M. Karunanidhi Vs. the Union of India

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Court : Chennai

Decided On : May-10-1977

Reported in : AIR1977Mad310; (1977)1MLJ182

Judge : P. Govindan Nair, C.J. and ;Ramaprasada Rao, ;Ismail, ;Koshal and ;Ramanujam, JJ.

Acts : Criminal Law (Amendment) Act, 1952 - Sections 6; Code of Criminal Procedure (CrPC) , 1973 - Sections 197, 199(2), 239 and 482; Indian Penal Code (IPC), 1860 - Sections 21, 109, 120-B, 161, 420 and 468; Prevention of Corruption Act, 1947 - Sections 5(1) and 5(2); Constitution of India - Articles 14, 163 to 167, 254, 254(1), 254(2) and 311; Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 - Sections 2, 3, 3(3) and 29

Appeal No. : Criminal Revn. Case No. 50 of 1977, Cri. R.P. No. 49 of 1977 and Cri. M.P. 429 of 1977 against order

Appellant : M. Karunanidhi

Respondent : The Union of India

Judgement :

1. Thiru M. Karunanidhi, former Chief Minister of Tamil Nadu, is the petitioner in the criminal revision case as well as in the criminal miscellaneous petition. The revision is directed against the order of the Special Judge appointed under S. 6 of the Criminal Law Amendment Act, 1952, disposing of Cri. M. P. No. 2384 of 1976 in C. C. No. 27 of 1976. The prayer in Cri. M. P. No. 2384 of 1976 was to discharge the petitioner under S. 239 of the Cri. P. C., 1973. By the order sought to be revised the prayer was refused. Cri. M. P. No. 429 of 1977 purports to be under S. 482 of the Cri. P. C., 1973, and the prayer therein is that the proceedings of the Special Judge in C. C. No. 27 of 1976 on his file be quashed.

2. The arguments advanced in the revision as well as in the criminal miscellaneous petition were the same and the revision case and the criminal miscellaneous petition are therefore being disposed of by this common judgment.

3. The Acts with which we are concerned are the I.P.C., the Code of Criminal Procedure, 1973, the Prevention of Corruption Act, 1947, the Criminal Law (Amendment) Act, 1952, and the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973. We shall refer to these enactments hereafter as the Penal Code, the Procedure Code, the Corruption Act, the Criminal Law (Amendment) Act, and the State Act and to the first four compendiously as the Central Laws.

4. The main points urged by counsel on behalf of the petitioner were: (i) The State Act contained provisions repugnant to the Central Laws, the Penal Code, the Procedure Code and the Corruption Act, and in view of Art. 254(2) of the Constitution, the State Act alone could be applied and investigated for offences thereunder can only be done under the State Act. The investigation made under the Procedure Code, which led to the first information report, and the sanction under S. 197 of the Procedure Code as well as the criminal complaint before the Special Judge are therefore without the authority of law. (ii) Even assuming that the Procedure Code and the Corruption Act were available, no action could be taken against the petitioner for most of the offences under the sections under which he had been charged, because he is not a public servant.

5. During the course of the arguments, which ranged over a very wide filed, the interpretation to be placed on S. 29 of the State Act, as it stood before and after it was amended in 1974 was dealt with. It was suggested that, if Section 29 as amended is interpreted to mean that the provision would enable action being taken for offences, falling under S. 3 of the State Act under the Central Laws, S. 29 itself would be invalid as it would be against the provisions of Art. 254(2) of the Constitution. Another argument urged in this connection was that S. 29 of the State Act having been enacted at a time when Art. 14 of the constitution had not been suspended consequent on the Emergency, the section must be interpreted as not authorising actions being taken under the State Act or the Central laws indiscriminately. Only such an interpretation would make the section conform to the requirements of Art. 14 and every law made must be presumed to be made subject to Constitutional provisions and an interpretation which would violate any provision of the Constitution should not be placed on the section. It was further contended that the suspension of Art. 14 of the Constitution consequent on the declaration of Emergency was only with respect to what was termed as "emergency Laws' and that the suspension would not, therefore, apply to the State Act, as it is not an emergency Law, but one passed long before the emergency was declared and hence, if S. 29 of the State Act permitted one or the other of the procedure, one under the State Act and the other under the Central laws, the State Act would be discriminatory and violative of Art. 14 of the Constitution and hence ultra vires the Constitution.

6. We shall now refer to the salient features of the State Act. The preamble to the Act states that it is to provide for the appointment and functions of certain authorities for the investigation and inquiry into allegations of 'criminal misconduct' against public men in the State of Tamil Nadu and for matters connected therewith. 'Public man' is defined in S. 2(c) of the Act, and the Chief Minister is a public man and chief Minister is specifically mentioned in S. 2(c)(i) of the Act. 'Public servant' has the same meaning as in S. 21 of the Penal Code. 'Criminal misconduct' is defined in S. 3, which we shall extract in full:

3. Definition of criminal misconduct:--Whoever being a public man--

(1) accepts or obtains from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering any service or disservice to any person, with the Government or the Legislature of the State or with any local authority, corporation or Government company referred to in S. 21 of the Indian Penal Code (Central Act 45 of 1860) or with any public servant as such, or.

(2) accepts or obtains from any person for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant, to show favour or disfavour to any person or to render any service or disservice to any person with the Government or the legislature of the State, or with any local authority, corporation or government company referred to in S. 21 of the Indian Penal Code (Central Act 45 of 1860) or with any public servant as such, or

(3) by corrupt or illegal means or by otherwise abusing his position as a public man obtains for himself or for any other person any valuable thing or pecuniary advance,

is said to commit criminal misconduct.

