

Mainuddin and Others Vs. State of U. P.

Mainuddin and Others Vs. State of U. P.

SooperKanoon Citation : sooperkanoon.com/460307

Court : Allahabad

Decided On : Sep-16-1997

Reported in : 1998(1)AWC642; 1998CriLJ2109

Judge : P. K. Jain, J.

Acts : Railway Property (Unlawful Possession) Act, 1966 - Sections 2 and 3A;
[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 397 and 401

Appeal No. : Crl. Revision No. 3 of 1987

Appellant : Mainuddin and Others

Respondent : State of U. P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : V. Singh, Adv.

Judgement :

P. K. Jain, J.

1. Revisionists Mainuddin, Quamuddin and Jainuddin have filed the present revision challenging the judgment and order of Judicial Magistrate, Eastern Railway. Moghalsarai, Varanasi, dated 29.3.1986 whereby the revisionists were convicted under Section 3A of the Railway Property (Unlawful Possession) Act,

1966 (hereinafter referred to as the Act) and were sentenced to undergo 2 years' R.I. and the judgment and order In Criminal Appeal No. 64 of 1986 arising out of the judgment and order of the Judicial Magistrate, Eastern Railway. Moghalsarai. Varanasi whereby the appeal was dismissed and the judgment and order of the trial court was confirmed.

2. Briefly stated the facts are that on 3.2.78 an Information was received at R.P.F. outpost Moghalsarai that stolen railway property is stored in the shop of Mainuddin near Alinagar petrol pump. On this information S.I. Virendra Singh accompanied by Raj Deo Mishra, Virendra Kumar Shukla and others proceeded to the shop of Mainuddin. Information was also sent to the local police of Alinagar. Local witnesses, namely, Abdul Gafoor, Ram Nihor Prasad and Hari Shankar were called. Quamuddin the younger brother of Mainuddin was found present in Alinagar. The shop was locked. It was unlocked by Quamuddin and thereafter the search was taken: In one gunny bag 4 pairs of shoes described in the seizure memo were recovered. Besides this, two drums were also found which were got checked and from one drum 13 'Thans' of Markeen and from other drum 15 Thans of Markeen were recovered. On the first 13 Thans there was marking to the following effect both English and Hindi :

'Fabric Dhule Textile Mills Dhule, CHIDIYA CHHAP, UMMAD MAL, PREMRAJ BAMBAL, JAI BHARAT, JAI NEPAL, SUPERIOR SHEETING. V 38 A, COARSE AV CT 15, 81 CM. X 36 MT. FOR EXPORT TO NEPAL MADE IN INDIA'

On the other that of thans there was following markings :

'MTC fabric 596, 86 cms x mts. FOR EXPORT TO NEPAL, DHULE TEXTILE MILLS DHULE. MEDIUM -- MADE IN INDIA SUBSTANDARD DECR 1977'.

An enquiry was made from Quamuddin but he could not produce any papers. Seizure memo was prepared at the scene of occurrence.

3. On the basis of the seizure memo, a report Ex. Ka-2 was prepared and thereafter F.I.R. Ex. Ka-3 was registered. Investigation of the case was done by Assistant Sub-Inspector Sri Hardeo Singh. During investigation the I.O. went to

Dhule Textile Mills, Bombay and from enquiry it was learnt that 21 bundles of cloths were exported to Nepal by the said Mill. The recovered cloth was also in the said bundles. The I.O, had also enquired from North India Shoe Factory, Shahganj, Agra and it was revealed that 33 boxes of shoes were sent to Guwahati through R.R. No. 628319. During the investigation, it was also found that the aforesaid goods were being transported through railway wagon No. E.R.-39339. On 31.1.78 at Buxer goods yard the seal of the wagon was found broken and out of 76 packages only 71 packages were found in the wagon. Five packages were found short. The articles found in the shop of accused persons belonged to the said five packages which were being transported in the aforesaid railway wagon.

4. The prosecution examined P.W. 1 Rakshak Raj Deo Mishra, P.W. 3 Rakshak Virendra Kumar, P.W. 4 Assistant Sub-Inspector Sri Ramakant Mishra and P.W. 5 Sri Rama Shankar Upadhyaya, Assistant Sub-Inspector. The prosecution in support of its case also examined P.W. 2 Sri Upendra Kumar Das and P.W. 6 Assistant Sub-Inspector Sri Hardeo Singh.

