

Emperor Vs. Narayan Krishna Gogte

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Court : Mumbai

Decided On : Oct-18-1922

Reported in : AIR1923Bom1; (1923)25BOMLR26

Judge : Lallubhai Shah, Kt., Acting C.J., ;Marten and ;Crump, JJ.

Appeal No. : Criminal Reference No. 23 of 1922

Appellant : Emperor

Respondent : Narayan Krishna Gogte

Judgement :

Lallubhai Shah, Kt., Acting C.J.

1. This is a reference by the District Magistrate of East Khandesh recommending that the conviction and sentence should be set aside. The accused was convicted by the First Class Magistrate of Jalgaon City, under Section 109 of the Indian Railways Act for having entered a compartment which was reserved for Europeans and Anglo-Indians in a passenger train. The accused had a third class ticket to travel from Pachora to Bhusaval by the down passenger train on February 17, 1922; and he entered the compartment in Question which was in fact vacant. The learned Magistrate was inclined to hold that the railway company had no power to reserve the compartment in that manner; but following the ruling in Emperor v. Brijbasi Lal I.L.R. (1920) All. 327 he held that the railway company had the inherent right to reserve compartments in that manner and convicted the

accused and sentenced him to pay a fine of Rs. 5.

2. The accused applied to the District Magistrate who has made a reference to this Court.

3. The point that we have to consider is whether the compartment such as was reserved in this case could be legally reserved for a class of passengers without reference to the question whether there were any actual passengers of that class travelling or known to be intending to travel by that train, I have stated the question in this form, though in this particular case we are concerned with the reserved accommodation provided in a third class compartment in a passenger train for Europeans and Anglo-Indians, as in my opinion that is the question underlying the reference.

4. It is not suggested that there is any statutory provision or any rule under Section 47 of the Indian Railways Act which authorises this kind of reservation. It appears to have been done in pursuance of 'Working Instructions' issued by the railway company, a copy of which has been furnished to us by Mr. Binning appearing for the company. I refer to it only for the purpose of showing that the Crown and the Company rely upon the inherent powers of the company and not upon any statutory provision or rule.

5. I have considered the arguments urged before us on behalf of the Crown, the company and the accused : and I have also considered the decisions of different Courts on the point, which are opposed to the view which I take of this question. In the first place I feel quite clear that the powers of the company are subject to certain statutory limitations and must be determined in the light of the scheme of the Act so far as it bears upon the point in question. A penal provision ought to be strictly construed : and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on this occasion. The company has full power to regulate its traffic within the limits allowed by law. Section 42(2) provides the limitation in question; and it is for the prosecution to establish that the limitation has not been transgressed, in this case. I do not feel any doubt that the section refers to all traffic, which includes passenger traffic (see Section 3(11)). This point is, in my opinion, sufficiently dealt with in Vishvanath

Ganesh v. G.I.P. Railway Company I.L.R. (1921) 45 Bom. 1324 : 23 Bom. L.R. 809. It is true that no suit can be instituted or proceeding taken for anything done or any omission made by the railway administration in violation or contravention of any provision of Chapter V. But I do not see how a criminal Court is relieved of its obligation to consider this question so far as it is relevant in determining whether a particular offence is committed or not. In my opinion it is a question of fact to be determined in each case whether the particular accommodation reserved for a section of the travelling public to the exclusion of the rest of the public involves any undue or unreasonable preference or advantage to or in favour of any particular person or description of traffic in any respect whatever or subjects any particular person or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever. I readily concede that the powers of a railway administration are very wide so long as it does not transgress the limitation which the statute has imposed in the interests of the public. But where it exercises its powers in a manner, which may appear to involve some kind of preference, it is open to the administration to have an appropriate rule under Section 47 which would remove the doubt and difficulty to a large extent. For instance if there were a rule authorising the railway administration to reserve accommodation for Europeans and Anglo-Indians travelling in the third class within such limits as may be prescribed the onus of proving that such a rule was inconsistent with the provisions of the Act would lie heavily upon the party asserting it. When a rule is framed under Section 47, it would imply that the Governor-General-in-Council is satisfied as to its need and propriety.

