held that the brother of the deceased was entitled to claim compensation in regard to loss to the estate of the deceased. With respect, we agree with the view that in a case that was before the said Bench, brother as legal representative was entitled to lay a claim in terms of section 2 of the Fatal Accidents Act read with section 110-A of the Motor Vehicles Act to the loss to the estate of the deceased, but with respect we do not agree with the view that sections 110-A to 110-F of the Motor Vehicles Act are merely adjectival and procedural in nature and were enacted only to provide a cheap and quick remedy to the claimants who were earlier required to file a civil suit paying *ad valorem* Court-fees in the Court of general jurisdiction, and that any question pertaining to a substantive law had to be determined in accordance with the general law of tort and the Fatal Accidents Act.

(36) In the result, we conclude that brothers in the present case would be entitled to maintain an application for compensation before the Tribunal and we answer the formulation in the effirmative.

(37) The case may now be placed before a Single Bench for decision on merits.

S. P. Goyal, J.—I agree.

S. S. Sodhi, J.—I agree.

N. K. S.

FULL BENCH

Before P. C. Jain, C.J., D. S. Tewatia and K. S. Tiwana, JJ.

SUKHDEV SINGH DHINDSA AND ANOTHER
—*Petitioners.*

versus

THE STATE OF PUNJAB AND ANOTHER
—*Respondents.*

Civil Writ Petition No. 5926 *of* 1983

August 9, 1985

Code of Criminal Procedure (Punjab Amendment) Act (I of 1984)—*Sections* 4 *and* 11—*Code of Criminal Procedure (II of* 1974)—*Sections* 167, 439 *and* 439-*A*—*Constitution of India* 1950—*Articles* 21

and 50—*Terrorist Affected Areas (Special Courts) Act (LXI of* 1984)—*Section* 15—*Section* 11 *of the Amending Act introducing section* 439-*A in the Code in the matter of grant of bail—Offences mentioned in section* 439-*A almost the same as those triable by a Special Court—Grant of bail—Whether to be considered by Special Courts alone—Stringent provisions regarding bail as enacted in section* 439-*A—Whether have lost their significance in view of the provisions of section* 15 *of the Special Courts Act—Power to try specified offences given to Executive Magistrates to the exclusion of all other Magistrates—Powers of remand under Section* 167 *of the Code also made to vest in such Magistrates only—Provisions of section* 4 *of the Amending Act vesting such powers in Executive Magistrates—Whether* ultra vires *Article* 21 *of the Constitution.*

Held, that the Special Courts Act makes provision for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith. Section 3 makes a provision for the declaration of terrorist affected area. The State of Punjab and the Union Territory of Chandigarh have been declared to be terrorist affected areas. The offences which are triable under this Act, practically cover all the offences which have been mentioned in clause (a) of Section 439-A of the Code of Criminal Procedure as amended by the Amending Act and all these offences are now triable by a Special Court. In the Special Courts Act, Section 15 makes a provision, which results into the modified application of certain provisions of the Code of Criminal Procedure including those of bail. An analysis of clause (i) of section 439-A of the Code and sub-section (5) of Section 15 of the Special Courts Act goes to show that in view of the provisions of sub-section (5) of Section 15, the provisions of Section 439-A(i) have lost their importance inasmuch as the cases of the person who are charged of any scheduled offence have to be tried by the Special Courts and their bail matters are to be disposed of keeping in view the provisions of sub-section (5) of section 15 of the Special Courts Act also. It is quite evident that the distinction between a terrorist and a non-terrorist after the setting up of Special Courts has no meaning and the claims of bail of offenders charged of those offences have to be regularised under sub-section (5) of section 15 of the Special Courts Act.

(Paras 8, 9 and 10).

Held, that Article 50 of the Constitution of India gives a mandate to the State to take steps to separate the Judiciary from the Executive in the public services of the State. In the State of Punjab, in the year 1964, separation of Judicial and Executive Functions Act was enacted to divest the Magistrate of their judicial power Since 1964, in this State the Judicial Magistrates are functioning independently and they are under the direct control of the High Court. In any case, after the enactment of the Code of Criminal Procedure, 1973, there has been complete separation of

Judiciary and Executive and in this manner the directive principle as contained in Article 50 of the Constitution stands complied with. But surprisingly, for no valid reason, the position with regard to specified offences has now been reversed in the State of Punjab by enacting section 4 in the Amendment Act of 1983, under which specified offences have now been made triable exclusively by the Executive Magistrates. It is un-understandable as to why these offences have been made triable by the Executive Magistrates. Further, no material was placed on the record to satisfy the Court that Judicial Magistrates did not or were not in a position to dispose of cases pertaining to specified offences expeditiously. If the object is to ensure speedy disposal of the cases, then the subordinate judiciary can help better in achieving that object as it consists of experienced and legally trained officers and if in a given situation, cases pertaining to some particular type are required to be disposed of expeditiously, then their trial can always be given priority. Moreover, Executive Magistrates are under the complete control of the Government. Their promotion, increments and seniority of service, etc., are all dependent on their higher officers, who belong to the Executive and over these Magistrates, the High Court has no control. The Executive Magistrates are required to do all sorts of administrative work like collection of funds, arranging of functions, etc. In some cases the Executive Magistrate may not even be legally qualified or trained person to do the judicial work. As is evident from the aims and objects of enacting the Code of Criminal Procedure, 1973, the main emphasis was that an accused person should get a fair and just trial in accordance with the accepted principles of natural justice. In the present set-up when there is complete separation of the Judiciary from the Executive and especially when the Executive Magistrates are completely under the control of the Government it is very difficult to hold that an accused person charged of the offences which are now triable by the Executive Magistrates, shall ever have a feeling that he would have a fair and just trial. Merely the fact that the appeal or revision is to be heard by the Sessions Court or the High Court would not give any satisfaction to the accused as it is of the greatest importance that the basic trial should inspire the confidence of the accused and when under a procedure prescribed, confidence cannot be inspired, then such a procedure is to be held as unjust, unreasonable, unfair and violative of the provisions of Article 21 of the Constitution. Thus, it is held that having separated the judiciary from the executive and having achieved the directive principle as embodied in Article 50, the law now enacted for the trial of certain offences by the Executive Magistrates is neither fair nor just nor reasonable with the result that the provisions of section 4 of the Amendment Act empowering an Executive Magistrate, to the exclusion of any other Magistrate, to take cognizance of and to try and dispose of cases relating to specified offences are *ultra vires* Article 21 of the Constitution and are struck down.

