REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

1934
February, 19

KALI CHARAN (APPLICANT) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY)*

Indian Penal Code (Act XLV of 1860) section 185—Criminal Procedure Code (Act V of 1898), sections 195 and 537—Court taking cognizance of offence under section 185 without complaint required by section 195—Irregularity, whether curable by section 539 of the Code of Criminal Procedure—Accused bona fide *bidder—Section 185, Indian Penal Code, applicability of—Complaint under section 195, Criminal Procedure Code, essential elements of.*

The order of a District Magistrate merely granting sanction for the prosecution of the accused does not amount to a complaint within the meaning of section 195 of the Code of Criminal Procedure. *Abdul Rahman* v. *King-Emperor* (1), distinguished.

The omission of clause (*b*) of section 537 of the Code of Criminal Procedure by the amending Act XVIII of 1933 clearly shows that the absence of any complaint, as required by section 195 of the Code, would be fatal to any prosecution initiated without such complaint. *Ameraj Singh* v. *Emperor* (2), *Ram Samujh* v. *King-Emperor* (3), *Janki Prasad* v. *King-Emperor* (4) and *Girdhari Lal* v. *King-Emperor* (5), relied on.

If, therefore, a court takes cognizance of an offence under section 185 of the Indian Penal Code without a complaint, as required by section 195(1) of the Code of Criminal Procedure, and convicts the accused, the irregularity cannot be cured by section 537 of the Code of Criminal Procedure and the conviction cannot be sustained.

If the accused at the time of making the bid brings a large sum of money for deposit as earnest money, but owing to circumstances over which he had no control is unable to deposit the earnest money and there is nothing to show that at the time he made his bid he was not a *bona fide* bidder and had no intention of performing the obligations under which he laid himself by such bidding, then his subsequent failure to deposit the earnest money cannot be made a penal offence punishable under section 185 of the Indian Penal Code.

*Criminal Revision No. 8 of 1934, against the order of H. J. Collister, I.C.S., Sessions Judge of Lucknow, dated the 27th of November, 1933.

(1) (1932) A.I.R., All., 190. (2) (1924) 23 A.L.J., 35.
(3) (1926) I.L.R., 1 Luck., 523. (4) (1926) A.I.R., All., 700.
(5) (1925) A.I.R., Oudh, 413.

Mr. *P. N. Chaudhri* holding brief of Mr. *Hyder Husain*, for the applicant.

The Assistant Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

NANAVUTTY, J.:—This is an application for revision of an appellate order of the learned Sessions Judge of Lucknow confirming the conviction and sentence passed upon the applicant Kali Charan for an offence under section 185 of the Indian Penal Code.

The facts out of which this application for revision arises are briefly as follows: There was an auction sale held on the 17th of March, 1933, by the Excise Officer of Lucknow and the highest bid in respect of the licence fee for the country liquor shop in Victoriaganj was made by the applicant Kali Charan who offered Rs.9,000. He, however, made default in respect of the earnest money which he had to deposit shortly after his bid was accepted. A notice was issued to him on the 9th of April, 1933, to show cause why he should not be prosecuted for having made default. He submitted his explanation on the 18th of April, 1933, and a second explanation on the 28th of April, 1933. On the 14th of June a fresh notice was issued to him informing him that if he paid a sum of Rs.900, being the difference between his bid of Rs.9,000 and the highest bid amounting to Rs.8,100 which had been secured when the shop was re-sold on the 31st of March, 1933, then proceedings under section 185 of the Indian Penal Code would be dropped against him, otherwise he would be prosecuted. Kali Charan failed to deposit the sum of Rs.900 and so he was prosecuted in the court of Syed Mohammad Zakir, a Magistrate of the 1st Class of Lucknow, and was convicted of an offence under section 185 of the Indian Penal Code and directed to pay a fine of Rs.51, or in default, to undergo rigorous imprisonment for one week. An application in revision was filed before the learned Sessions Judge of Lucknow against the order of the Magistrate, but this application was dismissed on

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the 27th of November, 1933. Kali Charan has now come up in revision before this Court.

The first point of law taken in the application for revision before me is that as no complaint was made by the District Magistrate or the Excise Officer within the meaning of section 195 of the Code of Criminal Procedure, so the conviction of the applicant for an offence under section 185 of the Indian Penal Code cannot be legally sustained. Clause 1, sub-section (1) of section 195 of the Code of Criminal Procedure runs as follows:

> "No court shall take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."

In the present case the District Magistrate's order, dated the 3rd of August, 1932, directing the prosecution of Kali Charan runs as follows:

> "Prosecution under section 185 of the Indian Penal Code is sanctioned. Case to Syed Mohammad Zakir."

Now, this order of the District Magistrate cannot, by any stretch of language, be deemed to be a complaint within the meaning of the term as defined in section 4(A) of the Code of Criminal Procedure. "Complaint" has been defined in section 4 of the Code of Criminal Procedure as follows:

> "Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer."

