

Qabool and ors. Vs. Chajju and ors.

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SooperKanoon Citation : sooperkanoon.com/473115

Court : Allahabad

Decided On : May-31-1948

Reported in : AIR1948All411

Appellant : Qabool and ors.

Respondent : Chajju and ors.

Judgement :

ORDER

Agarwala, J.

1. Qabool, Dharam Singh, Manohara nd Bhullen filed a complaint against Ohajju and others under Sections 427, 147 and 379, Penal Code, alleging that the complainants were tenants of the accused who was a zamindar; that the accused (complainants) were in possession of the plots in dispute and had sown wheat, sugarcane and other crops thereon; that the accused had taken away the wheat grain and destroyed the sugarcane crop and that thus they were guilty of the offence charged.

2. The complaint was tried by a Bench of Magistrates, Second Class, of Kairana, district Muzaffarnagar. The Bench dismissed the complaint and acquitted the accused.

3. Against the acquittal of the accused the complainants filed a revision before the District Magistrate of Muzaffarnagar. The District Magistrate had made this reference to this Court.

4 The main ground taken by the learned District Magistrate in his reference is that there was no valid trial inasmuch as out of the two Bench Magistrates who delivered the judgment, one was not present at all the hearings.

5. On a perusal of the record I find that the Bench consisted of three Magistrates, Messrs. Mubarik Ali Khan, Bishan Lal and Indra Varma. On 16th July 1946 Messrs. Mubarik Ali Khan and Indra Varma recorded the evidence of the complainants under Section 202, Penal Code and then issued notices to the accused. On 21st August, Messrs. Mubarik Ali Khan and Bishan Lal, but not Mr. Indra Varma examined the prosecution witnesses in chief. On 9th September 1946 Messrs. Mubarik Ali Khan, Indra Varma and Bishan Lal examined some further prosecution evidence and framed charges. On 18th September 1946 Messrs. Mubarik Ali Khan, Bishan Lal and Indra Varma were present and eight prosecution witnesses were cross-examined. On 23rd September 1946 Messrs. Bishan Lal and Indra Varma were present and eight prosecution witnesses were further examined. On this date the counsel for the accused (but not for the complainant) stated that he had no objection to the inclusion of Chaudhari Indra Varma Sahib in the trial of the case at that stage. On 15th October 1946 defence evidence was heard by these two gentlemen and on 23rd October 1946 arguments were heard and on 29th October 1946 the decision was given acquitting the accused by these two gentlemen alone.

6. It would thus appear that if we include the hearing under Section 202, then not even one of the three Magistrates was present at all the hearings; and if we exclude that hearing then only one of the Magistrates, namely Bishan Lal was present throughout, and the other Magistrate was not present throughout. On some hearings Mr. Mubarik Ali Khan was present and on others Mr. Indra Varma was present. The result is that Mr. Indra Varma who signed the report was not present at all the hearings, and Mr. Bishan Lal was present on all the hearings after the accused had appeared but was not present in the initial stages of the

case.

7. It is a general principle of criminal trials that only a person who had heard the evidence in the case is competent to decide whether the accused is innocent or guilty, unless there is some statutory provision to the contrary : *In re Venku Naidu* ('23) 10 A.I.R. 1923 Mad. 327. Such a provision to the contrary is to be found in Section 350, Criminal P.C. Section 350 deals with cases where the trying Magistrate, after having heard and recorded the whole or a part of the evidence in the trial, ceases to have jurisdiction therein, and is succeeded by another Magistrate. In such a case the section provides that the succeeding Magistrate may act on the evidence so recorded by his predecessor. This is, however, subject to the proviso that the accused has a right in such a case to demand a fresh trial. Section 350-A relates to cases where there is a change in the constitution of a Bench of Magistrates consisting of more than one. That section provides that no order or judgment of a Bench of Magistrates shall be invalid only by reason of a change having occurred in the constitution of the Bench, provided two conditions are present, first, that the Bench by which the order or judgment is passed is a duly constituted Bench under Sections 15 and, 16, Criminal P.C., and secondly, that the Magistrates constituting the same having been present on the Bench throughout the proceedings. This Section 350A was added by the Code of Criminal Procedure Amendment Act, civil of 1923. Before the addition of this section it was uniformly held that where a judgment was delivered by the necessary quorum of Magistrates who had been present throughout the trial the judgment would be perfectly justified though some Magistrates had also been present at some other stage of the trial : *Khuda Baksha v. Emperor* ('17) 4 A.I.R. 1917 All. 379, *Venkatrama Aiyar v. Saminatha Aiyar* 1 A.I.R. 1914 Mad. 139, *Brij Bhukhan v. Ram Kirat* ('23) A.I.R. 1923 Oudh 163.

8. But there was a difference of opinion on the question whether a judgment by a Bench of Magistrates some of whom had not heard the whole of the evidence could be considered to be a valid judgment, according to one view such a judgment was a nullity : *Damri Thakur v. Bhownai Sahoo* ('92) 23 Cal. 194, *Girdhari v. Emperor* ('21) 8 A.I.R. 1921 Lah. 135, and *In re Subramama Ayyar* 3 A.I.R. 1916 Mad. 810. According to the other view this was a mere irregularity and

the; judgment would not be invalid unless the accused was prejudiced by the course adopted : Emperor v. Mathura 5 A.I.R. 1918 All. 56 and N. Padarath v. Ramdas ('16) 14 A.L.J. 22.