6. In the absence of such a rule, we have to consider it as a question of fact on the evidence in this case. In doing so it is necessary to bear in mind the provisions relating to 'carriage of passengers' in the Act. It is provided in a 66 that 'every person desirous of travelling on a railway shall, upon payment of his fare, be supplied with a ticket specifying the class, the tare and the range of his journey.' Section 67(1) provides that 'fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued,' and that in case a person to whom a ticket has been issued does not get accommodation the fare is to be refunded. Thus it appears to me that a person who purchases a ticket shows beyond reasonable doubt that he

is desirous of travelling by the particular train and is anxious to secure accommodation. If he finds a compartment vacant, and cannot travel by it he is put to an undue disadvantage, if the vacant room is kept apart for any person who has not shown any similar desire to travel. The trial Magistrate has remarked in his judgment with reference to third class passengers that they 'are now-a-days getting little accommodation in crowded trains even though these reserved compartments are seen mostly empty.' In fact the learned Magistrate goes so far as to think that even a rule if framed would probably be considered to be inconsistent with the Act. I am not concerned with the question whether a rule, if framed, would be consistent with the provisions of the Act, and I do not express any opinion as to that. It would be premature and improper to suggest any opinion in anticipation about a rule, which does not exist. But as regards the question of fact his observation is entirely in consonance with the evidence in the case. The relevant evidence on this point is quoted in the letter of reference by the District Magistrate, and is contained in the cross-examination of the Railway Police Constable and guard. It clearly establishes that the overcrowding is not a rare occurrence, while a compartment, which would accommodate nearly twenty-five passengers remains practically vacant. What appears to me to be a probable result of this manner of reserving accommodation for one class of passengers is that a passenger outside that class would be unable to travel by a particular train for want of room on account of overcrowding whereas there would be room in the train for a person of that class who may not have expressed any desire to travel and who may not travel at all by that train. That is a result which according to the evidence is not uncommon. When a compartment is reserved in pursuance of general instructions, leading to such results, it cannot be said to be legally reserved, so as to constitute an entry therein an offence punishable under Section 109. The accident that a particular train was not crowded and that there was room for the accused on that particular occasion elsewhere in the train does not seem to me to afford any answer to the real question in the case. If the evidence in this case is accepted, as it has been accepted, it shows that the exercise of this power involves the result that some passengers outside the class of passengers for whom the compartment is reserved would be left over without any accommodation in the train, whereas a passenger of that particular class at that station or any of

the following stations would get accommodation, and if there be no such passenger the compartment would remain unoccupied.

7. It is also a matter for consideration that while the average space theoretically allowed to third class passengers would be and should be the same for all, the space in fact allowed to passengers of a particular class, would be much greater, when a compartment is reserved for that class; for according to the evidence the average number of passengers of that class would be very small, and a compartment for twenty-five passengers would be practically reserved for that small number. This also indirectly but effectively introduces an element of preferential treatment. I desire to make it clear that I do not put any technical or narrow meaning upon the word 'passenger' as used in Section 109. I include within its meaning a class of passengers; but I do not think that it could include within its scope any persons representing a class or section of the public without the slightest reference to their desire or intention to travel by that train previously expressed or known to the railway company. I think that a reservation of that kind is apt to involve a transgresssion of the limitation laid down in Section 42(2) and may be shown by evidence to involve that result in a particular case. That appears to me to have been shown in this case to the satisfaction of the trial Magistrate; and the District Magistrate also takes the same view.

8. I have carefully considered the reported cases on this point; and I am unable to agree with the view that such reservation for a class or section of the public is necessarily legal. It may be illegal as transgressing the limits prescribed by Section 42(2), as it has been shown in this case.

9. I think, therefore, that the conviction and sentence ought to be set aside. I would order accordingly, fine, if paid, to be refunded.

Crump, J.

10. This is a reference by the District Magistrate East Khandesh, in the case of Narayan Krishna Gogate, who was tried by the Magistrate First Class, Jalgaon City, for an offence punishable under Section 109 of the Indian Railways Act (IX of 1890) and fined rupees five.

11. In making this reference the District Magistrate has relied on the decision of this Court in *Vishvanath v. G.I.P. Railway* : AIR1921 Bom73(1) . That decision proceeded on the ground that the Court had no jurisdiction by reason of Section 41 of the Indian Railways Act, and the remarks cited are therefore obiter. There is thus no decision of this Court precisely upon the point before us. There is, however, a decision of the Allahabad High Court, *Emperor v. Brijbasi Lal* I.L.R. (1920) All. 327 which on the facts is indistinguishable from the present case, and a decision of the Madras High Court, *In re Komaran* I.L.R. (1921) Mad. 215 which is also directly in point though it deals with other questions with which we are not here concerned. The first of these decisions is no doubt open to question as pointed out in the decision of this Court already cited, but in my opinion the decision of Oldfield J. in the Madras case contains a clear and accurate exposition of the law on the point before us, and I am content to follow it.

