

Udayanath Barik and ors. Vs. the State

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Court : Orissa

Decided On : Apr-18-1989

Reported in : 1989CriLJ2216

Judge : A. Pasayat, J.

Appellant : Udayanath Barik and ors.

Respondent : The State

Advocate for Pet/Ap. : Shri. Das

Judgement :

ORDER

A. Pasayat, J.

1. This revision application under Sections 397/401 397/401 read with Section 482 of the Cr. P.C. 1973 (hereinafter referred to as 'the Code') has been filed by sixteen petitioners, who along with two others, namely, Banka Mohapatra and Krupasindhu Prusty, faced trial for the alleged offences of forming unlawful assembly, wrongfully restraining, obstructing public servants in discharge of their public functions and preventing service of summons and other proceeding and preventing publication thereof Under Sections 143/ 341/ of the Penal Code (described in short as 'IPC') in the Court of the Judicial Magistrate, First Class, Bhadrak in G.R. Case No. 137 of 1979 (Trial No. 137 of 1984) in which each of

them has been found guilty under Sections 143/186, IPC and has been convicted and sentenced to pay a fine of Rs. 50/- on each count and in default to undergo R.I. for fifteen days on each count.

Originally there were two other accused persons, namely, Udhab Panda and Daitari Sukla, the trial against whom was split up for separate trial as non-bailable warrant of arrest had been issued against them on 11-4-1984 and process Under Sections 82 and 83 of the Code had been directed to be issued against them on 22-1-1985, and actually was issued on 16-4-1985. The Court below on 11-5-1984 had directed issue of non-bailable warrants against accused Udhab, Daitari, Banka and Krupasindhu. Thereafter on all relevant dates it had been recorded that these four persons were absent. The order dt. 22-1-1985 to which reference has been made earlier also shows that process Under Sections 82 and 83 of the Code was issued against all these four persons. Thereafter petitions Under Section 317, of the Code were filed on 26-2-1985, 10-4-1985 and 15-5-1985. On the significant date, i.e., 22-7-1985 also the petition Under Section 317 was in respect of sixteen persons. Therefore, the aforesaid four persons had not appeared in Court to face trial. Unfortunately, the learned Judicial Magistrate, First Class had split up the trial against only Udhab and Daitari whereas he proceeded against the other two, i.e., Krupasindhu and Banka. This is a serious lapse.

2. The prosecution case, in brief, is that on 27-2-1979 at 7 a.m. the Sales Officer, Cooperative Society with his staff and the Executive Magistrate and armed police reserved force went to village Susiladeipur for realisation of outstanding loan amounts and at village Susiladeipur after serving notice on one Suka Dibya attached her property for realisation of the loan amount outstanding against her. During course of attachment the said Suka Dibya absconded and the accused persons led the villagers to the said village into a mob which obstructed the officers of the Co-operative Society from removing the attached property and also threatened to assault them and obstructed them from coming out of the village by putting logs and such other articles on the road. The Secretary of the Charampa Co-operative Society reported the matter to the Officer-in-charge, Bhadrak Police Station by a written report which was handed over to the S.I. at the spot and the S.I. of Police took up investigation on the strength of the F.I.R. On the strength of

the F.I.R., Bhadrak Police Station Case-No. 35 of 1979 was registered and during the course of investigation, witnesses were examined, relevant documents were seized and on completion of investigation charge-sheet under Sections 143/341/186/173, IPC was submitted against the accused petitioners.

3. During trial the accused persons pleaded not guilty and took the plea of complete denial. They pleaded that the case has been falsely foisted against them on account of political rivalry.

4. Seven witnesses were examined on behalf of the prosecution. P.W. 1 is the informant and Secretary of the Co-operative Society as aforesaid. P.W. 2 is the A.C.E.O. of Bhadrak Block and P.W. 3 is the Special Officer, Balasore Central Co-operative Bank, who accompanied the party of Sales Officer. P.W. 4 is the local Grama Rakhi. P.W. 6 is a peon under the Central Co-operative Bank, Bhadrak and P.W. 7 is the Executive Magistrate on duty. P.W. 5 is a cultivator and is alleged to be an eye-witness to the occurrence.

