CHAPTER - IV

SUBDUCT JUDICIARY
NON-SEPARATION OF JUDICIARY

Lord Hewart, the Lord Chief Justice of England said, "The liberties of Englishmen are closely bound up with the complete independence of the Judges when, for any reason or combination of reasons, it has happened that there has been lack of courage on the judicial bench, the enemies of equality before law have succeeded and the administration of the law has been brought into disrepute".\(^1\) Lord Hailshman (Lord Chancellor) characterised the independence of judiciary "as palladium of the liberty of the subject". Both these distinguished jurists of England and many more have unequivocally stressed upon the imperative need of judicial independence from executive control. But in British India, the British sense of justice was meant for Britishers only. If there was any conflict between the sense of justice and scheme of empire building and maintenance, the former must be made subservient to the latter. Keeping this principle as guidelines the British Rulers in India accepted the demand of Indian National Congress and other organisations for separation of the Judiciary from the executive in principle but deferred it in practice. There main argument was that law and order must

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be maintained anyhow in their empire in India and this made the need of a strong executive indispensable. Thus, while on the one hand the British jurists like Adams and Huxley suggested decentralisation of authority from the hands of the executive people on the other Sir John Strachey and others, warned that any departure from the policy of keeping centralised authority in the hands of executive would be the beginning of the end of British Empire.

The pretensions on the part of the British rulers, whether of the East India Company or the Crown, who always maintained a show of their best endeavours to bring about an end to the system of combining in one individual the duties and powers of a Collector, a Deputy Commissioner, a Magistrate and an agent of Government, began during the early days of the British Rule in India. Throughout the British rule in India, liberal and progressive Englishmen at home, being influenced by the great movement, from despotism to freedom in Western Europe and American colonies, advocated the change in India. Even English Civil Service men when they first came out to India and before they were changed into seasoned bureaucrats and hardhearted empire builders, sent despatches to English suggesting reforms in this direction. But soon their attitude changed and they, in collaboration with the conservative element of the Home Government resisted all attempts of the Indian National
Congress to persuade the Government to introduce this much needed reforms.

From 1780 to 1787, the offices of the Judge and Collector were held by different persons mainly for reasons of administrative convenience as envisaged in what they called the Oriental Plan. But soon it was resolved in a meeting of Court of Directors in England that the office of the Judge should be held by the same person who had charge of revenue and till the year 1793 the several duties of the Collector, the judge and the Magistrate were discharged by the Collector. In 1795, Lord Cornwallis expressed his views that the Government must divest itself of the power of infringing, in its executive capacity, the rights and privileges which it has conferred on the land holders. The revenue officers much be deprived of their judicial powers.\(^2\) In 1836, Lord Auckland appointed a committee to investigate into the deteriorating condition of law and order in the Presidency of Bengal which unanimously reported in 1838 that for better administration, the Police and Revenue functions should be taken out of the hands of the District Magistrate and placed in-charge of separate officers.\(^3\) A contradictory

\(^3\)Ibid, Minutes by Sri F.Haliday, Lieutenant Governor Bengal, 30.4.1856.
view was advanced by Sri Cecil Beadon in 1854 known as "Oriental Theory of Government" that the separation of functions was against the genius and traditions of the Eastern people and a great advantage is gained by placing the judicial officers in all matters of an executive nature directly under the Commissioner.\(^4\)

Sir John Peter Grant, a Member of the Governor General's Executive Council, attacked Sir Beadon's Oriental Theory by saying that not only was the existing separation of powers desirable and useful but it should be carried further to the logical extent. Sir Barnes Peacock, the first Chief Justice at the High Court of Fort William, supported Sir John Peter Grant throughout the controversy which want a long-way to establish the justice of the cause which Grant was so fair-minded to take up. He made no secret of his view that the Union of Police and Judicial duties was so incongruous that it made either the Police Officer inefficient or the Magistrate biased. The High Court, was for immediate separation and on this account did not consider it feasible to provide for a systematic legal training of the District Judges without first relieving them of their executive functions.\(^5\)

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The agitation in India on this matter was not without any effect in England. In 1899, a memorial known as "the Hobhouse Memorial" was presented to the Secretary of State for India, Lord George Hamilton. The submission of this memorial was an important landmark in the administrative history of the country because it aroused the British Government from the sleep of complacency into which it had fallen since 1871. But the fact remained that while His Majesty's Government in England was not too unfavourably inclined for the reforms, the Government of India, was reluctant to take any definite steps towards the separation in view of the opposition from the provincial governments in general and Government of Bengal in particular.

