

# SUPREME COURT OF INDIA

Harihar Chakravarty

Vs.

State of W.B.

Crl.A.No.30 of 1953

(B. K. Mukherjea, Vivian Bose And N. H. Bhagwati, JJ.)

22.10.1953

## JUDGEMENT

### **BHAGWATI, J.:**

1. This is an appeal by special leave from the judgment of Mr. Justice K. C. Chunder of the High Court of Judicature at Calcutta in Criminal Revision No. 84 of 1952 setting aside an order of acquittal passed by the Presidency Magistrate, Calcutta in Case No. C/639 of 1951.

2. The Appellant was the Agent of the Calcutta branch of the Loyal Bank Ltd. from September 1938 to January 1948. The complainant, one Kshitish Chandra Mukherji opened an account with the said bank in about 1946 and he effected certain transactions in shares and securities through Messrs. J.M. Dutta, stock brokers at Calcutta. These shares and securities were purchased and sold by him on personal instructions given by him to the Appellant in that behalf and the purchase and the sale price of the shares used to be debited or credited as the case may be to his said account.

Towards April 1946 the complainant had with him 200 Burmah Corporation shares and 200 B. B. Petrol shares and it was his case that he left Calcutta towards the end of March 1946 entrusting these shares to the Appellant and only returned to Calcutta towards the middle of June 1948.

The bank is the meantime encountered financial difficulties and was not in a position to pay the two cheques drawn by him, one dated 6-3-1948 for Rs. 348, and the other dated 23-6-1948 for Rs. 17,000. A certified copy of his account was obtained by him on 26-8-1948 and on going through the same he found that on 14-8-1946 a sum of Rs. 10,500, being the price of 15 Baranagar Jute Mills shares had been debited to his account.

On 27-3-1951 the complainant filed in the Court of the Additional Chief Presidency Magistrate, Calcutta a complaint charging the Appellant and one Dinesh Majumdar, Accountant of the said bank with offences under Ss. 409, 406, 477A and 114, Penal Code on the allegations that he had not given any instructions to the appellant for the purchase of the said 15 Baranagar Jute Mills shares, that he had never purchased the said shares, that the appellant and the said Dinesh Majumdar had misappropriated the amount of Rs. 10,500 by taking away the said amount which was lying in his account with the bank, that the appellant had not sold the 400 shares which had been entrusted to him and that the appellant as a banker with the help of the said Dinesh Majumdar, an officer of the bank had misappropriated the amount of Rs. 10,500 and 400 shares by falsification of the book of the bank.

3. The complainant and his witnesses were examined before the Presidency Magistrate, and on 6-9-1951 the complainant deposed that he never gave any written or verbal instructions to the appellant to purchase for him the 15 shares of the Baranagar Jute Mills, and that the appellant had misappropriated Rs. 10,500/- and the said Dinesh Majumdar had helped him in the misappropriation of the said sum. The charge in regard to the alleged misappropriation of the said 400 shares was evidently not pressed by him.

4. On the said evidence the Presidency Magistrate, on 6-9-1951 framed against the appellant a charge under S. 409, Penal Code of having committed on 14-8-1946 criminal breach of trust in respect of the said sum of Rs. 10,500/- misappropriation of the said money.

5. The appellant entered upon his defence and cross-examined the witnesses whose evidence was led on behalf of the prosecution. He also examined some defence witnesses and on an appreciation of the evidence thus led before him, the Presidency Magistrate came to the conclusion that the 15 shares of Baranagar Jute Mills were purchased under the definite instructions of the complainant. Having regard to the above finding he acquitted the appellant as also the said Dinesh Majumdar of the charge under S. 409, Penal Code as framed.

6. The complainant having failed in substantiating the charge which he had made against the Appellant, approached the Legal Remembrancer, Government of West Bengal with a request to prefer an appeal under S. 417, Criminal P. C. The Legal Remembrancer however was of the opinion that it was not a fit case where the State should prefer an appeal.

The complainant thereupon filed a petition for revision on 28-1-1952, being the Criminal Revision Case No. 84 of 1952 to call for the records of the case and issue notices to show cause why the order of acquittal should not be set aside, and also to direct a retrial of the case on the same records or otherwise. A rule was issued by Mr. Justice S. N. Guha Roy on the same date which rule came on for hearing and final disposal before Mr. Justice K. C. Chunder on 10-6-1952.

