

# CALCUTTA HIGH COURT

Surendra Nath Ghosh

Vs

Emperor

(Mookerjee, C.J. Harington and Teunon, JJ.)

04.07.1910

## JUDGMENT

### **Mookerjee, J.**

1. The circumstances, under which the appellant Surendra Nath Ghosh has been convicted of an offence under Section 471 of the Indian Penal Code, have been narrated in the opinion recorded by my learned brothers Harington and Teunon, and need not be recapitulated at full length. On the 4th August, 1909, the appellant deposed as a witness in a case under Section 145 of the Criminal Procedure Code in which he himself was a party. He stated inter alia as follows: "I am witness to the qabuliats Exhibits I and II". Later on, in cross-examination he qualified the statement to some extent: "I was not a writing witness in any of the qabuliats." The qabuliats had been executed on the 15th March and 3rd April, 1898, and had been registered on the 15th April of that year. Certified copies from the Registration office were produced, and these established conclusively that the name of the appellant was not on the original documents as an attesting witness before their registration, in other words, that subsequent to the execution and registration of the documents, the name of the appellant was inserted in the list of attesting witnesses at the foot of each document. There is evidence to show that such insertion was made by the appellant himself. The position, therefore, is that the appellant placed his name on the documents as an attesting witness after their execution and registration. The theory of the prosecution is that he did this with intention to have it believed that he had witnessed the execution of the documents. It is conceded that his name alone appeared on the documents, and that there was no date affixed thereto ; on the other hand, there is no allegation that the appellant was actually present at the time of the execution of the documents. Upon these facts, the charge was brought against the appellant that he had dishonestly used as genuine documents (that is, the qabuliats) in which he had forged his name as an attesting witness. The Sessions Judge on the basis of an unanimous verdict of a jury has convicted the appellant under Section 471 of the Indian Penal Code, and sentenced him to undergo rigorous imprisonment for two years. Upon appeal preferred to this Court, my learned brothers Harington and Teunon have differed in opinion as to the legality of this conviction. The matter has, therefore, been referred to me under Section 429 of the Criminal

Procedure Code.

2. On behalf of the appellant, the conviction has been assailed on the ground that the elements which must be proved, before a conviction under Section 471 can be made, have not been established. It has been contended that the case is covered by neither the first nor the second clause of Section 464, not the first, because there is nothing to show that any part of a document was dishonestly or fraudulently made by the appellant with the intention of causing it to be believed that such part was made at a time when, he knew, that it was not made ; nor the second, because the appellant did not dishonestly or fraudulently alter a document in any material part thereof. These positions have been strenuously controverted on behalf of the Crown, and an attempt has been made to support the conviction as justified by both the first and second clauses of Section 464.

3. In so far as the first clause of Section 464 is concerned, to bring the case within its scope, it has to be proved that the act was done dishonestly or fraudulently. Dishonestly is defined in Section 24 which provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly. Fraudulently is defined in Section 25, which provides that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The question, therefore, arises whether when the appellant inserted his name as an attesting witness in the qabuliats, he could be said to have done so dishonestly or fraudulently. In my opinion, he cannot be held to have done the act either dishonestly or fraudulently within the meaning of these words as defined in Sections 24 and 25 of the Indian Penal Code. I am unable to appreciate how it can be seriously maintained that when the appellant inserted his name as an attesting witness, his intention was to cause wrongful gain to one person or wrongful loss to another person. The insertion of his name as an attesting witness may have increased the apparent evidence of the genuineness of the instrument. But the insertion of the name by itself could not have been intended to cause wrongful gain to one person or wrongful loss to another person. It seems to me further to be obvious, (sic) the insertion of the name of the appellant, as an attesting witness, could not have been done with intent to defraud. The expression "intent to defraud" implies conduct coupled with intention to deceive, and thereby to injure; in other words, "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is infringement of some legal right possessed by him, but not necessarily deprivation of property. This would be so, whether we accept the restricted interpretation of defraud given by Mr. Justice Banerjee in *Queen-Empress v. Muhammad Saeed Khan*<sup>1</sup> and by Sir James Stephen in his *History of Criminal Law*, Vol. II, 121, Vol. III, 187, or adopt the wider interpretation laid down in *Queen-Empress v. Abbas Ali*<sup>2</sup> *Abdul Razak v. Queen-Empress*<sup>3</sup> *Reg. v. Toshack*<sup>4</sup> Now the instruments in this case were admittedly genuine and operative in law. If, therefore, when produced in a Court of law they were found to be genuine, it could not possibly be maintained that any person would be defrauded thereby. Let us assume for a moment that an unwary Judge relied upon the statements of the appellant, treated him as an attesting witness, and on the faith of his allegation, found the instruments to be genuine, surely no body would be

