

In Re: B.G. Horniman

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Court : Mumbai

Decided On : Sep-19-1932

Reported in : AIR1933Bom59; (1932)34BOMLR1666

Judge : Patkar and ;Barlee, JJ.

Appeal No. : Criminal Application for Revision No. 235 of 1932

Appellant : In Re: B.G. Horniman

Judgement :

Patkar, J.

1.This is an application by the petitioner for revision of the order passed by the Presidency Magistrate, Third Court, under Sections 113(2), (3) and (4) of the Indian Railways Act, IX of 1890, directing him to pay Rs. 48-11-0 to the G. I. P. Railway, and further directing that the amount, if not paid, should be recovered as a fine.

2. A preliminary objection is raised on behalf of the railway company that the application for revision does not lie and reliance is placed on the decisions in the cases of In re Dalsukhram : (1907)9BOMLR1347 and Secretary of State for India v. Gobindram Jaichandrai (1930) 31 Cri. L.J. 962.

3. The proceeding under Section 113 of the Indian Railways Act is not a prosecution for an offence, Section 68 of the Indian Railways Act prohibits travelling without a pass or a ticket, and Section 69 provides that every passenger shall, on the requisition of a railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination. Section 113 provides for the consequences of the breach of this statutory obligation, Chapter IX of the Act, which contains Section 113, deals with penalties and offences. Sections 87 to 98 deal with penalties, Sections 99 to 105 deal with offences by railway servants, and Sections 106 to 130 are included under the heading of 'Other offences', and Sections 131 to 134 are included under the heading of 'Procedure'.

4. Though Section 113 is included under the heading 'Other offences', Sub-section (4) of Section 113 provides :-

If a passenger liable to pay the excess charge and fare mentioned in Sub-section (1), or the excess charge and any difference of fare mentioned in Sub-section (2), fails or refuses to pay the same on demand being made therefor under one or other of those Sub-sections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the railway administration.

5. The intention to defraud is not necessary as in the Cases falling under Section 112 to enable the railway administration to proceed under this section. The section provides a summary remedy to recover the charge incurred by a passenger together with a penalty provided in the section.

6. According to the decision in *Bhimji N. Dalai v. B.B. & G.I. Railway Co.* I.L.R. (1925) Bom. 515 : 28 Bom. L.R. 443 the liability to pay does not arise from the contract but from the statute, and the statute prescribes the method by which the amount a passenger is liable to pay can be recovered, and the amount is to be recovered by the Magistrate as if it were a fine imposed on the passenger, and paid to the railway administration. In *Queen-Empress v. Kutra* I.L.R. (1893)

Bom. 440 it was held that imprisonment in default of payment cannot be inflicted under Section 113 of the Indian Railways Act, The amount can only be recovered by attachment and sale of moveable property. The proceeding under Section 118 is not a prosecution for an offence. Though Section 118 is included among Sections 106 to 180, which are placed under the heading of 'Other offences' the classification appears to be misconceived, for some of these sections do not relate to offences, and Section 132 indicates that the acts committed under Section 113 are not deemed to be offences. Section 131 makes no reference to Section 18, and Section 182 refers to any offence other than that mentioned in Section 131 and specifically refers to failure or refusal to pay excess charge demanded under Section 113. It is clear, therefore, that the act referred to in Section 113 of the Indian Railways Act is not an offence.

7. Further, Section 133 provides that offences under the Act shall be tried by a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, but proceedings under Section 113 may be taken before any Magistrate, including a Magistrate of the third class.

8. It is contended on behalf of the opponent that the Magistrate mentioned in Section 113 is a *persona designata* and that the proceeding relates to recovery of money and is a civil proceeding, and the action of the Magistrate under Section 113 is in his executive capacity.

9. In *In re Dahsukhram* it was held that a Magistrate hearing an appeal under Section 86 of the Bombay District Municipal Act, 1901, was not an inferior criminal Court within the meaning of Section 435 of the Criminal Procedure Code, on the ground that he had jurisdiction given by the Act to deal with the question of a civil liability. Section 86 invests a Magistrate with appellate powers against a notice of demand issued under Sub-section (3) of Section 82 of the Bombay District Municipal Act III of 1901, and the Magistrate in that case exercises an appellate authority against the executive order of the notice of demand under Sub-section (3) of Section 82 of Bombay Act III of 1901. Under Section 113 of the Indian Railways Act it is not merely the sum which is due to the railway company in the form of fare that is recovered but also the penalty provided by the section.

10. In *Secretary of State for India v. Gobindram Jaichandrai* (1980) 31 Cri. L.J. 952 reference is made to several cases but no adequate reasons have been given to support the conclusion arrived at in that case.

