

Sudhindra Nath Vs. the State

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Court : Kolkata

Decided On : Mar-26-1952

Reported in : AIR1953Cal339,56CWN835

Judge : Harries, C.J. and ;S.R. Das Gupta, J.

Acts : [Evidence Act, 1872](#) - Sections 33 and 167

Appeal No. : Criminal Appeal No. 184 of 1951

Appellant : Sudhindra Nath

Respondent : The State

Advocate for Def. : J.M. Banerjee, Adv.

Advocate for Pet/Ap. : Nalin Chandra Banerjee and ;Prasun Chandra Ghosh, Adv.

Disposition : Appeal allowed

Judgement :

S.R. Das Gupta, J.

1. This is an appeal from an order of a learned Presidency Magistrate, Calcutta, convicting the appellant under Section 420, Penal Code and sentencing him to undergo rigorous imprisonment for two years and also to pay a fine of Rs. 1000/-,

in default to suffer rigorous imprisonment for six months more.

2. The prosecution case is that on 30-7-1947 Phanindra Nath Mukherjee, a retired Deputy Magistrate, lodged a written complaint charging the accused with cheating him in respect of a total sum of Rs. 49,000/-. The cheating as alleged took place in the following manner. The accused represented to the said Phahindra Nath Mukherjee and his partner in the firm of Indo Trading Corporation that he had already purchased a certain quantity of joists, angles and tees of the value of Rs. 85,000/- and that he had already obtained a delivery order in respect of the same. The said goods were alleged to have been purchased from M. E. S. and the delivery order issued by the Director General of Disposals in respect of 75 tons of tees, 75 tons of angles and 200 tons of joists. He represented to the said Phanindra Nath Mukherjee that he had already paid the price and in order to do that he had to borrow a sum of Rs. 47,000/- and that sum had to be paid off immediately. He requested the said Phanindra Nath Mukherjee to pay a sum of Rs. 49,000/- including Rs. 2000/- which he required as miscellaneous expenses and take delivery of the goods and from the sale proceeds give him the balance and some profits.

3. The complainant agreed to that proposal subject to the goods being inspected and found saleable. On the next day, that is on 20-6-1947, the appellant took one Harey Krishna, the other partner of the complainant, and one Satyen Chatterjee, P. W. 3, to the Garrison Engineer's Depot at Barraekpore for inspection of the goods. The appellant managed to show to those persons some goods which were stocked with the said M. E. S. and they found fee quality of the goods to be in order. Thereafter, the matter was reported to the complainant and the complainant thereupon gave two cheques, one for Rs. 20,000/- and another for Rs. 27,000/- and also a bearer cheque for Rs. 2000/-. The alleged delivery order was endorsed over to the complainant by the appellant and it was arranged that the delivery would be taken on 25-6-1947 and the complainant would send one of his men to the place wherefrom delivery was to be taken, where the appellant would be present. Although the complainant's man went there to take delivery but the appellant could not be found. Thereafter the other partner of the complainant, namely, Hare Krishna, contacted the appellant on 2-7-1947. As the date for taking

delivery was expiring on 3rd July, the appellant represented to the said Hare Krishna that he would get the delivery order extended by seven days and took the delivery order on that representation; thereafter the said Hare Krishna tried to contact the appellant several times but failed. On 10-7-1947 the appellant came to complainant's house and told that he was arranging delivery very soon. The complainant became suspicious and started enquiring about the matter and on enquiry it was found from the Disposals Office that no delivery order in question was at all issued & that the said delivery order was a faked one. The complainant then lodged the complaint upon which the appellant was charged under Section 420, Penal Code.

4. After the complainant presented his complaint, the then Additional Chief Presidency Magistrate examined the complainant under Section 200, Criminal P. C. and sent the case to the Deputy Commissioner, Detective Department, for enquiry. Thereafter the charge sheet challan was received on 24-7-1948 against the appellant and another person under Section 420, Penal Code and the case was ultimately transferred to the file of a Presidency Magistrate, Mr. K.C. Ghosal for disposal. After hearing the appellant was convicted.

