Bhagirathi And Ors. vs The State Through Smt. Raziya on 12 October, 1954

Equivalent citations: AIR1955ALL113, AIR 1955 ALLAHABAD 113

JUDGMENT

Malik, C.J.

1. I have had the benefit of reading the judgment of my brother Desai. I agree with him that the Panchayati Adalat is not bound by the provisions of the Criminal P. C. and if for the three offences it did not pass separate sentences, it cannot be said that the sentence is illegal provided the sentence passed by it is within its competence.

2. As regards the second contention that the bench was not constituted in accordance with the provisions of Section 49 (2), Panchayat Raj Act, two points were raised before us: firstly, that the decision was given by as many as seven panches and, secondly, that there was only one panch from village Hajiganj to which the complainant and the accused belonged while there should have been two.

3. As regards the first point, we gave the appellant an opportunity to establish that the bench consisted of more than five panches or that more than five panches had taken part in the proceedings or pronounced, the judgment. Learned counsel admitted that he had no instructions on the point and was not able to substantiate the same. The affidavit in support of the allegation has not been properly sworn and cannot, therefore, be relied upon.

4. Coming to the second point, Sub-section (2) of Section 49, U. P. Panchayat Raj Act (26 of 1947) is as follows:

> "Every such Bench shall includes one Panch who resides in the area of the Gaon Sabha in which the plaintiff of a suit or proceeding or the complainant of a case resides and likewise one Panch residing in the area of the Gaon Sabha in which the defendant or the accused resides and three Panches residing in the area of the Gaon Sabha in which neither party resides; ....."

The Sub-section clearly provides for a case where the complainant is a resident within the area of one Gaon Sabha and the accused is a resident within the area of another Gaon Sabha and in such a case one Panch is to be from the area (sic) the Gaon Sabha of the complainant and one (sic)om the area of the Gaon Sabha of the accused (sic) three Panches were to be from the area of (sic) Gaon

Sabha in which neither party resides.

The legislature does not seem to have made any provision for a case where both the complainant as also the accused come from the same area of the Gaon Sabha.

5. The other point to be borne in mind is that in a case there may be more than one complainant and more than one accused who may all be residents of areas under different Gaon Sabhas. In such a case it will be difficult to appoint a bench in accordance with the provisions of Sub-section (2) of Section 49.

6. The third important factor to be borne in mind is that the quorum is of three Panches and none of the three Panches taking part in the trial and forming the quorum may be from the area of the Gaon Sabha of the accused or the complainant.

7. Under Sub-section (2) of Section 49 it will be possible only in a limited number of cases for the Sarpanch to constitute a Bench. It was suggested that whenever the Sarpancli finds any such difficulty he can always refer the matter to the prescribed authority which in such a case will not be bound by the provisions of Sub-section (2) of Section 49 in making the nomination.

8. Sub-section (4) of Section 49 provides that "Notwithstanding contained in this section the State Government may by rules prescribe the constitution of special Benches for determining any dispute arising between any parties or Gaon Sabhas of different circles or for any other purpose."

Rules 84 (a) and (b) are the rules framed in this connection. Rule 84 (b) is as follows:

> "If in a suit, case or proceeding the Sarpanch of a Panchayati Adalat or his near relation, employer, and employee or partner in the business of his, is a party or in which any of them, may be personally interested, or the Sarpanch finds any difficulty to form a bench according to Section 49 of the Act the Sarpanch, instead of forming a bench under the said section shall immediately after the institution of the suit, case or proceeding, as the case may be, submit the papers to the prescribed authority who shall constitute a bench for its trial, under Section 49 (2) or Sub-rule (a) of this rule as the case may be, ..."

This provision does not appear to me to be helpful as it refers us back to Sub-section (2) of Section 49, Pancayat Raj Act and the bench has to be constituted in accordance with the provisions of that Sub-section. Sub-rule (a) of Rule 84 is as follows: "(1) 'Constitution of a special bench':

> For the purpose of trial or decision of any suit, case or proceeding parties of which are residents of different circles or different districts or are residents of places governed by the Act, the prescribed authority having jurisdiction over the Panchayat Adalat in which a suit or case or proceeding is instituted or transferred for disposal shall constitute a special bench consisting of Panches of the said Panchayati Adalat and if convenient and possible may include a Panch of the other circle and shall

appoint one of them as Chairman of the bench of the unless the Sarpanch is a member of it. The bench shall hold its sittings at a place to be fixed by the prescribed authority and procedure shall, in other respects, be governed by rules framed for the guidance of Adalat.

