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Chhakari Shaik Vs. Emperor

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Court : Kolkata

Decided On : Jul-18-1924

Reported in : 85Ind.Cas.711

Judge : Babington Bennett Newbould and ;Mukerji, JJ.

Appellant : Chhakari Shaik

Respondent : Emperor

Judgement :

Mukerji, J.

1. The appellant, Chhakari Sheikh, has been convicted under Sections 1-17 and 324/149, Indian Penal Code, by the Additional Sessions Judge of Khulna in agreement with the verdict of the majority of the Jury, the Jury being divided in the proportion of 5 to 4, and sentenced under Section 324/149, Indian Penal Code, to undergo rigorous imprisonment for 3 years. There was a further charge for an offence under Section 302/149, Indian Penal Code, in respect of which the Jury unanimously found him not guilty and the learned Additional Sessions judge has acquitted him of that charge.

2. The three charges aforesaid ran as follows:

First.--That you on or about the 4th day of June at Banisanta Abad committed rioting as a member of an unlawful assembly with the common object of enforcing a supposed right over the lands of Biraj, tenant of Purna Mandal by driving away Srimanta, Biraj and others with force and thereby committed an offence under Section 147, Indian Penal Code.

Second.--That. you on or about the same day at the same place (were member of an unlawful assembly and in prosecution of the common object of which viz., by driving Srimanta and others by force, one of. the members Sonaram Pal caused the murder of Shital Mandal and you are thereby under Section 149, Indian Penal Code, guilty of committing the same offence under Section 302, Indian Penal Code, read with Section 149, Indian penal Code.

Third.--That you on or about the 4th day of June at Banisanta Abad were member of an unlawful assembly and in prosecution of the common object of which viz., to drive away Srimanta and others by force, some of you voluntarily caused hurt with a deadly weapon, on Jharu and Dandadhar and thereby committed an offence under Section 324/149, Indian Penal Code.

3. The common object set put in the aforesaid charges is not is the same words in all of them; while in that charge under Section 147, Indian Penal Code, it is to, enforce supposed right over the lands of Biraj, tenant of Purna Mandal by driving away Srimanta, Biraj and others by force, that set out in the two charges under Section 149, Indian Penal Code, is to drive Srimanta and others by force. Now driving persons by force is not one of the common objects mentioned in Section 141, Indian Penal Code, and if these two charges stood alone the accused could very well have contended that he was tried for offences not known to law. The charge under Section 147, Indian Penal Code, however, set out the common object of enforcing a supposed right and the driving away of Srimanta and others was set out as the means by which the supposed right was enforced. The accused, therefore, was not misled by the want of precision in the framing of the charges. An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him for unless he has this knowledge he may be seriously prejudiced in his defence. In framing charges, therefore, it is always a

sound rule for the Court to adhere to the language of the Statute as far as possible. A departure from the words of the Statute benefits no body and only introduces complications in many instances, of which the present case may serve as an illustration.

4. In a charge of rioting of which the common object is to enforce a right or supposed right it is necessary for the prosecution only to show that the accused was not in actual possession at the time of the occurrence. In the case of Silajit Mahto v. Emperor 4 Ind. Cas. 19 : 36 C. 865 : 13 C.W.N. 801 : 10 Cr.L.J. 471 clear distinction was drawn by the Court between enforcing a right, and maintaining undisturbed the actual enjoyment of a right. By introducing the Mrords 'by driving Srimanta and others by force' the prosecution took upon itself the burden of proving that Srimanta and others were in possession of the land at the time of the occurrence, and by confining the charge to the enforcement of a supposed right it further alleged that the accused had no real right to be on the land at the time.

5. These elements have got to be taken into consideration along with the facts alleged by the prosecution, in order to determine what facts must be found to justify a conviction of the accused on the charge of rioting or on the other charges which are based thereon.