Explanation: (a) The word 'gratification' is not restricted to pecuniary gratifications or to gratifications estimable in money.

(b) The words 'legal remuneration' are not restricted to remuneration which a public man can lawfully demand, but include all remuneration which is lawfully permissible.

(c) A person who received a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done comes within the expression 'a motive or reward for doing'.

7. Section 4 contemplates the appointment of Commissioner of Inquiries and Additional Commissioner of Inquiries by the Government. Such appointment shall be on the recommendation of the Chief Justice of the High Court and shall be by notification. There will be only one Commissioner of Inquiries, but one or more persons may be appointed as Additional Commissioner of Inquiries. the Commissioner shall be a person who is, or who is qualified for appointment as, or who has been a Judge of a High Court, and the Additional Commissioner shall be a person who is, or who is qualified for appointment as, or who has been a District Judge. A person appointed as Commissioner or Additional Commissioner shall hold office for a term of three years from the date on which he enters upon his office. On ceasing to hold the office, the Commissioner and the Additional Commissioner shall be ineligible for any further employment whether as Commissioner or Additional Commissioner or in any other capacity under the Government, for any employment under any local authority, corporation, company or society (whether private or public). The salary payable to the Commissioner and the Additional Commissioner will be respectively RS. 4,000 and Rs. 3,000 and the allowance and pension payable to and other conditions of service of the Commissioner or Additional Commissioner shall be the same as admissible to a Judge of a High Court in the case of the Commissioner and to a District Judge in the case of an Additional Commissioner. A Commissioner or Additional Commissioner can be removed from his office by the Government only on the grounds of misbehaviour and on no other ground, and no action can be taken for that purpose unless there is a specific allegation alleging misbehaviour on their part. This is, of course, subject to the provisions of Art. 311 of the Constitution. When allegations as stated above are made, they shall be enquired into by a Special Tribunal consisting of three Judges of the High Court nominated from time to time by the Chief Justice in that behalf, and the Special Tribunal shall be obliged to give a finding whether or not the allegations have been substantiated.

8. When allegations of criminal misconduct are made against a public man, investigation by the Commissioner in the first instance, must be to find out whether there is a prima facie case against the public man. If the investigation does not establish a prima facie case, the Commissioner or Additional Commissioner is obliged to dismiss the compliant. If a prima facie case is established, there shall be a detailed investigation. If, during such detailed investigation it is made out that the allegations are false, frivolous or vexatious, the Commissioner may make an order for the payment to the public man by the compliant damages by way of compensation. Further, the Commissioner can refuse to investigate false or frivolous complaints and every person who makes a false, frivolous or vexatious compliant against a public man shall be liable, on conviction, to imprisonment for a term which may extend to three years, and shall also be liable to fine. After the final investigation, the Commissioner or the Additional Commissioner, as the case may be, is to prepare a report stating whether it is expedient in the interests of justice that the public man against whom criminal misconduct has been alleged should be prosecuted for an offence under S. 15, or that the allegation has not been substantiated and therefore, recording a finding to that effect, stating his reasons therefor. If the Commissioner or the Additional Commissioner comes to the conclusion that it is expedient in the interests of justice that the public man must be prosecuted, the Act says that the public man shall be prosecuted, and tried under S. 6 of the Criminal Law (Amendment) Act, and if the finding is that the allegation has not been substantiated, 'the matter shall be dropped'.

9. The punishment for criminal misconduct is imprisonment for a term which may extend to seven years and the public man is also liable to fine.

10. The Government may refer any allegation of criminal misconduct to the Commissioner or Additional Commissioner, when such allegation against any public man is or has been brought to the notice of the Government, if they are satisfied that it is necessary in the public interest that the allegation of criminal misconduct to the Commissioner or Additional Commissioner, when such allegation against any public man is or has been brought to the notice of the Government, if they are satisfied and it is necessary in the public interest that the allegation of criminal misconduct should be investigated under the Act (Section 25(1)(a)). Where a resolution is passed by the Legislative Assembly of the State that any allegation of criminal misconduct made by any person against a person (including the Chief Minister or any other Minister), who is or has been a member of the Legislative Assembly, shall be referred to the Commissioner, or where a resolution is passed by the Legislative Council of the State that any allegation of criminal misconduct made by any person against a person (including the Chief Minister or any other Minister), who is or has been a member of the Legislative Council, shall be referred to the Commissioner, the Government shall require the Commissioner, as the case may be, to investigate the allegation of criminal misconduct. (Section 25(1)(b) and (c)). The person who made the allegation of criminal misconduct, for the purpose of the section, shall be deemed to be the complainant.

11. We shall also extract S. 29 of the Act as it stood before it was amended by Tamil Nadu Act 16 of 1974 and as it now stands after the amendment effected by Tamil Nadu Act 16 of 1974:

Before the amendment:

Section 29: "The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom, usage or contract or decree or order of a Court or other authority."

After the amendment:

Section 29: "The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public man from any proceeding by way of investigation or otherwise which might, apart from this Act, be instituted against him."

12. C.C. No. 27 of 1976 before the Special Judge arose in these circumstances. On the 15th of June, 1976, the Chief Secretary to the Government of Tamil Nadu addressed a communication to the Deputy Inspector General of Police, Central Bureau of Investigation, which concluded by stating that

"since the State Government have reasons to believe that the persons who were responsible for the above decisions abused their official position and acted mala fide with a view to cause the pecuniary advantage to the dealers concerned, the State Government would be grateful if the Central Bureau of Investigation could make a detailed investigation into the matter and let us know the results."