11. It appears however, that the High Courts have interfered under the revisional powers with orders under Section 113 of the Indian Railways Act when imprisonment in default of payment of fine was inflicted under Section 113 of the Indian Railways Act: see *Queen-Empress v. Kutrapa* I.L.R. (1893) Bom. 440 *Queen-Empress v. James Crowson* (1899) 1 Bom. L.R. 166 *Queen-Empress v. Subramania Ayyar* I.L.R. (1897) Mad. 385 *Queen-Empress v. Ram Pal* I.L.R. (1897) All. 95 *Station Master, Ranaghat v. Habul Sheikh* (1819) 24 C.W.N. 195 and *King Emperor v. Ma Kalay Ma* I.L.R. (1928) Ran. 619

12. It is true that the point now taken was neither raised nor considered in those cases. The question, therefore, arises whether the Magistrate acting under Section 113 exercises a judicial function or an executive function, and whether the Magistrate is an inferior criminal Court within the meaning of Section 435 of the Criminal Procedure Code.

13. In *A. Grey v. North Western Railway Administration* (1891) P.R. No. 13 of 1891 (Cr.) it was held, following the decision in *Queen-Empress v. Manaji* I.L.R. (1889) Bom. 381 that the proceedings of the Magistrate under Section 113 are judicial proceedings and fall within the ambit of Sections 435 and 439 of the Criminal Procedure Code. Under Section 4 (m) of the Criminal Procedure Code, 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath. Proceedings, though of a civil nature, e.g., proceedings of the Magistrate under Section 2 of the Workmen's Breach of Contract Act or Section 48S of the Criminal Procedure Code, if they are held by a criminal Court, are subject to revision under Section 435 of the Criminal Procedure Code. I may refer in this connection to the case of *Emperor v. Devappa Ramappa* I.L.R. (1918) Bom. 607 : 21 Bom. L.R. 277 where the test laid down is not the nature of the proceeding held by the Court but the nature of the Court in which that proceeding is held. In *Dinbhai Jijibhai, In re* I.L.R (1919) Bom. 864 : 21 Bom. L.R. 755 it was held that the order passed by the Magistrate under Section 161(2) of the Bombay

District Municipal Act, 1901, can be revised by the High Court, and it was held that as the Magistrate has to make Some inquiry in a proper case there is no reason to treat such an inquiry as purely ministerial.

14. In fact the proceedings in the present case were conducted in the same manner as a judicial proceeding. Evidence has been taken, the statement of the applicant is recorded, and the evidence is weighed by the learned Magistrate. It is difficult to hold that such a proceeding is merely a ministerial or executive proceeding, and not a judicial proceeding. Under Section 113 (4) the Magistrate has to decide whether the sum is payable by the passenger, and for that purpose he has to take evidence in the case on any of the points on which the passenger contends that the sum is not payable, and the Magistrate has to recover the sum payable including the penalty as if it were a fine imposed on the passenger by the Magistrate. Section 435 empowers the High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate specially empowered, to call for and examine the record of any proceeding before any inferior criminal Court in order to satisfy itself or himself as to the correctness, legality or propriety of any finding or order. ' Proceeding ' is a very wide term, and would include any judicial proceeding taken before any inferior criminal Court even though it may not relate to any specific offence.

15. I think, therefore, that the High Court has the power to revise any order passed by a Magistrate under Section 113(4), and the preliminary objection, therefore, fails.

16. On the merits it is contended on behalf of the applicant, first, that under Section 145(1) there must be an authorization in writing to act for or represent the railway company before any criminal Court and that no such authority in writing has been produced by Mr. Londe to enable him to file the complaint in the present case. The point does not seem to have been taken specifically before the Magistrate. Under Section 118(4) the application is to be made to the Magistrate ' by any railway servant appointed by the railway administration in this behalf.' It is contended on behalf of the railway company that Section 145 refers to a person who is appointed to conduct the proceedings in a criminal Court, and that in the

present case Mr. Behere was appointed to conduct the proceedings by an instrument in writing. Mr. Londe in his cross-examination has stated that the Chief Traffic Manager has issued orders for filing this complaint, and it is contended on behalf of the opponent that if this point had been taken in the lower Court, they could have produced the order in writing appointing Mr. Londe to make an application under Section 113(4) I think that the point does not, in my opinion, vitiate the proceedings as at the most it is merely an irregularity which does not prejudice the petitioner, and the point ought to have been taken specifically before the lower Court.