defrauded thereby, whether we interpret the word defraud" in its wider or narrower sense ; the person against whom the qabuliats might be successfully used could not maintain the position that there had been any injury to him or infraction of his rights. In my opinion, it is clear that the appellant had no intent to defraud when he inserted his name as an attesting witness in the documents in question. In popular phraseology, perhaps, his conduct may be described as dishonest and fraudulent', but his act does not fall within the scope of the definitions given in Sections 21 and 25 of the Indian Penal Code. The essence of the matter is that although he might have intended that it should be believed that he was an attesting witness, he could not have thereby intended to cause wrongful gain to one person or wrongful loss to another person, or to defraud any person by his act. I am further of opinion that the case does not fall within the first clause of Section 464 of the Indian Penal Code, because there is nothing to justify the inference that the appellant intended it to be believed that the document was made or his signature was put at a time, when he knew it was not made or signed. His act is certainly consistent with the hypothesis that he intended it to be believed, that he would be able, if called as a witness, to prove the genuineness of the instruments, either because he had been present at the execution, or had, at some occasion subsequent to the execution, received an acknowledgment from the executants as to the genuineness of his signature. In so far, therefore, as the contention on behalf of the Crown, that the case falls within the first clause of Section 464 is concerned, it must, in my opinion, be overruled.

4. In so far as the second contention on behalf of the Crown is concerned, it is, in my opinion, full of difficulties and is entirely unsustainable. It will be observed that in order to bring the case within the second clause, it has to be established quite as much as in the case of the first clause, that the act was done dishonestly or fraudulently. Apart from this element, however, the question arises whether the appellant altered a document in any material part thereof, when he affixed his name to it as an attesting witness. Now it must be taken as settled beyond the possibility of dispute, that the interpolation of the name of a witness, in a document which need not be attested, is not a material alteration so as to render the document void. This proposition was enunciated by Mr. Justice Wilson in the case of *Mohesh Chunder v. Kaminikumari*<sup>5</sup> there that learned Judge distinguished the case of *Suffell v. Bank of England*<sup>6</sup> where an attestation of the number of a Bank of England note so as to resemble another note of the same amount, was held to be an alteration of an essential part of the note. The alteration to be material must be one which alters or attempts to alter the character of the instrument itself, which affects or may affect the contract which the instrument contains, or of which it furnishes the evidence. This view has been followed in both Madras and Bombay [*Vazeeralli v. Surya Narayana*<sup>7</sup> and *Venkatesh v. Baba*<sup>8</sup> In the latter case, Sir Charles Sargent, C.J., with the concurrence of Mr. Justice Telang dissented from the contrary view adopted in the earlier decision in *Sitaram v. Daji* 7 B 418. The view that an alteration in a document stating a falsehood, either expressly or by implication, by way of increasing the apparent evidence of its genuineness, is a material alteration, cannot be supported either upon the authorities or upon principle. The principle which, lies at the root of the doctrine, as explained by this Court in the cases of *Gogun Chunder v. Dhuronidhur*<sup>9</sup> and *Gour Chundra*

*Das v. Parsanna Kumar Chandra*<sup>40</sup> is twofold, first, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected; and secondly, that by the alteration, the identity of the instrument is destroyed, so that to hold one of the parties liable under such circumstances would be to make for him a contract to which he never agreed. It is manifest, that the principle upon which the rule is based cannot be extended to cases in which there is no attempt to commit a fraud, nor is there an alteration of the identity of the instrument. The test, therefore, which has always been applied to determine the materiality of an alteration in an instrument, is based upon solid grounds; that test is to see whether the addition gives a different legal character to the writing, and whether it completely changes the nature of the relation towards each other of the parties to it, and their remedies upon it. (Laws of England, Ed., Lord Halsbury, Vol. X, Section 740). As has been well said, the test is, does the change in the instrument cause it to speak a different language in legal effect from that which it originally spoke? Has the change altered the legal identity or character of the instrument, either in its terms or in the relation of the parties to it? If it has, the change is a material alteration, and invalidates the instrument against all parties not consenting thereto. [See, for instance, *Homer v. Wallis*<sup>11</sup> *Brackett v. Mountfort*<sup>12</sup> *Milbry v. Storer*<sup>13</sup> where the insertion of the name of an attesting witness to a bond after execution, was held to be a material alteration, because in those states, different periods of limitation, are applicable to suits upon attested and unattested instruments. Tested from this point of view, there is no room for controversy that the insertion of the name of the appellant as an attesting witness to the instruments in question does not constitute material alteration. This view is also in accord with that generally adopted in the American Courts [*Fuller v. Green*<sup>14</sup> though I am not unmindful, that in isolated cases it has been maintained that as attestation furnishes a distinct and different medium of proof of the execution of the instrument, the addition of the signature of an attesting witness to an unattested instrument, may be a material alteration. [*Ellerson v. Slate*<sup>15</sup> *White v. Saxon*<sup>16</sup> *Marshall v. Gongler*<sup>17</sup>. It has been suggested, however, that the test to be applied to determine whether a document has been materially altered within the meaning of Section 464, is different from the test to be applied to determine whether the alteration is material from the point of view of the rights of the contracting parties. In my opinion, there is no difference in principle between the two classes of cases. What is the purpose for which a qabuliat is used? It is not direct evidence of possession; it merely furnishes the evidence of a contract of a tenancy between two persons. In so far as it furnishes such evidence, it may tend to corroborate evidence of possession of the land to which it relates. In other words, if A asserts against X that he has been in occupation of the land, and produces a lease thereof from B, the lease, if believed, may strengthen oral evidence, because it furnishes a prima facie explanation of the alleged possession. It seems to me to be manifest that even if it be assumed that the addition of the name of the appellant to the qabuliat as an attesting witness has increased the apparent evidence of their genuineness, such insertion has not, in any sense of the term, altered the document in a material part thereof. In this view, the attempt of the Crown to bring the case within the second clause of Section 464 of the Indian Penal Code cannot possibly succeed.