The Deputy Inspector General of Police, Central Bureau of Investigation, endorsed on the communication from the Chief Secretary:

"As this prima facie discloses cognisable offences under the P.C. Act and related sections of I.P.C., S.P. II Shri Ratna Rao may register a case, investigate and take action according to law." And the S.P. recorded:

"As the complaint disclosed commission of an offence under S. 5(2) read with S. 5(1)(d) of the Prevention of Corruption Act (Act II of 1947) by officials of the Food Department, Government of Tamil Nadu, Madras this F.I.R. is registered."

An investigation followed the Criminal Compliant No. 27 of 1976 was initiated. A charge-sheet has also been filed and the charge related to offences under Section 120-B read with S. 161, Penal Code, S. 5(2) of the Corruption Act, Ss. 420 and 468, Penal Code, S. 5(3)(a) of the Corruption Act, S. 5(2) read with S. 5(1)(d) of the Corruption Act, S. 420 of the Penal Code, S. 109 read with S. 468, Penal Code and S. 468, Penal Code.

13. In support of the first contention formulated in paragraph 4 above, counsel referred in detail to the various sections of the State Act, the Corruption Act and the Penal Code and prepared a statement comparing S. 3(1) of the State Act with S. 161 of the Penal Code and S. 3(3) of the State Act with S. 5(1)(d) of the Corruption Act. This statement is appended to this judgment for ready reference. With the assistance of that statement it was urged that S. 3(1) of the State Act was in pari materia with S. 161 of the Penal Code and S. 3(3) of the State Act was similar to S. 5(1)(d) Corruption Act. In so far as the procedure prescribed for investigation under the State Act is materially different from the investigation contemplated by the Procedure Code and the Corruption Act, which would be the procedure to be followed in the case of offences falling exclusively under the Penal Code and the Corruption Act. It was urged that the State Act contained irreconcilably inconsistent provisions relating to

investigation of the offences under S. 3(1) of the State Act committed by public men, that such irreconcilably inconsistent provisions in the State Act are repugnant to the provisions of the Central Laws and hence Art. 254(2) of the Constitution was attracted and that the State Act must, therefore, prevail. Though after investigation under State Act, if a prosecution is decided upon, the prosecution must be before the Special Judge in view of S. 19 of the State Act read with S. 6 of the Criminal Law (Amendment) Act and the procedure for trial would be as provided by the Procedure Code, the provisions for investigation under the State Act are special provisions containing special safeguards in favour of public men, which would include a Chief Minister, and these special provisions which confer special protection to the public cannot be denied by applying the Central Laws. This in substance was the argument of the counsel and it proceeded on the basis that some at least of the offences under the State Act are the same as those under the Corruption Act and the Penal Code, which, as we said, was sought to be made out by a comparison of the corresponding sections which are set out in the annexure. While dealing with this aspect, the following argument were advanced. The tests to be applied to find out whether the provisions of the State law are repugnant to the provisions in a Central law, for the purpose of Art. 254(2) of the Constitution, it was suggested, are different from the tests that are to be applied for the purpose of deciding the question whether there is an implied repeal of an earlier law by a later legislative enactment resulting from irreconcilable inconsistency. It was urged that the repugnancy contemplated by Art. 254(2), is a repugnancy between a State law and a Central law; whereas in ordinary cases of repugnancy, which may result in implied repeal, the question would have arisen between two laws passed in succession by the same Legislature. So it was contended that the tests of "occupied field" and "complete code" are available for finding out whether a State law is repugnant to a law of Parliament for the purpose of Art. 254(2), whereas those tests may not be applicable for deciding the question of implied repeal, when the question of a later law or statute passed by the same Legislature overriding an earlier statute arose. We see no justification for laying down different tests for determining repugnancy; one for the purpose of Art, 254(2) and another for implied repeal by a later statute. The tests have often been stated and relied in without specifying which test should be applied in a given circumstance. The attempt must always be to find out whether the provisions in one law are so different from another that the two laws cannot co-exist because of the conflict. If the two laws occupy different areas, though in the same field, or are to apply for different periods, or deal with different subjects, no question of conflict can arise and, therefore, there will be no repugnancy. It will, therefore, be often necessary to find out first whether a field has been occupied by a legislation, be that of a paramount Legislature such as that of a Parliament in India or a Federal Legislature in other Constitutions such as that of Canada and Australia or an earliest law made by a State Legislature. If the earlier law or the law passed by what may be called the paramount Legislature, as the case may be, did not occupy the field and the later did not occupy the field and the later legislation or the one passed by the State Legislature did not relate to the same matter, subject or area, dealt with by the earlier law or the law of the paramount Legislature, no repugnancy would arise. But without enacting laws for every conceivable subject in the field, the paramount Legislature can evince an intention to occupy the entire field. In such case, a State Law cannot make any provision which would fall within the field, though there is no provision in the paramount law relating to the matter dealt with by the State law, for the paramount law, though silent on a matter falling within the field, must be taken to have intended that no provision is necessary for that matter and when the State Legislature steps in and makes a law for that matter, it impinges on the paramount law by acting against

the intention of the paramount Legislature. Such a result can follow when, without making an exhaustive code, i.e., without making provision for all conceivable and possible circumstances and situations, a law of the paramount Legislature provided a code and indicated clearly that its Act must cover the entire field. In such circumstances, any State legislation, which pertains to the matters that can fall within the field covered by the Act of the paramount Legislature, that legislation having evinced a clear intention to occupy the entire field, will necessarily clash with the paramount law and its provisions would become irreconcilably inconsistent and the provisions of the paramount law.