(Paras 24, 25 and 26).

(*Case admitted for Full Bench by a Division Bench on 4th January,* 1984).

Petition under Article 226 *of the Constitution of India praying that this Hon'ble Court may be pleased* :—

(*i*) *to issue an appropriate writ, order or direction declaring the impugned Act* (*The Code of Criminal Procedure* (*Punjab Amendment*) *Act,* 1983, *Punjab Act No.* 22 *of* 1983, *particularly its clause* 4 *to* 11, *as unconstitutional and not enforceable.*

(*ii*) *to stay the operation of clauses* 4 *to* 11 *of the said Act;*

(*iii*) *to pass an order or direction which under the circumstances of this case may be deemed fit;*

(*iv*) *to dispense with the advance notices of the writ petition on the respondents; and*

(*v*) *to allow the Writ with costs.*

G. S. Grewal, Senior Advocate with H. S. Nagra, Advocate.

Bhagwant Singh A.G. (P) with H. S. Riar, D.A.G. (Punjab).

JUDGMENT

PREM CHAND JAIN, C.J.

(1) The petitioners have challenged through this petition the constitutional validity and the legality of the Code of Criminal Procedure (Punjab Amendment) Act, 1983 (hereinafter called the 'Amendment Act'). This Act received the assent of the President of India on 3rd November, 1983, and was published in the Gazette of Government of Punjab on 24th November, 1983. Earlier to the enactment of the Amendment Act, the State of Punjab had promulgated Ordinance No. 3 of 1983 on 27th June, 1983. The provisions of the Amendment Act have come into force with effect from the date the Ordinance was promulgated.

(2) In this petition, the main attack is on Sections 4 and 11 of the Amendment Act, which read as under:—

"4. Notwithstanding anything contained in the Code:—

(a) an Executive Magistrate shall, to the exclusion of any other Magistrate, have power to take cognizance of and to try and dispose of cases relating to specified offences;

(b) The Executive Magistrate shall, to the exclusion of any other Magistrate, exercise powers of remand under Section 167 of the Code in relation to the specified offences and for that purpose the said Section 167 shall be so read as if the words 'Executive Magistrate' were substituted for the words 'Judicial Magistrate' or 'Magistrate' and the words 'District Magistrate' were substituted for the words 'Chief Judical Magistrate'.

11. After Section 439 of the Code the following section shall be inserted, namely, 439-A. Notwithstanding anything contained in this Code, no person—

(a) who, being accused or suspected of committing an offence under any of the following sections, namely, sections 120B, 121, 121A, 122, 123, 124A, 153A, 302, 304, 307, 326, 333; 363, 364, 365, 367, 368, 392, 394, 395, 396, 399, 412, 431, 436, 449 and 450 of the Indian Penal Code 1860, Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908, and Sections 25, 26, 27, 28, 29, 30 and 31 of the Arms Act, 1959, is arrested or appears or is brought before a Court; or

(b) who, having any reason to believe that he may be arrested on accusation of committing an offence as specified in clause (a), has applied to the High Court or the Court of Sessions for a direction for his release on bail in the event of his arrest,

shall be released on bail, or as the case may be directed to be released on bail, except on one or more of the following grounds, namely:—

(i) that the Court including the High Court or the Court of Sessions for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any offence specified in clause (a);

(ii) that such person is under the age of sixteen years or a woman or a sick or an infirm person;

(iii) that the court including the High Court or the Court of Sessions for reasons to be recorded in writing is satisfied

that there are exceptional and sufficient grounds to release or direct the release of the accused on bail."

(3) Before I deal with the contentions, the purpose as described in the preamble of the Act, which necessitated the enactment of the Amendment Act may be noticed :—

"Whereas the circumstances prevailing in the State of Punjab are such that in order to ensure maintenance of Public Order and Tranquility in the State, it is considered expedient to confer certain powers under the Code of Criminal Procedure, 1973, on the Executive Magistrates in the State for a temporary period and to amend certain provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) in its application to the State of Punjab."

