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Court : Mumbai

Decided On : Aug-07-1907

Reported in : (1907)9BOMLR967

Judge : Chandavarkar and ;Heaton, JJ.

Appeal No. : Criminal Application for Revision No. 152 of 1907

Appellant : Emperor

Respondent : A.M. Jeevanji

Judgement :

Chandavarkar, J.

1. This is an application by the petitioner, A.M. Jeewanjee, for a revision of the judgment of the Chief Presidency Magistrate, convicting him of the offence under Sub-section 1 of Section 107 of the Indian Emigration Act of 1883, as amended by Act No. X of 1902. Under that provision, 'whoever without having first obtained the permission of the Local Government referred to in Section 107, Sub-section 1, enters or attempts to enter into an agreement purporting to bind any Native of India to depart by sea out of India for any of the purposes specified in the Sub-section ... shall, on conviction by a Magistrate of the First Class, be punishable with fine which may extend to Rs. 250 for each Native of India in respect of whom the offence is committed.'

2. The learned Chief Presidency Magistrate has held that the petitioner Jeewanjee entered into such an agreement (which i Ex. T in the case) with one Shaik Ismail Shaik Jamal, on the 23rd of January 1907, without having first obtained the permission.

3. The conviction is assailed before us on several grounds, some of law and others of fact.

4. To deal with the grounds of law first, it is urged that the Chief Presidency Magistrate, being not a Magistrate of the First Class, had no jurisdiction to convict the petitioner. It is true that the offence, with which the petitioner was charged, is triable exclusively by a Magistrate of the First Class and that, in the Code of Criminal Procedure such a Magistrate is in terms specified or described, for the purposes of criminal jurisdiction outside a Presidency town, as one distinct from a Presidency Magistrate in that town. But the question is whether the term 'Magistrate of the First Class' in Section 111 of the Emigration Act was intended by the Legislature to include or to exclude a Presidency Magistrate Section 6, Clause 4 of the Act defines the term 'Magistrate 'to mean, 'in the Presidency towns, a Presidency Magistrate and elsewhere a District Magistrate, or a sub-divisional Magistrate '. A Presidency Magistrate, being thus brought in under the denomination of Magistrate' must belong to one or other of the three classes into which those falling within the general description have to be divided, according to the express provisions and scheme of the Code of Criminal Procedure. He does not belong to the second or the third class, because he is the highest class of Magistrates in a Presidency town-there is no Magistrate exercising there higher Magisterial powers. And, though in the Criminal Procedure Code, there is no definition of the term ' Magistrate of the First Class ', it is used in the Code to mean a Magistrate exercising within his jurisdiction the highest Magisterial powers, which are ordinarily conferred under it upon such Magistrates. That is the sense also in which the term is used ins. 111 of the Emigration Act. The whole scheme of Chap, II of the Code is in fact so arranged as to signify that a Presidency Magistrate belongs to what is, gene, rally speaking, the highest class of Magistrates and that is the First Class. This is specially clear from Section 32 of the Criminal Procedure Code, by which the Courts of Presidency Magistrates and of Magistrates of the

First Class are put upon the same footing in respect of sentences which Magistrates may pass-The omission of the term ' Presidency Magistrate ' in Section 111 of the Emigration Act, being accounted for by these considerations should not be treated as a casusomissus, as to which the law is that it ought not to be created by interpretation save in some case of strong necessity or where the words of the Statute are so plain as to lead to an irresistible inference of it : see the dicta of Lord Fitzgerald in Mersey Docks and Harbour Board v. Henderson Brothers (1888) 13 App, Cas, 595. We are of opinion, therefore, that the term 'Magistrate of the First Class' in Section 111 of the Emigration ' Act means a Magistrate appointed to exercise, within his jurisdiction, the highest Magisterial powers ordinarily prescribed by the Criminal Procedure Code and includes a Presidency Magistrate.

5. The Chief Presidency Magistrate had, therefore, jurisdiction to try this case and convict the petitioner.

6. It is next contended that the conviction is illegal, because Section 111 of the Emigration Act, on which it rests, applying only where the agreement referred to therein is one purporting to bind a Native of India, there is no evidence in this case to show that Shaik Ismail Shaik Jamal is such a native. No doubt there is no oral evidence, but the term 'evidence' is not confined to that and includes circumstantial or documentary evidence. The correspondence between Messrs. C.H.B. Forbes and Co. and the petitioner in respect of the engagement of Shaik Ismail Shaik Jamal, which is admitted as evidence in the case (Exs. J, K, O, Q and R), was conducted upon the basis of his being a 'Native of India.' Messrs. Forbes and Co. wrote on the 9th of January to the petitioner that he would have to obtain a permit or certificate from the Protector of Emigrants for Shaik Ismail; otherwise he would not be allowed to land in British East Africa. It is an admitted fact in the case that the petitioner sent his clerk with Shaik Ismail to the office of the Protector of Emigrants for taking the steps required by Sections 107 and 111 of the Act; that there the clerk obtained the necessary forms to be filled up under the Act. On the 10th of January 1907, Messrs. Forbes and Co. informed the petitioner that the Protector had refused to give Shaik Ismail a pass unless the petitioner as his em ployer applied for one (Ex. K). In reply the petitioner sug-gested to them that they,

