

State of Maharashtra and Others

Vs

Mohammed Salim Khan and Others

Criminal Appeal No. 640 of 1990

(K.N. Singh, K. Jagannatha Shetty, Kuldip Singh JJ)

22.11.1990

JUDGMENT

K. JAGANNATHA SHETTY, J. –

1. We grant special leave and proceed to dispose of the appeal.
2. The point raised in the appeal is a very short one, but nevertheless of general importance. It is with respect to the powers of the Special Executive Magistrates appointed under Section 21 of the Code of Criminal Procedure, 1973 ('the Code').
3. Before narrating the facts, we may set out the relevant statutory provisions bearing on the question. Section 20 and 21 of the Code provide power to the State Government to appoint Executive Magistrates and Special Executive Magistrates.
4. Section 20 so far as material reads :

"20. Executive Magistrates. - (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force as may be directed by the State Government.

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(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-Divisional Magistrate."

5. In each district, the State Government under Section 20 may appoint as many Executive Magistrates as it thinks fit. One of them shall be appointed as District Magistrate and another may be appointed as an Additional District Magistrate. An Executive Magistrate may be placed in charge of a sub-division and he would be called as Sub-Divisional Magistrate. These Magistrates except the Additional District Magistrates are entitled to exercise all the powers and perform all the duties conferred and imposed by the Code. The Additional District Magistrate however, will have only such of the powers of the District Magistrate as may be directed by the State Government.

6. Section 21 provides :

"21. Special Executive Magistrate. - The State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates, for particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the power as are conferrable under this Code on Executive Magistrates, as it may deem fit."

7. The Special Executive Magistrates may be appointed for such term as the government may think fit. They may be appointed for particular areas or for the performance of particular functions. They may be conferred with the powers that the conferrable under the Code on Executive Magistrates.

8. The facts in the instant case are not in dispute and they fall within a narrow compass. The Maharashtra Government by notification dated April 11, 1974 appointed all Assistant Commissioners of Police in the metropolitan area of Greater Bombay as Special Executive Magistrates. By another notification dated October 20, 1976 the government conferred on them the powers of an Executive Magistrate under Section 107 of the Code. The notification reads as follows :

"No. XXI-SB/EXM. 0775.1 - In exercise of the powers conferred by Section 21 of the Code of Criminal Procedure, 1973 (2 of 1974) the Government of Maharashtra hereby confers the powers of an Executive Magistrate under Section 107 of the said Code on all Assistant Commissioners of Police, Greater Bombay, appointed as Special Executive Magistrates, by Government Notification, Home Department No. MSC 1274/V-C dated April 1, 1974 in relation to the metropolitan are of Greater Bombay."

9. Respondent 7 lodged a complaint against a group of persons-respondents 1 to 6 before the Senior Inspector of Police, Mahim Police Station - appellant 2. The complaint was investigated and proceedings under Section 107 of the Code were initiated before the Special Executive Magistrate-appellant 3. But the Bombay High Court has quashed the proceedings at the instance of respondents 1 to 6. The High Court on the structure of Section 21 and in the light of other provisions in the Code has observed that the Special Executive Magistrate is not entitled to exercise the powers of an Executive Magistrate and cannot also be conferred with the powers of an Executive Magistrate under Section 107 of the Code.

10. The State Government has appealed to this Court challenging the decision of the High Court.

11. We may first have the history perspective of Section 21 of the Code. The Thirty-seventh Report of the Law Commission (1967 paras 117-18) recommended the creation of a class of Special Executive Magistrates. The Law Commission in that Report also indicated a draft Section to be inserted while amending the Code. The draft Section 14-A as indicated by the Law Commission provided that the State Government may also appoint Executive Magistrates who shall be called as Special Executive Magistrates for particular areas or for the performance of particular functions and confer upon them such powers conferred or conferrable by or under this Code on an Executive Magistrate of the first or second class as it deems fit. The Forty-first Report of the Law Commission, however, did not approve the idea of creating a class of Special Executive Magistrates. It has been pointed out that the functions of the Executive Magistrates under the new Code are going to be so limited that it would not warrant the creation of a separate class of Executive

Magistrates for performing particular functions or in a particular area. The Bill introduced in the Parliament apparently did not contain a provision for appointment of Special Executive Magistrates. The Bill was referred to the Joint Select Committee which upon deliberation seems to have accepted the line of suggestion made by the Law Commission in its Thirty-seventh Report. The Committee made a report dated December 14, 1972 stating that a provision to enable the appointment of Special Executive Magistrates to meet special needs in relation to particular areas or for the performance of particular duties should be incorporated. Accordingly, the Parliament has enacted Section 21.

12. The primary question for decision is, what, on its true construction, does this provision mean ?

13. The entire reasoning of the High Court is rested on the distinction between "powers conferred" by the Code and "powers conferrable" under Code on the Executive Magistrate and the omission to use the term "powers conferred" in Section 21. The High Court has inter alia expressed the views that the "powers conferred" by the Code are those powers which are exercisable by virtue of holding the post of Executive Magistrate. The person appointed as an Executive Magistrate gets automatically all the powers conferred by the Code and is entitled to exercise such powers. He is entitled to exercise all the powers and perform all the duties by virtue of his being an Executive Magistrate. Such powers are not to be conferred on him since they are attached to the post. But it would be open to the government to confer on the Executive Magistrates the powers that are conferrable under the Code which powers are distinct and different. The High Court then dealt with the structure of Section 21 and pointed out that the Special Executive Magistrate appointed under Section 21 can have only the powers which are conferrable, and not the powers conferred by the Code since the term 'conferred' has not been used in the Section. And the Special Executive Magistrate cannot possess by virtue of his appointment any of the powers of the Executive Magistrate conferred by the Code.