5. Accused persons did not examine any witness. The learned Judicial Magistrate, First Class, Bhadrak on consideration of the testimony of the prosecution witnesses came to hold as follows:

(i) P.Ws. 1, 2 and 3 were public servants and at the time of occurrence they were acting as public servants in course of their duty;

(ii) P.Ws. 1, 2, 3 and 6 were officers on duty and P.W. 7 was the Magistrate on duty,

(iii) The non cross-examination on material aspects of most of the P.Ws. clearly established the truth of the prosecution case;

(iv) The defence plea of political rivalry being the basis for initiation of prosecution is far-fetched;

(v) The accused persons have been duly identified by the P.Ws. and identification by P.Ws. 2, 3, 4 and 6 remained unquestioned;

(vi) The evidence of P.W. 5 and regards his ignorance as to who had put the obstruction on the road is not a severe contradiction or lacuna;

(vii) Non-examination of the I.O. does not prejudice the accused persons and is not fatal to the trial; and

(viii) The non-production of any documentary evidence to show that the informant and/or other official members of his party were acting off course of duty is not material as there was no cross-examination of P.W. 2 and therefore, it was established that the officials were acting in discharge of their official duty as public servants.

Having so observed, the learned Magistrate came to the conclusion that the prosecution! has proved that the accused persons formed an unlawful assembly and led the villagers to obstruct the public servants from carrying on their duty as public servants and such obstruction was caused voluntarily and the petitioners were guilty of offences Under Section 143/186, IPC and according to the learned Magistrate the allegations Under Sections 341/173, IPC were part and parcel of the allegations Under Sections 143/186, IPC and did not constitute separate offences for the purpose of conviction and sentence.

6. State has accepted the judgment and there is no appeal against the non-conviction of the petitioners for the alleged offences Under Sections 341/173, IPC.

7. Shri Yasobant Das, learned Counsel appearing on behalf of the petitioners, challenges the order of conviction and sentence on the following grounds:

(a) The non-examination of the Investigating Officer is fatal;

(b) The officers of the Co-operative Society are not public servants;

(c) The accused statement Under Section 313 of the Code was not recorded and this being a mandatory requirement, non, adherence has rendered the conviction and sentence illegal;

(d) No document was exhibited to show that the officers came for the performance of public duty and even the alleged attachment order has not been exhibited;

(e) No evidence was led to show that the Magistrate was performing any public duty;

(f) If there was non-examination of the accused persons and no accused statement was recorded Under Section 313, Cr. P.C., at least the lawyer appearing for the petitioners should have been asked to give statement on their behalf; and

(g) Non-recording of reason by the learned Judicial Magistrate, First Class vitiates the judgment inasmuch as the learned magistrate has not indicated the reason or the basis for which he was dispensing with the personal attendance of the accused and/or the recording of statement Under Section 313.

8. Strong reliance is placed by Shri Das on a decision of the Delhi High Court reported in 1985 Cri LJ 154, Delhi Development Authority v. Amarjit Sing in support of the contention that even in summons cases there was requirement for recording the statement and even if the attendance of the accused had been if the attendance of the accused had been dispensed with the statement of the lawyer appearing on his behalf should have been recorded and also for the proposition that the Magistrate dispensing with the attendance of the accused has to pass reasoned order indicating the basis for dispensing with the requirement of recording the statement.

9. Shri S.K. Das, learned Additional Standing Counsel on the other hand, submits as follows:

(a) The evidence of P.W. 2 having not been countered and there being no cross-examination of this witness, the testimony does unchallenged and therefore, the submission as made as regards absence of material to show the nature of duty performed and/or the status as public officers cannot be sustained;

(b) P. W. 7 (the Magistrate) has clearly stated the nature of his duties and the purpose for which he had come to the alleged place of occurrence and there being no effective cross-examination on this aspect the challenge as aforesaid is not tenable;

(c) Similarly, P.W. 3 (the Special Officer) has categorically stated the purpose of his visit and there being no material elicited from him to show that he was not stating the truth, the allegations of absence of material to show the nature of duty performed by the officers cannot be sustained; and

(d) There is no requirement in law that the lawyer appearing for the accused persons has to be examined and/or that reasons are to be recorded while dispensing with the recording of the statement and that the decision of the Delhi High Court is not a correct exposition of law and is distinguishable.

In any event according to him, the petitioners having not shown as to how they were prejudiced by the non-recording of the statement, even applying the ratio of the Delhi case, the petitioners have not made out a case for interference.

The contentions raised by the respective parties require careful consideration.