5. The accused persons in their statements under Section 313, Cr. P.C. denied the prosecution case and also the alleged recovery from their shop and stated that they had been falsely Implicated in the case. They did not examine any witness in their defence.

6. The trial court believing the prosecution version accordingly convicted and sentenced the accused persons. Criminal Appeal No. 64 of 1986 filed by the accused persons was dismissed by the appellate court vide Judgment and order dated 18th December, 1990.

I have heard Sri V. Singh. learned counsel for the revisionists and the learned A.G.A.

7. The Judgment and orders of the Courts below are challenged on the ground that according to the prosecution witnesses shop belonged to Mainuddin. Therefore, other accused namely, Quamuddin and Jainuddin could not have been convicted for offence punishable under Section 3A of the Railway Property (Unlawful Possession) Act, 1966. That the names and signatures of P.W. 1, P.W.

3. P.W. 4 and P.W. 5, namely. Rakshak Raj Deo Mishra, Rakshak Virendra Kumar, Sub-Inspector Ramakant Mishra and Assistant Sub-Inspector Sri Rama Shankar Upadhyaya did not find place in the seizure memo and, therefore, their presence at the time of search and seizure is doubtful and that it is not proved that the property in question was railway property since such property was available in the market. The learned A.G.A. contends that there are concurrent findings of fact and there is no infirmity in the statements of the witnesses. Therefore, the judgments and orders of the trial court as well as appellate court do not require any interference.

8. There is no dispute that the names of P.W. 1, P.W. 3, P.W. 4 and P.W. 5 were not mentioned in the seizure memo. The learned Magistrate in his judgment observed that this will not make the presence of the witnesses doubtful. He further observed that in the seizure memo, the description of the articles recovered is given. Besides this, the names of local witnesses and constable of P.S. Alinagar were mentioned in the seizure memo. The appellate court has not at all considered this aspect of the matter. A perusal of the seizure memo Ex. Ka-2 shows that the names of Virendra Singh S.I., Rakshak Ramji Mishra and Assistant Sub-Inspector Rama Shankar Upadhyaya are in the seizure memo although it is stated that Rama Shankar Upadhyaya had reached there along with Hardeo Singh A.S.I. The names of other witnesses, namely, Raj Deo Mishra and Ramakant Mishra do not find place in the seizure memo. P.W. 1 has admitted in his cross-examination that his signatures were not obtained on the seizure memo. In his deposition, he has also not stated that the seizure memo contained signatures. P.W. 3 has admitted in his cross-examination that he had not signed on the seizure memo. P.W. 4 although states that the signatures of the witnesses were obtained on the seizure memo but he does not state that his signatures were also obtained on the seizure memo or that the seizure memo Ex. Ka-2 contained his signatures. Similar is the statement of P.W. 5 also. It would also be seen that according to the seizure memo S.I. Virendra Singh had received information at the out post and he had led the parties which had gone to make search. A memo was prepared by S.I. Virendra Singh. He has not been examined by the prosecution. It would be seen that out of the five witnesses of fact examined by the prosecution, only names of Virendra Kumar and Rama Shankar Upadhyaya are mentioned in

the seizure memo. Although it is stated in the First Information Report that S.I. Hardeo Singh and others had also reached the scene of occurrence before search and seizure but this fact does not find place in the seizure memo. When the names of some of the witnesses were not in the seizure memo and their signatures were not obtained on the seizure memo although signatures of other witnesses were obtained, the testimony of such witnesses that they had witnessed the search and seizure cannot be accepted and the Courts below have committed an error in accepting the testimony of these witnesses about the search and seizure.

9. Although in exercise of its revisional jurisdiction, the Court should normally not reappreciate the evidence and disturb the finding of fact arrived at by the Courts below but in cases the findings of fact are found to be perverse and without considering the material evidence, the Court in exercise of its revisional Jurisdiction can certainly reappreciate the evidence. There are material discrepancies in the testimony of the witnesses which further make their presence doubtful at the scene of occurrence. The prosecution case is that the accused Quamuddin was found at the scene of occurrence and he had unlocked the shop. P.W. 4 Sri Ramakant Mishra whose name does not find place in the seizure memo, states that he did not know if the shop was unlocked by Quamuddin by key or the lock was broken. He also did not remember if his shop was locked after search and seizure. He was also unable to state whether the recovered articles were brought to the Court in his presence or not. Such statement coupled with the fact that the name of the witness is not mentioned in the seizure memo and his signatures were also not obtained on the seizure memo clearly indicates that this witness has not at all witness the search and seizure. The Court has not at all considered the statement of the witness given by him during the cross-examination. P.W. 5 Rama Shankar Upadhyaya has stated during his cross-examination that shop was locked after the search and seizure but he was unable to tell as to whom the key was given and he was also unable to state if after locking of the shop the lock was sealed or not. He has admitted that the key was not taken into possession and he did not remember if the shop was returned to accused Quamuddin or not. Similar is the statement of P.W. 6. He states that he does not know as to what happened to the shop after Quamuddin was taken into