2. The Surpanch shall prepare a list of names of all the panches in alphabetical order and constitute a bench of five panches serially turn by turn from it for the trial of the case, suit or proceeding:

Provided that the Surpanch shall exclude from a bench, after recording his reasons in writing, any panch, if he does not fulfil the provisions of Section 49 or rule made in that behalf or if any party has any reasonable objection against him:

Provided further that so far as possible the bench shall be constituted in the presence of both the parties and the statement to the effect that they have no grievances against the panches of the bench shall be taken in writing."

Clause (1) of Sub-rule (a) of Rule 84 gives the power for constitution of a special bench where the parties are residents:

(i) of different circles, or (ii) of different districts, or (iii) of places governed by the Act and read as a whole it seems to me to apply to a case where the dispute is between parties living not within the jurisdiction of the same Sarpanch and not to a case where merely by reason of the fact that there are more than one accused or more than one complainant living in areas in the same circle under different Gaon Sabhas that difficulty has arisen.

9. Sub-rule (d) of Rule 84 gives a party a right to object to the Sarpanch regarding the personnel of a bench. The Sarpanch has to decide the objection and his decision is liable to correction in revision by the appellate prescribed authority.

10. After careful consideration, brother Agarwala and I took the view -- 'Mohar Singh v. State', AIR 1954 All 81 (A), that the provisions of Section 49 (2), U. P. Panchayat Raj Act, do not go to the root of the jurisdiction of the bench and that if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of Rule 84 (b), it is not open to them to raise that point in a Writ petition under Article 226 or 227 of the Constitution.

11. As regards the objection that the application was filed under Article 227 and not under Article 226 of the Constitution, if I were of the opinion that the Panchayati Adalat had not been properly constituted and had. therefore, no jurisdiction to convict the accused, it may have been possible to interfere even though proper relief may not have been asked. In this connection I may refer to the recent decision of the Supreme Court in -- 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (B), where their Lordships pointed out that Article 227 restored to the High Courts power of judicial superintendence which they had under Section 15. High Courts Act, 1861, and Section 107.

Government of India Act. Such power, their Lordships pointed out, had to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

In this connection I may refer to the judgment of my brother Sapru J. in -- 'Motilal v. State', AIR 1952 All 963 (C), where he pointed out that Articles 226 and 227 must be so interpreted that they do not overlap and that "while Article 226 concedes to this Court vast powers of what might be called judicial review, or control by the issue of writs, directions or orders, the main objective of Article 227 would, more broadly, seem to be to secure administrative supervision not easily exercisable by writs, directions or orders, over all Courts or tribunals (excepting Army tribunals) within its jurisdiction."

And further he said:

> "Articles 226 and 227 are thus supplementary to each other. The emphasis under Article 227 is on administrative control and the limited judicial powers contemplated by it are intended for and merely ancillary to such administrative control. Thus Articles 226 and 227 are not intended, as far as I can see, for identical situations."

Though, therefore, Article 227 can be said to be, as has been pointed out by their Lordships of the Supreme Court, not merely administrative superintendence, the power of superintendence conferred by Article 227 must be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

12. I agree that this application must be dismissed.

Mukerji, J.

13. I agree and have nothing to add.

Desai, J.

14. This is an application under Article 227 of the Constitution for setting aside conviction of the applicants by a panchayati adalat under Sections 323, 504 and 506, I. P. C. The applicants were prosecuted by the opposite party before the panchayati adalat for the three offences mentioned above. The Sarpanch constituted a Bench consisting of five panches to try the case. The applicants are residents of village Hajiganj and the opposite party also is a resident of the same village. Out of the five panches, only one panch, namely Shri Mewa Lal. belonged to village Hajiganj and the rest belonged to other villages. The Bench passed upon the applicants one sentence of fine to cover all the three offences of which they have been found guilty. They challenged their conviction through an application under Section 85. Panchayat Raj Act, presented before the Sub-divisional Magistrate.

It is not known what were the grounds taken by them in their application but the grounds that were pressed orally before the learned Sub-divisional Magistrate were (1) that the convirtion for the offences of Sections 504 and 506 was illegal when they were convicted under Section 323. I. P. C.

and (2) that if the opposite party had been attacked by all of them with lathis, she would not have escaped with only bruises. The learned Sub-divisional Magistrate not seeing any force in these grounds and not being satisfied that there had resulted any miscarriage of justice dismissed their application.

Thereupon they filed the present application. It is stated in the application that it was illegal for the panchayati adalat to pass one sentence for all the three offences and that the Bench was not constituted in accordance with the provisions of Section 49(2), Panchayat Raj Act, as it included only one panch from village Hajiganj instead of two. The case came up for hearing before our brother Ragnubar Dayal J., who was of the opinion that -- 'Brij Nanaan v. Emperor', AIR 1948 All 136 (D), required reconsideration and that the questions that arise in the present case arose in Misc. 2126 of 1951 which he had referred for decision to a larger Bench, and accordingly he referred this case also to a larger Bench.

