1940

M. FAIYAZ ALI KHAN AND OTHERS v. MIAN SAIFULLAH SHAH AND OTHERS

when the application was made, the office of the President of the *dargah* and *takia* committees was vacant owing to the resignation of Khan Sahib Maulvi Iqbal Ahmad, Deputy Collector, so that it cannot be said that the application was put in for the removal of the President of the *takia* committee.

The application does not in our view offend in any manner against section 92, Civil Procedure Code.

Ziaul Hasan and Radha Krishna, JJ.

Against the merits of the amendments sought by the opposite parties no arguments were addressed to us beyond saying that the opposite parties ought to show that the amendments were necessary or advisable and we have already shown that they are both necessary and advisable.

In the result we uphold the order of the learned Judge of the court below and dismiss these applications with costs.

Application dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice Ziaul Hasan

1940 MAY 7

MAQBOOL HUSAIN (APPLICANT) *v.* KING-EMPEROR (OPPOSITE-PARTY)*

Government of India Act, 1935, sections 205, 270 and 271—Section 270, applicability of—Criminal Procedure Code (Act V of 1898), section 197—Police Act (V of 1861), (amended by the Government of India (Adaptation of Indian Laws) Order, 1937), section 7—Sub-Inspector of Police, prosecution of—Sanction of Provincial Government for prosecution, if necessary—Rules framed under the Government of India Act, 1919, whether can override the provisions of Government of India Act, 1935.—Certificate for appeal to Federal Court, when can be granted.

Section 270 of the Government of India Act relates to acts done prior to April, 1937, and has, therefore, no application to acts done subsequent to that date.

*Criminal Miscellaneous Application No. 36 of 1940, in Criminal Appeal No. 510 of 1939, against the order of Raghubar Dayal, Esq., I.C.S., Sessions Judge of Hardoi, dated the 3rd November, 1939.

The power to dismiss, suspend or reduce any police officer of the subordinate rank conferred by section 7 of the Police Act on the Inspector-General and other officers is not a delegation of its power by the Provincial Government. In view of section 7 of the Police Act it cannot be said that a Sub-Inspector of Poilce is a public servant "who is not removable from his office save by or with the sanction of the Provincial Government or some higher authority" and this being so section 197 of the Code of Criminal Procedure does not apply to him and no sanction for his prosecution is necessary. *Pichai Pillai* v. *Balasundara Mudaly* (1), relied on. *Emperor* v. *Jalaluddin* (2), referred to.

The rules which were framed when the Government of India Act of 1919 was in force cannot override the clear provisions of the Government of India Act of 1935, and of the Acts of the Federal or Provincial Legislatures as amended by that Act.

A certificate under section 205 of the Government of India Act can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder is involved.

Mr. *R. F. Bahadurji*, for the Applicant.

Mr. *H. S. Gupta*, Rai Bahadur, Government Advocate, for the Crown.

THOMAS, C. J., and ZIAUL HASAN, J.:—This is an application purporting to be under section 561-A of the Code of Criminal Procedure filed on behalf of Maqbool Husain, a sub-inspector of police, who was convicted on the 3rd November, 1939, by the learned Sessions Judge of Hardoi, under sections 161 and 218, Indian Penal Code and sentenced on each count to rigorous imprisonment for one year and Rs.200 fine, the sentences of imprisonment being concurrent, and whose appeal was dismissed by this Court on the 4th March, 1940.

The contention is that the sanction of the Provincial Government was necessary for the prosecution of the applicant both under the Government of India Act of 1935 and under section 197, Criminal Procedure Code, and as no such sanction was granted by the Provincial Government the trial of the applicant and the proceedings

(1) (1935) I.L.R., 58 Mad., 787. (2) (1925) I.L.R., 48 All., 264.

1940

MAQBOOL HUSAIN v. KING-EMPEROR

thereunder are absolutely void and illegal. On these allegations the learned counsel for the applicant prays this Court to quash all the proceedings taken against the applicant, and further, that if the proceedings are not so quashed, a certificate for appeal to the Federal Court be granted to him under section 205 of the Government of India Act.

Thomas, C.J., and Ziaul Hasan, J.

In support of the contention that sanction of the Provincial Government was necessary under the Government of India Act for the prosecution of the applicant, the learned counsel relies on sections 270 and 271 of the Act. Neither of these sections is, however, applicable to the present case. Section 270(1) provides as follows:

> "No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion."

And the expression "relevant date" has been defined in sub-section (3) as meaning—

> "in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part III of this Act."

Part III of the Government of India Act came into force in April, 1937. Therefore the Act referred to in section 270(1) is an Act done prior to April, 1937. The charges against the applicant however related to acts done by him on or about the 20th and 21st day of April, 1938. The applicant cannot therefore avail himself of the provisions of section 270(1). Sub-section (2) of section 270 also has no application as it obviously refers to those cases in which proceedings already instituted are pending in court on the "relevant date", but the prosecution against the applicant was launched

much after April, 1937. The learned counsel for the applicant had in fact to concede that section 270 of the Government of India Act relates to acts done prior to April, 1937, and had therefore no application.

Section 271 is still less relevant to the present application. While sub-section (1) provides that—

Thomas, C.J., and Ziaul Hasan, J.

> "No bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by section one hundred and ninety-seven of the Indian Code of Criminal Procedure, or by sections eighty to eighty-two of the Indian Code of Civil Procedure shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanctions of the Governor in his discretion"

sub-section 2 provides that the powers conferred upon a Local Government by section 197 of the Code of Criminal Procedure with respect to the sanctioning of prosecutions and the determination of the court before which, the person by whom and the manner in which a public servant is to be tried shall be exercisable in the case of a person employed in connection with the affairs of a province only by the Governor of that Province exercising his individual judgment. The question however is whether under section 197, Criminal Procedure Code, sanction for the prosecution of the applicant was necessary and we are of opinion that it was not, as we shall show later. Sub-section 3 of section 271 relates to civil suits and has therefore no application.