custody. He also states that the key was not taken into possession by the officer conducting the search and seizure. The key should have been taken into possession in order to establish that Quamuddin had unlocked the shop and in case it was not taken into possession it should have been found in possession of Quamuddin when Quamuddin was taken to R.P.F. out post and was searched before he was kept in the lock up of the out post. These circumstances also have not been considered by the Courts below which make the entire prosecution story doubtful.

10. According to the prosecution case, information received was that the shop belonged to Mainuddin. There is no evidence that Quamuddin and Jainuddin had any concern with the shop. P.W. 1 has stated that the shop belonged to Mainuddin. P.W. 3 has not stated as to whom the shop belonged. During cross-examination, he has stated that it was learnt that the shop belonged to Mainuddin. He further states that Mainuddin was called. He unlocked the shop and Mainuddin was taken into custody. P.W. 1 has also stated that he does not know if Quamuddin has any concern with the shop or not. Thus there is material discrepancy in the statements of the witnesses as to whom among the three revisionists the shop belonged. There is absolutely no allegation or evidence of the prosecution that all the three accused persons were partners in the shop. It has also come in evidence of the witnesses that Mainuddin to whom shop allegedly belonged was called and when he was not found his brother, namely. Quamuddin was called to open the shop. In these circumstances, it cannot be said that the shop belonged to Quamuddin or to Mainuddin. The offence under Section 3A of the Railway Property (Unlawful Possession) Act. 1966 relates to unlawful possession of railway property. From the facts and evidence as stated above it cannot be concluded with a definiteness as to who among the three revisionists was actually in possession of the alleged railway property. There is absolutely no evidence as to who among the three revisionists had put the property in question in the shop. Even if the shop was opened by Quamuddin, no inference can be drawn that he was in possession of the railway property found in the shop. Therefore, in the absence of any specific evidence and finding as to which of the three revisionists was actually found in unlawful possession of the railway property, none of them could have been convicted by the trial court. Both the

Courts below have not considered this legal aspect of the matter.

11. There is also no reliable evidence that the property in question was the railway property. The definition of the railway property has been given in Section 2(d) of the Railway Property (Unlawful Possession) Act, 1966. Railway property includes the property which is in possession of the railway for purposes of being transported from one destination to another destination. P.W. 6, the Investigating Officer has stated that during the investigation, he made enquiry from Dhule Textile Mills, Bombay and North India Shoe Factory. Shahganj, Agra and from which it was revealed that these Mills/Firms had entrusted the property to the railway for transportation. No witness from Dhule Textile Mills, Bombay or North India Shoe Factory. Shahganj, Agra was examined, nor the documents with regard to such entrustment were obtained to be produced before the Court. What was told to the witness by the representatives of Dhule Textile Mills. Bombay and North India Shoe Factory. Shahganj, Agra is hearsay which is not admissible. Similarly, the witness stated that he had also come to know during the enquiry that the articles seized in this case belonged to goods consigned to various destinations through railway wagon, seals of which were found broken and 5 packages were found short in the said wagon. The report of such inspection of the wagon and shortage in the wagon has not been filed or proved by the prosecution nor any witness who had checked the wagon and had found tampering in the seals of the wagon has been examined by the prosecution. Again what came to the notice of the Investigating Officer during investigation was not admissible unless the witnesses relating to the theft of the railway property from the said wagon were examined.

Such evidence as given by P.W. 6 would again be hearsay evidence and would not be admissible. This aspect has also not been considered by the Court-below.

12. In view of the foregoing discussions. I come to the conclusion that both trial court as well as appellate court have committed illegality and material error in convicting and sentencing the revisionists. The revision deserves to be allowed and is hereby allowed. The Judgments and orders of the trial court as well as of the appellate court are set aside. The revisionists are acquitted of the charge

under Section 3A of the Railway Property (Unlawful Possession) Act, 1966. Their bail bonds are cancelled and sureties are discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com