

In Re: V.R. Kothari

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Court : Mumbai

Decided On : Oct-09-1928

Reported in : (1929)31BOMLR79; 117Ind.Cas.333

Judge : Mirza and; Baker, JJ.

Appeal No. : Criminal Application for Revision No. 285 of 1928

Appellant : In Re: V.R. Kothari

Judgement :

Mirza, J.

1. The applicant owns an oil mill situated Article 8, Bhavani Peth, Poona, which prior to these proceedings he used to work continuously during night and day. The opponent whose residence adjoins the mill made a complaint to the City Magistrate, First Class, Poona, under Section 133 of the Code of Criminal Procedure. The City Magistrate made a conditional order requiring the applicant to desist from working the mill between the hours 7 p. m. and 7 a. m. and to appear before him on &, date fixed to move to have the order set aside or modified. The applicant appeared before the Magistrate as required and applied under the provisions of Section 135 of the Criminal Procedure Code to appoint a jury to try whether the conditional order made was reasonable and proper. The Magistrate decided to have a jury of five persons for the purpose and called upon the applicant under the provisions of Section 138 to nominate two out of the five. The

applicant nominated two jurors and suggested a third name which was accepted by the Magistrate who nominated him as foreman. The Magistrate addressed a letter, dated September 30, 1927, to the present opponent which was as follows :--

You have applied against Mr. V.B. Kothari (applicant) as regards an oil mill under Article 133 of the Criminal Procedure Code. It was written to you to inform the names of the jurors, you wanted to nominate; but you have not till to-day, arranged to do so. Now, do arrange to do so by the 3-10-27. Take note.

2. The opponent replied :-

I have received the summons.

The names of the jurors appointed are :-

(1) Mr. Ardeshir Bomanji Sethna, residing at Convent Street, Camp, Poona.

(2) Khan Saheb Aspandiar Rustom Irani, residing at Gutta Street, Poona.

The jurora as above should be appointed on my behalf. Dated October], 1927.

3. On receipt of these two nominations the Magistrate treated them as completing the jury. On October 3, 1927, the opponent wrote to the City Magistrate as follows :-

I received an intimation from you, through a police constable, I have given to him names of two jurors on my behalf; and I am also giving (those two names) to-day in this application.

1, Mr. Ardeshir Bomauji Sethna, Pleader, Convent Street, Camp Poona.

2. Khan Saheb Aspandiar Rustom Irani, of Gutta Street, Poona.

Thus the names of the two jurors have been given, which may be taken note of.

4. On October 14, 1927, the opponent made an application to the Magistrate as follows :-

In the above case, Mr. Ardesar Bomanji Sethna was appointed one of the jurors on behalf of the complainant (opponent). But he being a pleader, and as the Civil Courts are now closed, he has to go to Bombay for some private business. He is going in a day or two. I came to know that the jurors were to return their verdict after inquiry on 18-10-27. I, therefore, request that another juror should be nominated on my behalf who should be Mr. Jehangir Pestonji, pleader. The period of October 18, 1927, should therefore be extended and Rao Bahadur Lallubhai should be informed accordingly.

5. Accordingly, Jehangir Pestonji, pleader, was substituted for Ardeshir Bomanji Sethna, On October 19, 1927, the opponent again applied to the Magistrate as follows:-

I had informed your honour on October 11, 1927, that I had appointed Mr. Jehangirji Pevtonji as a juror. But 'Pestonji' as the name of the father of Mr. Jehangirji was given through mistake. Instead of that, the name is Jehangirji Dinshaw. This fact should be made known to your honour and hence this application.

Accordingly the name of the juror was corrected.

6. It seems that the applicant raised no objection in the trial Court to the procedure followed by the Magistrate in accepting two of the nominees of the opponent as members of the jury instead of nominating such jurors himself. The point was raised by the applicant before the Sessions Judge in appeal, but was not seriously pressed there. The point is now taken in this Court in revision.

7. It is not shown that the appointment of the two nominees of the opponent on the jury has resulted in any apparent injustice to the applicant. The jury including the applicant's nominees were unanimous in modifying in the applicant's favour the conditional order of the Magistrate by requiring that the mill should be closed from 9 p. m. to 6 a. m. instead of from 7 p. m. to 7 a. m. It is not shown that the nominees of the opponent were in any sense his partisans. They were members of a different community from his and were not residents of the locality where the alleged public nuisance had become the subject matter of the complaint. It is also

conceded that they are men of position and respectability in Poona. The only question to consider, therefore, is whether the nomination of these two persons as members of the jury by the present opponent amounts to an irregularity or is an illegality which vitiates the proceedings.

8. Under Section 138, Clause (1)(a), a duty is cast upon the Magistrate to nominate the foreman and one-half of the remaining members of the jury. In *Upendra Nath Bhattacharjee v. Khitish Chandra Bhattacharjee* I.L.R (1896) CAL. 499. a Division Bench of the Calcutta High Court has held that in the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate under the provisions of Section 138 of the Criminal Procedure Code, it is his duty to exercise his own independent discretion, and not merely to accept persons who may be put forward by the party who set him in motion, and that a jury constituted in violation of the provisions of Section 188 is not legally constituted, and is incapable of making a legally binding award. In *Kailash Chunder Sen v. Ham Loll Mitra* I.L.R (1899) CAL. 869. the Calcutta High Court gave a similar ruling that in nominating the foreman and one-half of the remaining members of the jury as required by Section 138 of the Criminal Procedure Code the Magistrate must exercise his own independent discretion and not appoint the nominees of the party who first made the complaint.

9. Reliance is placed on behalf of the opponent upon a ruling of Piggott J., sitting as a single Judge, in *Farzand Ali v. Hakim Ali* I.L.R (1914) All. 26. It was held there that it is not illegal on the part of a Magistrate to address any inquiry to the complainant with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury; but the Magistrate should see that he does not appoint friends or partisans of the complainant. The Court laid down the principle in such cases as being that the person at whose instance the proceedings were instituted should not be allowed to exercise rights not conferred upon him by law as if he were a party to the litigation. That case, in my opinion, can be distinguished from the present on the ground that the Magistrate there was investigating a complaint under Section 133 with regard to a property in a village to which he was a stranger. He called upon the person who had put him in motion to submit the names of respectable and

independent persons of the neighbourhood who might be acceptable for being nominated by him to the jury; and when such names were submitted to him, the Magistrate used his own discretion in nominating them to the jury. In the present case the Magistrate has treated the nomination of the remaining two members of the jury as a right of the opponent as if he were a party to the litigation. The procedure here adopted would be in direct conflict with the principle laid down by Piggot J. in *Farzand Ali v. Hakim Ali* (1914) I.L.R. 37 All 26. The nominations here are made not by the Magistrate as required by Section 138, but by the opponent. This, in my opinion, is an illegality which vitiates the proceedings. The order of the Magistrate is set aside and the case remanded to him for disposal according to law.

Baker, J.

10. I agree. I do not think there is any reason to suppose that the jury were not impartial, but in view of the distinct rulings of the Calcutta High Court as well as the terms of the section itself, it appears that the Magistrate must exercise his own discretion in nominating a proportion of the jury, whereas in the present case it appears that he has accepted the names suggested by the original complainant without exercising his own discretion in the matter, and this has been held to be an illegality in *Upendra Nath Bhattacharjee v. Khatish Chandra Bhattacharjee* I.L.R (1896) Cal. 499. and again in *Kailash Chunder Sen v. Ram Lall Mittra* I.L.R (1899) Cal 869. I agree, therefore, that the order should be set aside, and the case remanded for disposal according to law.