(1967) 02 CAL CK 0018

Calcutta High Court

Case No: Criminal Revision Cases No''s. 1160 and 1233 of 1966

Jaswant Lal Monilal Shah		APPELLANT
	Vs	
The State		RESPONDENT

Date of Decision: Feb. 23, 1967

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 10(2), 196A(2), 515
- Customs Act, 1962 - Section 135
- Defence of India Act, 1939 - Section 2(5)
- Defence of India Act, 1962 - Section 3(2), 40(2)
- Defence of India Rules, 1939 - Rule 26
- Defence of India Rules, 1962 - Rule 30(1)
- Imports and Exports (Control) Act, 1947 - Section 5
- Penal Code, 1860 (IPC) - Section 120B
- Sea Customs Act, 1878 - Section 167(81)

Citation: (1968) 2 ILR (Cal) 428

Hon'ble Judges: R.N. Dutt, J; A.K. Das, J

Bench: Division Bench

Advocate: S.S. Mukherjee and Samar Roy Choudhury, for the Appellant;A.K. Sen and Madhusudan Banerjee, for the Respondent

Judgement

R.N. Dutt, J.
This order will govern both the Rules.

2. The Petitioner in Rule No. 1160 has been charged u/s 120B of the Indian Penal Code read with Section 135 of the Customs Act, 1962. The Petitioner in Rule No. 1233 has been charged u/s 120B of the Indian Penal Code read with Section 167(81) of the Sea Customs Act, 1878 and Section 5 of the Import and Export (Control) Act, 1947. Consent to the initiation of the proceedings against them was given by an

order in writing by Sri V. Misra, Additional District Magistrate, 24-Parganas, u/s 196A(2) of the Code of Criminal Procedure.

3. Mr. Mukherjee, who appears for the Petitioners in both the Rules, argues that the Additional District Magistrate is not competent to give such consent u/s 196A(2) of the Code. He contends that such consent can be given only by the District Magistrate if empowered in that behalf by the State Government, and no Additional District Magistrate has the power to give such consent. Section 196A(2) reads as follows:

In a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards, unless the State Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the State Government has, by order in writing, consented to the initiation of the proceedings.

4. It is clear that the District Magistrate can give such consent if he is empowered in that behalf by the State Government. We are satisfied that the District Magistrate, 24-Parganas, was so empowered by the State Government vide Notification No. 4882J, dated July 28, 1950. Mr. Mukherjee does not dispute this, but he submits that by virtue of his notification it is the District Magistrate, 24-Parganas, who could give such consent in writing: Mr. Sen refers to Notification No. 5643-GA dated December 28, 1961, by virtue of which Sri V. Misra, I.A.S. was appointed as Additional District Magistrate, 24-Parganas. This order further directs that Sri Misra shall have, during the period he is so employed, all the powers of a District Magistrate under the Code of Criminal Procedure and under all other laws in force in that District. Mr. Sen argues that the power of the District Magistrate to give such consent u/s 196A(2) of the Code is a power of the District Magistrate under the Code and, as such, by virtue of the said notification u/s 10(2) of the Code, the Additional District Magistrate had also the power to give such consent u/s 196A(2) of the Code. Mr. Mukherjee, however, submits that the power of the District Magistrate u/s 196A(2) of the Code is not a power under the Code of Criminal Procedure but is a power which accrues to the District Magistrate under the executive order made by the State Government. He contends that this power does not automatically follow from the provisions of the Code of Criminal Procedure but is dependent on some executive order made by the State Government. This argument cannot, however, be sustained. The power of the District Magistrate u/s 196A(2) is a power which is derived from the Code of Criminal Procedure itself. Unless the Code made a provision for such power, no such power could have accrued to the District Magistrate even if the State Government made an executive order to that effect. Such power accrues to the District Magistrate only because the Code makes a provision for it. It is no doubt a power contingent on the State Government making an order empowering the District Magistrate to exercise such power, but the power is there vested in the District