4. Before us, Mr. G. S. Grewal, Senior Advocate, arguing the case on behalf of the petitioners, first challenged the legality of the provisions of Section 11, which have been reproduced above. The main contention of the learned counsel was that by introducing Section 11 the Government has nullified or, in other words, has completely taken away the right of bail to the accused with regard to offences mentioned therein and this provision is hit by Article 21 of the Constitution of India. What was sougth to be argued by the learned counsel, was that before the amendment, bail was a rule except with regard to offences punishable with death or life imprisonment, but with the introduction of the Amendment Act, it was become practically an absolute bar to grant bail as before doing so the accused is required to show that reasonable grounds exist for holding the accused not guilty. In other words, the Court will have to record a finding that the accused is not guilty, which findng at the initial stage may not at all be possible. The learned counsel went on to argue that under the criminal jurisprudence the accused is to be presumed to be innocent, but by the introduction of the amendment, the accused will have to be presumed to be guilty unless otherwise proved. While developing the argument, the learned counsel drew our attention to some of the following facts:—

(1) Section 120-B of the Indian Penal Code has been included in the amended provision and its result would be that the

case with regard to bail of an accused charged with an offence not included in Section 11 will be decided in the light of the provisions of Section 439, while the case of a conspirator (charged under Section 120-B) the provisions of Section 439-A shall apply and in this manner the main accused would have better chances to be released on bail than the conspirator. In other words, what was emphasized by the learned counsel was that in the Indian Penal Code, there are more than 400 offences; while in Section 439-A, about 30 Sections have been included. Now besides 30 Sections, a real offender under some other section would for the bail matter be treated under the provisions of the old Code, while a conspirator of that offence (against whom Section 120-B has been made applicable) shall have to suffer the rigour of the provisions of the Amendment Act. In this manner, a conspirator would be in a worse position than the real offender ;

(2) That the amendment is supposed to have been introduced keeping in view the law and order situation. But inclusion of a few offences only in Section 439-A, which generally have nothing to do as such with law and order situation, clearly proves that there has been no applicability of mind ;

(3) That out of the offences enumerated in Section 11, some are triable by the Sessions Court, while some are triable by the Magistrates. Now for bail the offences which are triable by the Magistrates, the provisions of Section 437 would be applicable and under that provision the Magistrates would have wider powers to grant bail. But for the offences which are triable by the Sessions Court the power of granting bail by the Sessions Judge or the High Court stands curtailed by the amendment which would mean that the higher Court has lesser discretion of granting bail than the lower Court.

(4) Chapter 15 of the Indian Penal Code specifies offences relating to religion. Chapter 8 mentions offences against the public tranquility. Section 153-A of the Indian Penal Code talks of offences, which relate to promoting enmity between different groups on grounds of religion, race, place of birth, residence, etc., and doing acts prejudicial to

maintenance of harmony. But surprisingly, offences under Section 153-B, which relate to the imputations, assertions prejudicial to national integration, has not been included. Chapter 6 details offences against the State and out of this Chapter, Section 124, 125, 126, 127, 128, 129 and 130 have not been included in Section 11. Chapter 16 related to offences against human body. Sections 308 311 and 327 have not been included in Section 11. Rccording to the learned counsel, all this shows complete arbitrary selection of certain offences for the purposes of bringing the same within the purview of Section 439-A, without there being any rationale or applicability of mind;

(5) That any law that restricts the right of bail has to be just, fair and reasonable. According to the learned counsel, the unreasonableness of the amendment is writ large inasmuch as under the amended provisions it is impossible for an accused to obtain bail. By the amendment it is required that the Court at the time of granting bail has to come to a conclusion that the accused is not guilty which is an impossible condition to be fulfilled;

(6) That to prove his innocence, the accused person will have to disclose his defence in many cases and such a disclosure would be prejudicial to the interest of the accused.

(5) It was on the basis of the aforesaid facts that Shri Grewal sought to argue that by enacting this provision the liberty of the accused has been completely taken away and that the amended provision is hit by Article 21 of the Constitution. In support of this contention, the learned counsel had drawn our attention to several judicial decisions of the Supreme Court of India.

(6) On the other hand, the learned Advocate-General has submitted on behalf of the State that the impugned legislation has been enacted with a view to meet a particular abnormal situation in the State and that where some provision is made out of sheer necessity, the Courts are required to judge its reasonableness taking into consideration the object and the aims which necessitated such an enactment. According to the learned Advocate-General, the impugned legislation is perfectly fair, just and reasonable, especially when the tenure of the same is for a limited period and has been introduced to

meet an abnormal situation. It was also emphasized by Mr. Sidhu, learned Advocate-General that this provision has covered only those cases in which the terrorists in the State commit an offence as mentioned in clause (a) and that the cases of the ordinary accused under any such offence would not fall within the purview of Section 439-A. In support of his contention, the learned counsel made reference to clause (iii), which provides that the Court, including the High Court or the Court of Session, for the reasons to be recorded in writing, if satisfied that there are exceptional and sufficient grounds, may direct the release of the accused on bail. What was sought to be contended by the learned Advocate-General was that clause (iii) was purposely introduced to cover the cases of ordinary accused with the result that the case of an ordinary accused is to be dealt with not taking into consideration the provisions of Section 439-A; but under the law before the impugned amendment.

