The State Vs. Bejoy Kr. Chatterjee and ors.

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Court : Kolkata

Decided On : Dec-16-1976

Reported in : 1977CriLJ1503

Judge : Anil K. Sen and ;A.P. Bhattacharya, JJ.

Appellant : The State

Respondent : Bejoy Kr. Chatterjee and ors.

Judgement :

Anil K. Sen, J.

1.This reference Under Section 395(2) of the Cr. P. C., 1973 (thereinafter referred to as the new Code) by the Chief Metropolitan Magistrate, Calcutta raises a question of law on which there has been a sharp difference of opinion between the learned Chief Metropolitan Magistrate and the learned Judge, City Sessions Court at Calcutta, 4th Bench. The question involved is as to whether an offence Under Section 27(b) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the said Act) is exclusively triable by the Court of Session or not.

2. The facts leading to the making of the reference may shortly be stated :

On November 12, 1974 the police seized from the possession of Bijoy Kumar Chatterjee and Joydev Chatterjee (2nd party in this letter of reference) a huge

quantity of various brands of medicines marked for physician's sample stocked by them for sale in violation of Rule 65(18) of the Drugs and Cosmetics Rules, 1945. As a result the police submitted a charge-sheet Under Section 27(b) of the said Act and Section 120-B of the Indian Penal Code against them. It is not in dispute that such an offence Under Section 27(b) of the said Act as it stands amended by the Prevention of Adulteration of Food, Drugs and Cosmetics (West Bengal Amendment) Act (West Bengal Act 42 of 1973 Section 5, Clause (iii)) in its application to West Bengal is punishable with imprisonment for life or with fine or with both. Prior to the Amendment such an offence was punishable with imprisonment for a term which could extend to ten years or with fine or with both. The offence being punishable with imprisonment for life, the learned Chief Metropolitan Magistrate took the view that it was exclusively triable by the Court of Session and as such he by an order dated September 9, 1975 committed the accused persons to the Court of Session.

3. When the case (being the Sessions Case No. 36 of 1975) came up for trial before the learned Judge, City Sessions Court, 4th Bench two petitions were filed, one on behalf of the Public Prosecutor and the other on behalf of the accused persons praying for transferring the case for trial to the Chief Metropolitan Magistrate on the ground that the offence is not exclusively triable by the Court of Session. The learned Judge, City Sessions Court conceded this prayer and by an order dated Feb. 9, 1976 transferred the case for trial to the Chief Metropolitan Magistrate under the provisions of Section 228(1)(a) of the new Code.

4. The case having been sent back to the Court of the Chief Metropolitan Magistrate, the Public Prosecutor appearing before him, however, took the stand that the learned Chief Judicial Magistrate had no jurisdiction to try the case, the offence being punishable with imprisonment for the life. The learned Chief Metropolitan Magistrate agreed with the Public Prosecutor and took the view that he had not the jurisdiction to try the case. Hence he made the reference as aforesaid to this Court for deciding the issue on which the two Courts had differed viz. as to whether the offence is exclusively triable by the Court of Session or not.

5. Inconsistent stand having been taken by the two Public Prosecutors appearing before the two Courts, we thought it necessary to hear both of them in support of their respective view point. We have also heard the learned Advocate for the State appearing before us in this Court and Mr. Dey, the learned Advocate for the accused persons. On anxious consideration of the respective contentions put forward before us on the point we have, however, come to the conclusion that the view taken by the learned Chief Judicial Magistrate is correct and we proceed to give our reasons therefor.

6. Section 26(b) of the new Code which corresponds to Section 29 of the Criminal P. C., 1898 (hereinafter referred to as the old Code) is as follows :

26. Subject to the other provisions of this Code ....

(b) Any offence under any other law shall when any court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by (i) the High Court or (ii) any other Court by which such offence is shown in the first schedule to be triable.

7. Part II of the first schedule prescribes that the offences if punishable with death, imprisonment for life or imprisonment for more then 7 years would be triable by the Court of Session while offences which are punishable with imprisonment for three years and upwards but not more than 7 years are triable by Magistrate 1st Class and those punishable with imprisonment for less than 3 years or with fine are triable by any Magistrate.