17. It is next urged on behalf of the applicant that the sum of Rs. 48-11-0 was wrongly levied from the applicant and the penalty of Rs. 6 was not due but only a penalty of Rs. 1 under Sub-section (3), Clause (a). There is no evidence in the case that the applicant immediately after incurring the charge and before being detected by the railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred. This point also does not appear to have been taken before the Magistrate, and it is, therefore, not necessary to go into the question whether Mr. Williams was a railway servant on duty with the train.

18. The next point is the most important point in the case, and it is urged on behalf of the applicant that he was justified in not travelling in the second class compartment for which he had purchased the ticket and in which there were pardanashin ladies, and it is contended on his behalf that so long as there was room available in the train, the railway company was bound under the contract to provide him reasonable accommodation. It is difficult to hold on the evidence that the applicant was not justified in refusing to travel in the second class compartment in which there were pardanpshin ladies.

19. The question, however, arises whether he was justified in travelling in a first class compartment without the permission of a railway servant when he had not purchased a proper ticket for the first class but had purchased only a second class ticket. Under Section 67 of the Indian Railways Act, fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being sufficient room available in the train for which the tickets are issued. But Section 68 provides

that no person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket. It is contended on behalf of the applicant that if there was room available in the train, in a class higher than that for which the passenger had purchased a ticket, the railway company was bound under the contract to provide reasonable accommodation for him, and that in the absence of reasonable accommodation, he was entitled to enter even a high class and the ticket which he has purchased for the lower class would be a proper ticket. It is difficult to accept this argument. There is no provision in the Indian Railways Act which entitles a person, who has purchased a ticket of a lower class, to enter a compartment of a higher class without a proper ticket for that class. We are not concerned here with the question whether the railway authorities should not have acted more discretely in the matter having regard to the circumstances of the case and allowed the applicant to travel in the first class when there was no proper or reasonable accommodation in the second class for which he had purchased a ticket and in which under the circumstances mentioned by him he was prevented from travelling. Section 68 of the Indian Railways Act prohibits a person entering any carriage without the permission of a railway servant unless he has a proper pass or ticket. It appears from the provisions of the Indian Railways Act that if he is unable to travel in the class for which he has purchased a ticket, he can apply for his fare being refunded under Section 67, Sub-section (2), on his returning the ticket within three hours after the departure of the train, or under Sub-section (S) of Section 67, if there is no room available in the class of the carriage for which he has purchased a ticket, and he is obliged to travel in a carriage of a lower class, he shall be entitled on delivering up his ticket to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he has travelled. He can, therefore, either have his fare refunded or have the difference refunded to him if he travels in a carriage of a lower class. But if he intends to travel in a carriage of a higher class, it is clear that there is no section in the Indian Railways Act which empowers him to do so, Under Section 68 he could have travelled in a higher class with the permission of the railway servant. But in the present case it is not proved that the applicant secured the permission of a railway servant before entering a carriage of a higher class. The consequences of

travelling by a higher class without the permission of a railway servant under Section 68 of the Indian Railways Act; are provided for by Sub-section (2) of Section 113 which lays down that if a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket, he shall be liable to pay, on demand by any railway servant appointed by the railway administration in this behalf, the excess charge in addition to any difference between any fare paid by him and the fare payable in respect of each journey as he has made. Section 113, Clause (2), is clear and explicit, and admits of no implications or exceptions.

20. Section 113 applies not to offenders against justice but ordinarily to innocent persons, who, as stated in the judgment of the Calcutta High Court in *Hart v. Buskin* I.L.R. (1885) Cal. 192 'may find themselves in the wrong by mere accident.'

21. I think, therefore, that the excess fare together with the penalty was properly ordered to be recovered by the learned Magistrate.

22. The result, therefore, is that this application fails and the rule will have to be discharged.

Barlee, J.

23. I agree. Even assuming that in the circumstances there was no sleeping berth available in the second class, Mr. Horniman must fail. I cannot find anything to justify his view that he was entitled to travel by first class on his second class ticket. The relations between him and the railway company were governed not only by contract but by statute, and the Act is quite clear. Section 113(2) of the Indian Railways Act runs:-

If a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket...he shall be liable to pay, on demand...the excess charge, etc

To this rule there is no exception in the Act. The learned Counsel has referred us to Sections 67 and 68, but, in my opinion, they do not help him. Section 67

provides that a person for whom there is no room in the train for which he has purchased a ticket or who is obliged to travel in a carriage of a lower class, shall be entitled to a refund of the fare paid or to a refund of the difference between the fare paid by him and the fare payable for the lower class. There is nothing in the Act to show that he can, in any circumstances, travel by first class on a second class ticket.

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