15. The facts in -- 'Brij Nandan v. Emperor (D)' were that five men were prosecuted under Sections 147, 452 and 323 read with Section 149, I.P.C. and were convicted by a Magistrate, who did not specify the sections under which he convicted them, and passed a sentence of six months' imprisonment and a fine of Rs. 50/-. Our brother Harish Chandra held that the conviction and the sentence were illegal because the Magistrate ought to have specified the offences of which he convicted the applicants and ought to have given separate sentences for the diilerent offences.

He referred to Sections 367 and 537, Criminal P. C.; but the provisions of the Criminal P. C. do not govern proceedings before a panchayati adalat. A panchayati adalat is not at all bound by its provisions and its orders cannot be held to be illegal on the ground of any conflict with them. It might have been illegal under the Code to convict without specifying the sections or to pass one sentence for a number of offences, but it does not follow that it would be illegal for a panchayati adalat also to record a conviction without specifying the offences and to pass one sentence for all of them. Whether it is illegal or not would depend upon the provisions of the Panchayat Raj Act alone. None of its provisions makes it illegal for a panchayati adalat to record eonviction without specifying the offences or to inflict one sentence for a number of offences. The powers conferred upon a panchayati adalat are so wide that nothing that it does is illegal if it does not contravene any specific provision of the Panchayat Raj Act. Therefore it was not illegal for the panchayati adalat to pass one sentence upon the applicants without specifying the offences and it is not necessary for us to reconsider -- 'Brij Nandan v. Emperor', (D).

16. Section 49 (2), Panchayat Raj Act, undoubtedly requires a bench to consist of one panch residing in a Gaon Sabha in which the complainant resides, one panch residing in a Gaon Sabha in which the accused resides and three panches residing in Gaon Sabhas in which neither party resides. According to it, a Bench must consist of exactly five panches. It follows that if both the parties reside in the area of one Gaon Sabha, the bench must include two panches residing in that Gaon Sabha. If it includes only one, the remaining four would come from the areas of Gaon Sabhas in which neither party resided and that would be against the provisions of Section 49 (2). The opposite party is absent, taut the State, which is also impleaded as an opposite party, has not denied the allegation of the applicants that the Bench which tried them included only one panch from the Gaon Sabha of

Hajiganj and that the parties both reside in Hajiganj. The bench was, therefore, constituted against the provisions of Section 49 (2).

17. In -- 'Girja Prasad v. Zalim Singh', AIR 1953 All 340 (E), it was held by our brother Agarwala that Section 49 (2) does not require that if both the parties come from the same Gaon Sabha there should be two panches from that Gaon Sabha. I respectlully diner. In my opinion, the law in Section 49 (2) is clear and the above decision should be overruled. The question was discussed in 'AIR 1954 All 81 (A)', by the learned Chief Justice who does not appear to have accepted the view of Agarwala, J.

18. I now come to the question of the effect of non-compliance with this particular provision of Section 49 (2). I am of the opinion that the non-compliance causes a jurisdictional defect in the constitution of the bench and that the panches have no jurisdiction to try the case assigned to them. The law insists upon there being exactly five panches in every bench and upon those panches coming from particular Gaon Sabhas. If a bench must include a panch belonging to a particular Gaon Sabha but does not include him or includes more panches belonging to a Gaon Sabha than are required under Section 49 (2), the constitution of the whole bench becomes defective and the panches are devoid of any jurisdiction. If a person has no right at all under the provision to be a member of the bench it means that he has no jurisdiction whatsoever to try the case.

In the present instance, out of the four panches belonging to Gaon Sabhas other than of Hajiganj, one was not qualified to be a member of the bench, though it may not be known which one. In all four of the panches were qualified to be members and the fifth, on account of his disqualification should be treated as not a member. The law requires a bench of not more than, and not less than, five panches. Hence the bench, being of only four members, was not legally constituted and had no right to try the case. In other words it had no jurisdiction over the subject matter of the case.

I may mention here that the provision that a bench must include five panches is not inconsistent with the provision contained in Section 77A to the effect that if on any date a panch is absent on account of illness etc., the remaining panches may go on with the case provided that at least three of them including the chairman are present. One deals with the constitution of a bench and the other, with presence of its members during the trial of a case. What the two provisions considered together mean is that a bench must consist of five panches, that it is not essential for all of them to be present on every date of hearing and that if at least three panches, including the chairman, are present, they can try the case. The fact that three panches are allowed to try the case does not mean that there is no jurisdictional defect if a bench is constituted with only four or even three panches, or with five panches, one or more of whom possess no residential qualification to be members of it.

