

Before Gurnam Singh, J.

BRIJ KISHORE,—Petitioner.

versus

STATE OF HARYANA and another,—Respondents.

Criminal Misc. No. 4352-M of 1978

November 10, 1978.

Haryana Children Act (14 of 1974)—Sections 1, 4, 7 and 65—Code of Criminal Procedure (2 of 1974)—Sections 4, 5 and 27—Constitution of India 1950—Article 254 and Schedule VII, List III, entries 1 and 2—Child accused of an offence punishable with death or imprisonment for life—Children Act providing for the trial of such a child by Children's Court—Code also providing for the trial by ordinary criminal courts—Repugnancy between the State Act and the Code—Such child—Whether to be tried under the provisions of the Code.

Held, that from a reading of sections 1, 4, 7 and 65 of the Haryana Children Act 1974, it is clear that all offences committed by children within the State of Haryana have to be tried by the Children's Courts. However, section 27 of the Code of Criminal Procedure 1973 which is practically the same as section 29-B of the Code of 1898 enacts that any offence not punishable with death or imprisonment for life committed by a person under the age of 16 years may be tried by a Chief Judicial Magistrate or any Court specially empowered under the Children Act or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders, meaning thereby that an offence punishable with death or imprisonment for life cannot be tried by a Children's Court. There is, therefore, a direct conflict between the provisions contained in the Code of 1973 and in the Act and while proceeding in the case of a child, one out of the two has to be disobeyed. Thus, the law made by Haryana State is repugnant to the law made by Parliament. The subject matter of the two enactments falls in List III of Schedule VII of the Constitution of India 1950 and in such an eventuality Article 254 of the Constitution comes to the help of the Court, according to which it has to be seen as to which out of the two laws, one made by the State and the other by Parliament, is an earlier one. The Code of 1973 came into force on 1st of April, 1974. The Haryana Act was to come into force on such a date as the State Government by notification had to appoint and the date so appointed is 1st day of March, 1974. Under sub-clause (1) of Article 254, the law made by the Parliament subject to the provisions of clause (2) shall prevail. Since the Code of 1973 passed by Parliament came into force after the Haryana Act, it will prevail and the law made by the State shall be void and clause (2) of Article 254 of the Constitution will not be available to

save it. Thus, a child who is being prosecuted for the offence punishable with death or imprisonment for life shall have to be tried by the Court of Session under the provisions of the Code and not under the provisions of the Haryana Act. (Paras 5, 7, 9 and 10).

Petition under section 397 read with section 482 of Cr.P.C. praying that the impugned order annexure P/1 be set aside and the Sessions Judge be directed to conclude the trial at an early date as the offence was committed about 4½ years back and the proceedings pending before the committing court be ordered to be stayed during the pendency of the petition.

H. N. Mehtani, Advocate, for the Petitioner.

Achok Kumar, Advocate, for respondent No. 2.

H. S. Gill, A.A.G., for Respondent No. 1.

Gurnam Singh, J.—

(1) Rohtash, son of Chuni Lal Mittal, resident of village Hodel, Tehsil Palwal, District Gurgaon, respondent No. 2, is being prosecuted under section 302, Indian Penal Code, for causing the death of Subhash on 23rd December, 1974. The Judicial Magistrate 1st Class, Palwal, committed Rohtash to the Court of Session, Gurgaon, to stand his trial under section 302, Indian Penal Code. The trial of the case commenced on 15th September, 1975 in the Court of Session presided by Shri Sarup Chand Goel. The case could not be completed as the complainant in the case, had applied to the High Court for the transfer of the case to some other Court. In the meantime Shri Sarup Chand Goel, Sessions Judge, retired from service. The trial of the case, therefore, commenced before Shri Shiv Dass Tyagi, the successor of Shri Sarup Chand Goel. The prosecution evidence was completed and the case was adjourned to 5th of May, 1978 for recording the statement of the accused-respondent No. 2.

(2) In the meantime Harbans Lal, J., in *State of Haryana v. Ishwar* (1), held as under :

“The scheme of the Act clearly appears to be that in case of children as defined in the Act, all offences have to be

(1) Cr. M. 5415-M/77, decided on 20th January, 1978.