7. The learned Judge accepted the finding that the 15 Baranagar Jute Mills shares were purchased by the Loyal Bank with the monies of the complainant and belonged to him, with the result that as the charge was framed against the appellant there was no case of criminal breach of trust. This was sufficient to dispose of the case in favour of the appellant. The learned Judge however observed that:

"That charge was not properly framed. The contention was that these shares which belonged to Kshitish were pledged with the Nath Bank which was clearly in violation of the trust under which the Bank held the shares on behalf of Kshitish. Therefore the criminal breach of trust case really related to the disposal of these shares with the Nath Bank and the real point at issue was whether the disposal of these shares was by the accused Harihar Chakravarty (the appellant). Evidence should have been called from the Nath Bank with whom the shares were pledged to show when and by whom these shares were actually pledged."

and adopted the extraordinary procedure of directing that the charge should be amended saying that it was with regard to the criminal breach of trust relating to the disposal of these 15 Baranagar Jute Mills shares to the Nath Bank. He accordingly set aside the order of acquittal and ordered that the case should go back to the Presidency Magistrate so far as the appellant was concerned for decision after proper amendment of the charge and by examining proper evidence. This is the order which is the subject matter of the present appeal before us.

8. This was a private prosecution in which the complainant came forward with a story that he never ordered the appellant to purchase these shares and that therefore the shares did not belong to him, and he had no interest in them or title to them. In fact his case was that the shares were never purchased by the appellant under his instructions. All that was found to be false and it was found that he did order them to be purchased and that therefore the shares were his. The order which was made by the learned Judge in effect meant that the complainant should abandon his original story to lay claim to the shares and prosecute the appellant for another and distinct offence which could only arise on a different set of facts coming into existence after the purchase of the shares.

The appellant might or might not be guilty of this other offence, but he is certainly innocent of the offence with which he was charged and for which he was fully tried and therefore he is entitled to an acquittal and the learned Judge had no power to set aside that order so long as he agreed, as he did, that the appellant was not guilty of the offence with which he was charged. Once a charge is framed and the accused is found not guilty of that charge an acquittal must be recorded under S. 258(1), Criminal P. C. There is no option in the matter and we are of the opinion therefore that the order setting aside the acquittal was in any event bad.

9. Next as regards the direction to alter the charge so as to include an offence for which the appellant was not originally charged, that could only be done if the Trial Court itself had taken action under S. 227, Criminal P. C. before it pronounced judgment. It could only have done so if there were materials before it either in the complaint or in the evidence to justify such action.

10. The complaint affords no material for any such case because it is based on the allegation that the shares did not belong to the complainant and that in fact they were never purchased. The learned Judge observed that the contention was that the shares belonged to the complainant and were dishonestly pledged by the appellant with the Nath Bank. We do not find even a word about this either in the complaint or in the examination of the complainant. All that there is on the record is the evidence of one Phanindra Nath Bose, P. W. 5 and Exhibits 14(1) and 15(1) which together show that the dividends on these shares were paid into the Nath Bank in the account of the appellant in the Nath Bank.

There is not a syllable to suggest that this was done dishonestly or in violation of any direction of law, or of any legal contract; and dishonesty cannot certainly be presumed. Some person must come forward and make a definite assertion to that effect and take the responsibility for making such an assertion and be prepared to suffer the consequences if the allegations are untrue. Under the circumstances, there was no material on which the Trial Court could have amended the charge under S. 227, Criminal P. C. and the learned Judge therefore had no power to direct an amendment and a continuation of the same trial, as he purported to do.

11. We may also reiterate the observations which were made by this Court in --- 'D. Stephens v. Nosibolla', AIR 1951 SC 196 (A) in regard to the exercise of the revisional jurisdiction at the instance of a private complainant;

"The revisional jurisdiction conferred on the High Court under S. 439, Criminal P. C. is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the Government has a right of appeal under S. 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court had taken a wrong view of the law or

misappreciated the evidence on record."

We do not see anything in the record of this case to warrant the order made by the learned Judge below. We therefore set aside the order passed by him and restore the order passed by the Presidency Magistrate, Calcutta. The appellant will be accordingly acquitted under S. 258 (1), Criminal P. C.

Order set aside.

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