14. The Supreme Court, in dealing with inconsistencies arising from the provisions in a later enactment with those in an earlier enactment passed by the same Legislature (in that case by Parliament), observed in T. S. Baliah v. T. S. Rangachari :

"Before coming to the conclusion that there is a repeal by implication, the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together and the repeal of the express prior enactment must flow from necessary implication of the language of the late enactment."

15. We are not in these cases concerned with the questions arising from the clash between two enactments passed by the same Legislature. As we indicated, the test to the applied, even in such cases, will be irreconcilable inconsistency between the two enactments. Irreconcilable inconsistency can, as will be seen from the discussions that are to follow, arise, either from incompatibility between specific provisions in two enactments that of a Paramount Legislature and of a State Legislature, or because the Act of the Paramount Legislature was a complete code occupying the entire field of legislation though the paramount Legislature did not make provisions for all the matters that could be provided for within the field of legislation, but clearly indicated its intention to occupy the entire field, and the State Legislature made provisions in a State enactment for matters which would fall within the area of the Paramount Legislature, and thus provided a law for matters on which the Paramount Legislature evinced a clear intention not to have any law. These tests of occupying the entire field or of intention to occupy the entire field can arise even in the case of clashes between enactments of the same Legislature. We need not pursue the question of clash between the laws of the same Legislature further and need not express any opinion thereon, because that question does not arise here. We shall now proceed to discuss the question arising under Art. 254(2) of the Constitution. We shall at this stage extract the whole of Art. 254 of the Constitution.

4(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the concurrent List, then, subject to the provisions of Cl. (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy be void.

(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."

16. The general rule is that the law made by Parliament, or the existing law, shall prevail in the case of repugnancy between such law and the law made by the State Legislature, Parliament and the State being both competent to legislate. Not only is this so by virtue of Art. 254(1), but the State law shall, to the extent of the repugnancy, be void. This is subject to Cl. (2) of Art. 254, which is in the nature of an exception. Even in cases of repugnancy, if the law made by the Legislature of a State has been reserved for the consideration of the President and has received his assent, the State law shall prevail in that State. The actual wording of Art. 254(2) is that the law of the State Legislature must be with reference to one of the matters enumerated in the Concurrent List and that it contains 'any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter'. The Article as such does not contemplate the whole of the law made by Parliament being replaced by the State law, falling under Art. 254(2). All that it says is that any provision in the State Law repugnant to the provisions of an earlier law made by Parliament or an existing law with reference to a subject-matter enumerated in the Concurrent List, the State law shall prevail in that State. Normally therefore the Article will come into play more with reference to any specified provision in a State law prevailing over the corresponding provision in a Central law, when the former is repugnant to the latter, and when the conditions of Art. 254(2) are satisfied. But we do not think that it will be proper to confine the ambit of the Article merely to specific provisions of the State law prevailing over specific provisions of the Central law. The State law can be a complete Code or may occupy an entire filed by virtue of the specific provisions contained in that law or even y State Legislature evincing an intention to occupy the entire filed of the subject-matter. In such cases, an earlier law made by Parliament or an existing law will be displaced. Similar questions have arisen both in Australia and Canada. It will be useful to refer to some of the aspects which to refer to some of the aspects which had been dealt with at length by the Courts of Australia with reference to S. 109 of the Australia Constitution. The Parliament of a State in Australia retains any power which it had at the time of federation, unless that power by the Constitution is "exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State". (Section 107). These powers are enumerated in S. 51 of the Constitution and are called concurrent powers. The majority of the Legislative powers are neither exclusively vested in the Parliament of the Commonwealth nor withdrawn from the Parliaments of the States. There have been a number of cases arising from the situation where the Commonwealth and the State Laws on a particular subject happened to be inconsistent with each other. We may at this stage extract S. 109 of the Australian Constitution:

"109. When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, by invalid."

17. This section provides for what is stated in Art. 254(1) of the Constitution of India, but the principle applicable to find out whether one law will prevail over another for the purpose of Art. 254(1) and Art. 254(2) of the Constitution must be the same, and the important aspect is: are the laws inconsistent? In our Constitution also in matters

falling under Art 254(1), when there is such inconsistency, not only will the law made by Parliament prevail over the law made by the Legislature of the State to the extent of the repugnancy, but such law shall be void. The Constitution has used the word 'repugnancy' both in Art. 254(1) and Art. 254(2). We do not think that this expression has any meaning other than irreconcilable inconsistency that has been considered for the purpose of Section 109 of the Australian Constitution.

18. In earlier days the concept of inconsistency centered on the occurrence of direct conflict between laws, that is where there happened to be detailed conflicts between the provisions of the law made by a State and the law made by the Commonwealth. where there were such detailed provisions in the laws made by the State and the Commonwealth, the question of inconsistency would have to be decided with reference to the specific provisions in the two enactments, and the question has been to find out whether the two sets of provisions were irreconcilably inconsistent. But where the Commonwealth intends its Act to be a complete statement of law on a given subject, and a State intends its own Act also apply to that subject, there may be no detailed conflict because on some topics within the generally subject-matter the Commonwealth has not legislated, whereas the State has. Nonetheless there will be substantial inconsistency between the legislative intention of the Commonwealth and the legislative intention of the State. these are cases where irrespective of detailed inconsistency or incompatibility the Commonwealth intends its own Act to be the law. In such a case there may be no direct conflict between particular laws. The Commonwealth law might have said nothing about some situations because of a policy decision that they were best unregulated by a statute. If that by so, when a State statute regulates those situations such regulations will be in conflict with the intention of the Commonwealth Act. This result was explained by what is called 'covering the filed' test. When that test is satisfied, the entire State Legislation on the subject in question, and not merely that part of it which has directly clashed with the Commonwealth law, would be invalidated. We need not tarry any more, except to notice certain refinements in the concepts of obvious inconsistency. One of such tests was whether it was possible to obey both laws at the same time. This test, though useful, may not be a satisfactory test, and it was finally rejected in Clyde Engineering Co. Ltd. v. Cowburn, (1926) 37 CLR 466) in 1926. It may be possible to obey both laws and still there may be inconsistency and this can be illustrated with reference to R. v. Licensing Court of Brisbane, ex parte Daniell (1917) 28 CLR 23). With reference to the facts of the case, the critical question was whether voting on the local motion was compulsory. If it was, obedience to both State and Commonwealth law was incontestably impossible. If it was not, it was possible. This example illustrates the inadequacy of the obedience test for, even if voting was not compulsory, the conclusion that there was therefore no inconsistency between the State and Commonwealth laws was unsatisfactory.