(7) The learned Advocate-General further submitted that granting of bail was always in the discretion of the Court and an accused is not entitled to bail as a matter of right. While distinguishing the judgments of the Supreme Court, to which reference was made by the learned Counsel for the petitioners, the learned Advocaet-General submitted that those decisions did not deal with any particular provision which might have been enacted to meet a particular situation and hence all those judgments on which reliance had been placed by the learned counsel for the petitioners were distinguishable. The learned Advocate-General placed reliance on some judicial pronouncements which have been rendered under the Defence of India Rules, the provisions of which are exactly similar so far as they relate to bail. In this manner, the learned State counsel sought to support the impugned legislation.

(8) Though I have noticed the arguments, but as a result of the enactment of the Terrorist Affected Areas (Special Courts) Act, 1984, which had come into force on 1st September, 1984, I do not deem it necessary to deal with the point on merits. The Special Courts Act makes provision for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith. Section 3 makes a provision for the declaration of terrorist affected area. The State of Punjab and the Union Territory of Chandigarh have been declared to be a terrorist affected area. The offences which are triable under this Act, practically cover all the offences which have been mentioned in clause (a) and all these offences are now triable by a Special Court. In the Special Courts Act, Section 15 makes a provision, which results into the modified application of certain provisions

of Code of Criminal Procedure. Sub-sections (4), (5), and (6) of Section 15, which relate to bail, are in the following terms :—

"(4) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person of an accusation of having committed a scheduled offence in a terrorist affected area.

(5) Notwithstanding anything contained in the Code, no person accused of a scheduled offence shall, if in custody, be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(6) The limitations on granting of bail specified in sub-section (5) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail."

(9) Now a bare perusal of sub-section (5) shows that no person accused of a scheduled offence shall be released on bail without giving the Public Prosecutor an opportunity to oppose the application and on the satisfaction of the Court that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. Under sub-section (6), it is provided that the limitations on the grant of bail as provided in sub-section (5) are in addition to the limitations under the Code. So far as the scheduled offences under the Special Courts Act are concerned, the same are triable by the Special Courts, as has been provided under Section 7 of the Special Courts Act. Further, the bail matters now with regard to scheduled offences are to be disposed of in the light of the provisions of sub-section (5), which as earlier observed, provides that no person accused of a scheduled offence shall be released on bail without giving the Public Prosecutor, an opportunity to oppose the application and on the satisfaction of the Court that there are reasonable grounds for believing that he is not guilty of such offneces and that he is not likely to commit any offence while on bail. Now an analysis

of clause (i) of Section 439-A and sub-section (5) of Section 15 goes to show that in view of the provisions of sub-section (5) of Section 15, the provisions of Section 439-A(i) have lost their importance inasmuch as the cases of the persons who are charged of any scheduled offence have to be tried by the Special Courts and their bail matters are to be disposed of keeping in view the provisions of sub-section (5) of Section 15 of the Special Courts Act also.

10. It may be observed that the question as to which Court has the jurisdiction to dispose of the bail matters with regard to scheduled offences is not **res integra** as we have a decision of this Court in **State of Punjab** versus **Piara Singh** (1), by M. M. Punchhi, J., wherein, on consideration of the entire matter, it has been observed thus:—

> "Thus in view of the above discussion, I am of the considered view that the distinction between a terrorist and a non-terrorist is totally out of tune with the setting up of Special Courts, which are set up to try scheduled offences and so claims of bail of offenders charged of those offences have only to be entertained by the Special Courts who have their powers regulated under sub-section (5) of Section 15 of the Ordinance/Act, Section 439-A (wherever applicable) and Section 439 of the Code of Criminal Procedure and other laws applicable limiting the scope. I am also of the considered view that the view taken by the learned Sessions Judge in confining the scope of the Ordinance/Act to terrorists accused of scheduled offences is uncalled for in the scheme of things."

From the aforesaid observations it is quite evident that the distinction between a terrorist and a non-terrorist after the setting up of Special Courts has no meaning and now the claims of bail of offenders charged of those offences have to be regularised under sub-section (5) of Section 15 of the Special Courts Act.

(11) At this stage it would be pertinent to observe that the **vires** of sub-section (5) of Section 15, besides some other provisions of the Special Courts Act, has been challenged in the Supreme Court, as well as in this Court. In this situation, in my view, it would be proper and appropriate to leave this issue undecided and not to express any opinion on merits and to await the decision of the Supreme Court or this Court.

(1) Cr. R. 1292/84 decided on 21st September, 1984.

(12) This brings me to the next contention of Mr. Grewal, learned counsel for the petitioners, which relates to the **vires** of Section 4 of the Amendment Act. According to the learned counsel, the independence of judiciary is the basic structure of the Constitution and enactment of Section 4 has resulted in destroying this independence inasmuch as the control of the High Court on the subordinate judiciary regarding the trial of specified offences has been taken away. What is sought to be projected by the learned counsel is that after the enactment of Criminal Procedure Code, 1973, there has been complete separation of judiciary from the executive in whole of the country and this has been done to implement the mandate of the Constitution as provided under Article 50 that the State shall take steps to separate the judiciary from the executive; that by merging the judicial function in the executive, the basic structure of the Constitution has been affected; that justice and fair trial cannot be ensured under the Executive Magistrates, inasmuch as some of them are not legally qualified and trained persons and, in actual practice, are required to perform various other functions; that the conditions of service of the Executive Magistrates are governed by the Punjab Civil Service (Executive Branch) (Class-I) Rules, 1976, that as is evident from those Rules, the High Court would have noting to do with the appointment, removal or other conditions of their service; that the Executive Magistrates are entirely under the control of the Government which is exercised through the Deputy Commissioners, who are overall incharge of the law and order in the Districts; and that in view of all these facts, the procedure now provided for the trial of specified offences is unfair and unjust to the accused. The learned counsel further submitted that the jurisdiction of the Judicial Magistrates regarding certain offences has been taken away with a view to ensure speedy trial as was contended by the learned Advocate-General that in the aims and objects it is nowhere stated that the specified offences have been taken away for trial by the Executive Magistrates in order to ensure speedy trial; that trial of the offences by the Executive Magistrates has nothing to do with the maintenance of public order and tranquility in the State and that the State has not furnished any data to show that after the enactment of the 1983 Act, there has been speedy disposal of the cases relating to specified offencecs or that when these offences were being tried by the Judicial Magistrates, there was inordinate delay in their disposal and that in this manner the withdrawing of the specified offences from the jurisdiction of the Judicial Magistrates is wholly arbitrary.