The period between 1908-1921 was one in which some lip-service was done to the principle of separation by the Government of India. As a result, the recommendation of the Royal Commission on decentralisation, appointed in 1909, Additional District Magistrates were provided, to take over the judicial duties of the District Magistrate but in actual practice, these Additional District Magistrates became miniature District Magistrates and thus provided another link between the Magistrates and the Police which increased the fusion of the two incongruous functions. Besides this arrangement did not alter the existing system in which the trying Magistrates were under the discipline and
control of the prosecutor an evil which during the regime of Sir Charles Elliot, the Lieutenant Governor of Bengal, established the dictum - "No conviction-no Promotion".

The implementation of the provisions of the Montague Chelmsford Reforms of 1919, which brought out a reconstitution of the Central and Provincial Legislatures, in which the elected elements formed a sizeable part, raised high hopes in the minds of the Indians regarding the policy of the Government to bring about the separation. But because the executive was not responsible to the legislature, nothing could be done. Then justice was made a provincial subject but the provincial governments as determined as Central Government were not to change the existing system in the interest of the permanence of their sway over India.

From 1921, the efforts of the Indian public and the Indian Congress were confined to the bigger problem of achieving independence by terminating British rule over India. Hence, this comparatively minor problem receded into the background. But considering the problem in retrospect, one can easily see the motive of the British Government in perpetuating system practice even after accepting it in principle that separation was necessary in the interest of imparting fair justice to the Indians. The motive was to hold autocratic power, inspite of its frequent
abuse, so that their political and economic sway over India remain unaffected.

This non separation had its impact in British Orissa Police committee of 1890 for better criminal judicial administration suggested remedise inclusive of recommendation regarding separation of executive and judicial powers at the Headquarters Offices. The Provincial Government of Orissa accepted this recommendation and Challes Eliot, the then Lieutenant Governor of Orissa forwarded to lay down rules to give effect to the recommendation, but the Government at the centre did not accept this recommendation. So as before in British Orissa remained the most controversial aspect of judicial administration, exercise of criminal jurisdiction by executive officers i.e., the District Magistrates and other Magisterates subordinate to them. This system was left open to both theoretical and practical objections. Also it led to public discontentment when some Executive Magistrates misutilised their judicial powers for political gain as in the historical case of Surendra Sai of Sambalpur.

6. RCP, 1890, Para –177, 189.
CASE STUDY:- (Emperor Vs. Surendra Sai and others)

The deputy commissioner Sambalpur, on the instruction of the Commissioner, Chhatisgarh Division in his letter No.254 dt.1st February, 1864 submitted a compedium of the case against soorundur Sahi and 13 others basing on the report from the Superintendent of Police, Berill which was enclosed with Talputta letters seized from the house nearby of the prisoners or from their left out campus, a copy of note taken by captain Stewart on conversation of prisoner, khageswar Dao which was over-heard and the statement of the witnesses who were then present there. The Deputy Commissioner was of opinion that the evidence available was enough for holding a trial against them u/s 122 IPC.

U/s 35 "Criminal Procedure Bill", G.S Campbell, judicial Commissioner, Central Provinces, transferred the cases Government Vrs. Soorundur Sahi and others charged u/s 122 of the IPC from the Court of the Deputy Commissioner, Sambalpur to that of the Deputy Commissioner of Raipur for enquiry with direction to complete the enquiry under Chapter - XII of the code and on availability of sufficient evidence to commit the case to the Court of Commissioner, Chhatisgarh.

for sessions trial. After a brisk enquiry, the Deputy Commissioner of Raipur committed the case against Soorundur Sahi and others to the Sessions Court.