The learned Sessions Judge has held that if the District Magistrate's order of the 3rd of August, 1933, be read with the order of the Excise Officer, dated the 12th of June, 1933, and the report of the Excise Inspector, dated the 6th of June, 1933, then that order of the

District Magistrate can be reasonably held to be a "complaint" within the meaning of section 195(1)(*a*) of the Code of Criminal Procedure, and that the irregularity in the form of this complaint is such as is curable under section 537 of the Code. I regret I am unable to accept this reasoning. The facts of the ruling cited by the learned Sessions Judge, namely *Abdul Rahman* v. *King-Emperor* (1), are entirely different from the facts of the present case. In fact, in the ruling relied upon by the learned Sessions Judge, it was held by two learned Judges of the Allahabad High Court that the order of the District Magistrate merely granting sanction for the prosecution of the accused did not amount to a complaint within the meaning of section 195 of the Code.

The learned Assistant Government Advocate on behalf of the Crown has strenuously argued that the absence of a complaint by the District Magistrate of Lucknow or by the Excise Officer or Excise Inspector of Lucknow against the accused Kali Charan only amounts to an irregularity which can be cured by section 537 of the Code of Criminal Procedure. There is, however, no force in this contention. It is to be noted that clause (*b*) of the old unamended section 537 of the Code of Criminal Procedure was omitted by section 148 of Act XVIII of 1923. Clause (*b*) of the unamended section 537 of the Code laid down that no finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on account of the want of or any irregularity in any sanction required by section 195, or any irregularity in procedure taken under section 476 of the Code of Criminal Procedure. The omission of clause (*b*) of section 537 of the Code clearly shows that the absence of any complaint, as required by section 195 of the Code, would be fatal to any prosecution initiated without such complaint.

In *Ameraj Singh* v. *Emperor* (2) it was held by a learned Judge of the Allahabad High Court that no court

(1) (1932) A.I.R., All., 190. (2) (1924) 23 A.L.J., 35.

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could take cognizance of an offence of perjury, except on the complaint of a public servant and such complaint should be produced in writing on the date of the prosecution. In that case the learned Judge made the following observation:

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> "It is worth mentioning that under the unamended section 537 (of the Code of Criminal Procedure) want of a sanction or any irregularity in the matter of the sanction or in proceeding under section 476 of the Criminal Procedure Code, did not stand in the way of a conviction if it was otherwise sound. This provision was contained in clause (*b*) of section 537 before it was amended. This clause does not any longer find its place in the new section. The inference is that want of a regular complaint or order of a court must be fatal to a prosecution."

Again, in *Ram Samujh* v. *King-Emperor* (1) it was held by the late Mr. Justice RAZA that the absence of sanction or of complaint under section 195 of the Code of Criminal Procedure vitiated the whole proceedings and the defect was not cured by section 537 of the Code of Criminal Procedure, which applied to errors of procedure and not to substantive errors of law, and that where a trial was held contrary to law it was no trial at all and that disobedience of an express provision of law as to the mode of that trial was not an irregularity which could be cured by section 537 of the Code of Criminal Procedure and that the absence of a complaint made the whole proceedings in the criminal trial void *ab initio*.

Again, in *Janki Prasad* v. *King-Emperor* (2) it was held by Mr. Justice DANIELS that since the amendment of the Code of Criminal Procedure by Act XVIII of 1923 if a court entertained a case covered by section 195 of the Code of Criminal Procedure without such a complaint as the law required, then the procedure would

(1) (1926) I.L.R., 1 Luck., 523: A.I.R., Oudh, 485. (2) (1926) A.I.R., All., 700.

be void. The reasoning of the learned Judge in the case is summed up as follows:

> "Before the recent amendment of the Criminal Procedure Code a sanction and not a complaint would have been required, and the law as it then stood laid down that the absence of a sanction would not invalidate the proceedings. This portion of section 537 has now been omitted, and it appears to me that since the amendment if a court entertains a case covered by section 195 of the Code of Criminal Procedure, without such a complaint as the law requires, its proceedings are void. The case would appear to come under section 530(*p*). The court is not empowered to try the offender, except upon a complaint made by the proper authority."

Similarly, in *Ram Samujh* v. *King-Emperor* (1) it was held that a court could not take cognizance of an offence under section 467 of the Indian Penal Cole without a complaint required by section 195(*c*) of the Code and that absence of sanction or complaint under section 195 of the Code of Criminal Procedure vitiated the whole proceedings and the defect was not cured by section 537 of the Code.

Similarly, in *Girdhari Lal* v. *King-Emperor* (2) it was held by the late Court of the Judicial Commissioner of Oudh that the want of a complaint by the court concerned under section 195 of the Code of Criminal Procedure vitiated the whole trial and the defect could not be condoned.