19. The analogy of a High Court having a number of Judges, any number of whom can form a bench to try any case, does not apply to a panchayati adalat. All Judges of a High Court are equally qualified to try any case, but all panches of a panchayati adalat are not equally qualified to try any case. The creation of a Bench of any Judges of a High Court to try any case is not in contravention of any statutory or constitutional provision; on the other hand the creation of a bench of five panches to try a case may contravene the provisions of Section 49. The Constitution vests the power in the High Court and not in its divisions but the Panchayat Raj Act does not vest the power in the

panchayati adalat and vests it only in a particular department or bench of it. An offence is triable by a panchayati adalat but not by all or any of its panches; it is triable only by particular five panches possessing certain qualifications and selected by the Sarpanch in a particular order. A list is prepared of all the panches of a panchayati adalat in alphabetical & the Sarpanch has to select five panches possessing the necessary residential qualifications serially turn by turn from it; see Rule 84 (2) of the Rules framed by Government under the Act. Only the panches selected by the Sarpanch can try a case; no other panch can try it.

20. If a court is not constituted in accordance with the law it has no jurisdiction to act as such. In -- 'Queen Empress v. Ganga Ram', 16 All 136 (FB) (F), a Full Bench of this Court was called upon to decide whether a Judge of this Court was appointed in accordance with the law and was competent to hear a case. It held that he was legally appointed but observed, though by way of obiter, at page 156, that if he were not legally appointed "all his judgments, decrees and orders in civil and criminal cases would have been ultra vires and illegal".

In -- "The Colonial Bank of Australasia v. Willan', (1874) 5 PC 417, at p. 442 (G), the Judicial Committee explained what is meant by "want of jurisdiction". It pointed out that there must be certain conditions upon which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends and that they may be founded "either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry".

This supports the view that illegal constitution of a tribunal is a jurisdictional defect. It is stated by Craies in his "Interpretation of Statutes", (1952) p. 246 that "when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin the conditions and qualifications annexed to the grant must be strictly complied with".

> "A Judge, who is prohibited from sitting by the plain directions of the law, cannot sit. & the consent that he shall sit gives no jurisdiction"; per Peckham, J. in -- 'MeClaughry v. Deming', (1902), 46 Law Ed 1049, at p. 1057 (H)".

If the quorum for a bench of Magistrates is fixed at three and only two Magistrates are present, the bench is not legally constituted; see --'Queen Empress v. Muthia', 16 Mad 410 (I). The reason is, as stated in -- 'Textile Mills Securities Corpn. v. Commr. of Internal Revenue', (1941) 86 Law Ed 249 (J), that a court consists of all the Judges appointed to it. A rule made under the Bar Councils Act, 1926, required that all the members of a tribunal must sign their findings. -- 'In re V., An Advocate Madras', AIR 1942 Mad 267 (SB) (K), a member of a tribunal died before the findings were written out and could be signed and it was held by a Special Bench of the Madras High Court that the tribunal ceased to be properly constituted on his death.

The Supreme Court dealt with a similar defect in a tribunal established under the Industrial Disputes Act in the -- 'United Commercial Bank Ltd. v. Their Workmen', AIR 1951 SC 230 (L). The tribunal was constituted with three members but one member ceased to be available to it and the Supreme Court decided that the remaining two members had no jurisdiction to function as tribunal. Kania, C. J. observed on page 237:

> "In our opinion, the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three members, if proceedings are conducted and discussions on several general issues took place in the presence of only two, followed by an award made by three, the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings."

Maxwell writes in his Interpretation of Statutes, 9th edition, paragraph 371:

> "An Act which empowered two or more Justices, or other persons, to do an act of a judicial, as distinguished from a ministerial, nature im-pliedly required that they should all be personally present and acting together in its performance."

21. Jurisdiction means "the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them"; -- 'State of Rhode Island v. Commonwealth of Massachusetts', (1838) 9 Law Ed 1233 (M); -- 'Sample v. Hager', (1866) 18 Law Ed 402 (N); 'Binderup v. Patho Exchange', (1923) 68 Law Ed 308 (O). Moody, J. described it in -- 'Venner v. Great Northern Rly. Co.', (1907) 52 Law Ed 666 (P), as "the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence".