19. The second refinement of the test of direct inconsistency is perhaps more productive of useful results. The judgments of Knox. C. J. and Gavan Duffy. J. (Clyde Engineering Co. Ltd. v. Cowburn, (1926) 37 CLR 466 rested it on this aspect. Their Lordships observed:

"Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other, even though the right be one which may be waived or abandoned without disobeying the statute which conferred it."

20. Collin Howard, writing on the Australian Federal Constitutional Law observed:

"There is no doubt that many cases of direct or obvious inconsistency can be explained on this ground. The difficulties occasioned by applying the obedience test to the local option vote in R. v. Licensing Court of Brisbane, ex parte Daniell ((1917) 28 CLR 23) are avoided. State law gave a right to vote which Commonwealth law took away. Equally in Clyde Engineering Co. Ltd. v. Cowburn ((1926) 37 CLR 466) itself State law gave a right to be paid a week's wages for 44 hours of work which Commonwealth law took away. In Hume v. Palmer ((1927) 38 CLR 116) it might be said that Commonwealth law imposed a liability to conviction and punishment which State law took away. In ex parte Mc Clean ((1932) 43 CLR 472) State law imposed a liability to punishment for breach of contract which Commonwealth law took away. In Colvin v. Bradley Bros. Ltd. (((1957) 68 CLR 151) Commonwealth law gave a right to employ women which State law took away. In Wenn v. Attorney General (Victoria) ((1966) 77 CLR 84) State law gave a right to preference in employment which Commonwealth law took away."

21. But the author proceeds to point out that even this explanation on the basis of rights is not all-embracing in respect of obvious inconsistencies. In view of the development of the 'covering the filed' approach to inconsistency, the development of a satisfactory criterion of obvious or direct inconsistency is probably not a matter of great import, when 'covering the filed' test can be satisfactorily applied.

22. The first clear enunciation of the principle of 'covering the filed' test of inconsistency is perhaps that of Isaacs, J. in Clyde Engineering Co. Ltd. v. Cowburn ((1926) 37 CLR 466) where be observed:

"But surely the vital question would be: was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect all to the first Act, because the second was intended entirely to exclude it.....

"If such a position as I have postulated be in fact established, the inconsistency is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions. Where that wholesale inconsistency does not occur, but the filed is partly open, then it is necessary to enquiry further and possibly to examine and contrast particular provisions. If one enactment makes or acts upon as lawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent. It is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is palpable inconsistency. In the present case there is inconsistency in both of the senses I have described."

23. We may also refer to a passage from the judgment of Dixon, J. in ex parte Mc Lean ((1932) 43 CLR 472):

"When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes and S. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse, Hume v. Palmer ((1927) 38 CLR 441). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject-matter and provide what the law upon it shall

be. If it appeared that the Federal Law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

(The emphasis is supplied by us).

24. It will be seen from paragraph 13 above that two contentions have been raised by counsel on this aspect of the case. The first related to obvious inconsistencies between the provisions in the State Act and the Central law. The second one was that the State law had provided a complete code in relation to offences under S. 3 of the State Act with reference to 'public men', that the procedure therein being different from that applied to offences under the Corruption Act and the Penal Code, namely, the procedure under the Criminal Procedure Code, the provision in the State Act was repugnant to the provision in the law made by Parliament and that the State Act, being a complete Code, the State law along could be applied for offences under the State law committed by public men.

25. If the two laws, one made by Parliament and the other made by the State, covered different areas, though in the same field, or different subject-matters, or if the offences were different, there is no scope for applying one or the other of the tests relied on by counsel for the petitioner. It was not contended or suggested that either the Penal Code or the Corruption Act was an exhaustive Code. It is evident from the provisions of the Penal Code that it does not purport to lay down all possible cases of offences nor are we able to gather any intention on the part of Parliament to make the Corruption Act a complete Code or to cover the entire filed, as we said, it was not even contended that either the Penal Code or the Corruption Act covered the entire field or evinced an intention to cover the entire field. The argument, on the other hand, was that the State Act, with reference to its subject-matter and offences defined in that Act committed by public men, is an exhaustive Code, and therefore is repugnant to the Corruption Act and the Penal Code and prevailed over those enactments because the procedure prescribed for investigation and the punishment provided by that Act are different from those for the offences under the Penal Code and the Corruption Act though some at least of the offences therein are the same as those under the State Act.

