INTERNATIONAL PERSPECTIVE – INHERENT POWERS GRANTED TO MAGISTRATES IN THE UNITED KINGDOM AND THE REPUBLIC OF SOUTH AFRICA

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Abstract

This article examines the international acceptance of according inherent powers to magistrates who take cognizance of an offence and / or those Magistrates to whom the case has been made over for inquiry or trial of an offence it further discusses the judicial systems in other countries wherein Magistrates have been accorded inherent powers in the interests of equity and justice. The purpose behind granting inherent powers to the Magistrates is to make the system more approachable and the provision of exercise of inherent powers more effective. As the study focuses on the international field it focuses on the experiences of Magistrates at South Africa and United Kingdom, in order to relate the experience, the author has also drawn upon the Indian provisions. An analysis of the laws in other countries goes on to highlight how such powers in the hands of the Magistrates is not only a luxury available to the common man or a proviso to ease the process, but rather a matter of right to have an unjust decision turned to ensure that the ends of justice have been met. By making such a remedy available to a litigant at a court of law that is more accessible to him, both geographically and economically, would ensure that the power of the court will be better utilized and be more effective in the redressal of such issues.

Keywords: Magistrate, Cognizance, Inherent power, Litigant

I. Introduction

In this article, the author examines the international acceptance of according inherent powers to Magistrates who take cognizance of an offence[1] and / or those Magistrates to whom the case has been made over for inquiry or trial of an offence[2]. The article discusses the judicial systems in other commonwealth countries wherein Magistrates have been accorded inherent powers in the interests of equity and justice. The purpose behind granting inherent powers to the Magistrates is to make the system more approachable and the provision of exercise of inherent powers more effective.

II. Provisions for Inherent Powers in other countries

In the United Kingdom, while the Parliament has given inherent powers to Magistrates in criminal cases[3], such is not possible in civil cases. Similarly, powers to rescind or vary their own judgements have been granted to Magistrates in South Africa under specific circumstances as envisaged by the law.[4] Further, although not codified explicitly by the Legislature, there are various cases in which the Judiciary in other countries has upheld the inherent powers of a Magistrate by conceding to their decisions and upholding the validity of conclusions drawn in exercise of such powers. These are contrary to the Indian position of law wherein civil courts have inherent powers under the Code of Civil Procedure[5],

[1]The Code of Criminal Procedure, 1973, India, s.190
[2]The Code of Criminal Procedure, 1973, s.192
[3]Magistrates Court Act, 1980, United Kingdom, s.142
[4]Act 32 of 1944, South Africa, s.36
[5]The Code of Civil Procedure, 1908, s.151

whereas the Code of Criminal Procedure only gives such powers to the High Courts across the country.[6]

The author shall further examine the position and role of Magistrates in two other countries following the common law system – the United Kingdom and the Republic of South Africa. In doing so, the author shall reiterate the powers vested in the Magistrates for performing their roles and carrying out their duties as per the Magistrates Court Act, 1980 of the United Kingdom and the Magistrates Court Act, 1944 of South Africa. The author shall then go on to examine several cases wherein the inherent powers of the Magistrates have been upheld by the apex courts of these countries, thereby indicating that such powers in the hands of Magistrates is in the best interest of the law and order enforcement mechanism and play a valuable role in delivering justice to prejudiced individuals fast and affordable.

III. Provisions for Inherent Powers in India

The Supreme Court of India has clarified that[7] Section 482 of the Code envisages the circumstances in which inherent powers of the Court may be exercised be limited to the following:

- To give effect to an order under the Code
- To prevent abuse of the process of the Court
- To secure the ends of justice.