There is thus no provision of the Government of India Act of 1935 that supports the applicant's contention that sanction of the Provincial Government was necessary for his prosecution and it remains to be seen whether such sanction was necessary under section 197 of the Code of Criminal Procedure.

Section 197(1), which is the only relevant portion of the section, as amended by the Government of India

1940

MAQBOOL HUSAIN v. KING-EMPEROR

Thomas, C.J., and Ziaul Hasan, J.

(Adaptation of Indian Laws) Order, 1937, runs as follows:

> "When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction—
>
> "(*a*) . . .
>
> "(*b*) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment."

Now the first question is whether or not the applicant, who was undoubtedly a public servant, was not removable from his office save by or with the sanction of the Provincial Government or some higher authority.

Section 7 of the Police Act as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, provides—

> "Subject to such rules as the Provincial Government may from time to time make under this Act, the Inspector-General, the Deputy Inspectors-General, the Assistant Inspectors General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty or unfit for the same. . . ."

Section 1 of the Act provides that reference to the subordinate ranks of a police force shall be construed as references to members of that force below the rank of Deputy Superintendent. Therefore under section 7 of the Act the applicant was removable from his office by several authorities under the Provincial Government. Section 243 of the Government of India Act provides—

> "Notwithstanding anything in the foregoing provisions of this Chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively."

This gives further support to the provisions of section 7 of the Police Act being applicable to the present applicant. In view of section 7 of the Police Act it cannot be said that the applicant is a public servant "who is not removable from his office save by or with the sanction of the Provincial Government or some higher authority," and this being so section 197 of the Code of Criminal Procedure does not apply to him and no sanction for his prosecution was necessary.

Thomas, C.J., and Ziaul Hasan, J.

The learned counsel for the applicant has referred us to some decision of some High Courts in which a distinction has been drawn between the Provincial Government delegating its powers and its transferring those powers to subordinate authorities and in which it was held that where the Local Government delegates its power to remove a public servant to a subordinate authority, the public servant for the purposes of section 197, Criminal Procedure Code, nevertheless continues to be removable by the original authority and sanction to prosecute such public servant must be obtained from the Local Government or other superior authority. We are, with respect, unable to accept this view as in view of the clear statutory provisions of section 7 of the Police Act, we cannot hold that the power to dismiss, suspend or reduce any police officer of the subordinate rank conferred by that section on the Inspector-General and other officers is a delegation of its power by the Provincial Government. We entirely agree, if we may say so with respect, with the view taken in the case of *Pichai Pillai* v. *Balasundara Mudaly* (1), in which it was held that the expression "any public servant who is not removable from his office save by or with the sanction of the Local Government or some higher authority" in section 197(1), Criminal Procedure Code, will not include public servants whom some lower authority has *by law or rule or order* been empowered to remove. In the case of *Emperor v. Jalaluddin* (2), a Bench of the

(1) (1935) I.L.R., 58 Mad., 787. (2) (1925) I.L.R., 48 All., 264.

1940

MAQBOOL HUSAIN v. KING-EMPEROR

Thomas, C.J., and Ziaul Hasan, J.

Allahabad High Court held that the Local Government is competent to delegate to the Excise Commissioner its power to dismiss an Excise Inspector and if the Commissioner in the exercise of such delegated power dismissed an Inspector, such a dismissal is not a dismissal by the Government but by the Commissioner; but in any case we have in section 7 of the Police Act a clear statutory power conferred on the Inspector General and some other officers to dismiss a police officer of subordinate rank and no question of delegation of its power by the Provincial Government arises.

Reliance was also placed by the learned counsel for the applicant on Government of India notification No. F-472-II—23 containing rules framed by the Secretary of State in Council under sub-section (2) of section 96B of the then Government of India Act, published at page 552 of Part I of the *Gazette of India*, dated the 21st June, 1924. He relies on rules 13 and 15 which run as follows:

> "13. Without prejudice to the provisions of law for the time being in force, the Local Government may for good and sufficient reasons—
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> . . . . . .
>
> (5) remove, or
>
> (6) dismiss
>
> any officer holding a post in a provincial or subordinate service or a special appointment."
>
> 15. A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule 13, in regard to officers of the Subordinate services."

These rules which were framed when the Government of India Act of 1919 was in force cannot in our opinion override the clear provisions of the present Government of India Act and of the Acts of the Federal or Provincial Legislatures as amended by that Act.

The second question which arises under section 197, Criminal Procedure Code, is whether or not the offences for which the applicant was prosecuted can be said to

have been committed by him while acting or purporting to act in the discharge of his official duty; but in view of what we have held on the question whether the applicant was removable or not by an authority subordinate to the Provincial Government, it is not necessary to go into this question though we may point out that at least with regard to the offence under section 161, Indian Penal Code, the applicant cannot be said to have committed it while acting or purporting to act in the discharge of his official duty.

For reasons given above, we are definitely of opinion that no sanction of the Provincial Government was necessary for the prosecution of the applicant. We may also mention that though the case against the applicant lasted for about two years, from 17th May, 1938 (the date of the complaint) to 4th March, 1940, the date on which his appeal was decided by this Court, the plea now raised was never raised in any court.

Now remains the question whether the applicant is entitled to a certificate under section 205 of the Government of India Act. Sub-section (1) of that section is as follows:

> "An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder. . . ."

This shows that a certificate can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder is involved. No such question of law arises in the present case and therefore no certificate can be given to the applicant.

The application is therefore dismissed.

Application dismissed.