8. On the provision of Section 26(b) of the said Code read with the above schedule if the said Act itself has not mentioned any particular Court by which the offences under the said Act or more precisely the offences Under Section 27(b) are triable, then in that event the offence Under Section 27(b) would be triable exclusively by the Court of Session since undisputedly the offence is punishable with imprisonment for more than 7 years. The said Act, in our view, on its terms does not mention or specify any particular Court for trying an offence Under Section

27(b) of the said Act.

9. The learned Judge, City Sessions Court in transferring the case to the Chief Metropolitan Magistrate Under Section 228(1)(a) of the new Code, took the view that when the offence Under Section 27(b) of the said Act is not one of the offences enumerated in Section 5 of the West Bengal Act 34 of 1974 which amends the West Bengal Act 42 of 1973, it cannot be considered to be exclusively triable by the Court of Session. Such a conclusion, however, does not follow from that provision and in our opinion the learned Judge had really failed to appreciate the true implication of the amendment made by Section 5 of the West Bengal Act 34 of 1974. An offence Under Section 27(b) of the said Act was not brought within the purview of Section 4 of West Bengal Act 42 of 1'973 or Section 5 of West Bengal Act 34 of 1'974 not because such an offence was not being made triable by Court of Session, but because on the existing provisions of the Code the same being already made triable by a Court of Session, there was no necessity of making it so as in the case of offences Under Sections 272-276 of the I. P. C. Section 5 of the West Bengal Act 34 of 1974 no doubt refers to offences Under Sections 272 to 276 of the I. P. C. It should be recalled that by Section 3 of the West Bengal Act 42 of 1973. Sections 272 to 276 of the I. P. C. were amended (in their application to West Bengal) and offences under those sections were made punishable with imprisonment for life with or without fine. Such offences under the I. P. C. having been made punishable with imprisonment for life, Sch. 2 of the old Code then in force had necessarily to be amended making such offences triable by the Court Of Session instead of by a Presidency Magistrate or Magistrate of the 1st or 2nd Class as they originally stood in the old Code when such offences were punishable with imprisonment for six months with or without fine. That was done by Section 4 of the West Bengal Act 42 of 1973. Section 5 of the West Bengal Act 34 of 1974 in substituting Section 4 of the West Bengal Act 42 of 1973 in a recast form introduced nothing new but merely adopted the same to the form and terms of the new Criminal P. C., 1973 which came into effect in the meantime. Such offences under the I. P. C. being punishable with imprisonment for life with or without fine were made triable by the Court of Session by the West Bengal Act 42 of 1973 and remained so even on the further amendment by Section 5 of West Bengal Act 34 of 1974. The learned Judge, City Sessions Court erroneously took

the view that when these offences by the amendment were made triable by the Court of Session and when the offence Under Section 27(b) was not brought into the schedule, it would necessarily follow that the offence Under Section 27(b) of the said Act is not triable by the Court of Session. He however, totally overlooked the fact that the offence Under Section 27(b) being an offence under a law other than the I. P. C. comes under Part II of the 1st Schedule of the new Code (which corresponds to 2nd Schedule of the old Code) and as soon as such an offence was made punishable with imprisonment for a term more than 7 years it becomes triable by the Court of Session on the entry in Part II of the first schedule of the new Code, on its very terms which needed no amendment unlike the offences Under Sections 272 to 276 of the I. P. C. It was this mistake which led the learned Judge, City Sessions Court to take the view that the offence Under Section 27(b) of the said Act is not exclusively triable by the Court of Session.