not he, should apply to the Protector. It is unnecessary to set out the rest of the correspondence here but the effect of it and other evidence in the case is clear. The petitioner and Messrs. Forbes and Co. dealt with each other in the matter of the engagement of Shaik Ismail on the distinct understanding that Section 107 of the Emigration Act applied to him. Shaik Ismail also conducted himself likewise in the same matter to the knowledge of the petitioner. He went and saw the Protector, informed him of his intention to depart out of India by sea and asked for the necessary permission.. All this is evidence of conduct from which, under Section 114 of the Evidence Act, it is competent for the Court to presume that Shaik Ismail is a Native of India. And the presumption was not challenged before the Magistrate. The point as to absence of evidence is taken before us for the first time. This objection also must be overruled.

7. The third objection to the conviction is this. On the 26th of January 1907 the Chief Presidency Magistrate, issued a summons against the petitioner, charging him with an offence alleged to have been committed on the 10th of January, 1907. The petitioner appeared before the Magistrate in obedience to it and submitted that the summons disclosed no offence. Thereupon the learned Magistrate ordered a fresh summons to issue. The trial now complained of was upon that fresh summons, which was to answer the charge relating to an offence alleged to have been committed on the 23rd of January 1907. The objection raised is that this second summons was issued without any fresh or supplemental information. Assuming that there was that defect in the summons, it is an error, omission or irregularity, which, under Section 537 of the Code of Criminal Procedure, is not sufficient to upset the finding and sentence unless it 'has in fact occasioned a failure of justice'-that is, unless it has unfairly affected the petitioner's defence on the merits. No such failure has even been hinted at in argument before us.

8. Passing now to the merits on the facts of the case, the learn-ed Magistrate has found upon the evidence that on the 23rd of January 1907 the petitioner did enter into the agreement, evidenced by Ex. T, with Shaik Ismail Shaik Jamal, purporting to bind the latter to depart by sea out of India for one of the purposes specified in Section 107 of the Indian Emigration Act. That is a finding of fact which this Court, acting under its revisional jurisdiction, will not revise unless it is vitiated by any

error of law or based upon a gross misconception of the evidence. What is urged for the petitioner by his learned Counsel is that Ex. T is not an agreement of the kind mentioned in Sub-section 1 of Section 111 of the Emigration Act but is merely a memo of an agreement which was to be entered into. This argument ignores two important considerations. First, Sub-section 1 of Section 111 hits at not merely entering into an agreement but also at any attempt to enter into it. And an attempt consists in ' some external act which shows that progress is made in the direction of it or towards maturing and effecting it'-that is, 'something tangible and ostensible of which the law can take hold, which can be alleged and proved' '(Broom's Legal Maxims, page 254, Eleventh Edition). Judged by this test, there was here, as the learned Magistrate finds proved, an advance paid by the petitioner to Shaik Ismail in respect of his engagement and a writing drawn up on a stamped paper, Ex. T. That is sufficient to fall within an attempt to enter into an agreement of the kind specified in the section. Secondly, the terms of Ex. T are that Shaik Ismail agrees and binds himself. In that view it is an agreement on the face of it. Whether it was valid and legal is not the question. It is enough under the section if it purported to bind Shaik Ismail. And it did so purport. In either view, the question is one of fact and we see no good reason to interfere with the learned Magistrate's finding based on his appreciation of the evidence.

9. But it is urged that the agreement was entered into, not by the petitioner, but by his clerk, without the consent or knowledge of the former and that, this being a criminal case, the petitioner is not liable for his servant's act. There again the Magistrate has found on the evidence that the petitioner authorised his servant 'to make the necessary arrangements and after the agreement, Ex. T, was entered into he expressly ratified it by his letter Ex. N.' The direction to 'make the necessary arrangements ' would of course not authorise the servant to enter into the agreement on his master's behalf without first obtaining the Protector's permission according to law. And if, without that authority, the servant entered into the agreement, a subsequent ratification of it might not render the master liable under Section 111, Sub-section 1 On that point it is unnecessary for the purposes of this case to express any opinion. But the direction given to the servant 'to make the necessary arrangements' coupled with the money paid in advance to Shaik Ismail by the petitioner and the letter Ex. N, are strong evidence that what the

servant did was done as the petitioner's agent duly appointed for the purpose of entering into the agreement.