(13) On the other hand, Mr. Bhagwant Singh Sidhu, learned Advocate-General, Punjab, contended that there is a presumption that the authority to whom a function is assigned shall discharge its duty honestly; that against the order of an Executive Magistrate, an appeal is provided to the Sessions Judge, so also a right of revision is available to the High Court; that even otherwise, the High Court would have power and control over the Executive Magistrates under Articles 226 and 227 of the Constitution; that under the Gram Panchayat Act, certain offences are triable by the Gram Panchayat and that merely by taking away the jurisdiction of of certain offences and vesting the same in the Executive Magistrates, neither the independence of the judiciary has been minimised nor does it display in any manner the exercise of the power arbitrarily.

(14) Before I deal with the contentions on merits it would first be necessary to refer to the specified offences, the trial of which has been vested in the Executive Magistrate. Section 2(b) of the Amendment Act defines the 'Specified offences' as follows:—

"(b) 'specified offences' means—

(i) offences falling under Chapters VIII and X of the Indian Penal Code, 1860 (Central Act No. 45 of 1860);

(ii) offences under the Arms Act, 1959 (Central Act No. 54 of 1959) punishable with imprisonment upto three years or with fine or with both;

(iii) offences under the Punjab Security of the State Act, 1953 (Punjab Act No. 12 of 1954)".

(15) An analysis of the aforesaid definition would show that clause (i) refers to offences falling under Chapters VIII and X of the Indian Penal Code Chapter VIII of the Code consists of Sections 141 to 160 and all offences under these sections are against public tranquillity. Chapter X contains sections 172 to 190 and all offences under these sections relate to the contempts of the lawful authority of public servants. Clause (ii) refers of offences under the Arms Act, 1959 which are punishable with imprisonment upto three years or with fine or with both. Clause (iii) talks of offences under the Punjab Security of the State Act. It is the trial of all these

offences which has now specifically been given to the Executive Magistrates to the exclusion of the Judicial Magistrates.

(16) Coming to the subject of separation of Judiciary from the Executive, I would first refer to the relevant statement of objects and reasons which resulted in the enactment 1973 Criminal Procedure Code.

(17) The law relating to criminal procedure applicable to all criminal proceedings in India (except those in the States of Jammu and Kashmir and Nagaland and the Tribal Areas in Assam) was contained in the Code of Criminal Procedure, 1898. That Code had been amended from time to time by various Acts of the Central and State Legislatures. The more important of these were the amendments brought about by Central Legislation in 1923 and 1955. The amendments of 1955 were extensive and were intended to simplify procedures and speed up trials as for as possible. In addition, local amendments were made by State Legislatures, of which the most important were those made to bring about separation of the Judiciary from the Executive. Finding the Code of Criminal Procdure, 1898 needed some comprehensive revision. Central Law Commission was set up in 1955.

(18) The first Law Commission presented its Report (the Fourteenth Report) on the Reform of Judicial Administration, both civil and criminal, in 1958; it was not concerned with detailed scrutiny of the provisions of the Code of Criminal Procedure, but it did make some recommendations in regard to the law of criminal procedure, some of which required amendments to the Code. A systematic examination of the Code was subsequently undertaken by the Law Commission not only for giving concrete form to the recommendtions made in the Fourteenth Report but also with the object of attempting a general revision. The main task of the Commission was to suggest measures to remove anomalies and ambiguties brought to light by conflicting decisions of the High Courts or otherwise, to consider local variations with a view to securing and maintaining uniformity, to consolidate laws wherever possible and to suggest improvements where necessary. A Comprehensive report for the revision of the Code, namely, the Forty-first Report, was presented by the Law Commission in September, 1969. This report took into consideration the

recommendations made in the earlier report of the Commission dealing with specific matters, namely, the Fourteenth, Twenty-fifth, Thirty-second, Thirty-third, Thirty-sixth, Thirty-seventh and Fortieth Reports.

(19) The recommendations of the Commission were examined carefully by the Government, keeping in view among others, the following basic considerations:—

(i) an accused person should get a fair trial in accordance with the accepted principle of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.