9. It was in this state of the rulings that this new Section 350A was added in the Criminal Procedure Code. The section is really very unhappily worded. It does not in so many words say what trials would be invalid. It only says certain trials will not be invalid. But when a rule of law lays down the conditions under which an order or judgment shall not be invalid, it by necessary implication must be deemed to lay down the further rule that the order will be invalid if those conditions are not fulfilled. This follows from the maxim *expressio unius est exclusio alterius* : expression of one mode is exclusion of all others. It follows that where the 'Magistrates constituting the Bench have not been present throughout the proceedings their judgment or order cannot be valid. This is in accord With the general principle of law already stated, namely, that only the Magistrate who had heard the evidence in the case is competent to decide the same.

10. In Chitoshwar Dube v. Emperor : AIR1932 All127 the accused were convicted by a Bench consisting of three Honorary Magistrates. One of these three Magistrates did not join the other members of the Bench on several occasions when witnesses were examined. Niamatullah J. held that the trial was vitiated. His Lordship observed:

If witnesses are examined by one or more Magistrates in the absence of one or more of those constituting the Bench they cannot be considered to have been examined by the Bench. In this view the order of conviction is based partly on evidence recorded by the Bench as such and partly on evidence not deemed to be recorded by the Bench. A conviction based on such evidence is clearly unsustainable.

11. In Ramkhwilwan v. Sheo Nandan : AIR1932 All191 , of the three Magistrates constituting a Bench one was riot present at some of the hearings and yet he was a party to the ultimate decision of the case along with the other two Magistrates. Bennet J. held that the order was invalid. In this case the order was of acquittal and an argument was addressed to his Lordship that in a case of acquittal no

interference should be made in revision. His Lordship repelled this contention and set aside the order of acquittal.

12. In *Emperor v. Desrath Rai* : AIR1934 All144 , the Bench consisted of three Honorary Magistrates. On most of the hearings all the three Magistrates were present but on one of the hearings when some witnesses were examined one of the Honorary Magistrates was absent. He rejoined on the next date and ultimately took part in delivering and signing the judgment. All the three Honorary Magistrates unanimously came to the conclusion that the accused were guilty and convicted them. It was held by Sulaiman C.J. and King J. that:

Where one of the Honorary Magistrates had not heard the whole evidence and has not been present throughout and takes part in the deliberations and joins the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By virtue of his absence he becomes incompetent to form a true opinion on the merits of the case, and if he joins in the deliberations there is likelihood of failure of justice. The conviction was therefore illegal and should be set aside.

13. In *Emperor v. Har Narain* : AIR1943 All20 the facts are not clearly stated in the report. I have sent for the record of that case and I find that the facts were these: The Bench consisted of two members, Mr. Pathak and Mr. Abdul Wahid. The prosecution evidence was recorded by these two gentlemen. During the pendency of the case Mr. Abdul Wahid ceased to be a member of the Bench and Mr. Srivastava was substituted as a member in the place of Mr. Abdul Wahid. The accused did not desire a fresh trial and the case was ultimately disposed of by Messrs. Pathak and Srivastava. Allsop J. held that the provisions of Section 350, Criminal P.C., read with para. 814 of the Manual of Government Orders were applicable to the case and the trial was not vitiated.

14. In the case in hand there is nothing to show that any one out of the three Bench Magistrates ceased to exercise jurisdiction and was replaced by another Magistrate. Section 350, Criminal P.C. would, therefore, have no application to the present case. In my opinion, therefore, the trial in the present case was by a Bench not properly constituted and the order passed is wholly invalid.

15. Learned Counsel appearing for the accused urges that at the worst this was a mere irregularity and since there has been no prejudice to the accused this Court will not interfere in revision. He further contends that inasmuch as the order is one of acquittal, this Court will refuse to interfere. In my opinion this is not a matter of mere irregularity at all. This is a defect of jurisdiction which cannot be cured by Section 537, Criminal P.C. : *Gokulchand Dwarkadas v. The King* 35 . Besides, as pointed out in the three earlier cases cited above, there is always a prejudice to one party or the other when a person who has not heard the whole of the evidence joins in the decision of the case. For this reason the irregularity will not be cured under the provisions of Section 537, Criminal P.C., I am therefore convinced that even though the order is of acquittal, in a case of this nature I must interfere. This was the view taken by Bennett J. in the case already quoted above : *Ramkhwilawan v. Sheo Nandan* : AIR1932 All191 .

16. The learned Sessions Judge has pointed out several other irregularities in the order of the Bench Magistrates. I do not think it necessary to examine these irregularities as, in my opinion, the order of the Magistrates was wholly invalid.

17. I, therefore, accept this reference, set aside the order of the Bench Magistrates dated 29-10-1946, and direct that the case shall be tried by a Magistrate or Magistrates competent to try the same in accordance with law, but not by the Bench of Magistrates who originally tried it.