10. So far as the question as to whether the officers of the Co-operative Society are public servants is concerned, the matter is no longer res integra. The apex Court in the case of S.S. Dhanoa v. Municipal Corporation Delhi : 1981 CriLJ871 , has held that even a civil servant working on deputation with the Co-operative Society is not a public servant and that 'corporation' as occurring in Section 21, Clause (12)(b) of the Penal Code does not include a Co-operative Society Similar is the view expressed by this Court in the case of Chakradhar Patel v. Samasingha Service Co-operative Society : (1982)ILLJ381Ori .

11. To constitute an offence Under Section 186, IPC the following ingredients must be present.

(i) There must be an obstruction;

(ii) the obstruction must be by the accused;

(iii) the obstruction must be voluntary;

(iv) the obstruction must be of a public servant; and

(v) the obstruction must be in discharge of his, i.e., the public servant's public functions.

Since the officers of the Co-operative Society are not public servants, it cannot be said that the petitioners were guilty of an offence Under Section 186. But the position is entirely different with regard to the Executive Magistrate who is a public servant. This position has been fairly conceded by the counsel for both parties.

12. Coming to the other legal point raised as to the non-compliance of Section 313, it may be pointed out that the mandatory requirement of Section 313 has an exception which is provided in the proviso to Sub-section (1), i.e., in a summons case where the Court has dispensed with the personal attendance of the accused it may also dispense with his examination under Clause (b). There is no dispute that so far as the offence Under Section 186 is concerned the offence is not cognizable and is triable as a summons case. Therefore, it has to be seen as to under what circumstances the Court which has dispensed with the personal attendance of the accused, has the power to dispense with the examination under Clause (b). The order-sheet reveals that on 22-7-1985 the accused persons were absent on call and that a petition Under Section 317 of the Code was filed on behalf of the absentee accused persons except Udhav and Daitari, The recording of the order is clearly wrong, as Banka and Krupasindhu were also absent and no steps were taken on their behalf.

13. I shall now examine the question as to the correctness of the contention that the lawyer appearing for the accused persons should have been asked to give statement Under Section 313. This matter is settled beyond dispute by the Hon'ble Supreme Court in the case of Bibhuti Bushan Das Gupta v. State of West Bengal : 1969 CriLJ654 . While considering a case under Section 342 of the 1898 Code (hereinafter referred to as the 'old Code') the Hon'ble Court was pleased to observe as follows:

Even in a case where the Magistrate has dispensed with the personal appearance, a pleader cannot represent the accused for purposes of Section 342 of the Cr. P.C. except where the accused is company or a juridical person and hence cannot be examined personally. In all other cases only the accused can be examined

Under Section 342 of the Cr. P.C. Examination of the Pleader is not a sufficient compliance.

The provisions of Section 342 of the old Code and Section 313 of the Code are almost identical. The only significant exception is that the proviso has been added to Section 313(1) and in Sub-section (1) of Section 313, the word 'personal' has been used which was not there in Section 342 of the old Code. Therefore, even when the word 'personal' was absent in the old Code, the Hon'ble Court disapproved the examination of the pleader and held that such an examination was not a sufficient compliance of Section 342.

The contention of Shri Das, learned Counsel for the petitioners that the advocate appearing for the accused persons should have been asked to give a statement is, therefore, without any force and is rejected. I may point out here that the Division Bench of the Delhi High Court in paras. 10, 13 and 14 have come to contradictory conclusions. In paragraph 10 it has been held that even under the old Code in the absence of the word 'personal' the Courts frowned at the practice of the accused being examined through counsel. Therefore, they accepted that the examination of the advocate is not compliance of Section 342 of the old Code and for that matter Section 313 of the Code. But strangely in para. 13 referring to the aforesaid decision of the Hon'ble Supreme Court it has been said that they were rejecting the contention of the appellant in the case before them that the examination of the accused cannot be permitted through a pleader. The Court in para. 14 has further observed and concluded that it is necessary for the Court to record the examination of the accused through counsel. In my view the conclusion is clearly contrary to the law as laid down in Bibhuti Bushan's case (supra) and I find myself unable to agree with the conclusion.