Insofar as the object of such power in the hands of the Judge are concerned, considering the welfare of the society and the last circumstance mentioned above, it would be in the best interest to hand over such powers to the Magistrates as well. The Allahabad High Court had pointed out how *"the High Courts are not merely court in law, but also courts of justice and possess inherent powers to remove injustice"*[8]. The author herein contends that the Magistrate Courts must also have the power to ensure justice delivery by reducing the situations where injustice may have been met, whether erroneously or fraudulently. The underlying principles for exercise of such powers would be the same that govern the High Court as on date. Even in the hands of the Magistrates, it must be clear that such power will be exercised only when no other remedy is available to the litigant and not where a specific remedy is already provided for in the statute. This remedy shall only be in the nature of an "*effective alternate remedy*"[9] to reduce the burden on the higher judiciary that has increased responsibility to deal with matters of heightened significance as per the hierarchy established in the statutes, and to make it convenient and approachable for the litigants who may otherwise not be able to avail the same.

IV. Powers of Magistrates' in England & Wales

The Magistrates Court Act passed by the British Parliament in the year 1980 was an act brought about to implement recommendations of the Law Commission with regard to consolidation of the procedures applicable to the Magistrates' Courts of England and Wales. The Act systematically codifies the practices and procedures in both civil and criminal matters before the Magistrates' Courts. Among other things, it also lays down the functions of the Justices' clerks. Given that virtually all criminal cases begin in the Magistrates' Court and more than 90% are completed there[10], it was considered to be absolutely necessary to streamline and codify the practices and procedures of these courts into a single Act for increasing the efficiency of their functioning and ensuring uniformity among all such courts across the territory. Part I of the Act lays down in detail, the

[6]The Code of Criminal Procedure, 1973, s.482
[7]*State of Karnataka v Muniswami*, AIR 1977 SC 1489.
[8]*Dr. Monica Kumar v State Of U. P.* on 27 May, 2008 Arising out of S.L.P. (Crl.) No.5593 of 2006.
[9]Mondaq, "Overview of Section 482 vis-à-vis Landmark Judgements of the Supreme Court", *available at* https://www.mondaq.com/india/Litigation-Mediation-Arbitration/697362/Overview-Of-Section-482-CrPC-Vis-Vis-The-Landmark-Judgments-Of-The-Supreme-Court-Of-India (last visited on 11 May 2019).
[10]LawTeacher, "Magistrates Court Act 1980", *available at* https://www.lawteacher.net/acts/magistrates-court-act-1980.php (last visited on 11 May 2019).

provisions in relation to the criminal jurisdiction of the Magistrate's Courts. In addition to the aforesaid, Magistrates also have jurisdiction over certain civil matters including family matters and non-payment of council tax. Part II of the Act details the procedures and practices relating to the exercise of the Court's civil jurisdiction.[11]

The Act codifies several powers entrusted in the Magistrates to perform the duties and roles assigned to them under the same. Section 142 of the Act of 1980 lays down the "Power of Magistrates' Court to re-open cases to rectify mistakes etc."

The provision grants powers to the Magistrates to vary, rescind or replace a sentence in view of a mistake committed during hearing and in the interest of justice. A bare perusal of the impugned provision indicates a similarity with Section 482 of the Code of Criminal Procedure which bestows such powers on the High Courts. While in India, only the High Courts have such power as far as criminal cases are concerned, the Legislature of the United Kingdom has bestowed such powers in the hands of Magistrates in all of England and Wales. Furthermore, the Judiciary had time and again upheld these powers of the Magistrates in several landmark cases, even before the codification of the Magistrates Court Act in 1952, and till date continues to do the same by providing explanatory reasoning as to how such power is beneficial when exercised with caution.

a. Judicial Pronouncements of Kings Bench

In *Rex v Marsham, ex parte Pethick Lawrence*[12], Lord Alverstone CJ alongside Lord Avory J and Lord Pickford J upheld the Magistrate's decision of treating the first hearing as nullity owing to the nature of the evidence the court had relied upon in the same. They clarified that even if the Magistrate had not done so in exercise of his powers, it would have compulsorily compelled the appellate court to quash the conviction in the event of an application for such purpose being referred to the Bench. The Kings Bench Division in the year 1912 declared the inherent power of Magistrates in this case when Lord Alverstone CJ opined along the following lines:

The Hon'ble Judge stated that, when the magistrate found that during the first hearing he had before him, the evidence given were not admissible and hence, he decided the case as per the law, his act of hearing the case and conducting the trial through second hearing for calling proper evidence was within his jurisdiction.