26. We have already in paragraph 6 to 10 analysed the provisions of the State Act. On a reading of the whole of that Act, it is evident that the Act is intended to provide a high-power machinery for investigation into allegations of 'criminal misconduct' made against public men as defined in the Act, by a member of the public. We have referred to the high status given to the Commissioner and the Additional Commissioner under the Act and the irremovability of those officers except on ground of misbehavior. On ceasing to hold office, they should not hold any other office, either under the Government or even under a private establishment and they are to be appointed on the recommendation of the Chief Justice. These are provisions which are intended, we consider, to provide a guarantee, in public interest, that any allegations of corruption against public men, which would include such high dignitaries as Chief Ministers, will

be carefully scrutinized by a very impartial person of high status and learning and experience and of the highest integrity. This provision is meant to ensure that highly placed officers or authorities (who are public men under the State Act) should not interfere with any investigation into allegations of misconduct by ordinary citizens of the land. A reference to Ss. 9, 11, 16 and 25 makes the position clear. A person making allegations of criminal misconduct to the Commissioner is called the complainant. The Commissioner can order compensatory costs in respect of false, frivolous or vexatious are false, frivolous or vexatious, the complainant can be punished (S. 16). Section 25 can now be noticed:

"25(1)(a) Where any allegation of criminal misconduct against any public men is or has been brought to the notice of the Government, the Government may, if they are satisfied that it is necessary in the public interest that the allegation of criminal misconduct should be investigated under this Act, or

(b) Where a resolution is passed by the Legislative Assembly of the State that any allegation of criminal misconduct made by any person against a person (including the Chief Minister or any other Minister) who is or has been a member of the Legislative Assembly shall be refereed to the Commissioner, the Government shall, or

(c) Where a resolution is passed by the Legislative Council of the State, that any allegation f criminal misconduct made by any person against a person (including the Chief Minister or any other Minister) who is or has been a member of the Legislative Council, shall be referred to Commissioner, the Government shall,

by order in writing, require the Commissioner or Additional Commissioner, as the case may be, to investigate the allegation of criminal misconduct, and notwithstanding anything contained in this Act, the Commissioner or Additional Commissioner shall comply with such order.

(2) For the purposes of this Act, the person who made the allegation of criminal misconduct, referred to in sub-s. (1) shall be deemed to be the complainant."

27. In order that this section may be attracted, there must be a person who makes the allegation of criminal misconduct. When, in pursuance of allegations, resolutions are passed by the legislative Assembly or the Legislative Council falling under Cls. (b) and (c) of S. 25(1), the Government have no option, but to refer such allegation for investigation to the Commissioner or Additional Commissioner, as the case may be. When allegations of misconduct come to the notice of the Government under Cl. (a) of S. 25(1), it has a discretion either to refer the matter to the Commissioner or not refer the matter to the Commissioner. Two aspects have to be emphasized at this stage. There must be a person making the allegation of criminal misconduct for the application of Cl. (a), (b) or (c) of S. 25(1), and such a person is liable to be proceeded against under S. 11 or S. 16 as the case may be, if the complaint turns out to be false, frivolous or vexatious. The other aspect is that the Government as such by itself is not obliged by S. 25(1)(a) to take any steps under the Act. When all the relevant provisions of the Act are read together, it appears to be clear that the provisions in the State Act are intended to be supplementary to or cumulative upon the Central laws. This aspect has been referred to by Dixon, J. in ex parte Mc Lean ((1932) 43 CLR 472) and the passage has already been extracted. As we indicated earlier, the provisions of the Act are meant to enable the general public to make allegations of misconduct with the assurance that those allegations would be seriously and

thoroughly investigated. It was argued that the high office in the post of Commissioner has been created for the protection of public men holding important positions such as that of a Chief Minister. We do not think that the Act is meant so much for the protection of persons holding high office, as to ensure a satisfactory procedure to enable the public to come forward, if they are dissatisfied with the functioning of high authorities, in that they were committing criminal misconduct. This is a salutary provision. It is intended in public interest, and for enabling any citizen to make allegations of criminal misconduct against any high authority if there are reasons for that and ensuring that such allegations would be investigated by high authority of unquestionable integrity. Such a right conferred on a citizen is capable of misuse. So incidentally the Act provides for restraining false, frivolous or vexatious complaints. this is a necessary provision of limitation which is meant as deterrent against frivolous complaints. When the flood-gates are opened enabling any one to make any allegation against any public man, high or low some restraining force is necessary to prevent the Commissioner being inundated by a flood of complaints. But this restraint is not the essence of the Act. As we see it, the Act is intended to give an assurance to the general public that there is a satisfactory machinery for looking into their complaints regarding the criminal misconduct committed by public men particularly of high status. To say that the Act is meant for the protection of the public men is to misunderstand the scope, effect and the purpose of the Act. Submissions made by counsel for the petitioner that the main purpose of the Act is the protection of the public men cannot be accepted. The provisions in the State Act are enabling provisions and are certainly supplementary to and cumulative upon the Central laws and from such provisions no inconsistency can be spelt out, because there can be different types of investigations under the Central Act and under the State Act. or because different penalties are provided by the State Act and the Central Laws.

28. We must again emphasise one aspect to which we have already adverted, at the risk of repetition. The provision in S. 25(1)(a) does not compel the Government to take action under the Act and refer the matter to the Commissioner. The contention, therefore, that the Government, if it came across facts or material, which indicated that a criminal misconduct had been committed by a public man, must proceed to refer the matter to the Commissioner for investigation, does not seem to be a sound one. The Government as such cannot be said to be a person: at any rate, there is nothing to indicate that the Government is obliged to act under S. 25(1)(a) of the State Act. For that matter, we do not see any restriction on the right of an individual person either to complain to the Commissioner under the State Act or file a complaint before the appropriate Court for offences under the State Act or under the Corruption Act or under the Penal Code. The State Act and the Central Law can co-exist and we are therefore not able to discern any inconsistency.

29. If this be the correct position, a minute examination of the offences under the Penal Code and the Corruption Act on the one hand, and the State Act on the other, is unnecessary.

