section 25 did not completely perpetuate the so called policy as embodied in the main provision. It made an exception. Its opening part stated "save as otherwise provided in Sub-section (3)...." So an exception was already engrafted in the section itself. The proviso was another such exception. The legislation cannot be held to be incompetent on this ground.

13. In the end, it was argued that the proviso was a colourable piece of legislation. The doctrine of colourable legislation applies where a legislature attempts to do something which it is not competent to do. Here the subject-matter of the Code of Criminal Procedure was in the Concurrent List. The State Legislature has full competence on any aspect of the Code of Criminal Procedure. The proviso was saved by Article 254(2) expressly. It cannot possibly be said that the enactment of the proviso was a colourable piece of legislation.

14. The proviso being valid and the same being operative retrospectively, the notification dated March 15, 1975 cannot be held inconsistent with Section 25 of the Code of Criminal Procedure.

15. In the result, the appeal succeeds and is allowed. The judgment of the learned Single Judge is set aside and the writ petition is dismissed but, in the circumstances, without any orders as to costs.