3. The prosecution case on the question of possession shortly stated is this, Purna Mandal took a verbal lease of 151 bighas of land in 1315 U.S. from the predecessor-in-interest of Kiran Das and others. He kept 38 bighas in his khas possession and sub-let the remainder to nine different persons, viz., Srimanta, Biraj and others. The said sub-tenants used every year to erect a hut in the land of one of them, viz., Biraj, for protection against rains during the cultivation season, and demolish the same after the rains were over, that is to say, in the month of Bhadra. Early in Jaistha, 1330, such a hut was erected on? the land of Biraj and on the 21st Jaistha, 1330 (4th June 1923) when the sub-tenants were about to start the work of cultivation, the accuseds persons variously armed came to the spot demolished the said hut and began to construct a new hut on its site. Purna and his sub-tenant offered opposition or rather remonstrated and upon that the occurrence took place. The motive which actuated the accused according to the

prosecution was to take forcible possession of the land as one of the accused Sonaram Pal and one Ayenuddi Molangi had obtained settlement of the land under a kabuliyat executed in favour of the landlords.

4. The suggestion made to the prosecution witnesses during their cross-examination indicate that according to the defence Purna Mandal was a tenant in the land for the years 1328 and 1329, that he had no tenancy right in the land at the date of the occurrence, that he and his sub-tenants ceased to have any possession, on the expiry of the year 1329, that thereafter the landlords gave the lands in barga settlement to Sonaram Pal and Ayenuddi Molongi and they executed a kabuliyat dated 2nd Jaistha 1330 (16th May 1923) and registered on 25th May 1923. Their case further appears to have been that there was no hut on the land as alleged by the prosecution.

5. Even if these suggestions be ignored as having been mere suggestions, upon the case as presented by the prosecution itself the most essential fact which would have to be proved in order to support a conviction on the charge of rioting was that there was a hut on the land which the accused came to demolish and which the prosecution alleged the accused did demolish. It is true that if the prosecution had not made a definite case as to the existence of a hut it would have been enough if it was-proved that Srimanta and others or for the matter of that Purna Mandal, were in 'possession, either actually or even inferential from any right which any of them may have had to the lands. It was not pretended, however, that there was any act of possession exercised on the lands of Biraj by Purna or any of his sub-tenants since the cultivation of 1329 and the only act of possession in those lands was confined. To the erection of the hut in question. As for inference of possession from a right to possess, no such right has been attempted to be proved in this case.

6. On the question of possession the learned Judge clearly misdirected the Jury. The misdirection is of a two-fold character, that is to say, of omission as well as of commission.

7. The question as to whether the hut was in existence or not being of prime importance, it was the duty of the learned Judge to place before the Jury facts and

circumstances appearing on the evidence showing the existence or non-existence of the hut as either possible or probable. All that the learned Judge says on the point is this:

The prosecution witnesses No's. 1 to 3, 7, 9, 10, 11, 14 and 18 say that Puma's subordinate tenants had a hut and this was demolished and new huts constructed. The Sub-Inspector says that he found on the 6th remnants of an old plinth over which the new hut was erected.

8. Though the demolishing of the hut was an integral part of the prosecution case and the existence of the hut for some days before the date of the occurrence was alleged as showing the possession of the subtenants, the learned Judge did not. direct the Jury at all about the importance of finding whether it existed or not; on the other hand he observed thus in his charge: 'If they had it (meaning the hut) and it was demolished and new huts were constructed or even if they had no hut, and Sonaram Pal constructed new huts, whether these subordinate tenants and Adar, brother of Purna would not have objected, and if new tenants were backed by armed men on behalf of the maliks, a riot was probable, and whether there was a riot resulting in the death of Sital brother of Srimanta, one of Puma's tenants and the wounding of Puma's brother and two others was substantially correct or not, is for you to consider.' He thus told the Jury that even if they found that the sub-tenants had no hut 'on the land they should proceed further to consider whether they could not find the accused guilty of rioting. This in my opinion is a clear misdirection. He should have, on the contrary, told the Jury definitely and distinctly that if they found that the prosecution had failed to prove that there was any hut of the sub-tenants on the land at the time of the occurrence, they should acquit the accused on the charge of rioting as framed. On the question of possession the learned Judge did not draw the attention of the Jury to some vital points which appear on the evidence. The case as laid before the Court was that the sub-tenants had been in possession of the different plots ever since Purna Mondal was settled on the land and P.W. No. 9 Sonatan Moral said that none of the sub-tenants used to take settlement every year, whereas before the Investigating. Sub-Inspector P.W. No. 24 Biraj himself stated and this statement was recorded under Section 161, Cr.P.C., and proved that he obtained settlement of the land 10 or 15