Lord Avory J. concurred to Lord Alverstone CJ's decision and further went on to explain his stance on the appeal wherein the substantial and real ground upon which the conviction was to be set aside was that it was bad because the applicant at the time of the conviction had previously been placed in peril in respect of the same offence. He expressed his view saying that it was just some other way of saying that the applicant was in a position of either pleading *res judicata* or *autrefois convict* before the magistrate. It was elucidative that in order to make an effective pleading, either a plea of autrefois convict or autrefois acquit should be made, it must be evident that the defendant has been convicted or acquitted legally. As per the authority, Chitty on Criminal Law[13], citing the relevant para on page number 455, *"the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him."* It is also laid down by the same authority at page number 459 that "*if a judgment*"—and this appears to be directly in point in the present case—"*in*

[11]U.K. Judiciary, "About the judiciary – Judicial Roles", *available at* https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/district-judge-mags-ct/ (last visited on 11 May 2019).
[12][1912] 4 WLUK 27.

[13]Joseph Chitty, A.J.Valpy ed., I *A Practical Treatise On The Criminal Law* 455 (2nd ed., 1816).

favour of a prisoner be reversed, he may be arraigned and tried de novo."

In this case it was admitted that if the first judgment is even considered once, then it would have been reversed even if the proceedings would have continued for that purpose. It would have been set aside on certiorari as it would have been based on evidence and not on oath, and hence the principles applicable to the plea of autrefois convict as enunciated earlier would not be in favor of the applicant to plead such a plea. As laid down in the same volume of Chitty on Criminal Law at page number 463 that the plea autrefois convict *"will be of no avail when the first indictment was invalid, and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy."* The Hon'ble Judge relied on the aforementioned principles, and held that if he considers the conviction on the first hearing in the present case must have been set aside, and accordingly the defendant was never in danger and therefore would not have been in the position to plea exception to the jurisdiction of the magistrate.[14]

Thus, the concept of Magistrate's inherent powers were clarified and substantiated with reasoning in this case, which holds precedential value in the issue, and continues to be reiterated time and again even today.

b. Judicial Pronouncements of Criminal Court of Appeal

Several other courts across the United Kingdom in various other cases have upheld the nullity of proceedings and their subsequent committals to quarter sessions wherein the Magistrates had the power to hear the offences summarily, thereby, in effect, declaring and upholding the power of magistrates to rescind or vary their decisions as far back in 1920[15] and 1950[16] as well.

c. Judicial Pronouncements of Queens Bench

In 2002, the local authority contended before the Queens Bench Division, Administrative Court of the High Court of Justice[17] that the Magistrates had no jurisdiction to revisit the decision in respect of which they were *functus officio*. Maurice Key J. dismissed the appeal, and held that the magistrates had not exceeded their jurisdiction or acted unlawfully by setting aside the liability order. When Magistrates ostensibly did something which was unlawful and / or in excess of their jurisdiction, they were competent to correct their error, provided such power is used sparingly and cautiously. In the instant case, the Magistrates had not sought to do something unlawful as they had been unaware of the request for an adjournment. Such omission, despite in nature, being a very small procedural detail, can be material in coming to a conclusion in specific cases, especially criminal cases. However, it was held that they were entitled to revisit the matter to address the discretion which they had not realised was the subject of a specific request. Although there were other remedies available, it was contrary to fairness and common sense to force anyone to pursue them by constraining the Magistrates from correcting such a perceived omission. The court's observation can be quoted as follows:

"It would be unfortunate and contrary to common sense and fairness if Magistrates were constrained by law to stand on their earlier decision, made in ignorance of the facts, and to have to direct the disadvantaged ratepayer to the Administrative Court and an application for judicial review."