It is clear, therefore, upon the authorities cited above, that the conviction of the applicant Kali Charan for an offence under section 185 of the Indian Penal Code cannot be legally sustained on the ground of want of sanction for his prosecution in respect of that offence.

This finding effectually disposes of this application, but the learned counsel for the applicant has also

(1) (1926) I.L.R., 1 Luck., 523. (2) (1925) A.I.R., Oudh, 415.

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strenuously argued that on the merits too the applicant has got an unanswerable case.

Section 185 of the Indian Penal Code runs as follows:

> "Whoever, at any sale of property held by the lawful authority of a public servant, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase the property at that sale or bids for such property not intending to perform the obligations under which he lays himself by such bidding shall be punished with imprisonment of either description for a term which may extend to one month or with fine which may extend to Rs.200 or with both."

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It is common ground that Kali Charan has been doing the business of a country liquor vendor for some years. It is also common ground that at the time when he made his bid of Rs.9,000 for the shop in Victoriaganj in the city of Lucknow he had brought with him a large sum of money for deposit as earnest-money after his bid had been accepted. The learned Magistrate who convicted the applicant has stated in his judgment that Kali Charan was obliged to pay the sum he had brought with him on account of arrears due from him for the previous year for which the Tahsildar had issued severe coercive processes. On this point the learned Magistrate writes as follows:

> "He (Kali Charan) brought back the money but had to pay it off for his arrears of the previous year for which there was a very harsh demand from the Tahsildar with threats of his arrest and being detained in the lock-up."

It is clear, therefore, that Kali Charan was a *bona fide* bidder at the auction sale and if he was unable to deposit the earnest-money which he was legally bound to do after his bid was accepted, his inability was due to

circumstances over which he really had no control. Section 170 of the Excise Manual, Vol. I, p. 66, runs as follows:

> "Cases in which a man whose bid has been accepted at auction, fails to pay in his advance deposit are not to be reported as cases for remission of an irrecoverable balance. Such a default is not a balance, and is not recoverable as an arrear of revenue. In such a case the contract must be re-sold, the price so obtained being entered as the demand. *The only legal method of recovering a loss accruing on re-sale is by a civil suit against the defaulter.*"

In the present case, instead of filing any civil suit against the defaulter Kali Charan for the recovery of the loss of Rs.900 consequent on the re-sale of the shop at Victoriaganj, the district authorities of Lucknow have chosen to prosecute the defaulter Kali Charan criminally under section 185 of the Indian Penal Code. It is clear from the facts admitted by the prosecution and proved against the applicant Kali Charan that the provisions of section 185 of the Indian Penal Code cannot be made applicable to the facts of the present case. There is nothing whatever on the record of the case to show that at the time when Kali Charan made his bid of Rs.9,000 he had no intention of performing the obligations under which he laid himself by such bidding. The Tahsildar of Lucknow could have allowed the money which Kali Charan had brought with him at the time of the auction sale to be deposited as earnest-money and he could have realized the arrears due from Kali Charan on account of licence fees of the previous year by some other method. If Kali Charan was practically a bankrupt and an undesirable person to whom a licence for the sale of country liquor should not be given, the Excise Officer who was holding the auction sale should not have allowed him to make any bid at all, and should not have accepted his bid of Rs.9,000, if he thought that

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Kali Charan's financial position was unsound. If, on the other hand, Kali Charan made a *bona fide* bid at the time of the auction sale and had no intention of shirking his obligations, then his subsequent failure to deposit the earnest-money due from him cannot be made a penal offence punishable under section 185 of the Indian Penal Code. In fact the Excise authorities of Lucknow were prepared to drop the prosecution of Kali Charan if he made good the loss of Rs.900, and it was only on the failure of Kali Charan to deposit this deficiency that his prosecution under section 185 of the Indian Penal Code was sanctioned. The learned counsel for the applicant has some colourable ground for asserting that his client was prosecuted for an offence under section 185 of the Indian Penal Code only as a means for the recovery of the amount of Rs.900 due from him.

In my opinion upon the facts found proved by the learned trying Magistrate no offence under section 185 of the Indian Penal Code appears to have been committed by the applicant Kali Charan.

For the reasons given above, I allow this application for revision, set aside the conviction and sentence passed upon the applicant Kali Charan, acquit him of the offence charged, and direct that the fine, if paid by him, be refunded to him.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Rachhpal Singh

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LAL BAHADUR (JUDGMENT-DEBTOR-APPELLANT) v. MATHURA PRASAD (DECREE-HOLDER-RESPONDENT)*

Limitation Act (IX of 1908), article 182(7)—"Such date", meaning of—Decree payable by instalments—Decree providing that entire money will be recoverable in default of any

*Execution of Decree Appeal No. 49 of 1933, against the order of Saiyid Qadir Hasan, Subordinate Judge of Bara Banki, dated the 2nd of August, 1933.