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Court : Allahabad

Decided On : Apr-14-1972

Reported in : 1972CriLJ1223

Judge : K.B. Srivastava, J.

Appellant : The State

Respondent : Suraj Bali and ors.

Judgement :

ORDER

K.B. Srivastava, J.

1.This criminal revision arises out of the following fact's:

2. Opposite parties Suraj Bali, Misri Lal Rama Nand. Sagdu, Shankar and Moti Lal were prosecuted under Sections 147. 324/149. 323/149 and 342 of the Indian Penal Code, before the Judicial Magistrate, Mohanlalganj. Lucknow. He recorded the statements of various witnesses including that of one Ram Chandra as P. W, 2. Thereafter he convicted and sentenced the opposite parties to undergo various terms of imprisonment on the said counts; They appealed and the appellate Court, being of the view that the evidence indicated the alleged commission of an offence under Section 387 of the Indian Penal .Code which was exclusively triable by a court of Session, set aside the convictions and sentences and remanded' the case

to the learned Magistrate with a direction that he should commit them to the court of session on a proper charge. On the receipt of the record after remand, the learned Magistrate passed a commitment order which, inter alia, contains the following:

Accused persons appeared in Court. and each namely the prosecution and the accused were informed that they may re-examine or re-call any witness. No fresh witness was examined by the prosecution nor any was summoned by the defence for cross-examination. The accused persons were examined again. On going through the evidence on record and after perusing the case diary I am of opinion that a prima facie charge Under Section 387 I.P.C. is made out against all the accused. In alternative charges under Sections 147 I, P.C. 324/149 I. P.C. 323/149 I. P.C. and 342 I. P.C. are also framed. I therefore, commit accused...to the court of Sessions to stand their trial on the charges mentioned above.

3. It transpires that Ram Chandra . (P. W. 2) (who had been examined by the Magistrate) died before he could be examined at the trial before the Assistant Sessions Judge, Lucknow. The Public Prosecutor presented an application to examine Faqirey, father of the said Ram Chandra. to prove the latter's death to enable the prosecution to apply for the transference of the deposition of Ram Chandra from the record of the court of the Magistrate on to the record of the Sessions trial as evidence under Section 33, Evidence Act. The learned Assistant Sessions Judge rejected this application on the following ground: 'The record does not show that the prosecution and the defence had agreed that the evidence that already existed on the record (prior to the filing of appeal) should be read for the purpose of committal proceedings. In the absence of any such undertaking or agreement it is not open in my judgment to the prosecution to rely upon the statement of any one of the witnesses already examined before the committing Magistrate. I, therefore, think that the statement of Ram Chandra without the consent of the defence could not have been brought on the record and as such cannot be tendered in evidence Under Section 33 of the Indian Evidence Act.' It is in these circumstances that the State has come up in revision to this court.

4. I have heard the learned Counsel on both sides.

5. Section 423 (11 (b), Code of Criminal Procedure. provides for the power of an appellate court. in disposing of an appeal, from a conviction. It may in such an appeal reverse the finding and sentence. and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial. This section. therefore, does empower the appellate court to order commitment for trial to the Court of Session. See also *State of Uttar Pradesh v. Shankar* : AIR 1962 SC1154 . The contention of the learned Assistant Government Advocate is that the deposition of Ram Chandra falls fairly and squarely within the scope and ambit of Section 33. Evidence Act. This section says that evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it. is relevant for the purpose of proving, in a subsequent judicial proceeding. or in a later stage of the same judicial proceeding, the truth of the facts which it states. when the witness is dead, provided that the proceeding was between the same parties or their representatives-in-interest, that the adverse party in the first proceeding had the right and opportunity to cross-examine and that the question in issue were substantially the same in the first as in the second proceeding. The Explanation to Section 33 says that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section. Counsel on both sides are agreed that all the requirements of Section 33 stand fulfilled. They have disagreed only with regard to the fulfilment of one requirement, namely. whether or not the deposition of Ram Chandra could be said to have been recorded 'in a judicial proceeding.' The contention of the learned Counsel for the opposite parties is that since the appellate court took the view that the prima facie case made out was one under Section 387 of the Indian Penal Code which was exclusively triable by a court of session. therefore, the Magistrate had usurped the jurisdiction of the Sessions Judge and the trial was illegal and consequently the evidence recorded by him was also without jurisdiction and to such an evidence Section 33, Evidence Act. can obviously have no application. He has placed reliance on case law for this proposition. In *Ram Reddi v. Seshu Reddi*, (1881) ILR 3 Mad 48, the Sessions Judge had annulled the conviction on the ground that the Magistrate had no jurisdiction to try the case. Innes and Muthusami Ayyar. JJ.. held that the evidence of a witness given in a proceeding pronounced to be coram