30. Even if we analyse the ingredients of the offences created under S. 3 of the State Act and compare them with the offences under S. 5(1) of the Corruption Act and S. 161 of the Penal Code, it is clear that the offences are not the same. The status and character of the person who commits the offence is also an ingredient of the offence. The person committing an offence under S. 3 of the State Act must be a 'public man' as defined in that Act, while the person committing an offence under the Central

Laws must be a 'public servant' as defined in S. 21 of the Penal Code. The State Act makes a distinction between 'public servants', 'Government servants' and 'public men'. The expression 'public servant' defined in S. 21 of the Penal Code, which applies for the purpose of the Corruption Act as well, will not cover 'public men' as defined in the State Act. The status of the persons who would fall for consideration under the State Act and those who would fall under the Central Laws is therefore different. The offences created by the State Act on the one hand, and those under S. 5(1) of the Corruption Act and s. 161 of the Penal Code, on the other, are therefore not identical. In such circumstances, there can be no repugnancy. This is so, notwithstanding the fact that there may be common area, in that there may be public servants who are also public men. The existence or otherwise of repugnancy cannot be determined on the basis that in a particular case the person committing the offence may fall within the scope of the definition of the term 'public man' as contained in the State Act and also under the definition of the expression 'public servant' as contained in S. 21 of the Penal Code. Repugnancy has to be considered with reference to the ingredients of the offence created by the statutes and so long as there is no identity of the ingredients, the offences have to be held to be different and separate, and in such cases there can be no repugnancy. The offences under S. 3 of the State Act are, we consider, distinct and separate and are of different import from those under the Corruption Act and the Penal Code. If the offences are distinct and separate, there can be no question of the State Act displacing the Central laws. This principle has been accepted by the Supreme Court in Om Prakash v. State of U. P. . The

Court came to the conclusion that the offence under S. 5(1)(c) of the Corruption Act is different and separate from that under S. 409 of the Penal Code. This conclusion was reached by analysing the ingredients of the offences under S. 5(1)(c) of the Corruption Act and S. 409 of the Penal Code. After analysing the ingredients of the sections, it was held that the ingredients were not the same. The offences are different and there could therefore be no repugnancy or inconsistency by which the later enactment would override the provisions of any other enactment. No doubt, the question there related to two Acts of the Parliament and the problem that might arise under the provisions of a State law, different from the provisions of the law made earlier by Parliament did not arise in that case. But, as far as the principle of inconsistency is concerned, the same rule must apply in both the cases. We have already observed that repugnancy with reference to Art. 254(2) of the Constitution must be understood as irreconcilable inconsistency. If the decision in Om Prakash v. State of U. P. is

read with the decision in Dalpat Singh v. State of Rajasthan (, there can be no doubt that the offences under S. 3 of the State Act are distinct and separate and of a different import from those under the Central laws contained in the Corruption Act and the Penal Code. In analysing the ingredients of the offences dealt with in Dalpat Singh v. State of Rajasthan Hegde, J.,

referred to the status of the person committing the offence as a 'public servant' as being the first ingredient of the offence dealt with in that judgment. It is evident therefore that, if the offences under the State Act related to a person of a different status from 'public servants', dealt with by the Corruption Act and the Penal Code, there can be no question of repugnancy arising. A glance at the definition of the term 'public man' under the State Act and a comparison of that definition with the definition of the term 'public servant' under S. 21(12) of the Penal Code, which

definition would apply to the Corruption Act as well, clearly indicates that 'public man' is different from a 'public servant'. In fact, the State Act, as has already been mentioned, makes a distinction between 'public servants', 'public man' and 'Government servants'. For this reason also we are of the view that there can be no question of clash between the State Act and the Central laws and Art. 254(2) of the Constitution is not attracted.

31. In any view of the matter, therefore, we are unable to accept the contention that Art. 254(2) of the Constitution has been attracted so as to nullify the Central laws and make the State law alone applicable to offences under that law committed by public men.

32. During the course of the arguments reference was made to S. 29 of the State Act, as it stood before and after the amendment. We have already extracted this section, as it stood before and after its amendment. For the purpose of Art. 254(2) of the Constitution and by the vigour of that provision and for the Article to be attracted there must be a law made by the Legislature of a State which contains provisions repugnant to the provisions of an earlier law made by Parliament or an existing law. The State Legislature, without enacting laws which are repugnant to laws made by Parliament or an existing law, cannot be enacting merely a section such as S. 29 of the State Act provide that the State law alone would apply. So, S. 29 of the State Act, even as it stood before its amendment, cannot be assigned the meaning attributed to it by counsel for the petitioner that the section has the effect of superseding the Central laws. Section 29 as it stood can only mean that, when action is taken under the State Act, the procedure under the State Act will have to be followed, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom, usage or contract or decree or order of a Court or other authority. This only means that, if a person had made a complaint before the Commissioner, the Commissioner will have to investigate the matter as envisaged by the provisions in the State Act and not follow any other procedure. Act this view, it is unnecessary to consider the elaborate arguments advanced by counsel that S. 29 of the Act had not become law before it was sought to be amended or even the effect of the amendment. The wording of the section as it stood before the amendment did not make the State law exclusively applicable. If the amended provision is that which should be considered it is quite clear that by the wording of that section no intention at all is expressed by the State Legislature to override the Central laws.

33. In the light of the above discussions, we need not refer to the numerous decisions cited at the Bar on various other aspects. For the real question arising in the case, we do not consider them to be important or even of assistance.