In trial No.3 of sessions for June 1864, the Crown Vrs. Soorundur sahi, and 13 others, all the 14 prisoners stood charged U/s 122 of the Indian Penal Code on the allegation of preparing to wage war against her Majesty the Queen, u/s 123 of the IPC on the allegation of concealing the excellence of a design to wage war against Her Majesty the Queen and 109 of the IPC on the allegation of abetting the preparation to wage war against Her Majesty the Queen during the months of December 1863 and January 1864 and prior to it. I.G.Balmain, Commissioner of Chhatisgarh, weighing the documentary and oral evidence adduced by the parties, English translation of 24 letters produced and 20 witnesses examined in his Judgment of 23rd June, 1864, concurring with the assessors held Prisoners Soorundur Sahi, Oodunt Sani and Khageswar Dao guilty of the offence u/s 22 of IPC for collecting arms with the intention of waging war against the Queen and sentenced each of them to transportation for life with forfeiture of all their

property. The Court also concurring with the assessors held prisoners Droop Sahi, Mehduee Sahi, Lokanath Gasteea, Sirdakur Mullik, Moortanjay Panigrahi, Jagabanhu Hota and differing from the assessors, held prison Miturban Sahi guilty of offences u/s 109 and 123 IPC for committing the offences of abetment in collecting arms with the intention of waging war against the Queen and of concealing the same with intent to facilitate a design to wage war against the Queen and sentenced each of the Prisoners to transportation for life with forfeiture of all their property. Further, the Court concurring with the assessors found prisoners Minkuthun, Mohan Das and concurring with Jagmohan Das but differing from Choteylall Danu found Dhuruee Misra and Pandab Gooroo guilty of offence u/s 123 of the IPC for committing offence of concealment of collecting arms with an intent to facilitate a design of waging war against the Queen and sentenced each of them to 7 years transportation.  

At the outset of the Judgment, the Court observed "from certain signs and ruins that there was reason to believe that a succession of dacoities and murders perpetrated in Sambalpur in the early part of 1863 had a political rising and were the result of a combination between certain amnestied rebels and their friends still in arms to coerce Government into a restoration of the native rule".

9. OSA, Acc. No. 5860/PUR.
While reposing confidence on letter Nos. III, IV, VII, X, XVI, XXI, XXII the learned Court has observed, Nos. "IX, XVII, XVIII and XIX seem unimportant, as does No.XX save to show misdatings the remaining documents are for the most part mysterious or of a period shortly after the general amnesty by Bengal Government in 1862, individually they proved little, but in conviction with others, and the oral evidence assume importance".

It is further observed " some of the depositions in like manner may seem unsatisfactory in certain points, for the subserviency of native witnesses is only too notorious".

There it is observed, "it must be borne in mind that even though the authenticity of the sundry of the documents may not be fully established, they are equally damning to the parties with whom they were found, as indicative that they were (if not in correspondence with the reputed writers) at any rate making use of their names to string then their own cause by misleading others into joining them".

Reflecting above observations at the beginning part of his Judgment Learned Judicial Commissioner has assessed the extent of liability of each Prisoner against the charges and have convicted all of
them finding them guilty. The result of the trial was duly communicated to the Governor-General at Simla.¹⁰

Before the Court of John Scarlett Campbell, Judicial Commissioner, who was the Principal Court of Appeal in Central Provinces, an Appeal against this order was filed by the accused persons. The Appellate Court while reversing the orders of the Commissioner of Chhatisgarh acquitted all the convicts on 18ᵗʰ August, 1864. His Judgment showed in brief that the case was investigated and conducted in a Police way and the Police who were unable to cope with Kamal Singh and other outlaws who were committing dacoities thought the next best thing to do was to get punished those whom they considered to be the friends of the dacoities and accordingly prepared the case without any real proof against the accused persons. The Judicial Commissioner found both documentary and oral evidence fabricated and concocted in the matter of entangling the accused persons. Even if the authorship of these documents was not challenged, those did not prove any treason against any of the accused persons though calculated to cause suspicion. The possession of the incriminatory documents by particular person or persons was in the least degree satisfactory and so bad that it gave rise to