14. Counsel for the appellant submitted that the view taken by the High Court is not warranted by the scope and shape of Section 21 and that would defeat the very purpose of appointing the Special Executive Magistrates if they are held to have no power of an Executive Magistrate. He urged that the Special Executive Magistrate is also an Executive Magistrate and the court may ignore in the instant case the conferment of power under Section 107 of the Code.

15. These submissions do call for serious discussion. Section 21 may conveniently be divided into two parts : (i) The State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates, for particular areas or for the performance of particular functions; and (ii) the State Government may confer on such Special Executive Magistrates such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit. Part I provides power to the State Government to appoint Executive Magistrates to be known as the Special Executive Magistrates. It also sets out the terms of such appointment. Part II speaks of the nature of the power to be conferred on the Special Executive Magistrates. It refers only to the powers conferrable on the Executive Magistrate under the Code but not the powers conferred on them by the Code. We agree with the High Court that there is a broad divide between the powers conferred and powers conferrable by or under the Code on the Executive Magistrate. The powers conferred by the Code on the Executive Magistrates are the powers which are attached to the post of Executive Magistrate. Any person appointed as Executive Magistrate is entitled to exercise such powers. The powers located under Section 107, 108, 109, 110, 129, 145 and 147 etc. are the instances of such powers. These are not the powers conferrable on the Executive Magistrate though they may be conferred on other like the Commissioner of Police under

Section 20 sub-section (5). There are other provisions in the Code such as Sections 133, 143 and 144, which may be said to be conferrable powers under the Code. The Executive Magistrates cannot exercise such powers unless they are empowered in that behalf.

16. The attractiveness of this distinction by our meticulous construction should not however, lead us astray in construing Section 21. The aim of the section as evinced in its language should be ascertained and the provision should be so construed so as to effectuate the purpose of the legislation. The purpose of empowering the State Government to appoint Special Executive Magistrates was evidently to meet the special needs of a particular area or to perform particular functions in a given area. Such appointments without adequate powers would be futile and the legislation without providing such powers would be pointless. It can be assumed that the Parliament does not indulge in pointless legislation. Indeed, it has not done so in Section 21. A careful analysis of the section indicates very clearly that the Special Executive Magistrates are also Executive Magistrates. Under part I of the section, the State appoints Executive Magistrates to be known as Special Executive Magistrates. They are given a different appellation perhaps to distinguish them from the category of other Magistrates appointed under Section 20. But basically they are Executive Magistrates. Their area of operation may be limited and the terms of appointment may be different, but nevertheless they remain as Executive Magistrates. They do not cease to be Executive Magistrates by being called with different designation. Since they are appointed as Executive Magistrates, they are entitled to exercise the powers conferred by the Code much the same as other Executive Magistrates.

17. It is true that the latter part of Section 21 speaks of the powers to be conferred upon the Special Executive Magistrates and it refers only to the powers conferrable on the Executive Magistrate. But the power to appoint under part I of Section 21 is not dependent upon or coupled with the power to be conferred under part II of the Section. The appointment of Special Executive Magistrates is one thing and conferment of power on them is another. Each is independent of the other. Part II of the section, in our opinion, speaks of additional powers to be conferred depending upon the nature of the particular function to be performed. It has nothing to do with the power located under part I of the Section.

18. The significant difference can be discerned between the language of Section 13 sub-section (1); Section 18 sub-section (1) and Section 21 of the Code. Section 13 sub-section (1) provides that the High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the government, all or any of the powers conferred or conferrable, by or under Code on a Judicial Magistrate of the first class or of the second class, in respect to particular cases or to particular classes of cases, in any local area, not being a metropolitan area. Section 18 sub-section (1) likewise provides power to the High Court to confer on any person all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate. But he is not first appointed as Judicial Magistrate or Metropolitan Magistrate. It is only the powers of such Magistrate which are conferred upon a person. Therefore, there was need to use the term 'conferred' or 'conferrable' in Section 13 and 18. But the language of Section 21 as analysed earlier is quite different. Since the Special Executive Magistrates are appointed as Executive Magistrates, the draftsman seems to have purposely avoided to use the term "conferred" in the latter part of Section 21. It would seem very odd indeed to say that the State may appoint Executive Magistrate to be known as Special Executive Magistrate and confer upon them the powers conferred by the Code on Executive Magistrate.

19. We are, therefore, unable to agree with the High Court that the Special Executive Magistrates

cannot exercise any of the powers of the Executive Magistrate conferred by the Code. In our opinion, they are also entitled to exercise those powers and it was therefore, unnecessary for the State Government to have conferred the powers under Section 107 on the Special Executive Magistrates.

20. In the result we allow the appeal and set aside the judgment of the High Court.

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