Brij Kishore v. State of Haryana and another (Gurnam Singh, J.)

tried by the Children's Court. In view of this, it was incumbent on the Magistrate concerned to come to a positive conclusion if the respondent was a child as defined under the Act or not. If in his opinion, the respondent was not a child, he had the jurisdiction to commit the accused for trial to the Court of Sessions and if the respondent was found to be a child, it was incumbent on the Magistrate to forward the accused to the Children's Court."

(3) In view of the finding in *State of Haryana v. Ishwar* (supra), Shri Shiv Dass Tyagi, Sessions Judge, taking the date of birth of Rohtash respondent No. 2 as 19th February, 1959, came to the conclusion, that it becomes mandatory to decide conclusively as to whether the accused-respondent No. 2 was a child within the meaning of the Haryana Children Act, 1974 (hereinafter referred to as the Act) and for following the procedure laid down by Harbans Lal J., in *State of Haryana v. Ishwar* (supra), remitted the case to the committing Court or to his successor Court for holding an enquiry and coming to a positive conclusion as to whether the accused-respondent No. 2 was a child as defined under the Act or not and if he is found to be a child then it would be incumbent upon the Magistrate to forward him to the concerned Children's Court after being dealt with under the provisions of the Act. It is against this order of the learned Sessions Judge, Rohtak, Camp at Gurgaon dated 5th June, 1978, that Brij Kishore, brother of Subhash deceased has filed this petition under section 397 read with section 482, Criminal Procedure Code, 1973 (hereinafter referred to as the Code of 1973) for quashing the order passed by the Sessions Judge on 5th June, 1978, copy annexure P. 1.

(4) Notice of this petition was given to the respondents and the counsel for the parties have been heard.

(5) The Haryana Children Act, 1974, received the assent of the President of India on 6th of February, 1974 and was published in the Haryana Gazette dated February 12, 1974. Under section 4 of the Act, the State Government is required to constitute Children's Courts. Under section 7 of the Act, a case relating to an offence committed by a child has to be forwarded to a Children's Court. The Children's Court is required to hold an enquiry against the child charged with an offence, under section 19 of the

Act in accordance with the provisions of section 37 of the Act. After such an enquiry, an order has to be passed under section 20 of the Act against the delinquent children. Section 21 of the Act categorically says that the penalty of death or imprisonment cannot be awarded by the Children's Court. Harbans Lal J., in *State of Haryana v. Ishwar* (supra), came to the conclusion that according to the scheme of the Act all offences committed by the children have to be tried by the Children's Court and, therefore, it is necessary for the Magistrate to come to a positive conclusion whether the accused is a child as defined in the Act or not.

Section 65 of the Act reads as under :

“Certain Central Acts not to apply.—(1) The Reformatory Schools Act, 1897 (Central Act 8 of 1897), and sections 29B and 399 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898), shall cease to apply to any area in which this Act has been brought in force.

(2) * * * * *

(6) The Haryana Children Act, 1974, extends to the whole of the State of Haryana,—*vide* sub-section (2) of section 1 of the Act.

(7) Under section 29B of the Criminal Procedure Code of 1898 (hereinafter referred to as the Code of 1898), offences other than punishable with death or imprisonment for life, committed by a person under the age of 15, can be tried by a Magistrate specially empowered to exercise the powers conferred by section 8, sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby. Since section 29B of the Code of 1898 had ceased to apply to the State of Haryana,—*vide* section 65 of the Act, all the offences committed by a child could be tried by a Children's Court. The Act came into force on 1st March, 1974. The Code of 1898 was amended by Act No. 2 of 1974 and the amended Code of 1973 came into force with effect from April 1, 1974. Section 4 of the Code of 1973 lays down that “all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the

Brij Kishore v. State of Haryana and another (Gurnam Singh, J.)

provisions hereinafter contained." The offence which is punishable under section 302, Indian Penal Code, falls within sub-section (1) of section 4 of the Code of 1973 and, therefore, has to be tried in accordance with the provisions of the same Code. However, an exception has been made by section 5 of the Code of 1973 and it lays down that "nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by any other law for the time being in force." Thus where special jurisdiction or special power is conferred or any special form of procedure is prescribed by any other law for the time being in force that jurisdiction, power and procedure will prevail over those contained in the Code of 1973. Section 27 of the Code of 1973 enacts that an offence not punishable with death or imprisonment for life, committed by a person under the age of 16 years, may be tried by a Chief Judicial Magistrate or any Court specially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders. Section 27 of the Code of 1973 is practically the same as section 29B of the Code of 1898 was,—*Vide* section 65 of the Act, section 29B of the Code of 1898 ceased to apply in the state of Haryana, meaning thereby that all the offences could be tried by the Children's Court. As section 27 of the Code of 1973 is practically the same as section 29B of the Code of 1898 was, so it was argued by the counsel appearing for the respondents that the present case was triable by the Children's Court and, therefore, it was necessary to find out as if respondent No. 2 was a child or not in terms of the Act.