12. Stated shortly the law is as follows. The railway company can deal with their rolling stock as they please subject to any duties or restrictions imposed by the Legislature. We are here concerned with restrictions imposed by the Indian Railways Act 1890; and Section 42 of that Act is the only section which falls to be considered. The question is whether there has been 'undue preference' within the meaning of that term as used in Section 42(2). The term is familiar in England, but the English cases turn almost entirely on questions of differential treatment in the matter of rates. This much, however, may be said, that there is nothing illegal in showing 'preference' so long as it is not 'undue preference.' Further, that it is a question of fact in each Case whether the preference shown is or is not 'undue.'

13. The accused entered this compartment knowing that it was reserved by the railway company for European and Anglo-Indian passengers. He did so because he objected to racial distinctions (see his plea and examination dated April 8, 1922). Prima facie his act was an offence under Section 109 of the Indian Railways Act. It is open to him to show in his defence that the preference shown to the class of passengers indicated was undue preference, but that was not the meaning of his plea. That plea in no way turned on the extent of the accommodation reserved for this class. If, however, the plea of undue preference is made out by the evidence effect may be given to it.

14. It is reasonable to assume that the railway company know their own business best, and that they will not reserve for any class accommodation beyond what is reasonable. Certainly I see no reason to suppose that railway companies are inclined to be over-liberal in the matter of accommodation. It would not pay them. The general instruction which the company has issued in this case is that one compartment shall be reserved for the class of passengers in question on all long distance trains. In order to determine whether with reference to this train the preference is undue it would be necessary to know matters on which the record is silent. I take it that there is no undue preference to A unless there is prejudice to B. To determine this question for this train generally speaking it would be convenient to know what is the total average number of passengers, what is the average number of this special class, what is the accommodation reserved for this special class, and what is the accommodation available for other passengers. Here all that is known is that the compartment reserved would hold from twenty to twenty-five passengers, Without some such data as I have indicated it is (in my opinion.) impossible to say that generally speaking there is any undue preference. As to this general aspect of the question the evidence on the record gives little assistance. That this compartment is often empty does not go far unless it is shown that the other passengers have not sufficient accommodation. The only evidence of overcrowding is contained in the statement of the guard which is as follows:- 'Except on bazar days the passenger trains are not overcrowded.

15. With reference to the day of the alleged offence the evidence is against the plea set up. The accused did not complain that he was in any way prejudiced. The guard says that the accused complained that the board indicating the reservation of the compartment was 'an insult' to him. That view of the matter is quite understandable but it has nothing to do with the question of undue preference. Indeed it shows plainly enough that the accused's grievance would have been equally acute, had the accommodation reserved been adequate for one passenger only. I fully appreciate that aspect of the question, but I am not concerned with it. It does not affect the legal aspect of the matter. For the rest both the guard and constable Khandu say that on this day there was ample accommodation elsewhere. This being so I fail to see how the plea of undue preference can be made out. Had it been established that owing to this reservation the class

indicated find accommodation while other passengers cannot find accommodation the case might be different but there is no evidence to that effect, nor indeed is there any evidence worth the name of overcrowding in general.

16. I would decline to interfere and direct the record and proceedings to be returned.

Marten, J.

17. In this case I enjoy the advantage of having before me the judgments of my brothers Shah and Crump, as well as those of the two learned Magistrates. I will not therefore recapitulate the facts, but will state my own conclusions.

18. In my judgment it is clear that by virtue of Section 109 of the Indian Railways Act 1890 the railway company has a general power of reserving compartments for the use of passengers, I am further of opinion that this power of reservation may be exercised either for actual passengers who have already booked their seats, or for prospective passengers who the Company anticipate will travel. I further hold that the Company are entitled to reserve either individual seats, or whole compartments. Thus they may reserve compartments for females travelling first or second class, or for smokers or non-smokers; or for members of a theatrical company or for a cricket or football team. I say females travelling first or second class, because Section 64 only makes it compulsory on the Company to reserve accommodation for females travelling in the lowest class of carriage in the train. So, too, they may, in my opinion, reserve compartments for a large particular traffic expected at some particular station, whether it be a terminus or an intermediate station. For instance they could reserve such accommodation for pilgrims or other passengers expected to visit a particular religious festival or fair. Or, again, for persons attending some large political or other gathering, or a race meeting. The fact that the particular passenger traffic thus to be catered for may consist of some particular caste or sect, e. g., Hindu or Mahomedan pilgrims, is not, I think, a bar to the exercise of this general power of reservation See *In re Komaran I.L.R. (1921) Mad. 215.*