[14] *Supra* note 12.

[15] *Bannister v. Clarke*, [1920] 3 K.B. 598.
[16] *Rex v. Norfolk Justices*, *ex parte DPP,* [1950] 2 KB 558.
[17] *Liverpool City Council v Plemora Distribution Limited*, [2002] 11 WLUK 614.

Thus, the Court in effect held that Magistrates Courts have the power to correct its own mistakes and the litigant, in such circumstances, should not be made to knock the doors of the High Court as that would, in most cases, make the remedy distant in time for the litigant to reach.

d. Judicial Pronouncements of Civil Court of Appeal

In line with the above decision, the Court of Appeal (Civil Division) in *R. (on the application of Mathialagan) v Southwark LBC*[18] further reiterated the fact that a Magistrates' powers were statutory and it seemed that the Parliament had intentionally not given a general power to Magistrates to reopen civil cases. An analysis of the view taken in the judgement indicates that the burden on higher judiciary is resultantly reduced in view of reasonable and appropriate exercise of such powers by the Magistrates, thereby increasing the efficiency of the judicial system in place.

A perusal of the cited judgements and an understanding of the views taken by the judiciary in the above cases goes on to explain the importance of inherent powers in the hands of magistrates and the rationale behind granting the same to them. It evidences that such powers in the hands of the Magistrates ought to be used sparingly and cautiously, and that reasonable exercise of such powers has always been in the interest of justice. Although all such principles have been recognised by the Indian courts in various judgements as well, the power of judicial review has been granted only to the High Courts and the Supreme Court.

V. Inherent Powers of Magistrates' in the Republic of South Africa

Much like the inherent powers given to Magistrates in the United Kingdom, the Magistrates Court Act, 1944 of the Republic of South Africa also gives powers to the Magistrates to rescind or vary their own judgements, *suo motu*.[19]. Section 36 of the Act provides for *judgements that may be rescinded.* The litigant affected by an unjust and adverse order against himself can make an application for rescinding a judgement

The Magistrates' Court Rules of Court Act deals with the subject in a more detailed manner, laying down the procedure to be adhered to and the content of the affidavits which must be filed in support of such an application for rescission.

a. Judicial Pronouncements of Various High Courts

Various High Courts across South Africa have repeatedly discussed about the issues in an application for rescission, and have clarified that it is not merely a test of whether or not to issue sanction against a party for his failure to follow, or a *prima facie* neglect that led to omission of a compliance as per the rules and procedures laid down for the court proceedings as per the statute.

It has been rightly remarked that "*the magistrate's discretion to rescind the judgments of his court is therefore primarily designed to do justice between the parties."* [20] He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (PTY) Ltd*.[21] and *HDS Construction v Wait*[22] and also any prejudice that might be occasioned by the outcome of the application.

b. Period of Moving Application for Rescission of Judgement

[18][2004] 12 WLUK 360.

[19]Act 32 of 1944, s.36.
[20]*De Witts Auto Body Repairs (Pty) Ltd. V Fedgen Insurance Co. Ltd.,* 1994 (4) SA 705 (E) 711E-G.
[21]1949 (2) SA 470 (O).
[22]1979 (2) SA 298 (E).

It is further of necessary import to acknowledge that an Application for Rescission of Judgment must be moved within 20 days after the Applicant was made aware of the Judgment against him. If, however, the application is not made within the aforesaid 20 day period, the Applicant may request the Court to condone his late filing of the Application. While seeking condonation from the Court for his late filing of the Application, the Applicant must provide substantial reasons to explain why there was a delay by the extended period in the case after the lapse of 20 days, before the making out of the Application. Therefore, it is evident from the aforesaid that a Court will not merely rescind a judgment only on the basis of the fact that the Defendant was not aware of the Summons. If the Defendant does not have a viable defence to the Plaintiff's claim, it will be superfluous for the Court to rescind the judgment, in view of the fact that the Plaintiff will subsequently, in any event, and after a lengthy and costly trial, obtain judgment against the Defendant. The same would be against the object of having such a provision in place.