5. In so far as this second aspect of the case is concerned, I may add that it cannot be disputed,

that where the addition of an attesting witness has the effect of extending or altering liability under the document, for instance, where a document to be operative is required by law to be attested, and yet has not been attested, the procuring of a witness to sign as an attesting witness after the execution of the instrument and without the consent of the maker, may be material, and may constitute an alteration ; but where, as here, subscribing witnesses have no influence upon the legal operation of the document, the addition does not change the legal effect of the instrument, and is consequently immaterial. The precise question whether the addition of the name of an attesting witness to an instrument, which does not require by law to be attested, does or does not constitute forgery, has been raised, so far as I have been able to trace, in one case only. In *Slate v. Gorkin* 7 Iredell N.C. 206, it was argued that the insertion in a bond, after the execution, of the name of a subscribing witness constituted forgery. This contention was overruled, and it was held that putting a witness's name to a bond, not required to be attested by a subscribing witness, does not affect the validity of the bond and does not consequently constitute forgery. In fact in the *New Commentaries on the Criminal Law* by Bishop, (Vol. II, Section 577), it is treated as settled law in the American Courts that the offence of forgery is not committed by the addition of the name of a subscribing witness to a bond not required by law to be witnessed, because the alteration effected is not material, as it creates no falsity in the seeming legal efficacy of the writing [*Blackwell v. Lane*<sup>18</sup>]. The only case in the English Courts which has any bearing on the subject appears to be that of *Reg. v. Asplin*<sup>19</sup>. There it was ruled, in a case under the Marriage Act, 24 and 25 Vict. Ch. 93 Section 37, that the addition of a name as a witness where witnesses are required, is not an immaterial alteration' although but two witnesses are required and there are two witnesses without the added name. That case, therefore, is clearly distinguishable. There was also the additional circumstance in that case that the witness knowing his own name to be Asplin signed another name Richardson without authority, and it was held that though there might not have been any intent to defraud, he was guilty under these circumstances.

6. On these grounds, I agree with my learned brother Harington that the Sessions Judge in this case ought to have directed the jury to return a verdict of acquittal, and that the conviction of the appellant has been brought about by a misdirection to the jury.

7. The appeal is, therefore, allowed, the conviction and sentence set aside, and the prisoner acquitted. If he is still in custody, he must be released forthwith. If he is on bail, he will be discharged from his bail.

#### Cases Referred.

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512 C. 313

69 Q.B.D. 555 : 51 L.J.Q.B. 401 : 47 L.T. 146 : 30 W.R. 932 : 46 J.P. 500  
71 M.L.J. 388  
815 B. 44]  
97 C. 616 : 9 C.L.R. 257  
1033 C. 812 : 3 C.L.J. 363 : 10 C.W.N. 788  
11(1814) 11 Mass. 309 : 6 Am. Dec. 169  
12(1833) 11 Maine 115  
13(1883) 75 Maine 69 : 46 Am. Rep. 361  
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15(1881) 69 Ala. 1  
16(1899) 121 Ala. 399 : 25 South 784  
17(1823) 10 Serg. and Raw. (P.A.) 164  
18(1838) 4 Dev. and Bat. 113 : 32 Am. Dec. 675  
19(1873) 12 Cox. C. C. 391