19. In short the general discretion in these cases must rest with the railway company, for they are the statutory managers of the railway. As such managers it is for them to issue the requisite orders for the reservation of passenger accommodation; and speaking generally it is for each passenger to obey those orders, believing that thereby he will best promote the general comfort of his fellow passengers, and also of the railway staff, and incidentally of himself. If, on the other hand, each passenger is to be a law unto himself, chaos can be the only result. In this respect I cannot do better than quote from the judgment of Lord Halsbury in *Perth General Station Committee v. Ross* [1897] A.C. 497 some sentences which are, I think, typical of the common sense which that learned Judge always showed. He says at p. 483:

But I should be sorry to throw any doubt on the absolute right of the railway company in the first instance to regulate their own traffic in their own way,.... I do not believe that any actual inconvenience to the public can result from the recognition of the right; of the railway company to carry on their business in their own way. Their own interest is the best security that their strict legal right will not be abused.

20. The above then being the general powers of the railway company in the matter of reservation of passenger accommodation, I further hold that under Section 42(2) they must not exercise such powers as to give an undue preference or to cause an undue prejudice to any particular passenger traffic, whether individual or collective. In this connection; and with all respect to the learned Judges of the Allahabad High Court who decided *Emperor v. Brijbasi Lal* I.L.R. (1920) All. 327 I find myself in agreement with the views which Sir Norman Macleod and Sir Lallubhai Shah expressed in *Vishvanath v. G.I.P. Railway* : AIR1921 Bom73(1) as to the effect of Section 42. That being so, it is in my opinion a question of fact in each case whether the railway company has shown an undue preference. And, in my judgment, under the ordinary rules of evidence, the onus of proof will lie on the person who alleges such undue preference. (See Indian Evidence Act, Section 102, illustration (b) and Section 103).

21. What then are the facts here? The accused declined to call any evidence. Consequently all we have to go upon is the cross-examination of Khandu Vithu, the constable on duty at Jalgaon station, and of W. B. Shaw, the guard of the train between Pachora and Jalgaon. Now the train in question is the No. 11 North East Down Passenger, which is one of those very slow trains-happily not met with in England-which meanders through the country for hours and days at the stately average speed of about 15 miles per hour. It leaves Bombay at 7 A.M. and reaches Pachora about 10 P.M. and Jalgaon about 11-30 P.M, Pachora being about 232 and Jalgaon about 261 miles away from Bombay. Its ultimate destination appears to be Delhi some 957 miles away from Bombay, which it reaches in about two and a half days.

22. But as to what was the passenger traffic by this particular train on this particular day, or indeed on any other day during the 15 hours and 232 miles between Bombay and Pachora, we have no evidence whatever. Khandu Vithu, the constable, was only on duty at Jalgaon. Shaw, the guard, was obviously not on continuous duty for 16 hours, viz., between Bombay and Jalgaon. I am entitled to presume this under Section 114 of the Indian Evidence Act. But it also so happens that I have recently had to investigate closely the running of the two sister trains, viz., the No. 13 N.E. Down Passenger and the No. 12 N.E, Up Passenger between Bombay and Pachora. I refer to the G.I.P. murder case (Emperor v. Morris and Donnison) which was tried before myself and a special jury at the Bombay Criminal Sessions last November. There the two murders were committed in train No. 13 between Deolali and Manmad and discovered at Pachora but the two murderers escaped back from Manmad to Deolali by train No. 12. Some of the guards had then to give evidence, and to produce the way bills. What they said in that case is not evidence in this, but the working knowledge I thus gained as to the particular portions of the line worked by the various guards of these slow trains, and consequently as to the ordinary course of business of the Company in this respect, all goes to fortify the above presumption which I should draw apart from such working knowledge.