According to Corpus Juris Securdum, Vol. 22, "Criminal Law", paragraph 107, jurisdiction as applied to criminal law means the power to enquire into the facts, to apply the law and to declare the punishment for an offence in a regular course of juridical proceeding or the right of administering justice through laws by the means which the law has provided for that purpose. Therefore if a bench of a panchayati adalat is not constituted in accordance with the law and therefore, cannot try the case to try which it is constituted, it is devoid of jurisdiction over it, whether the defect in the constitution arises out of there being not exactly five panches or out of there being five panches, one or more of whom are not Qualified to sit on the bench,

22. It is elementary that there can be no waiver of want of jurisdiction. If the jurisdiction of a court is a grant of authority to it by a legislature, it is beyond the scope of litigants to confer it. Territorial jurisdiction stands on a different footing; though defined by a legislation it relates to the convenience of litigants and as such is subject to their disposition. A personal privilege respecting the venue or place of a suit may be waived or lost by failure to assert it seasonably; see -- 'Neirbo Co. v. Bethlehem Ship Building Corpn.', (1939) 84 Law Ed 167 (Q), and -- 'Industrial Addition Association v. Commr. of Internal Revenue', (1944) 89 Law Ed 260 (R). In criminal matters parties cannot waive what, the law directs; see -- 'Park Gate Iron and Co. Ltd. v. Coates', (1870) 5 CFD 634 (S).

It is stated by Maxwell at page 392 that "In criminal matters, a person cannot waive what the law requires" and that "any statutory objection which goes to the jurisdiction does not admit of waiver", and at 391 that "When public policy requires the observance of the provision, it cannot be waived by an individual. Privatorum conventio juri publico non derogat".

It was pointed out in -- 'Patton v. U. S.', (1929) 74 Law Ed 854 (T), that one of the circumstances that gave rise to the ancient doctrine that an accused cannot waive anything was that he was not furnished counsel. Under the Panchayat Raj Act also an accused is not allowed the assistance of counsel; therefore it would not be proper to hold that he waives a defect in jurisdiction on account of his failure to object to it in time. An essential requisite of the doctrine of waiver is that the party knows of the irregularity. If he does not know of it he cannot be said to waive it. Waiver is always a question of fact and there can be no waiver without knowledge as observed in -- 'Pence v. Langdon', (1878) 25 Law Ed 420 (U), Though ignorance of law is no excuse, an accused in fact may not know that the bench constituted by the Sarpanch to try him is not constituted in accordance with the provisions of Section 49, Panchayat Raj Act and if on account of his ignorance does not object to the Bench trying him, it cannot be said that he waives the defect. A Pull Bench of the Patna High Court observed in -- 'Ramranvijai Prasad Singh v. Ram Kawal', AIR 1949 Pat 139 (FB) (V), that if a court has competence in respect of the person, the place and the character of the case, it may exercise jurisdiction, that if by reason of any limitation imposed by statute, a court is without jurisdiction to entertain any particular action, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court and that a different question arises when it is suggested that a court in the exercise of the jurisdiction, which it possesses, has not acted according to the mode prescribed by the statute. If such a question is raised it relates obviously not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner and the maxim 'consensus tollit errorem' applies. Maxwell writes at page 390 that:

> "The regulations concerning the procedure and practice of civil courts may in the same way be waived by those for whose protection they were intended."
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> "Matters upon which the jurisdiction of the court depends, since they do not refer to matters of procedure which are enacted for the benefit of the individual, cannot be waived"; see Crawford on Statutory Interpretation, paragraph 272.
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> W. Bowsted writing in Encyclopaedia of the Laws of England, Vol. 14, under article "Waiver" says that a statutory provision which is introduced, for general public purposes, and not for the benefit of a particular person only, cannot be waived. The provision in Section 49 (2) that a bench must include one panch who resides in the area of the Gaon Sabha in which the complainant resides and one panch residing in the area of the Gaon Sabha in which the accused resides, cannot be said to have been enacted for the purpose of any individual. If a bench includes only one panch residing in the area of the Gaon Sabha in which both the parties reside, it cannot be said that the provision that is infringed is one enacted for the benefit of any particular party only and that he can waive the irregularity. The two panches have to be of one Gaon Sabha but not of opposite factions in the village and it cannot be said that the legislature contemplated that when there are two panches residing in the common Gaon Sabha, one would side with or vote for the complainant or look after his interests and the other would side with or look after the interests of the accused.