10. The question, then, is whether the petitioner is criminally liable for the agreement entered into on his behalf by his servant. The law on the subject is 'where a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute' Broom's Legal Maxims, Eleventh Edition, p. 252, citing Coppen v. Moora (1898) 2 Q B. 306. And the Statute should be construed not merely with reference to its language, but also its subject-matter and object.

11. Now, Sub-section 1 of Section 111 of the Emigration Act has for its object the protection and safe guarding of the interests of a certain class of the public. The subject matter dealt with is an agreement made, for the purpose specified there, between any person falling within that class and any other person. Such an agreement, according to the Contract Act, is legal and binding even if it is entered into by a party represented by his agent acting within the scope of his employment. In that respect the Contract Act merely follows the well-known principle, qui per alium, facit per seipsum facere videtur (he who does an act through another is deemed in law to do it himself). Sub-section 1 of Section 111 of the Emigration Act does not break in upon that rule of law, in respect of the agreements afiected by it. When it says that "'whoever...enters or attempts to enter into an agreement & c,' the natural construction of the word 'whoever', according to the rule just mentioned, is, whoever either by himself or through his agent. In other words, the Act leaves untouched the right of every person to enter into such agreements through an agent. It merely provides that such agreements shall not be entered into without the previous permission of the Local Government. Whether, therefore, we have regard to the language of the section or the subject matter of it or its object, the manifest intention is to hold the master liable for his servant's act, provided the act was done by the servant so as to bind the master according to the law of contract. Were it otherwise, it would be possible for any person to employ a servant to enter into such agreements on his behalf and

thereby defeat the object of the Act.

12. The last objection urged in support of this application is that the petitioner had obtained such permission as the section requires before the agreement, Ex. T, was entered into. For the purposes of this objection reliance is placed on the evidence of Mr. Boyd, the Protector, on which the learned Chief Presidency Magistrate has proceeded in arriving at his conclusion. According to that evidence, Shaik Ismail having seen Mr. Boyd and informed him of his intention to go to Mombassa and the terms upon which the petitioner intended to send him there for employment, Mr. Boyd told Shaik Ismail 'that before he would be allowed to go, a proper agreement would have to be ' made out by Mr. Jeewanjee' before him (Mr. Boyd) and a deposit left with him. Mr. Boyd further states: 'I told him that until this agreement was made out, I could not let him go.' These conditions prescribed by Mr. Boyd were never complied with before the execution of Ex. T. That is conceded. What is contended is that Mr. Boyd was not within his legal rights in prescribing those conditions. Section 108 authorised him to grant the permission applied for 'on such terms and conditions (if any)' as he might think fit. That vested in him a discretionary power to be exercised reasonably, not arbitrarily. The argument of the learned Counsel for the petitioner that the words 'terms and conditions' in Section 108 mean ' the terms of the agreements ' mentioned in Clause (v) of Section 107 is opposed to the plain meaning of the words. Had the Legislature intended to limit the discretionary power to an approval or disapproval of the terms of the agreement between the person applying for the permission and the native of India he was going to engage, they would have said 'on approval of the terms of the agreement referred to in Clause (v) of Section 107'. The coupling of the word 'conditions' with the word 'terms' in Section 107 makes out the intention of the Legislature to be that the officer authorised to grant the permission should have power to impose any reasonable terms and conditions he thinks proper as conditions precedent to the grant, whether they relate to the terms of the agreement itself, or, being extraneous to it, relate to its execution or other considerations which have to be taken into account in order to protect the interests of the native of India departing out of it by sea. But it is urged that, in any case, Section 108 should not be construed as authorising the Protector to require that the agreement shall be properly executed in his presence, as a condition

precedent to the permission, because had the Legislature intended to so authorise him, they would have said so expressly, as they have said in Section 29 in regard to 'every agreement to emigrate'. But in Section 29 the execution of the agreement (referred to there) in the presence of the Protector is made compulsory in every case. In Section 108 the power conferred on the Local Government, who have delegated their power to the Protector, is discretionary and it is left to that Government to decide whether in any particular case any agreement referred to in Section 107 shall be executed or not in their presence; that is, in the presence of the Protector, acting as their delegated authority. The two sections being thus distinguishable, the language of one cannot be invoked to aid the construction of the other, especially where the language of each is plain.

13. All the objections urged to the judgment of the learned Chief Presidency Magistrate failing, we confirm the conviction and sentence and discharge the rule.