10. Before us, Mr. Dutta, the learned Public Prosecutor who appeared before the learned Judge, City Sessions Court contended that in view of the provisions of Section 36 of the said Act it must be held that the learned Chief Metropolitan Magistrate had also jurisdiction to try an offence Under Section 27(b) of the said Act. Same was the stand taken by Mr. Dey, the learned Advocate who appeared on behalf of the accused persons. Mr, Basu, the learned Public Prosecutor, who appeared before the learned Chief Metropolitan Magistrate as also the learned Advocate for the State in this Court, however, strongly contested the stand so takenby Mr. Dutta and Mr. Dey. Section 36 Is set out hereunder :

36. Powers of Magistrates in excess of the Section 32 of the Criminal P. C.-- Not-withstanding anything contained in the Criminal P. C., 1898, it shall be lawful for any Presidency Magistrate or any Magistrate of the 1st Class to pass any sentence authorised by this Act in excess of his powers under the said Code.

11. It was sought to be argued by Mr. Dutt and by Mr. Dey, that when the Presidency Magistrates who are now described as Metropolitan Magistrates can Impose any sentence authorised by this Act, which they can impose only on a trial, they must necessarily. be deemed to have been conferred the jurisdiction to try the offence punishable with such imprisonment. In our view such an implication does

not follow from that section as would appear clear when we look at the legislative changes brought about in the said Act and the reason for later incorporation of Section 36.

12. The said Act was first enacted in 1940 being Act 23 of 1940. In the Act so enacted the offence Under Section 27 was punishable with imprisonment for a year or with a fine which may extend to Rs. 500/- or with both. Under Section 32 of the Act as it then stood such an offence was made triable by a Court not inferior to that of a Presidency Magistrate or Magistrate of the 1st Class. Under the provisions of Section 32 of the old Code (Criminal P, C., 1898) Presidency Magistrates and Magistrates of the 1st Class could impose any sentence of imprisonment up to two years and under the relevant entry in the 2nd schedule read with Section 29 of the old Code, such Magistrates were conferred concurrent jurisdiction to try any offence punishable with imprisonment for three years and upwards but less than 7 years. The sentence prescribed under the Act as it then stood being with in the competence of the Presidency Magistrate and the Magistrate of the 1st Class, there was no necessity for a provision like Section 36 of the said Act and as a matter of fact Section 36 was not then enacted, the last section in the Act then enacted was Section 34.

13. The said Act of 1940 was amended by Act 11 of 1955. By this amending Act for the first time an offence Under Section 27 was made punishable with imprisonment for three years or with fine. Simultaneously Section 36 as aforesaid of the said Act was introduced for the first time. The reason for the introduction is quite explicit. On the amendment of Section 27 as the offence thereunder was made punishable with imprisonment for three years, though such an offence was still within the jurisdiction of the Presidency Magistrate and the Magistrate of the 1st Class for trial under the provisions of Section 29 of the old Code read with 2nd schedule thereof, yet because of the provisions of Section 32 of the old Code such Magistrates had not the power to impose a sentence of imprisonment for more than three years. To obviate this difficulty Section 36 was introduced. Section 36 was never introduced to confer any specified jurisdiction on the Presidency Magistrate and the Magistrate of the 1st Class. The marginal note of this section would indicate that what was intended to be overridden was the bar Under Section

32 of the old Code which limited the power of such Magistrates to impose a sentence of imprisonment not exceeding two years. Section 36 of the said Act was thus clearly intended to override Section 32 of the old Code which corresponds to Section 29 of the new Code and was never intended to override or amend the provision of Section 29 of the old Code which corresponds to Section 26(b) of new Code set out hereinbefore.

