SUPREME COURT OF INDIA

Bibhuti Bhusan Das Gupta

Vs.

State of W.B.

Crl.A.No.73 of 1966

(S. M. Sikri, R. S. Bachawat and K. S. Hegde, JJ.)

16.09.1968

JUDGEMENT

BACHAWAT, J.:-

1. The complainant Sarajit Kumar Bose was a forest ranger having his headquarters at Bara Bazar range in the district of Purulia. Bibhuti Bhusan Dasgupta was the editor and Ram Chandra Adhikari was the printer and publisher of "Mukti" a local Bengali weekly journal with its registered office at Purulia town. At the instance of Sripati Gope, a resident of Bhuni, P. S. Patanda, District Singhbhum they published a letter in the weekly issue of Mukti dated the 4th Asar, 1388 B. S. corresponding to June 19, 1965. The letter which bore the caption "Wild law in the land of the Nags (barbarians)", contained several defamatory statements concerning Sarajit Bose. On his complaint, Sripati Gope and Bibhuti Dasgupta were charged with an offence publishable under Section 500 of the Indian Penal Code and Ram Adhikari was charged with an offence punishable under Section 501 I. P. C. They were tried jointly by Shri S. M. Chatterjee, Magistrate, First Class, Purulia. The Magistrate convicted all of them of the offences with which they were respectively charged, and passed appropriate sentences. The appeals filed by them against the order were dismissed by the Sessions Judge, Purulia. The order concerning the conviction and sentence of Sripati Gope has now become final. The two courts rejected his claim for protection under the first exception to S. 499 I.

P. C. A revision petition filed by Bibhuti Dasgupta and Ram Adhikari was dismissed by the High Court. They have filed the present appeal after obtaining a certificate under Article 134 (1) (c) of the Constitution.

2. All the courts concurrently found that the publication was not made by the appellant in good faith for the public good and that they were not entitled to the protection of the ninth exception to S. 499 as claimed by them. Mr. Chatterjee attacked this finding. The ninth exception to S. 499 provides that "it is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or any other person, or for the public good." Section 52 provides that "nothing is said to be done or believed in "good faith" which is done or believed without due care and attention." The appellants' case is that on their behalf one Dol Gobinda Chakravarty made enquiries and was satisfied about the truth of the defamatory statements. It appears that Dol Gobinda did not make any report to the appellants in writing. The enquiries made by him did not reveal that all the defamtory, imputations in the publication were true. On the materials on the record it is impossible to say that the appellants published the statements in good faith or with due care and attention. In Harbhajan Singh v. State of Punjab, 1965-3 SCR 235 = (AIR 1966 SC 97) the Court held that the accused person was entitled to the protection of the ninth exception to Section 499 if he suceeded in proving a preponderance of probability that the case was within the exception. We do not find that the courts below placed upon the appellant any heavier burden of proof.

3. Mr. Chatterjee next contended that the trial of Bibhuti Dasgupta was illegal as he was not personally examined under Section 342 of the Code of Criminal Procedure. To appreciate this argument it is necessary to refer to the following facts. On September 27, 1961 the Magistrate examined the complainant and issued summons to the three accused. On the application of Bibhuti Dasgupta the Magistrate passed an order on December 12, 1961, dispensing with his personal appearance and permitting him to appear by his pleader. On September 17, 1962 the examination of prosecution witnesses was concluded. On the same day Ram Adhikari was examined under Section 342. On December 21, 1962 the lawyer representing Bibhuti Dasgupta filed a petition stating that he was undergoing an operation in Calcutta and that the lawyer may be examined on his behalf under Section 342. On the same date the Magistrate allowed the application and examined his lawyer. On April 17, 1963 the Magistrate delivered judgment. The plea that the trial of Bibhuti Dasgupta was vitiated on account of his non-examination under S. 342 was not taken before the Magistrate or the Sessions Judge or at the hearing of the revision petition in the High Court. It was taken for the first time in the petition for grant of the certificate under article 134 (1) (c) in this background let us examine the contention.

4. As a general rule save where the Magistrate dispenses with the personal attendance of the accused person the first step in a criminal proceeding is to bring him before the Magistrate. The attendance of the accuser is secured if necessary by summons or by warrant of arrest. Thereafter the inquiry or trial proceeds in his presence. Section 205 of the Code of Criminal Procedure empowers the Magistrate whenever he issues a summons to dispense with the personal attendance of the accused and permit him to appear by a pleader. The section runs as follows:-

"205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason to do so, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinabove provided."