days before the occurrence; this on calculation would be after the date of the kabuliyat executed by Sonaram Pal and Ayenuddi Molangi. There is alto no precise evidence as to the date on which the hut which is said to have consisted of a few posts and a thatch and with no walls was actually erected. The kabuliyat which Puma Mandal executed in 1328 B. Section in favour of the landlords, about the contents of which he said he had no knowledge at, the time, was for one year only and was a registered document. The attention of the Jury was not at all drawn to these facts. These, he doubt are mere omissions but they are omissions on vital points.

9. On the question of probability as to the occurrence the learned Judge also misdirected the Jury. Dealing with the respective contentions of the parties, the prosecution case being that Purna Mondal was in possession since 131'5 and the defence being to the effect that he was on the land only during 1328 and 1329, the learned Judge rightly told the Jury that it was for them to consider whether they would believe that. Purna was in possession from 1315, But then he proceeded to observe as follows: 'But irrespective of the length of his possession, in view of the fact that the settlement operations are going on, it is for you to consider whether Purna could not set up successfully ant occupancy right in the land before the Settlement Authorities and whether it would have been easy for the landlord to deny it.' He should have told them that if possession from 1315 or about that time was not proved or if the defence story of possession from 1328 only was established, that would considerably weaken the case and necessitate the evidence about the occurrence to be examined with greater scrutiny and suspicion. He did not do so; on the other hand, he suggested to the Jury that there were facts and circumstances--irrespective of the length of Purna's possession which might help Purna to set up successfully an occupancy right in the land and which were not easy for the landlord to rebut. No such facts or circumstances are indicated in the charge; on the other hand every thing that appears on the evidence negatives the existence of such a right. The land itself is according to the prosecution 151 bighas by the 100 rasi bigha, and according to the kabuliyat executed by Sonaran 236 standard bighas. Purna sub-let almost the whole of the lands to nine persons and kept only about 38 bighas to himself. Pumas no doubt, has a ryoti holding in the village, but that also will not enable him to acquire an

occupancy right in these lands. This direction, therefore, was misleading. A further direction on the question of probabilities is also open to objection. The learned Judge said to the following effect: 'It is for you to consider what a landlord, worried granted no regular dakhilas and when there was no lease, would do to protect themselves (sic) against an acquisition of a tenant right by Purna, whether an unscrupulous landlord would try to set up another person as a tenant and to try to pat him in possession and if there was an attempt to do so whether the original tenant would come and object and whether a riot would or would not follow.' This direction proceeds upon an assumption of several facts against the landlords which should not have been assumed but, on the other hand, left to the Jury for their determination. There should have been a clear direction, on the other hand, that if Purna Mandal did not succeed in proving that he had acquired any right to the lands and if it be found that he was not actually in possession either by himself or through his sub-tenants and the accused persons went under the kabuliyat executed by them in favour of the landlords and began to build the huts and were opposed, they could not be convicted of rioting with the common object charged. The above direction as to probabilities had the effect of putting the probabilities in favour of the prosecution too strongly before the Jury; and upon a mere assumption of the facts which the Jury were not asked to find for themselves.

10. The above, in my opinion, are sufficient grounds for holding that the learned, Judge's charge to the Jury was vitiated by misdirection and such misdirection must necessarily have prejudiced the accused.

11. I would, therefore, allow the appeal and setting aside the conviction and sentence passed on the appellant, direct that he be re-tried.

Newbould, J.

12. I agree.

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