23. There being then no evidence as to the state of the passenger traffic between Bombay and Pachora, I hold that the accused hag failed to discharge the onus of

proof that there was any undue preference shewn by the railway company in attaching this reserved compartment to the train at its start from Bombay or in keeping it so attached. For all I know the compartment in question may have been full for many hours from Bombay of the class of passengers for whom it was intended. And for all I know it may have filled up again, or once more emptied many times during the remaining forty-two hours of its journey between Jalgaon and Delhi; for there is no evidence as to what happened after Jalgaon, any more than there is of the state of affairs before Pachora.

24. And even the evidence as to what happened between Pachora and Jalgaon is by no means conclusive. It is quite clear that there was ample room for the accused elsewhere in the train, if he had chosen to go there. Neither in his oral nor in his written statement does he even suggest that he would have been left behind if he had not entered this reserved compartment, or that he would have suffered any discomfort by overcrowding or otherwise if he had gone to an unreserved compartment. He really bases his defence-such as it is-on his alleged right to enter what compartment he pleases, and on the alleged inability of the railway company to reserve lawfully a compartment for any particular community, no matter what the actual condition of the passenger traffic may be.

25. In my judgment he is wrong in both these contentions. And as regards the evidence of Khandu Vithu, it at most amounts to this, that this compartment was generally empty between Pachora and Jalgaon, while other compartments were full. Shaw, on the other hand, says that except on bazaar days this train was not overcrowded. But this is not the sort of evidence on which I can find a railway company guilty of undue preference, for it only relates to Home one and a half hours of, the journey, while the total journey takes some two and a half days. Nor can one reasonably expect the railway company to be constantly detaching or attaching particular compartments at various places on this long journey, merely because local conditions may happen to vary either generally or on any particular day.

26. The conclusion then which I have arrived at is that on the evidence in this particular case, the accused was rightly convicted by the trying Magistrate. Nor do

I see any reason to interfere with the fine of Rs. 5 which he has been ordered to pay. If I could have spared this middle-aged man the indignity of a conviction and a petty fine, I should have been glad to do so. But this is not the case of a passenger in an overcrowded and stifling compartment who ventures into an adjoining empty compartment which is apparently reserved for some non-existent person. In that case I can well understand the passenger feeling a natural irritation. The present case is nothing of that sort. The accused had ample time for reflection both at Fachora and Jalgaon, and in the view I take he was out to give trouble, and succeeded in doing so both at Pachora and Jalgaon. In my judgment the subordinate railway officials must be protected in the discharge of their duties to the general public from conduct such as this, and if the accused considers he has any grievance against their employers on the ground of undue preference, the remedy open to him under the Act is to apply to the Governor-General-in-Council under Section 28 to have the complaint determined by a Railway Commission appointed under Section 26. The accused's pleader did indeed inform me that that course had already been adopted by some Association in Jalgaon, and that the matter was still under consideration by His Excellency in Council. If that is so, there was all the less reason for the accused to take the law into his own hands while the matter was being investigated by the proper authorities. It must be remembered that the proper running of a railway requires expert and detailed knowledge of its traffic and its general requirements, and that is why both in India and in England the Railway Commission consists of one Law and two Lay Commissioners. Thus in England it is the Railway Company Commissioners who determine such disputed matters as alleged undue preference in the matter of rates, etc., and normally those matters would not come before the High Court, and much less so before a Police Court. So here, it is hardly a matter for the ordinary Law Courts to determine matters of disputed railway policy, and in the present case the requisite expert evidence is wholly wanting.

27. In conclusion I will again quote from *Perth General Station Committee v. Ross* [1897] A.C. 497 and this time I will cite what Lord Watson, another great Judge, said in that case at p. 489:

But the Legislature has not committed to the ordinary tribunals of the country the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a railway or a station has reason, or without reason thinks fit, to complain that some facility which he ought to have has been withheld from him, and that an undue preference had been shewn to others in the same position, a Court of law can give him no remedy. He must resort to the tribunal which the Legislature has constituted for that purpose, the Railway Commissioners; and, until they have decided in his favour, he is not in a position to say, and no Court would be justified in holding, that he stands possessed of the right which he asserts.

28. I agree that this was a finding in a civil suit, and in the present case I have to deal with a criminal prosecution. But with reference to the argument in the case just cited that the respondent ought to have been prosecuted before the Magistrates, Lord Watson observed at p. 482 : 'To have this point decided by a Magistrate would have been most inconvenient.' What Lord Watson held was that the proper tribunal was the Railway Commission; and that in fact was the decision of the House of Lords in that case.

29. I, accordingly, decline to interfere in revision in the present Case, and I direct the record and proceedings to be returned.