34. In the view of that we have taken, there is no question of Art. 14 of the Constitution being violated. We think that the principle of the decision of the Supreme Court in T.S. Baliah v. T.S. Rangachari, Income-tax Officer will be applicable. With reference to S. 177 of the Penal Code and S. 52 of the Income-tax Act, 1922, and the choice of prosecution for submitting false statements in verification of income-tax returns, the Supreme Court observed that such a choice was not violative of Art. 14 of the Constitution on the ground that arbitrary or unguided discretion was vested in the Income-tax Officer. The Supreme Court said:

"The offence provided for in S. 52 of 1922 Act is an offence specially constituted and the prosecution for that offence requires the sanction of the Inspecting Assistant

Commissioner. No prosecution also can take place, if penalty has been imposed under S. 28 of the 1922 Act. The institution of a complaint under S. 52 of the 1922 Act is therefore circumscribed by sufficient safeguards and we do not consider that there is any violation of the guarantee under Art. 14 of the Constitution."

35. It is not as though any complaint made under the State Act should always result in a prosecution. In fact, the Commissioner or Additional Commissioner, as the case may be, will have to investigate, first preliminary, and afterwards finally and decide whether there is a case to go for prosecution. The scrutiny by the Commissioner or Additional Commissioner, as the case may be, is a closure scrutiny perhaps than the scrutiny by the Government for granting sanction for prosecution under S. 197 of the Cri. P. C., and we have already held that the offences under the State Act are separate and distinct offences. There can, therefore, be no question of discrimination under Art. 14 of the Constitution.

36. The only other point remaining to be considered in this case is whether the charges levelled against the petitioner are prima facie sustainable. It was contended that for charging any person under the provisions of the Penal Code and the Corruption Act, it has to be established that he is a 'public servant'. Thiru Venugopal, counsel for the petitioner, strenuously contended that the petitioner is not a public servant. He invited our attention to the definition in S. 21(12) of the Penal Code and argued at length that the first limb of the section dealing with a 'person in the service or pay' of the Government will not apply to a Chief Minister. It was his submission that by no stretch of imagination can it be said that the Chief Minister is a person 'in the service or pay' of the Government. The argument was that what is meant by the expression 'in the service or pay of the Government' is that there should be a relationship of master and servant. A number of decisions in support of this argument were cited before us and it was contended that it is too well-established a principle and beyond controversy that, if the master and servant relationship is not in existence, there could be no question of the person being a public servant. Analysing the ingredients which have to be established for position an employer-employee relationship, it was emphasised that there must be (i) choice or selection; (ii) control over the manner of discharge of duties; (iii) power to take disciplinary action, including dismissal; and (v) payment of remuneration. It was urged that in the matter of appointment of a Chief Minister, there was no question f choice or selection in the appointing authority, that there was no control over the manner of discharge of his duties and that there could be no disciplinary action or dismissal. It was also urged that between the elected representative and the Government no contractual relationship existed and that the rights and duties of the Chief Minister are those provided for under the Constitution (Arts. 163 to 167). Further, when reliance was placed by the Additional Solicitor-General appearing on behalf of the Central Government on the latter limb of S. 21(12)(a) of the Penal Code and it was urged that it was enough if a person performed any public duty on receipt of fees or commission, that the Chief Minister was certainly discharging public duties and that he was being paid fees or commission was different from remuneration and that the Chief Minister could not be said to be in receipt of any fees or commission.

37. We think that the matter is concluded by the decision of the Supreme Court in Dattatraya Narayan Patil v. State of Maharashtra . In paragraph 8 of the judgment in that case, it is observed as follows:--

"Under the orders of the Government, therefore, its officers including the Minister of

the District were to carry out certain public duties in connection with the reviewing of the working of Zilla Parishads and Panchayat Samitis which, of course, were constituted under the statutes. The Minister, a public servant, was to be the Chairman of the Committee. The Divisional Commissioner was to be the convener of the meeting. The Deputy Commissioner (Development) of the Division concerned was to act as the Secretary. They were all public servants. Is it possible to take the view that the Divisional Commissioner or the Deputy Commissioner, while performing the functions aforesaid under orders of the Government conveyed in the circular dated 5-8-1964 were performing any private functions and not public duty? Obviously it was a part of the public duty assigned to them by the Government. The duty assigned to a public servant by his master, be it under a statute or by an executive order, will assume the character of public duty, provided the duty assigned is not illegal or against public policy. Will it make any difference in the case of a Minister? In our judgment, not. The Minister is a public servant--not disputed. In accordance with the instructions issued by the Government he was to preside over the meetings of the advisory committee. He was doing so as a Minister and in execution and in discharge of his duty as such public servant."

38. Counsel for the petitioner, however, contended that the decision was based on a concession made by counsel. He emphasised the words "The Minister is a public servant--not disputed," in the portion of the judgment we have just now extracted, and we were reminded that a decision based on a concession cannot form a binding precedent. We need not consider this aspect, because, a reading of the passage from the decision of the Supreme Court which we have extracted above clearly shows that the Court had come to the conclusion that the person concerned was a public servant and that conclusion was not based on any concession by counsel. After having come to that conclusion, the Court also referred to the concession made by counsel. This decision of the Supreme Court is binding on us and we do not think that we should or are entitled to labour the point and come to a different conclusion.

39. A reference to S. 199(2) of the Code of Criminal Procedure also indicates that the Procedure Code has treated a Minister as a public servant, for reference is made to the President, Vice-President, Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, and then follow the words 'or any other public servant employed in connection with the affairs of the Union or of a State'. This necessarily implies that the persons mentioned earlier are public servants; and there can be no doubt that the Chief Minister is a person performing public duties. We, therefore, negative the contention that the Chief Minister is not a public servant.

40. In the result we dismiss these petition.

41. Petition dismissed.