14. When we look to Chap. III of the old Code, we find Parts A and B deal with different matters. Sections 28 to 30 in Part A deal with powers of different Courts in determining their respective jurisdiction while Sections 31 to 35 in Part 'B' merely prescribe limits as to sentences which a particular Court can impose. These latter provisions do not deal with jurisdiction of the Courts. Though it was open to the legislature while enacting the said Act to confer jurisdiction on any specified Court to try offences under that Act by overriding the jurisdiction already determined by the Code, the legislature never did so. By enacting Section 36, the legislature merely obviated the limit on the sentence which the Presidency Magistrate or a Magistrate of the First Class could impose prescribed by Section 32 of the old Code a provision in Part B of Chapter III. The amended provisions of the new Code have not changed the above scheme. This position having been brought to the notice of Mr. Dutt, the Public Prosecutor who appeared before the learned Judge City Sessions Court he has fairly conceded that his previous application was based on a mis-apprehension. Mr. Dey however, stuck to his contention that Section 36 of the said Act not only removes tiie disability as in Section 32 of the old Code of 1898 which corresponds to s. 29 of the new Code, the same also confers the jurisdiction on such Magistrates to try such offences. We are how ever, unable to accept this contention. The distinction between Section 26 which provides for jurisdiction and Section 29 which corresponds to Section 32 of the old Code which merely imposes a limit as to sentences which Magistrates may pass are quite distinct and distinguishable from each other. The provision in Section 36 which clearly seeks to override the bar as to sentence which a Magistrate can pass without overriding the provision as to jurisdiction in Section 26, cannot be so interpreted as to do the latter. There are provisions in the said Act itself, like Section 15 and Section 32 (prior to its amendments) which provided for Jurisdictional matters. The legislature was therefore, quite conscious

about the necessity of providing for jurisdiction as when it thought necessary, but did not do so in enacting Section 36 and hence that section in our opinion should not be so interpreted as to prescribe any specified jurisdiction in the manner contended for by Mr. Dey. In the circumstances, we accept the contention, of Mr. Basu and the learned Advocate for the State who was appearing before us and hold that the learned Chief Judicial Magistrate was right in his view that the offence Under Section 27(b) is exclusively triable by Court of Session and he himself had no jurisdiction to try such an offence.

15. Our attention has been drawn to an earlier decision of this Court in the case of S. &. R. of Legal Affairs v. M. C. Agarwalla, 1976 Cal HC (N) 6. Though in this decision it was held that an offence Under Section 27(b) was also triable by a Metropolitan Magistrate when it was punishable with imprisonment which may extend to ten years, it was so decided on the provisions of Section 32(2) of the said Act as it stood prior to its amendment by W, E. Act 42 of 1973. Section 32(2) then provided

(2) No Court inferior to that of Presidency Magistrate or of a Magistrate of the First Class shall try an offence punishable Under this Chapter.

16. It hast been debated before us that a provision as above only took away jurisdiction of Magistrates other than a Presidency Magistrate or a Magistrate of tine First Class to try offences under that Chapter but it did not confer on a Magistrate so apecified any jurisdiction to try any offence Under Section 27 which being punishable with imprisonment for 10 years was triable by a Court of Session under the Code. It is not necessary for Us to go into this controversy since the provision in Section 32(2) of the Act stands omitted on its 1973 amendment. The position stands materially altered on the 1973 amendment as aforesaid as the provision construed to have conferred specified jurisdiction on such Magistrates is no longer there. This Court in that decision made that position clear in observing that an offence Under Section 27 'was not exclusively triable by the Court of Session as the same remained under the concurrent jurisdiction of the Magistrate and the Court of Session till the Amending Act 42 of 1973 was introduced'.This decision therefore does not support the contention put forward by Mr. Dey.

17. Incidentally it has been pointed out by Mr. Basu, that so far as West Bengal is concerned Section 36 of the said Act has become wholly redundant since offences under the Act on amendment are either not triable by Magistrates or if triable by Magistrates are within the competence of the Magistrates for the purpose of imposition of sentence. Position seems to be so but that is a position which has to be taken into consideration for those who are to revise legislations. That however has no bearing on the point now under consideration by us.

18. Reference is therefore disposed of by answering the question of law referred to us in the manner indicated hereinbefore.

19. Since we hold that the case is exclusively triable by the Court of Session and that the learned Judge City Sessions Court wrongly transferred the same to the Court of the Chief Metropolitan Magistrate by his order dated February 9, 1976 Under Section 228(1)(a) of the Code [passed in Sessions Case No. 36 of 1975 (4th Bench)], we set aside the said order in exercise of our suo motu powers of revision. We direct that the order of commitment dated September 9, 1975 would stand and the learned Judge, City Sessions Court must now proceed to try the case.

A.P. Bhattacharya, J.

20. I agree