non judice cannot be used under Section 33 of the Indian Evidence Act, if the witness is dead on a trial before a competent Court. In *Buta Singh v. Karam Singh*. AIR 1926 Lah 582. Buta Singh and Karam Singh were sentenced to death by the Sessions Judge of Feroze-pore for the murder of Attarpuri. On appeal the High Court discharged them on the ground that the proceedings were without jurisdiction as the murder had been committed within the boundaries of the Native State of Kalsia. Karam Singh was tried in the Kalsia State and sentenced to transportation for life. Buta Singh was tried by the Sessions Judge of Ferozepore after the certificate required by the first proviso to Section 181, Criminal Procedure Code, had been obtained and was sentenced to death. Certain witnesses had died and their statements had been transferred to the record of the sessions court under Section 33. Evidence Act, It is in these circumstances that the Lahore High Court held that Section 33 had no application. The observation made by Addison. J., speaking for the Court, was this: 'The first trial was not a judicial proceeding as there is 'a final order' by this Court ruling it to have been without Jurisdiction .. A proceeding before a Judge or Magistrate who had no jurisdiction was coram non judice and that the evidence of witnesses given in such a proceeding could not be used under Section 33, Evidence Act. on a retrial before a competent Court.' In *Sankappa v. Keraga Pujary* AIR 1931 Mad 575 the trial of the suit was begun before the learned Munsif who examined a witness as D, W. 1. After this evidence and some other had been taken, the court returned the plaint on the ground that the value of the subjectmatter was above its pecuniary jurisdiction and it was accordingly filed in the court of the Subordinate Judge. D. W. 1 had died before she could be examined again and accordingly her deposition was made use of under Section 33 Curgenven and Bhashyam Ayyangar. JJ., referred to the decision in *Rami Reddi's* and *Buta Singh's* cases and held that the deposition did not fall within the purview of Section 33. In *Emperor v. A .jit Kumar Ghosh* : AIR1945 Cal159 the following observation will speak for itself: 'It has already been pointed out that the effect of the decision of this Court in *Benori Lal Sarma v. Emperor* : AIR1943 Cal285was to declare that those sections of Ordinance 2 of 1942, under which Special Courts were constituted. were ultra vires of the powers of the Governor-General under the Government of India Act, 1935. It follows, therefore. that Mr, Hattiangadi was not authorised by law to take evidence nor

could it be said that the witnesses before him deposed in a judicial proceeding. In view of the decision of this Court. which was subsequently affirmed by the Federal Court. Mr. Hattian-gadi had no jurisdiction, of any. kind in the had jurisadiction of any kind in the matter and statements made by witnesses before him had no greater efficacy than would have been the case if they had been recorded by a private individual.'The depositions of the witnesses were, therefore, not admitted under Section 33. In *Sudhindra Nath v. State* : AIR1953 Cal339 , Harries C. J. and S. R. Das Gupta. JJ, referred to the decisions in the cases of Rami Reddi, Buta Singh and Sankappa and summed up the legal position in the following terms:'If the proceedings had taken place without jurisdiction. it cannot by any means be said that the evidence given in those proceedings was given in a judicial proceeding. Such proceedings on the authorities which I have cited, can never be a judicial proceeding

6. The above is the entire case law cited by the learned Counsel for the opposite parties. These decisions proceed on the well-known and well settled principle of law that if a court or authority has no jurisdiction whatsoever. all proceedings taken before it! are mere nullities and can have no legal foundation. However, I am of the view that there is a basic and essential distinction between complete lack or want of jurisdiction and existence of jurisdiction but its irregular or improper exercise. In the former case. it is *coram non judice* but in the latter, the exercise may¹ be right or wrong but it will be within jurisdiction. A Magistrate may deal with a case as a warrant case and start with a regular trial. However, after recording the entire evidence but before signing the judgment, he may change his view and either think that the accused deserve a higher punishment than he can award, or he may take the view that the case is one which is exclusively triable by a Court of Session and at that stage he may order commitment. In such a case, it cannot be said that the proceedings already taken are rendered void or illegal. Such a contingency has been foreseen by the Legislature and covered by Section 347, Code of Criminal Procedure. It says that if in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment. it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions contained in Chapter XVIII. If such Magistrate is not

empowered to commit for trial. he shall proceed under Section 346. It is true that there is no specific section which provides as to what he has to do if a conviction is set aside and a direction is received for commitment. In such a case, it is obvious, that the appellate court does not annul the proceedings but only quashes the conviction and the sentence. In *Empress of India v Ilahi Baksh* 1878-80) ILR 2 All 910. Oldfield J. held that the commitment. after remand on a direction for commitment, will not be vitiated merely because the Magistrate does not commence a fresh enquiry and take evidence de novo. He went on to observe that the inquiry and the evidence at the trial are sufficient for the purposes of commitment. In *Sahdeo Ram v. Emperor* : AIR1935 All579 , the Division Bench held that where a Magistrate receives a direction for commitment by an appellate Court after the setting aside of the conviction. it does not give the Magistrate any jurisdiction to make any further enquiry and the enquiry already held is sufficient for the purposes of Chapter XVIII. I am in respectful agreement with this view of the Division Bench which is also binding on me. It appears to me that when the law empowers a Magistrate to convert a trial into an enquiry on his realisation that the case is triable exclusively by the Court of Session. without rendering the proceeding in the trial as illegal, that trial will not become illegal when the Sessions Judge. on appeal. came to an identical conclusion that the case was exclusively triable by it and should be committed. The Magistrate thereafter has precious little to do. He had recorded the entire evidence tendered. on behalf of the prosecution and each witness had been subjected to cross-examination. He had already recorded the statements of the accused and their defence witnesses, if any. He had nothing further to do except obtain a list of witnesses from the accused in respect of witnesses which they would like to examine at the trial before Court of Session.

7. The learned Assistant Sessions Judge was, to my mind. not correct when he rejected the application. It is. therefore, directed that the State shall have the liberty to lead evidence to prove that Ram Chandra is dead and to bring his earlier deposition on the record under Section 33. Evidence Act. As to what value should attach to that statement is for the trial Court to decide, and not for this Court.