¹⁰ Das, Op.Cit, Letter No.3523 dt. 1.8.1864 from C.Bernard Esq. Secretary to Chief Commissioner, Central Provinces to Col. H.M.Durand C.B.Secretary to Govt. of India.
an apprehension that far from being genuine, they were fabricated by the
parties interested in the prosecution or else by some enemies of the
prisoners.

At the beginning of his Judgment, the Judicial Commissioner observed:

"The proceeding of the Sessions Court are very far from
being clear or satisfactory much that ought to have been
detailed is left out on the seeming presumption that
common report was sufficient. The criminatory documents
on which the prosecution thoroughly relies are not put up
with the proceedings but only translations. On the other
hand, the evidence recorded lengthened out to a confusing
extent by long stories of what the witnesses heard from
others and what they thought, what might have been told
against the prisoners is mixed up with what has little or
nothing to do with the charges and altogether the Judgment
of the Sessions Court is so confused and wanting in points
that it is impossible to deal with it in coming to a Judgment
in the case". Judicial Commissioner further observed - "The
prove in partly oral, partly documents. As it seems to the
Court that the prosecution lay most stress on the latter, it
will be dealt with fresh, in consists of 24 documents or translation of documents".

The Court divided the produced documents into three classes, (i) non-treasonable (ii) treasonable of an old date & (iii) treasonable of recent date, keeping numbers 2,4,6,7,8,9 and 13 to 20 under first-class, numbers 1,3,5,11,12 & 24 under second-class and rest under Class -III. On lengthy discussion, the Court came to the finding that 1st class letters were not treasonable, second-class letters not acceptable having origin much prior to the alleged charge and third-class letters also were not believable carrying grains of forgery and doubts.

The Appellate Court has disapproved acceptance of the two letters written in Oriya language on 'Talpatri' translated into English by Capt. Stewart who deposed to have slight knowledge in Oriya language observing "The Sessions Court entirely failed to enquire into the meaning of the word and did great injustice both to the writer and receiver of the letter.

Concluding on the documents, the Judicial Commissioner held "it will be seen that those on which the prosecution chiefly relies are rejected by this Court has quite untrust-worthy and without them the others even in the opinion of the Sessions Court are of little value. All that can be made out from the documents taken collectively is that the
party Soorundur Sahi were by no means pleased with the abolition of native rule. There is nothing whatever that can be accepted as proof that the prisoners made any preparation or hed even any plan for again going into rebellion".

It is pertaining to note that giving good bye to the relevant position of the Indian Evidence Act, then in force, Learned Sessions Court accepted the documents original of which were not produced without any explanation thereof.

On oral evidence, it is held by the Appellate Court that the evidence of 1st witness Mr. Berrill, District S.P. of Sambalpur, was the only evidence pointing to anything tangible in the shape of preparation for waging war, and it might have been supposed that the Sessions Court would have gone carefully into such a matter but not a question was asked. Scanning the evidence of 1st witness, the Appellate Court observed:

"The Court is of opinion that the number of weapons found in the village is not more than could be found in any moderate size village is a wild country and that the running a fortified (probable loophole would be a correct word) wall round their house was no proof that Khageswar Das and his brothers were making preparations for or even meditated waging war against the Queen".
Appellate Court did not appreciate Sessions Court's acceptance of evidence of the second witness Capt. Stewart, Deputy Inspector General of Police, on over-hearing impeaching conversation in Oriya between Prisoner Khageswar Das and an informer Stewart having imperfect knowledge in Oriya language.