(20) One of the main recommendations of the Comission was to provide for the separation of the Judiciary from the Executive on an all-India basis in order to achieve uniformity in this matter. To secure this, the provision for a new set-up of criminal courts was sougth to be provided. In addition to ensuring fair deal to the accused, it was suggested that separation of Judiciary from the Executive would ensure improvement in the quality and speed of disposal, as all Judicial Magistrates would be legally qualified and trained persons working under close supervision of the High Court. As a result of this report, Code of Criminal Procedure, 1973 was enacted by Act 2 of 1974 and this new Code fulfilled the directive principle contained in Article 50 that the State shall take steps to separate the Judiciary from the Executive in the public services of the Sate. It may be observed at this stage that in the State of Punjab the Separation of Judicial and Executive Functions Act, 1964, was enacted as a result of which the Executive Magistrates were divested of the judicial powers and the same were vested in the judicial Magistrates.

(21) Coming to the merits, on the respective contentions of the learned counsel for the parties, the question that needs determination is whether the procedure now provided for the trial of

certain offences by the Executive Magistrates is ultra vires Article 21 of the Constitution of India inasmuch as such a provision providing for the trial of the accused by the Executive Magistrate would be unjust unreasonable and unfair to the accused.

(22) In order to get a correct answer it would first be necessary to notice certain provision of the Punjab Civil Service (Executive Branch) (Class I) Rules, 1976, which regulate the recruitment and conditions of service of persons appointed to the Service. Rule 2(a) defines 'administrative post in the Service' as a post shown in Appendix I to these Rules and shall include any post which may from time to time be declared to be an admini-administrative post in the Service for the purposes of these Rules by the Government by a general order or a special order. Rule 2(f) defines 'Service' which means the Punjab Civil Service (Executive Branch) (Class I). Rule 3 makes mention of the number and character of posts. Rule 7 provides that the appointment to the Service shall be made in the manner provided in the Rules from amongst accepted candidates whose names have been duly entered in accordance with these Rules in the Registers of accepted candidates to be maintained under the Rules. Rule 8 specifies the Registers which are required to be maintained. Rule 9 prescribes the procedure of selection of candidates for Register A-1, while Rule 10 makes a provision of selection of candidates for Register A-II. Similarly, Rule 11 makes a provision of selection of candidates for Register A-III. Rule 18 provides for the appointment of accepted candidates to the Service. There are other rules which provide for determination of the seniority, period of promotion, etc. As to what is an 'administrative post' in the Service, reference has to be made to Appendix I to the Rules, in which there are 37 items. At item No. 9 is the category of Executive Magistrates.

(23) What was sought to be emphasized by Mr. Grewal, learned counsel for the petitioners, was that the Executive Magistrates in some cases are not even qualified to do the job as they may be only Graduates; that the Executive Magistrates are under the direct control of the Government and their promotion, increments and seniority of service are all dependent upon the Deputy Commissioner and other officers belonging to the Executive; that the Executive Magistrates, as is well known, have to perform various executive functions like arranging functions, collection of funds, etc., and that an Executive Magistrate would be unsuited and unable to deal

with judicial cases effectively as their daily routine work is entirely of a different nature. It was further emphasized that the Executive Magistrate would, more or less, be a Judge in his own cause as it will be the Executive which would be prosecuting an accused and the trial would also be held by a person who is under the complete control of the Government. In this manner, according to the learned counsel, the accused would not be able to get a fair and just trial. The learned counsel went on to argue that justice must not also be done but must be seen to be done and if an accused is tried by an Executive Magistrate, however fair he may be, still the accused would never have a belief and satisfaction that he would get a just and fair trial, and once the procedure prescribed is such which would not ensure a just and fair trial, then the same has to be struck down as violative of Article 21 of the Constitution.

(24) After giving our thoughtful consideration to the entire matter, we find considerable force in the contention of the learned counsel for the petitioners. As is evident, Article 50 of the Constitution gives a mandate to the State to take steps to separate the Judiciary from the Executive in the public services of the State. In the State of Punjab, in the year 1963, Separation of Judicial and Executive Functions Act was enacted to divest the Magistrates of their judicial power. Since 1964, in this State the Judicial Magistrates are functioning independently and they are under the direct control of the High Court. Finding that in many States the Judiciary had not been separated from the Executive, suitable amendments were made and Act 2 of 1974, i.e., Code of Criminal Procedure, 1973, was codified to achieve the directive principle as enunciated in Article 50 of the Constitution. In the famous case known as 'Judges' Transfer case'—*Union of India* v. *Sankalchand Himatlal Sheth and another*, (2), Bhagwati J. (now My Lord the Chief Justice), who had given dissenting judgment, observed regarding Article 50 as follows:—

> "And hovering over all these provisions like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State policy, that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granville Austin

(2) A.I.R. 1977 S.C. 2328.

as 'the conscience of the Constiution' and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals, without any scope for doubt or debate, the intent of the Constitution-makers to immunise the judiciary from any form of executive control or interference."

After the enactment of the 1973 Code, there is no offence which is triable by an Executive Magistrate. The only power given to the Executive Magistrates is to try the cases referred to in Chapters VIII and X of the Code. It may be interesting to note that the Law Commission in its report even did not favour the trial of cases falling under Sections 108, 109, and 110 of the Code of Criminal Procedure. The relevant portion of the report reads as under :—

"8.10. Sections 108, 109 and 110 provides for taking security for good behaviour from persons disseminating seditious matters or matters amounting to intimidation or defamation of a Judge, from vagarants and suspected persons, and from habitual offenders, respectively. The question arises whether this power which is now vested in all senior Magistrates, judicial and executive should be vested only in Judicial Magistrate or in Executive Magistrates or concurrently in both. The present position in the State where separation of the judicial from the executive has been effected to some extent, is not uniform. In the earlier Report, emphasis was laid on the preventive nature of these security proceedings and on their vital impact on the maintenance of law and order and the recommendation was to the effect that the powers under all the three sections should be vested exclusively in Executive Magistrates.