> There is no assumption that the two panches would take opposite views of the case and balance each other. The law requires two panches from the common Gaon Sabha not with any such intention. They are as likely to be on one side as to be on opposite sides. Even if a bench Includes only one panch from the Gaon Sabha and he has given his opinion in favour of the accused, the accused can plead that the bench was illegally constituted because there was no second panch from the common Gaon Sabha. He can raise this objection even if, for all one knows, the second panch from the common Gaon Sabha, might have given his opinion against him. Section 49 was enacted with a view to reduce the discretion of the Sarpanch in the matter of constituting a bench as much as possible. It was only a fair provision that there should not be a preponderance of panches residing in a Gaon Sabha in which one of the parties resides; otherwise there would be a danger of judgment being subordinated to local prejudice.

23. Coming to the cases decided under the Panchayat Raj Act. I find some conflict in them. One of the earliest coses decided is -- 'Jiwa Ram v. Panchayati Adalat, Gursena', AIR 1952 All 510 (W). In that case an order was passed by only three panches and was. on that very ground, held to be "without jurisdiction" by our brothers Sapru and Agarwala. There was no detect in the constitution of the bench; it had five panches, presumarily of the required qualifications. Three of them passed the order in accordance with a rule framed by the State Government. The rule was held by our brothers to be ultra vires. The bench had jurisdiction and rightly proceeded to exercise it over the case; it was only in the course of the exercise of the jurisdiction that it committed the illegality. It is not known if any objection was raised to the order being passed by only three of the panches; probaoly it was not. Still our brothers held that the order was void for want of jurisdiction. A case in which the bench itself was not constituted in accordance with the law stands on a higher footing.

'Ram Prasad v. State', AIR 1952 All 843 (X), followed the decision in -- 'Jiwa Ram's Case (W)', In -- 'Musai Bhant v. Ganga Charan', AIR 1953 All 118 (Y) our brothers Sapru and Agarwala had to deal with a case in which the bench did not include a panch residing in the area of the Gaon Sabha in which the accused resided. The defect was held to affect the jurisdiction of the bench and its order was quashed on that ground. I notice that it was quashed in spite of the fact that the accused did not object to the constitution of the bench while the case was pending before the Panchayati Adalat. They took the objection for the first time, and that too not in very clear terms, in their application to the Sub-Divisional Magistrate under Section 85, Panchayat Raj Act. If they could have waived the illegality in the constitution of the bench, they could have done it only by not objecting to the illegality while the case was pending before the panchayati adalat. Whatever they did subsequently could not possibly affect the question of waiver. If they waived the illegality and could waive it, they could not have succeeded in the court of the Sub-divisional Magistrate at all. Under Section 49 (3) no panch can take part in any case to which he or any near relation is a party or in which he may be personally interested.

In 'AIR 1952 All 963 (C)', that provision was infringed and a panch who was personally interested in the case took part in trying it. Our brothers Sapru and Agarwala set aside the order of the panchayati adalat on that ground. Under Rule 84, Panchayat Act Rules, if it is not possible for a Sarpanch to

constitute a bench in accordance with the provisions of Section 49, a special bench is to be constituted by the Sub-divisional Magistrate. In -- 'Kameshwara Singh v. Bharat Koeri', AIR 1953 All 180 (Z), I quashed an order, passed by an ordinary bench when a Special Bench ought to have been constituted, as an order without jurisdiction. In -- 'Jodhye v. State', AIR 1952 All 788 (Z1), our brother Beg set aside an order passed by a panchayati adalat consisting of five panches constituting a bench and the Sarpanch as the sixth member.

In 'Harihar Tewari v. State', AIR 1952 All 489 (Z2) (Supra), a case again decided by our brothers Sapru and Agarwala it was contended that the bench did not include two panches residing in the Gaon Sabha in which the parties resided. Sapru, JJ. found that the contention was not substantiated. Agarwala J. held that even if there was only one panch from the common Gaon Sabha, the illegally could be, and was, waived ay the accused. I respectfully differ from his opinion that the provisions in Section 49 (2) do not refer to the capacity of a panch for being a member of a bench and have therefore, no effect upon his jurisdiction over the subject matter of the case. This case marks a departure from the previous decisions. If a panch does not possess the requisite residential qualification and cannot be appointed to a bench, it necessarily means that he has no jurisdiction to try the case and that a bench of which he is a, panch has likewise no jurisdiction to try the case. The residential qualification is one on which depends the right of a panch to be a member of a particular bench.

Further, Agarwala, J. observed at pp. 490-491 that the provision like the one under consideration which is intended solely for the benefit of one of the parties is not a provision which affects the existence of jurisdiction; it merely affects its exercise and can be waived. As I said previously, the provision under consideration is not in ended solely for the benefit of one party or the other. The legislature did not intend that the panch residing in the area of the Gaon Sabha in which the complainant resides should support him and that the other panch should support the accused. It would have been useless for the legislature to have two panches who would oppose each other; it would have been as good as not having either of them on the bench. Really the provision is based upon public policy.