The form of summons issued to the accused runs as follows:-

"Whereas your attendance is necessary to answer to a charge of (state shortly the offence charged) you are hereby required to appear in person (or by pleader, as the case may be) before the Magistrate) of . . . . . on the . .. . day . . of ... . Herein fail not."

Section 540-A empowers the Magistrate at any stage of an inquiry or trial to dispense with the personal attendance of the accused if be is represented by a pleader. The section is as follows:-

"540-A (1). At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, be may if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.' The point in issue is whether the pleader can represent the accused for purposes of Section 342 and whether the examination of the pleader in place of the accused is sufficient compliance with the section in a case where the Magistrate has dispensed with the personal attendance of the accused and permitted him to appear by a pleader. On this question there is a sharp conflict of judicial opinion. Most of the decisions upto 1962 are referred to in Prova Debi v. Mrs. Fernandes, AIR 1962 Cal 203 (FB). In that case a Full Bench of the Calcutta High Court by a majority decisions held that the Magistrate may in his discretion examine the pleader on behalf of the accursed under Section 342. This view is supported by numerous decisions of other High Courts, but from time to time many judges expressed vigorous dissents and came to the opposite conclusion. The two sides of the question are ably discussed in the majority and minority Judgments of the Calcutta case. After a examination of all the decided cases on the subject, we are inclined to

agree with the minority opinion.

5. The main arguments in favour of the view that the examination of the pleader is sufficient compliance with the provisions of S. 342 may be summarised as follows. The pleader authorised to appear on behalf of the accused can do all acts which the accused can do. The representation of the pleader extends throughout the trial except as provided in S. 366 (2). The form of the summons shows that the pleader may answer to charge on behalf of the accused at every stage of the proceedings. He may even plead guilty under Sections 242, 243, 251-A, 255 and 271. There is no reason why he cannot be examined under S. 342. That section is subject to and controlled by S. 205. The accused can refuse to answer questions under Section 342 and there is no point in insisting on his personal attendance if he has no intention to answer them. Accused persons will suffer harassment and inconvenience if the Magistrates have no discretion to dispense with their personal examination under S. 342. Having considered all these arguments we are not convinced that pleader can be examined in place of the accused under S. 342.

Section 342 reads as follows:-

"342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put sub questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into or tiral for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

Sub-section (1) of Section 342 consists of two parts. The first part gives a discretion to the Court to question the accused at any stage of an inquiry or trial without previously warning him. Under the second part the Court is required to question him generally on the case after the witnesses for the prosecution have been examined and before he is called for his defence. The second part is mandatory and imposes upon the Court a duty to examine the accused at the close of the prosecution

case in order to give him an opportunity to explain any circumstances appearing against him in the evidence and to say in his defence what he wants to say in his own words. He is not bound to answer the questions but if he refuses to answer or gives false answers, the consequences may be serious, for under subsection (2) the Court may draw such inference from the refusal or the false answer as it thinks fit. Under sub-section (3) the answers given by the accused may be taken into consideration in the inquiry or trial. His statement is material upon which the Court may act, and which may prove his innocence, (see State of Maharashtra v. Laxman Jairam, 1962 Supp 3 SCR 230 = (AIR 1962 SC 1204). Under sub-section (4) no oath is administered to him. The reason is that when he is examined under Section 342, he is not a witness. Before Section342-A was enacted, he was not a competent witness for the defence. His statement under Section 342 was intended to take the place of what he could say in his own way in the witness box. (see Hate Singh v. State of Madhya Bharat, AIR 1953 SC 468, at p. 470). Under Section 342-A, he is now a competent witness. But the provisions of Section 342-A do not affect the value of his examination under S. 342. Under sub-section (3) of S. 342 his answers may be put in evidence for or against him in other inquiries or trials for other offences. For instance, if in a trial for murder he says that he conceded the dead body and did not kill the victim his statement may be used as evidence against him in a subsequent trial for an offence under Section 201.

6. The privilege of making a statement under Section 342 is personal to the accused. The clear intention of the section is that only he and nobody else can be examined under it. This conclusion is reinforced if we look at S. 364. The whole of his examination including every question put to him and every answer given by him must be recorded in full and interpreted to him in a language which he understands, and he is at liberty to explain or add to his answers; and when the whole is made conformable to what he declares is the truth the record has to be signed by him and the Magistrate. The idea that the pleader can be examined on his behalf is foreign to the language of Sections 342 and 364. It was well observed by Rankin J. in Promotha Nath v. Emperor, AIR 1923 Cal 470, at p.481.

". . . .the intention of the statute is that at a certain stage in the case, the Court itself shall put aside all Counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice, to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating.. .. . . what is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence if he is willing to make one with his own lips."