8.11: This matter was again discussed in detail before us. We are of the view that, having regard to the fact that the final order to be passed in these proceedings affects the liberty of the person against whom the proceedings are instituted and that sifting of evidence in a judicial manner is required before an order demanding security can justifiably be passed, it is desirable to vest these powers exclusively in Judicial Magistrate. Inquiry

under any of these three sections partakes of the character of a trial, though technically the person against whom the proceedings are taken is not an accused person, there is no offence to be inquired into or tried and the ordinary rules of evidence are relaxed to some extent. All magistrates of the first class may, in our opinion, be given powers under these three sections. At the same time, we do not think that the powers under these sections need be vested concurrently in both Judicial and Executive Magistrates although this is the position in some States at present. Under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it."

However, it appears that this suggestion was not accepted and cases falling under these sections were also left to be tried by the Executive Magistrates. Now, these cases *stricto senso,* in our view, do not really relate to any offence. Be that as it may, the fact remains that after the enactment of the 1973 Code, there has been complete separation of Judiciary and Excutive and in this manner the directive principle as contained in Article 50 of the Constitution stands complied with. But surprisingly, for no valid reason (as no indication is available in the Statement of Objects) the position with regard to specified offences has now been reversed in the State of Punjab by enacting Section 4 in the Amendment Act of 1983, under which specified offences have now been made triable exclusively by the Executive Magistrates. It is ununderstandable as to why these offences have been made triable by the Executive Magistrates. Faced with this situation, the learned Advocate-General gave out his own reason for taking out these offences and giving their exclusive jurisdiction to the Executive Magistrates that the State Government was anxious that the specified offences be tried speedily and as the Judicial Magistrates were having large pending files, it was not possible for them to decide these cases expeditiously. Repeatedly we asked the learned Advocate-General to give us data to show as to after the enactment of this amendment act how expeditiously the cases have been disposed of by the Executive Magistrates, but he failed to supply such a data. Further, the learned Advocate-General has also not placed any material on the record to satisfy us that the Judicial Magistrates did not or were not in a position to dispose of cases pertaining to specified offences expeditiously. The learned Advocate-General has also not been able to point out as to what

material gain has been achieved by this amendment and how has the Government succeeded in its object in dispensing justice speedily. Rather our experience during inspection of the subordinate Courts shows that due to their other pre-occupations, the Executive Magistrates have not been able to dispose of even the cases under Sections 107/151, 109, etc., of the Code of Criminal Procedure expeditiously. If the object is to ensure speedy disposal of the cases, then it may be observed with some firmness that our subordinate Judiciary can help better in achieving that object. Our subordinate Judiciary consists of experienced and legally trained officers. If in a given situation, cases pertaining to some particular type of cases are required to be disposed of expeditiously, then their trial can always be given priority.

(25) Further, there is no gainsaying as it is an admitted fact that the Executive Magistrates are under the complete control of the Government. Their promotion, increments and seniority of service, etc., are all dependent on their higher officers, who belong to the Executive. At this stage, it may be observed that we have the highest respect for the Executive, including the Executive Magistrates and we wish to make it clear that nothing said by us in our judgment would be construed as casting any aspersion on them as a class. The Executive Magistrates like Judicial Officers occupy a position of honour and respect in society. But, we cannot shut our eyes to the statutory and Constitutional position, that on the Executive Magistrates the High Court has no control and that their promotion, increments and seniority of service, etc., are all dependent upon what reports they earn from their superior officers. The Executive Magistrates are required to do all sorts of administrative work like collection of funds, arranging of functions, etc. In some case the Executive Magistrate may not even be legally qualified or trained person to do the judicial work. As is evident from the aims and objects of enacting the Code of Criminal Procedure, 1973, the main emphasis was that an accused person should get a fair and just trial in accordance with the accepted principles of natural justice. In the present set-up when there is complete separation of Judicial from the Executive after 1973 Code and especially when the Executive Magistrates are completely under the control of the Government, we find it very difficult to hold that an accused person charged of the offences which are now triable by the Executive Magistrates, shall ever have a feeling that he would have fair and just trial. Merely the

fact that the appeal or revision is to be heard by the Sessions Court or the High Court would not give any satisfaction to the accused as it is of the greatest importance that the basic trial should inspire the confidence of the accused and when under a procedure prescribed confidence cannot be inspired, then such a procedure is to be held as unjust, unreasonable and unfair and violative of the provisions of Article 21. At this stage we may make reference to Special Reference No. 1 of 1978 reported in (3) regarding the Special Courts Bill, 1978, whih came up for hearing before a Seven Judges Bench of the Supreme Court. The observations of their Lordships in paras No. 94, 95, 96 and 97 of the report are very relevant and read as under:—

"94. Though this is so, the provisions of the Bill appear to us to be unfair and unjust in three important respects. In the first place, there is no provision in the Bill for the transfer of cases from one Special Court to another. The manner in which a Judge conducts himself may disclose a bias, in which case the interest of justice would require that the trial of the case ought to be withdrawn from him. There are other cases in which a Judge may not in fact be biased and yet the accused may entertain a reasonable apprehension on account of attendant circumstances that he will not get a fair trial. It is of the utmost importance that justice must not only be done but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. There are yet other cases in which expediency or convenience may require the transfer of a case, even if no bias is involved. The absence of provision for transfer of trials in appropriate cases may undermine the very confidence of the people in the Special Court as an institution set up for dispensing justice.