5. Against the said conviction the appellant preferred an appeal to this Court. On appeal the conviction and sentences were set aside by the High Court on 8-7-1949 and a retrial was ordered on the ground that the entire proceedings from after the submission of the charge sheet onwards were without jurisdiction, inasmuch as the Additional Chief Presidency Magistrate having acted under Section 200, Criminal P. C., the case could not be proceeded with upon a charge by the police.

6. When the case came back on remand the Chief Presidency Magistrate transferred the case to the file of another Presidency Magistrate, one Mr. Mukherjee, for disposal. Mr. Mukherjee issued process on the accused and the accused was tried and convicted. The appellant again appealed against the said conviction. The said conviction was again set aside on 4-4-1950 by this Court and a retrial was ordered. The said conviction was set aside on the ground that the Additional Chief Presidency Magistrate having taken cognizance of the case and

having directed an enquiry under Section 202, Criminal P. C. it was for him to decide whether process should be Issued or not and he could not transfer that task to anybody else. In other words, it was held that the action of the said learned Magistrate, Mr. Mukherjee in Issuing process on the accused was without jurisdiction and the subsequent trial was also without jurisdiction.

7. When the case came back on remand for the second time the Additional Chief Presidency Magistrate issued process on the accused under Section 420, Penal Code, The accused appeared on 14-8-1950 on which date the case was transferred to the file of a Presidency Magistrate, Mr. K.C. Sen, who tried this case. He examined eight witnesses, framed charges against the accused under Section 420, Penal Code and fixed 1-11-1950 and the subsequent two dates for cross-examination of the witnesses. On 1-11-1950 it transpired that the complainant had died that very morning. The case had to be adjourned. Thereafter, an application was made on behalf of the accused appellant for quashing the proceedings, but that application was rejected by this Court. The case then proceeded to trial. The learned Presidency Magistrate found the accused guilty under Section 420 Penal Code and convicted him under the said section and sentenced him as mentioned.

8. The complainant having died on 1-11-1950 he found that the evidence in chief of the complainant could not be tested by cross-examination by reason of his death and therefore no use could be made of the said evidence before him. But he admitted the evidence of the complainant, which had been given in the two previous proceedings and he purported to do so under Section 33 Evidence Act. He held that the parties were identical, the subject matter of the charge was identical and the accused in those proceedings had the right and opportunity to cross-examine the complainant and had in fact exercised that right and had cross-examined him and therefore the said evidence could be admitted in evidence. It appears to us that the learned Magistrate committed a great error in admitting the said evidence.

9. Section 33, Evidence Act permits evidence which had been given in a previous judicial proceeding by a witness to be admitted in evidence in a subsequent

judicial proceeding or in a later stage of the same judicial proceeding in order to prove the truth of the facts which it states, when the witness is dead or cannot be found. But such evidence in order to be admissible under the said section of the Evidence Act must have been given by the said witness in a judicial proceeding or to any person authorised by law to take it.

10. The question which arises is whether in the present circumstances the evidence which had been given by the complainant in the two previous proceedings was given in a judicial proceeding or before a person authorised by law to take it. In the first place, it cannot be doubted that the evidence given by the complainant in the previous proceedings was not given in a judicial proceeding because the previous proceedings had been declared by this Court to have been without jurisdiction.

11. That the evidence given in a judicial proceeding which had taken place without jurisdiction cannot be admitted in evidence under Section 33, Evidence Act, has been made quite clear in a number of decisions, which have been placed before us.