(8) The learned counsel for the petitioner, on the other hand has contended that the subject-matter falls within entry 2 of List III-Concurrent List in Schedule VII to the Constitution of India (Criminal Procedure including all matters included in the Criminal Procedure Code at the commencement of this Constitution) as also within entry 1 of the same list; that the Act is a law made by the Legislature of Haryana State while the Code of 1973, which came into force on 1st of April, 1974, is a law made by the Parliament, that according to section 27 of the Code of 1973 an offence punishable with death or imprisonment for life cannot be tried by a Children's Court while according to the Haryana Children Act, 1974, all offences can be tried by the said Court and that as there

is a direct conflict between the law made by the State and the law made by the Parliament, therefore, the former will be void. Thus according to the counsel for the petitioner, the case in hand shall have to be tried by the Court of Session.

(9) The subject-matter in hand falls in List III, Concurrent List in Schedule VII of the Constitution of India. In respect of the matter in hand, there is a direct conflict between the provisions contained in the Code of 1973 and in the Act and while proceeding in a case of a child, one out of the two has to be disobeyed. Thus the law made by Haryana State is repugnant to the law made by the Parliament. In such an event, article 254 of the Constitution of India comes to the help of the Court. Clause 2 of article 254 of the Constitution of India reads as under :

“254. (1) * * * * *

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.”

Now it is to be seen as to which out of the two laws, one made by the State and the other by Parliament, is an earlier one. The Code of 1973 came into force on 1st of April, 1974. It has specifically been provided in section 1(3) of the Code of 1973 that it shall come into force on the 1st day of April, 1974. Under section 5 of the General Clauses Act, 1897, where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the President of India. It means that where it is specifically provided that the Central Act will come into force on such and such

Parveen Kumar v. State of Punjab (Harbans Lal, J.)

date, that date will be considered as the date of its enforcement. Thus there is no dispute that the Code of 1973 came into force on 1st of April, 1974. The Haryana Children Act, 1974, was to come into force on such a date as the State Government by notification had to appoint. The Haryana Children Act, 1974, came into force in the whole of the State of Haryana on the 1st day of March, 1974,—*vide* notification No. SO 21/HA/74/S.1/74, dated February 27, 1974. Under sub-clause (1) of Article 254, the law made by the Parliament subject to the provisions of clause (2) shall prevail. Since the Code of 1973 passed by the Parliament came into force after the Haryana Children Act came into force, it will prevail and the law made by the State shall be void and clause (2) of Article 254 of the Constitution of India will not be available to save it. Harbans Lal, J., while deciding *State of Haryana v. Ishwar*, (*supra*) was not required to consider the effect of Article 254 of the Constitution of India on the two enactments and, therefore, any view taken in this petition will not be contrary to the view taken by the Hon'ble Judge.

(10) In view of the aforesaid finding, Rohtash respondent No. 2, who is being prosecuted for the offence punishable with death or imprisonment for life, shall have to be tried by the Court of Session under the provisions of Code of 1973 and not under the provisions of the Act. Consequently this petition is accepted and the order passed by the learned Sessions Judge, copy annexure P. 1 is set aside and the learned Sessions Judge is directed to conclude the trial of the case as early as possible.

N.K.S.

FULL BENCH

Before S. S. Sandhawalia C.J., Harbans Lal and C. S. Tiwana, JJ.

PARVEEN KUMAR,—Appellant.

versus

STATE OF PUNJAB,—Respondent.

Criminal Appeal No. 878 of 1978

Murder Reference No. 9 of 1978.

January 23, 1979.

Indian Penal Code (XLV of 1860)—Section 303—Scope of—Sentence of imprisonment for life awarded—Appeal by the convict