Like-wise, the Appellate Court had been reluctant to accept the evidence of third witness Mohan Sing, Inspector of Police, on whose evidence Sessions Court had put reliance against discrepancy in the evidence of witness No.II & III as to who was the chief speaker in the conversation between Khageswar Dao and the informer and presumption of such conversation finding place in the note of late Major Imphey, a presentee at the time of conversation, such note not seeing the light of the day. It has been observed in the Appellate Court's Judgment thus:

"Evidence telling what certain persons said in conversation, and come by a native official anxious to bring whom to guilt to those persons is of the most untrust-worthy nature, and the Court cannot place much reliance on the evidence of Mohan Singh".

Rest of the witnesses were non-officials out of whom on the evidence of following witnesses the Lower Court kept reliance. Witness
No. IV deposed on certain documents containing signature of Soorundur Sahi, he himself being unable to read. Witness No. X before the Magistrate stated that petition was written on a palm leaf, but before Sessions Court he stated that it was written on a paper. Likewise Witness No. XI has given different evidence in different Courts.

The Appellate Court while discarding the oral evidence adduced observed:

"Such is the evidence for the prosecution and was not surprising that the Sessions Court should note that some of the depositions may seem unsatisfactory in certain points, to this Court and the whole of the evidence is most unsatisfactory."

The only thing approaching to evidence of preparation to make war had been quoted from Mr. Berrill's evidence, and it really amounted to nothing.

There was a good deal of evidence of the Prisoners meet together to get up a petition to the Chief Commissioner but this had nothing to do with the charge which was "making preparation to wage war". When the Prisoners were arrested nothing suspicious was found in their house, no arms or ammunitions were discovered, in fact, nothing to lead to the idea that they were preparing to take the field.
That the Sessions Court should have accepted such evidence was much to be surrendered at. There was positively nothing in the whole case to prove that December, 63 and January, 64 Soorundur Sahi, Oodunt Sahi and Khageswar Dao were making any preparation whatever towards waging war against the Queen.

It follows that the other Prisoners could not have abetted, concealed such designs. The orders of the Sessions Court regarding all the Prisoners in the case were reversed.

So from the above, it is well derived that against the law in operation, without meeting the legal short-falls in proving the documents and making the oral evidence acceptable, the Trial Court found the Prisoners guilty under Penal provisions of the Indian Penal Code and that must be to satisfy the wish of the Executive and Police administration. Such conclusion has been fortified from the reaction of Richard Temple, Chief Commissioner of the Central Provinces, who agreed with the findings of the Judicial Commissioner that while, the documentary evidence was unsatisfactory, so also the oral evidence. It is pertinent to note that the Chief Commissioner arrived at the conclusion that there was not even moral presumption that the Prisoners attempted or even contemplated the commission of overt or active treason. However, as an
important part of the machine of British administration to ensure no disturbance in the frontiers, the Chief Commissioner arguing that Soorundur Sahi was guilty of an evidence in a moral political way, although he was not legally guilty justified the subsequent arrest and detention of Soorundur Sahi and 7 other acquitted prisoners under the order of Colonel Elliot, the temporary Chief Commissioner, under Regulation III of 1818. According to him, in all those affairs, the conduct of the Police was prompt and efficient. But he regretted that subsequently the police disfigured their proceedings by reception and production of some worthless evidence. He was of the opinion that save and accept in respect to reception and production of bad evidence, the conduct of the Police Officers, Capt. Stewart and Mr. Berill was highly commendable.11 After releasing the accused persons in consequence of their acquittal, the Commissioner ordered their detention recounting the same grounds which formed the basis of trial and acquittal and the authority approved the detention basing on the report of the Commissioner forwarded by the Chief Commissioner. Thus, the trial of Soorundur Sahi and 13 others was just a mock trial to secure them in the eye of law for confining worst part of it after acquittal which Regulation III did not contemplate.

11. Das, Op.Cit, Letter dt. 23rd January 1865 from C.Barnard Esq. Secretary to Chief Commissioner, Central Provinces to Secretary to Govt. of India, Foreign Deptt. (M.P Secretariat).
Further, Mr. Compbell, the Judicial Commissioner, a just and fair minded British subject, dispensed the law impartially in support of the British Nation's arch-enemy creating silver lining in the Judicial firmament.