12. In a Madras case, --'In re Rami Reddi and Seshu Reddi', 3 Mad 48, it has been so held by their Lordships. In another case, -- 'Buta Singh v. The Crown', 7 Lah 396, the same view has also been taken. In the Lahore case the appellant was tried twice on a charge of murder. The first trial was set aside as being without jurisdiction. In the second trial the Sessions Judge, acting ostensibly under Section 33, Evidence Act, admitted in evidence the statements of certain witnesses made before the Sessions Judge during the first trial and the statement of one witness was made in the first committal proceedings. Their Lordships held that a proceeding before a Judge or a Magistrate who had no Jurisdiction is not a Judicial proceeding 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 the course of their judgment their Lordships, inter alia, observed as follows:

'The first trial was not a judicial proceeding as there is a final order by this Court ruling it to have been without jurisdiction. It was held in -- 'Rami Reddi In re', 3 Mad

48 that evidence which was in a proceeding subsequently pronounced to be one coram non iudice was not admissible and could not be used under Section 33, Evidence Act on a retrial before a competent Court.'

13. The same view has also been taken in another Madras case, -- 'Sankappa Rai v. Koraga Pujary', 54 Mad 561, where it has been held that a proceeding before a Court which has no jurisdiction to entertain it is not a 'judicial proceeding' within the meaning of Section 33, Evidence Act, and a deposition given in such a proceeding is inadmissible in evidence under the said section. Their Lordships held: 'that if a Court has no jurisdiction over the subject-matter of the litigation its proceedings are mere nullities'; and for that proposition their Lordships referred to the case of 'Rajalakshmi Dassee v. Katyayani Dassee', 38 Cal 639 and held that the 'contents of the statement, cannot be used in evidence in this case.'

14. The matter seems to us to be beyond all question. 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 proceeding, on the authorities which I have cited, can never be a judicial proceeding. The next question is can such evidence of the complainant, given in the two previous proceedings, be admitted on the ground that it was given before a person authorised by law to take it.

15. It seems to me that when it is said that a person must be authorised by law to take it, it means that the person must be authorised to take that particular deposition or the particular case in which the deposition has been given. As I have said the entire trial had been declared by this Court to have been without jurisdiction. If that is so, it cannot be said that the Magistrate who took deposition in such a trial was a Magistrate who was authorised by law to take that deposition. Such a person must be, as I have indicated, a person authorised to take that particular deposition. But the effect of the decision of this Court in those two Revision Cases, is that he was not authorised to take those depositions --the trials having been declared to be without jurisdiction.

16. In the premises I have come to the conclusion that the evidence which has been admitted under Section 33, Evidence Act could not have been admitted

under the said section and the said evidence has been wrongly admitted by the learned trying Magistrate.

17. But the question then arises as to what should be done in the circumstances? Should the appellant be acquitted or should the matter be sent back for retrial by the learned Magistrate or should we under Section 167, Evidence Act go into the evidence which has been given before the trying Magistrate and determine the matter ourselves? It appears that although the complainant is dead and his evidence is not available for the purposes of the present trial, yet there are evidences of other persons given at the trial. For instance, there is the evidence of the other partner of the complainant before whom the representations in question are alleged to have been made and who is alleged to be an eye-witness to other facts and circumstances of the case, on which the guilt of the accused person is sought to be proved. In the circumstances the question of acquitting the appellant does not arise.

18. In my opinion although we can under Section 167, Evidence Act determine the matter ourselves on the evidence which are on the record eliminating the evidence of the complainant, yet for the ends of justice, I think, we should send the matter back to the learned Magistrate to determine the guilt or otherwise of the appellant after eliminating the evidence of the complainant which he had wrongly admitted. The trying Magistrate had the advantage of seeing the demeanour of the witnesses who had given evidence before him and we are informed that the said learned Magistrate is still available for the purpose of determining the case.

19. In the circumstances, I do not think we should decide the matter ourselves on the evidence before us on records, but should send the matter back to the trying Magistrate to determine it after eliminating the evidence of the complainant which had been admitted by him. He is to decide the matter on the other evidence which is before him.

20. The appeal is allowed, the conviction and sentences are set aside and the case is sent back to the learned Magistrate to decide it after eliminating the evidence of the complainant in the two previous proceedings which he had admitted.

21. Whether the other evidence is or is not sufficient to maintain the conviction, we express no opinion and we leave it entirely to the Magistrate.

22. The appeal is disposed of in those terms.

23. The appellant will continue on the same bail.

Harries, C.J.

24. I agree.

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