Moreover, as the provision deals with the very constitution of a bench, it deals with the existence of jurisdiction of a bench and not with the exercise of jurisdiction. When an illegality is committed by a court, it must have been committed by assuming jurisdiction over the case, or later while exercising jurisdiction vested in it. If a Bench illegally constituted tries a case, it commits an illegality by the very act of assuming jurisdiction over it, and not while exercising jurisdiction vested in it. In other words, the illegality is a jurisdictional defect. The illegality of constituting the Bench is committed by the Sarpanch; the Bench is not responsible for it. Both it cannot derive jurisdiction from the Sarpanch, if he acts against the law, and cannot try the case just because the Sarpanch assigns the case to it. If still it proceeds to try it, it assumes juridiction not vested in it; and this illegality cannot be waived by either party.

In 'AIR 1953 All 340 (E)', Agarwala, J. held that Section 49 (2) does not contemplate a case in which both the parties reside in the area of one Gaon Sabha and that if they do it is enough if the bench includes one panch only residing in that area. Section 49 (2) applies in all circumstances. It is not

unusual or strange for both the parties to come from the area of one Gaon Sabha; as a matter of fact in a majority of cases they would come from the area of one Gaon Sabha. Our brother did not consider how a Sarpanch can comply with the requirement that a bench must have three panches, none of whom resides in the area of the Gaon Sabha in which either party resides, if it has only one panch residing in that area of the Gaon Sabha in which the parties reside. In an earlier case -- 'Kuleshwar v. State', Cri. Revn. No. 1322 of 1950 D/- 15-5-1952 (All) (Z3), our brother Brij Mohan Lall had held that a bench which does not include two panches residing in the area of the common Gaon Sabha is improperly constituted; that decision is not referred to by Agarwala, J.

In 'Mohar Singh v. State', (A), (Supra) it seems to have been accepted that the provision under consideration does require that a bench must include two panches residing in the area of the Gaon Sabha in which both the parties reside, but an infringement of it was held not to go to the root of the jurisdiction of the bench. In my opinion, that decision requires re-consideration in view of what I have said above. If there are more than one complainant residing in the area of more than one Gaon Sabha or more than one accused residing in the area of more than one Gaon Sabha, all that the provision requires is that there must be one punch from each of the areas. The provision does not require that there the panches residing in the areas of all Gaon Sabhas in which every complainant and every accused resides. Cases may arise in which the requirement that the remaining three panches must come from areas of the Gaon Sabhas in which neither party resides cannot be fulfilled; it may happen that there are several complainants or several accused and there is no Gaon Sabha, in the area of which one complainant or one accused does not reside. The legislature, however, has provided for such a contingency by authorising the State Government to prescribe rules for the constitution of special benches.

Accordingly the State Government have made Rule 84 (3) to the effect that if a Sarpanch finds any difficulty in forming a bench according to the provisions of Section 49, he should submit the papers to the prescribed authority who will constitute a special bench. The prescribed authority is empowered under Rule 84 (d) to constitute a bench either in accordance with the provisions of Section 49 (2) or in accordance with the provisions of Rule 84 (a). There are two different sets of circumstances in which a Sarpanch may find it difficult to form a bench and is empowered to refer the matter to the prescribed authority. One is when he or any of his relations etc., is a party and he feels embarrassed in forming a bench; in such a case a bench can be formed in accordance with the provisions of Section 49 (2) and the prescribed authority must form a bench according to them. The other set of circumstances is that the Sarpanch cannot form a bench in accordance with the provisions of Section 49 (2) and in such a case the prescribed authority is required to form a special bench under Rule 84 (a). When forming a special bench he is not guided by the provisions of Section 49 (2) at all; this is evident ffom the fact that the matter is referred to him just because it is not possible to comply with those provisions.

I may also refer to Rule 84 (d) which allows a party to a case who is "dissatisfied with the personnel of a bench constituted for its bearing" to make an application to the Sarpanch "stating the grounds of his dissatisfaction and requesting for the reconstitution of the bench" and empowers the Sarpanch to constitute a fresh bench "if the party concerned proves to the satisfaction of the Sarpanch that the inclusion of a particular panch of panches in the bench would be prejudicial to

fair trial".