7. The proposition that a pleader authorised to appear on behalf of the accused can do all acts which the accused himself can do at the trial is too wide. If the statute gives the accused a personal privilege or imposes upon him a personal duty, only he can exercise the privilege or perform the duty. Thus under S. 366 (2) the accused must hear the judgment in person unless the sentence is one of fine only or unless he is acquitted. Under Section 342-A only the accused can give evidence in person and his pleader's evidence cannot be treated as his. The answer of the accused under Section 342 is intended to be a substitute for the evidence which he can give as a witness under Section 342-

A. The privilege and the duty of answering questions under Section 342 cannot be delegated to a pleader. No doubt the form of the summons shows that the pleader may answer the charges against the accused, but in so answering the charges, he cannot do what only the accused can do personally. The pleader may be permitted to represent the accused while the prosecution evidence is being taken. But at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place.

8. Sections 205 and 540-A do not expressly mention that the pleader cannot be examined under S. 342,but this does not lead to the inference that the pleader can be so examined. On the other hand, Sections 353, 360, 361 and 366 expressly provide that the pleader may represent the accused for certain purposes, but from this fact alone no inference can be drawn that the pleader cannot represent the accused for purposes of Section 342 or other sections. It is from the scheme, purpose and language of Section 342 that we are driven to the conclusion that the examination under the section must be of the accused person and not his pleader.

9. In Dorabshah v. Emperor, AIR 1926 Bom 218, the Bombay High Court held that where the accused is permitted to appear by his pleader under S. 205 the pleader may on his behalf be examined and may plead guilty under Ss. 242 and 243. Whether the Court can act upon an admission of guilt by the pleader under Sections 242, 243, 251-A, 255 and 271 does not directly arise in this case and we express no opinion on it. It is sufficient to say that the language of those sections and the effect of a missions under them are entirely different.

10. We are not impressed with the argument that an accused person will suffer inconvenience and harassment if the Court cannot dispense with his attendance for purposes of Section 342. The examination under the section becomes necessary when at the close of the prosecution evidence the magistrate finds that there are incriminating circumstances requiring an explanation by the accused. If there is no evidence implicating the accused, no explanation from him is necessary and he need not be examined under Section 342. If there is evidence implicating him, it is in his interest that he should be examined personally.

11. There are exceptional cases when an examination of the accused personally under Section 342 is not necessary or possible. Where the accused is a company or other juridical person it cannot be examined personally. It may be that the Court may then examine a director or some other agent on its behalf (see Express Dairy Ltd. v. Corporation of Calcutta, ILR (1950) 2 Cal 602 = (AIR 1950 Cal 61)). Exceptional cases apart, only the accused in person can be examined under S. 342. We therefore hold that the Magistrate should have examined Bibhuti Dasgupta personally and the examination of his pleader was not sufficient compliance with Section 342.

12. This conclusion does not dispose of Bibhuti Dasgupta's appeal. Under Section 537 the conviction and sentence are not reversible on account of any error, omission or irregularity in any

proceedings during the trial unless the error, omission or irregularity has in fact occasioned a failure of justice. Mere non-examination or defective examination under Section 342 is not a ground for interference unless prejudice is established. (see Tilakeshwar Sigh v. State of Bihar, 1955-2 SCR 1043= (AIR 1956 SC 238), K. C. Mathew v. State of Travancore-Cochin 1955-2 SCR 1057 at pp. 1061-62 = (AIR 1956 SC 241 at p. 244), Ram Shankar Sigh v. State of West Bengal, (1962) Supp 1 SCR 49 at p. 64 = (AIR 1962 SC 1239 at p. 1245). Looking at the facts of this case we do not find that any prejudice was caused to Bibhuti Dasgupta by his non-examination under Section 342. The prosecution evidence was closed on September 17, 1962. Ram Adhikari appeared in Court and was examined personally. Bibhuti Dasgupta did not appear in Court on that date. After 3 months on December 21, 1962 his pleader was examined on his behalf at his express request. The Magistrate delivered judgment on April 17, 1963. On that date Bibhuti Dasgupta was present in Court. He made no complaint at any time before the Magistrate or the Sessions Judge or the High Court that he had suffered any prejudice. Even in this Court Mr. Chatterjee could not point out what further explanation could have been given by Bibhuti Dasgupta if he had been examined personally. We are satisfied that the omission to examine him under Section 342 did not cause him any prejudice and has not in fact occasioned a failure of justice. We are, therefore, not inclined to interfere with his conviction and sentence.

13. In the result, the appeal is dismissed.

Appeal dismissed.