95. The second infirmity from which the procedural part of the Bill suffers is that by Clause 7, Special Courts are to be presided over either by a sitting Judge of a High Court or by a person who has held office as Judge of a High Court to be nominated by the Central Government in consultation with the Chief Justice of India. The

(3) A.I.R. 1979 S.C. 478.

provision for the appointment of a sitting High Court Judge as a Judge of the Special Court is open to no exception. In so far as the alternate source is concerned, we entertain the highest respect for retired Judges of High Courts and we are anxious that nothing said by us in our judgment should be construed as casting any aspersion on them as a class. Some of them have distinguished themselves as lawyers once again, some as members of administrative tribunals, and many of them are in demand in important walks of life. Unquestionably they occupy a position of honour and respect in society. But one cannot shut one's eyes to the constitutional position that whereas by Article 217, a sitting Judge of a High Court enjoys security of tenure until he attains a particular age, the retired Judge will hold his office as a Judge of the Special Court during the pleasure of the Government. The pleasure doctrine is subversive of judicial independence.

96. A retired Judge presiding over a Special Court, who displays strength and independence may be frowned upon by the Government and there is nothing to prevent it from terminating his appointment as and when it likes. It is said on behalf of the Government that if the appointment has to be made in consultation with the Chief Justice of India, the termination of the appointment will also require similar consultation. We are not impressed by that submission. But, granting that the argument is valid, the process of consultation has its own limitations and they are quite well-known. The obligation to consult may not necessarily act as a check on an executive which is determined to remove an inconvenient incumbent. We are, therefore, of the opinion that Clause 7 of the Bill violates Article 21 of the Constitution to the extent that a person who has held office as a Judge of the High Court can be appointed to preside over a Special Court, merely in consultation with the Chief Justice of India.

97. Yet another infirmity from which the procedure prescribed by the Bill suffers is that the only obligation

which Clause 7 imposes on the Central Government while nominating a person to preside over the Special Court is to consult the Chief Justice of India. This is not a proper place and it is to some extent embrassing to dwell upon the pitfalls of the consultative process though, by hearsay, one may say that as a matter of convention, it is in the rarest of rare cases that the advice tendered by the Chief Justice of India is not accepted by the Government. But the right of an accused to life and liberty cannot be made to depend upon pious expressions of hope, howsoever past experience may justify them. The assurance that conventions are seldom broken is a poor consolation to an accused whose life and honour are at stake. Indeed, one must look at the matter not so much from the point of view of the Chief Justice of India, nor indeed from the point of view of the Government, as from the point of view of the accused and the expectations and sensitivities of the society. It is of the greatest importance that in the name of fair and upolluted justice, the procedure for appointing a Judge to the Special Court, who is to be nominated to try a special class of cases, should inspire the confidence not only of the accused but of the entire community. Administration of justice has a social dimension and the society at large has a stake in impartial and even-handed justice.".

(26) As is evident from the observations reproduced above, administration of justice has a social dimension and the society at large has a stake in impartial and even-handed justice. In the hands of the Executive Magistrates as they are placed, it would be difficult for the accused to feel that justice would be done to him. As observed by Chief Justice Chandrachud, it is of the utmost importance that justice must not only be done but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court, which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. In the instant case, the learned Advocate-General, as earlier observed, has not been able to place any material to show as to what was the compelling need of divesting the Judicial Magistrates of their power to try offences nor triable by the Executive Magistrates, by enacting Section 4 and that what benefit would be derived by undoing the achievement

of the directive principles as embodied in Article 50 of the Constitution. Mr. Sidhu, learned Advocate-General, had contended that certain offences triable by the Judicial Magistrates have been made triable by the Gram Panchayat and that if Gram Panchayat could try some offences, why could not the Executive Magistrates be given the power of trying the specified offences. At first flush the argument may look to be attractive but a little scrutiny displays its hollowness. The power of the Legislature to withdraw trial of certain offences from the Courts and give the same to some other authority cannot be disputed. But then, as observed earlier, the accused should have the satisfaction that the authority trying him is not biased and that he will get a fair and just trial and, as is evident from the discussion in the earlier part of the judgment, the accused in case of specified offences which have been made triable by the Executive Magistrates would not have the satisfaction that his trial would be by an unbiased authority and would be just and fair. As a result of the aforesaid discussion, we find that having separated the judiciary from the executive and having achieved the directive principles as embodied in Article 50, the law now enacted for the trial of certain offences by the Executive Magistrates is neither fair nor just nor reasonable, with the result that the provisions of Section 4 of the Amendment Act empowering an Executive Magistrate, to the exclusion of any other Magistrate, to take cognizance of and to try and dispose of cases relating to specified offences are *ultra vires* of Article 21 of the Constitution and are accordingly struck down.

(27) No other point arises for consideration.

(28) For the reasons recorded above, the petition stands partly allowed in the terms indicated in the judgment.

D. S. Tewatia, J.—I agree.

Kulwant Singh Tiwana, J.—I agree.

N. K. S.

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