c. Judicial Interpretation of the Statutory Provisions

In *Patience Nondzondelelo Mabusela Vs Eastern Cape Development Corporation*[23], it was apparent from the application for rescission that the appellant contended that the judgment granted by default was void *ab origine*. The court opined as under:

"The grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to relief.[24]*"*

It had been previously held that in an application for rescission of a default judgment which is brought on the grounds that the default judgment is void *ab origine*, the applicant must set out his or her defence to enable the court to decide whether or not there is a valid and *bona fide* defence[25]. It is also well established that the defendant must at least furnish an explanation of his or her default sufficiently full to enable the court to understand how it really came about, and to assess his or her conduct and motives.[26]

The caution exercised in analysing the various conditions and situations where in an order maybe made against an individual under such provision by the South African courts goes on to highlight the importance of according utmost care to the sparing and exceptional use of such powers by the Magistrates. An in-depth analysis of the facts of the case and the remedies sought in view of the same is a fundamental necessity to ensure that justice is delivered in exercise of such powers.

In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits filed in the application for rescission, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage nor disadvantage can flow therefrom. The applicant is entitled to claim that the *status quo ante* be restored.[27]

A perusal of the above authorities are indicative of the elaborate powers in the hands of the magistrates in South Africa, which have been utilised effectively and consciously time and again to deliver justice. It can be seen from the above referred judgements that prominence is accorded to ensuring that no misuse of such powers is done either by the magistrates, or by the parties to the case who may be in a position to

[23][2015] ZAECMHC 76.
[24]*Spur Steak Raches Ltd v. Saddles Steak Ranch, Claremont,* 1996 (3) SA 706 (6) 714 E.
[25]*Leo Manufacturing CC v. Robor Industrial (Pty) Ltd T/A Robor Stewarts & Lloyds,* 2007 (2) SA 1 (SCA).
[26]*Silber V Ozen Wholesalers (Pty.) Ltd.,* 1954 (2) SA 345 (A) 352G.
[27]*Securiforce CC v Ruiters*, 2012 (4) SA 252 (NCK) 261 D-E.

gain unjustly from such provisions in place. A prominence is accorded by way of precedential value to following the procedure sparingly only in the rarest of the rare cases, as must be the case even in India if such powers is given to the Magistrates.

VI. Conclusion

An analysis of the laws in other countries goes on to highlight how such powers in the hands of the Magistrates is not only a luxury available to the common man or a proviso to ease the process, but rather a matter of right to have an unjust decision turned to ensure that the ends of justice have been met. By making such a remedy available to a litigant at a court of law that is more accessible to him, both geographically and economically, would ensure that the power of the court will be better utilised and be more effective in the redressal of such issues.

Although the author acknowledges that such a remedy is available in India and used frequently by litigants, yet the optimum utilisation of such recourse has been hindered due to the savings which has limited such exercise of inherent powers in the hands of High Court only. There would be no use of making available a remedy or recourse in law, which ultimately cannot be resorted to in all cases applicable to it. In light of the circumstances, and upon an in-depth analysis of the international perspective with regard to the same, it is clear that such a power in the hands of Magistrates in India would reduce the miscarriage of justice and would lead to better utilisation of the remedy available to the litigants.

It is pertinent to note that though the law is well-developed in the Indian scenario, wherein its applicability in various cases has resulted in a detailed discussion of the provision and its exceptions – where it has been used to *"do the right and undo the wrong"*[28], it is established by this discussion that if such powers could be exercised by Magistrates, it would lead to speedy redressal of the Applicant/Appellant's concerns and be an economically much viable recourse for the citizens.

[28] *K.K. Velusamy v. N. Palaanisamy,* (2011) 11 SCC 275.