

FEDERAL HIGH COURT

Biswanath Khemka

Vs

Emperor

(Zafrulla Khan, J.)

09.04.1945

JUDGMENT

Zafrulla Khan, J.

1. The appellant along with six other persons is being tried before an Additional Presidency Magistrate, Calcutta, on charges of hoarding and profiteering under Rule 81(4) read with Rule 122, Defence of India Rules. During the course of the trial he applied to the Chief Presidency Magistrate, Calcutta, for transfer of the cases from the file of the trying Magistrate. One of the grounds urged in support of the application for transfer was that the appointment of the Magistrate was irregular and therefore ineffective, as it had not been made in accordance with the conditions prescribed by Section 256, Constitution Act and that therefore the Magistrate had no jurisdiction to try these cases or indeed any case at all. The application was dismissed by the Chief Presidency Magistrate. The appellant hereupon moved the Calcutta High Court in revision with no better result. This appeal was preferred against the order of the Calcutta High Court supported by the requisite certificate under Section 205, Constitution Act. The sole question argued before us related to the interpretation and effect of Section 256, Constitution Act, which runs as follows:

No recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of any magisterial powers from, any person save after consultation with the District Magistrate of the district in which he is working, or with the Chief Presidency Magistrate, as the case may be.

It was contended that the appointment of the Additional Presidency Magistrate trying these cases was made without consulting the Chief Presidency Magistrate, and was therefore ineffective and inoperative. In our judgment the section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not at the time when the recommendation is made, working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District Magistrate of the district in which the person concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person

concerned is at that time working under him. In this case the services of the Magistrate concerned were borrowed from another province, and on these being placed at the disposal of the Bengal Government, he was appointed Additional Presidency Magistrate at Calcutta. In these circumstances we are of the opinion that the consultation prescribed by Section 256 should have been made with the District Magistrate of the district in which the Magistrate was working in his own province at the time when the question of his appointment as Additional Presidency Magistrate, Calcutta, came under consideration. There is nothing on the record to indicate that such consultation did not take place. There is thus no foundation for the contention that the direction contained in Section 256 was not complied with.

2. We are further of the opinion that the direction laid down in Section 256 is directory and not mandatory and that non compliance with it would not render an appointment otherwise regularly and validly made ineffective or inoperative. It seems to us that any other view would lead in many cases to results which could not have been intended by Parliament and would entail general inconvenience and injustice to persons who have no control over those entrusted with the duty of making recommendations for the grant of magisterial powers: see *Montreal Street Railway Co. v. Normandin*¹

3. A preliminary objection was taken on behalf of the Crown that the appeal was incompetent inasmuch as the order of the High Court appealed against was not a judgment or final order within the meaning of Section 205, Constitution Act. Reliance was in support of the objection placed on the observations of Sulaiman J., in *Hori Ram Singh v. Emperor*² Reference was also made to *Venugopala Reddiar v. Krishna swami Reddiar*³ As we have come to the conclusion that there is no substance in the appeal on the merits, we do not consider it necessary to deal with the preliminary objection. No other question was sought to be raised before us. The appeal fails and is dismissed.

Cases Referred.

1(17) 4 A.I.R. 1917 P.C. 142

2(39) 26 A.I.R. 1939 F.C. 43

3(43) 30 A.I.R. 1943 F.C. 9