Under these provisions, a party can object to the constitution of a bench only when he is dissatisfied with the personnel and apprehends miscarriage of justice. They do not permit him to object solely on the ground that the constitution is against the provisions of Section 49 (2). If a bench is constituted in contravention of those provisions, it cannot be said that either party would be dissatisfied with the personnel or that the non-compliance with the provisions would be prejudicial to fair trial. Even if the bench is not constituted in accordance with those provisions, it may do full justice in the case and its personnel may satisfy both the parties. Because it satisfies both the parties, its constitution is not-justified and it cannot assume jurisdiction over the case. There is no provision in the Act or in the Rules giving a right to a party to object to the constitution of a bench only on the ground that it is against the provisions of Section 49 (2). Therefore, if a party fails to object to the constitution seasonably, it cannot be said to have failed to have recourse to a remedy prescribed by the law and thereby to have been estopped from objecting to in a subsequent proceeding.

24. In the result, I find that the bench which tried the applicants was illegally constituted and had no jurisdiction to try them and that the defect in the jurisdiction could not be, and was not, waived by the applicants. The order of the panchayati adalat convicting them was void for want of jurisdiction and deserved to be set aside.

25. A panchayati adalat is a court subordinate to a High Court and amenable to its powers of superintendence. These powers include power to interfere with a judicial order, though only on the ground that it is in excess of jurisdiction, or passed without jurisdiction or involves refusal to exercise jurisdiction which vests in a subordinate court. Prior to the enforcement of the Constitution, this High Court had no power to issue writs of certiorari, mandamus and prohibition. There was, therefore, no occasion then for considering whether the powers of superintendence should be exercised through such writs or might be exercised in some other manner.

Now, the Court has the power to issue such writs and the question arises whether the powers of superintendence should be exercised through the issue of such writs or by passing a simple order cancelling or revising the order passed by the subordinate court or tribunal. The Queen's Bench of England exercises its superintending jurisdiction over subordinate courts and tribunals through the issue of the writs of certiorari, mandamus and prohibition; see -- 'Shiva Nathaji v. Joma Kashinath', 7 Bom 341 (FB) (Z4); -- 'Ryots of Garabandho v. Zamindar of Parlakimedi', AIR 1942 PC 164 (Z5); 'Province of Bombay v. K. S. Advani', AIR 1950 SC 222 at pp. 224, 225 (Z6). The Law of Extraordinary Legal Remedies by Ferris, 1926, p. 255, Short & Mellors' Practice of the Crown Office, 1890, p. 19, -- 'Ex parte Bradely', (1868) 7 Wall, 364 (Z7), and Schwartz's Law and the Executive in Britain, 1949, p. 156. Therefore, the powers of superintendence conferred upon all High Courts by Article 227 of the Constitution should be exercised through any of the writs of certiorari, mandamus and prohibition and not otherwise. If the remedy of certiorari etc., is not open to a person aggrieved by an order of inferior court or tribunal, it would mean that a High Court has no power to interfere with it; Article 227 does not confer any other power upon it and it cannot interfere with the order even though no certiorari, mandamus or prohibition can lie against it.

26. In 'AIR 1954 SC 215 (B)', the Supreme Court laid down that Article 227 confers not only administrative but also judicial superintendence over subordinate courts and tribunals. In that case the Judicial Commissioner of Himachal Pradesh on an application under Articles 226 and 227 both set aside an order of a Rent Controller on the ground that it was arbitrary and, therefore, without jurisdiction. Evidently the question whether the powers of superintendence are to be exercised only through an appropriate writ or can be exercised even when the remedy of a writ is not open to the aggrieved party or can be exercised without the issue cf an appropriate writ did not arise before, and was not decided by, the Supreme Court. But the Supreme Court did not hold that even when a writ of certiorari etc., can lie, an aggrieved party can invoke the powers of superintendence of Article 227 and not those of Article 226.

It seems to me that the existence of a remedy through an appropriate writ bars an aggrieved party's invoking powers of superintendence of the High Court under Article 227; this necessarily follows from the propositions, which are beyond controversy now, that the superintending jurisdiction exists to correct only such errors as can be corrected through a writ of certiorari etc., and that the superintending jurisdiction is exercised through the issue of one of such writs. If a party is aggrieved by an order of a subordinate court or tribunal, against which he has no statutory remedy, he must apply for an appropriate writ or he would have no remedy from a High Court. If under the superintending jurisdiction a High Court can issue an order or direction, it can only be in co-operation with, or ancillary to, a writ of certiorari, mandamus or prohibition. Only to this extent can a High Court in exercise of its superintending jurisdiction issue an order or direction which is not of the nature of a writ of certiorari etc. The order of the panchayati adalat was passed without jurisdiction and could be quashed by a writ of certiorari; therefore, the applicants' remedy was to apply for a writ of certiorari and not under Article 227 of the Constitution. For this reason I would dismiss the application.

BY THE COURT.

27. The application is dismissed. Having regard to the facts of the case, we make no order about the costs.