14. Now coming to the other point canvassed by Shri Das for the petitioners that even while dispensing with the examination u/Cl. (b) the Court has to record reasons, the same is clearly misconceived and has no force. The provisions of Section 313 do not postulate such a condition. The use of the word 'may' clearly indicates that it is the discretion of the Court to dispense with the examination under Clause (b). It is true that there has to be judicial use of the discretion in such

a matter. The discretion must be exercised judiciously and there should not be capricious use of such discretionary power, particularly when there is likelihood of the same adversely affecting the interest of justice. But insistence on recording the reasons is certainly not a requirement, much less a mandatory requirement. It has to be proved that a party is prejudiced by the action of the Court in dispensing with the examination and he has to establish as to how he has been affected or prejudiced by such action of the Court. Therefore, in my view their Lordships of the Delhi High Court have stretched the requirement a little too far and I am in respectful disagreement with the view expressed that reasons have to be recorded by the Court while dispensing with the examination under Clause (b). Whenever legislature has intended recording of reasons to be of Consequence, it has indicated so in clear terms in the Code, e.g., Section 317 relating to inquiries and trials being held in the absence of accused persons. Therefore, the decision of the Delhi High Court referred to above is of no assistance to the petitioners. The petitioners have also not shown any material to show as to how they have been prejudiced and/or affected by the non-examination. An accused gets several opportunities to prove his innocence; first at the stage of cross-examination of the prosecution witnesses, secondly at the stage of recording of statement Under Section 313 and thirdly by adducing defence evidence. In the instant case, the accused persons chose to remain absent during trial and even the cross-examination was very limited and, there was no cross-examination of P.W. 2 who was examined on 16-4-1982. cross-examination was declined. Long after, i.e., 22-1-1985 accused Babulal Das filed a petition for recalling P.W. 2 on the grounds stated in the application. The learned Judicial Magistrate passed orders that the petition would be put up on the date fixed, i.e., 26-2-1985. Strangely in the order-sheet the name of the accused has been written as accused 'Babulal Sana'. This shows the casual and irresponsible manner in which the order-sheet is maintained. However, by order dt 22-7-1985 the petition filed by accused Babulal was considered and the said accused was directed to deposit Rs. 150/- towards witness batta of P.W. 2 by 23-7-1985 failing which the petition was to be rejected. On 23-7-1985 there was no deposit as directed and, therefore, the petition for recalling P.W. 2 was rejected. The petitioners have not made out a case to show any prejudice by non-examination and non-recording of statement. Further no

witness was examined by the accused-petitioners. Therefore, due and proper opportunity was granted to the accused persons to defend themselves, and they having chosen to passively participate in the proceeding cannot take the plea of any prejudice by alleged non-compliance of mandatory requirement for their examination Under Section 313. They have not shown as to how the examination would have improved the case. I pointedly asked Shri Das for the petitioners to place before me the materials on the record if any, in this regard. He fairly conceded that he cannot improve upon what has been shown at the trial stage.

15. Now coming to the factual aspect, I find that there has been practically no identification of the accused persons to show their complicity in the alleged occurrence. P.W. 1 has simply stated that some villagers caused obstruction without disclosing the name of any person much less of the accused persons. P.W. 2 specifically named Udhab Panda, but did not identify the other accused persons. Similarly P.W. 3 who in examination in chief stated about the presence of the accused persons admitted in his cross-examination that he cannot say as to who caused obstructions. P.W. 4 has stated that he has not seen the accused persons on the date of occurrence. Similarly P.W. 5 has stated that he does not know as to who put the obstruction. P.W. 7 has stated about accused Udhab, but he has not spoken anything about others. The evidence of P.W. 6 is very confusing. He has stated about the presence of accused Babulal, but in cross-examination he has stated that he does not know the names of the accused persons and has also admitted that he cannot say as to which of the accused persons were present at the spot and/or had put the logs as obstructions. Even though there was no effective cross-examination by the defence that per se does not establish the prosecution case, The prosecution by its evidence has to establish the guilt of the accused persons and has to show beyond reasonable doubt that the accused persons participated in the alleged incident and/or were guilty of the offence as alleged. In the instant case the evidence of the prosecution witnesses is deficient in this regard. The petitioners have not been identified to have committed the alleged offence and their complicity in the alleged offence has not been indicated, much less proved. Therefore, there is no scope for their conviction.

16. In the result, the revision application is allowed and the order of conviction is allowed and the order of conviction and sentence as passed is set aside in respect of the petitioners. Amounts of fine, if realised, are to be refunded to the respective depositors. This judgment shall not govern the cases of non-petitioners, i.e., accused Banka Mohapatra and accused Krupasindhu Prusty, who have been convicted by the impugned judgment and also the absconding accused persons namely Udhab Panda and Daitari Sukla.

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