Magistrate under the Code. Its exercise is no doubt made contingent on the State Government empowering the District Magistrate to exercise that power but because of that it cannot be said that the power is not given under the Code. Since the Additional District Magistrate was empowered u/s 10(2) of the Code to exercise all the powers of a District Magistrate under the Code, and since the power to give consent u/s 196A(2) of the Code is a power given to the District Magistrate under the Code, the Additional District Magistrate is competent to exercise that power. General principles apart, so far as the facts of these two cases are concerned, we find that the District Magistrate was empowered by the State Government to give such consent u/s 196A(2) of the Code in 1950. Thus, the District Magistrate had this power on December 26, 1961, when the Additional District Magistrate was appointed and was empowered to exercise all the powers of the District Magistrate. Thus the power to give consent u/s 196A(2) was at that point of time an existing power of the District Magistrate and so, by virtue of the terms of his appointment, Sri Misra was competent to give such consent u/s 196A(2) of the Code. Mr. Mukherjee refers to the decision in Prabhulal v. Emperor (1944) Cri.L.J. 296. That was a case where an Additional District Magistrate empowered u/s 10(2) of the Code of Criminal Procedure to exercise all the powers of a District Magistrate under the Code or under any other law for the time being in force made an order under Rule 26 of the Defence of India Rules, 1939. The Nagpur High Court held that the Additional District Magistrate was not competent to make an order under Rule 26 of the said Rules. What was held there was this:

Rule 26 did not expressly or impliedly authorise the District Magistrate to maker an order under that Rule. The Rule conferred power on the Central and Provincial Governments only. The District Magistrate derived his power to make an order under Rule 26 by virtue of an executive order promulgated by the Provincial Government u/s 2(5) of the Defence of India Act, 1939. The fact that he was thereby enabled to exercise the powers of the Provincial Government under the Defence of India Rules did not put him on the footing of an officer or an authority exercising powers directly under the Defence of India Act or its Rules. The order only purported to delegate the authority, which the Defence of India Rules conferred on the Provincial Government and any order passed by the District Magistrate under Rule 26 of the Defence of India Rules would in effect be an order made by the Provincial Government.

But the facts here are different. Here Section 196A(2) of the Code itself gives the power to the District Magistrate. The District Magistrate in this case is not to exercise a power delegated to him by an executive order, but he is to exercise a power given to him by the Code. The District Magistrate was not to exercise the power on behalf of the State Government, but he was to exercise the power for himself. True it is that, before he can exercise the power, the State Government must empower him to exercise that power. But it is a power given by the Code to the District Magistrate and not to the State Government. The Nagpur decision,

therefore, is not attracted to the facts of the present cases. Mr. Mukherjee then refers to the Supreme Court decision in Ajaib Singh v. Gurbachan Singh (1965) 2 Cri.L.J. 553 and argues that the Supreme Court has held that an Additional District Magistrate, though vested with all the powers of the District Magistrate u/s 10(2) of the Code, cannot make a detention order under Rule 30(1)(b) of the Defence of India Rules, 1962. The Supreme Court has no doubt said this but for different reasons. The Supreme Court construed Section 3(2), Clause 15(1) of the Defence of India Act, 1962, and said that this section laid down that the authority empowered to detain shall not be lower in rank than that of a District Magistrate. Rule 30(1)(b) of the Defence of India Rules, 1962, empowers the Central and the State Government to detain any person. That power again can be delegated u/s 40(2) of the Act to any officer subordinate to it, but the power of delegation must be read harmoniously with Section 3(2), Clause 15(1) of the Act and so no detention order can be made by an officer lower in rank than that of a District Magistrate. The Supreme Court further held that the Additional District Magistrate is an officer lower in rank than that of a District Magistrate and so the Additional District Magistrate cannot make an order under Rule 30(1)(b) of the Defence of India Rules. This decision, therefore, does not assist Mr. Mukherjee.

5. Mr. Mukherjee then refers to the unreported decision in Criminal Revision Case No. 263 of 1965 to which I was a party. There an appeal u/s 515 of the Code of Criminal Procedure was presented before an Additional District Magistrate. We held in that case that such an appeal has to be presented before the District Magistrate. That decision concerned the right of the aggrieved person to prefer an appeal and the Code of Criminal Procedure states that the aggrieved person can prefer an appeal before the District Magistrate. There we were not concerned with the powers of the District Magistrate, but we were concerned with the right of an aggrieved person to prefer an appeal u/s 515 of the Code. That decision of ours does not assist Mr. Mukherjee either. Mr. Sen on behalf of the State refers to the decision In re In Re: Kalu and Others, and the recent decision in Hari Chand Aggarwal Vs. Batala Engineering Co. Ltd. and Others, It is not necessary to detail here the facts of these cases, as we find that these cases are in agreement with the views which we have expressed in this case and, with respect, we agree with the decisions of Bombay and Punjab High Courts on this point.

6. In the result, the Rules are discharged. Let the records be sent down at once.

A.K. Das, J.

7. I agree.