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RADHIBA
BALOBA
v.
ABURAO
BHAGWANTRAO

Sir Lancelot
Sanderson

The respondents Nos. 1 to 5 should pay the costs of the plaintiffs of this appeal and of the appeal to the High Court, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: Mr. *H. S. L. Polak*.

Solicitors for respondents Nos. 1 to 5: Messrs. *T. L. Wilson & Co.*

A. M. T.

CRIMINAL TRANSFER.

Before Mr. Justice Patkar and Mr. Justice Wild.

1929
June 24.

PARASHURAM DATARAM SHAMDASANI (ORIGINAL COMPLAINANT), APPLICANT v. HUGH GOLDING COCKE AND OTHERS (ORIGINAL ACCUSED), OPPONENTS.*

Criminal Procedure Code (Act V of 1898), section 556—Application for transfer—Magistrate, a share-holder in Bank—Personal interest—Disqualification of Magistrate to try case—Disqualification not cured by consent.

A complaint was filed under section 282 of the Indian Companies Act, 1913, against the auditors of the Central Bank of India, Limited, in the Court of the Presidency Magistrate, Third Court. It appeared that the Magistrate held two shares in the Bank. The complainant applied for a transfer of the case from the Magistrate's Court on the ground that the Magistrate was personally interested in the case.

Held, allowing the application, that although as a shareholder in the Bank the pecuniary interest of the Magistrate was small he was disqualified from trying the case under section 556 of the Criminal Procedure Code, 1898.

In re P. A. Rodrigues⁽¹⁾; *The Queen v. Farrant*⁽²⁾; *Allinson v. General Council of Medical Education and Registration*⁽³⁾; *Leeson v. General Council of Medical Education and Registration*⁽⁴⁾; *Serjeant v. Dale*⁽⁵⁾; *Emperor v. Cholappa*⁽⁶⁾ and *In the matter of the petition of Ganeshi*,⁽⁷⁾ referred to:

The consent or acquiescence of any party will not supply the defect or want of jurisdiction in a Magistrate.

Emperor v. Bisheshar Bhattacharya,⁽⁸⁾ approved of.

The Queen v. Justices of Antrim,⁽⁹⁾ referred to.

THIS was an application for transfer of a case from the Court of the Presidency Magistrate, Third Court.

*Criminal Application for transfer No. 176 of 1929.

⁽¹⁾ (1895) 20 Bom. 502.

⁽²⁾ (1887) 20 Q. B. D. 58 at p. 60.

⁽³⁾ [1894] 1 Q. B. 750.

⁽⁴⁾ (1889) 43 Ch. D. 366.

⁽⁵⁾ (1877) 2 Q. B. D. 558 at p. 567.

⁽⁶⁾ (1906) 8 Bom. L. R. 947.

⁽⁷⁾ (1893) 15 All. 192.

⁽⁸⁾ (1910) 32 All. 635.

⁽⁹⁾ [1895] 2 I. R. 603.

The material facts are sufficiently set out in the Judgment.

P. D. Shamdasani, applicant, in person.

S. G. Velinker, instructed by Messrs. *Payne & Co.*, for the opponents.

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PATKAR, J. :—This is an application for transfer of a case filed by the petitioner under section 282 of the Indian Companies Act against the auditors of the Central Bank from the Court of the Third Presidency Magistrate to the Court of the Chief Presidency Magistrate. The application is based on two grounds, first, that the Third Presidency Magistrate is disqualified from trying the case under section 556 of the Criminal Procedure Code on the ground that he is a shareholder in the Central Bank of India, Limited, and, secondly, that on account of certain events that have happened, the applicant has reason to apprehend that he will not have a fair and impartial trial before the learned Magistrate.

It is urged on behalf of the applicant that the learned Magistrate is personally interested as he is a shareholder of the Central Bank. It appears that the learned Magistrate holds two or two and a half shares in the said Bank. The personal interest of the Magistrate alleged by the petitioner is so insignificant that ordinarily no presumption would be drawn that the learned Magistrate would, in any event, be biased in favour of or against the accused.

In *In Re P. A. Rodrigues*,⁽¹⁾ where a compounder in the employ of Treacher and Co. was convicted by the Presidency Magistrate of criminal breach of trust and it appeared that the Magistrate was a shareholder in the company, it was held that the Magistrate was disqualified from trying the case, and that as a shareholder

⁽¹⁾ (1895) 20 Bom. 502.

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of the Company he had a pecuniary interest, however small, in the result of the accusation and was therefore personally interested in the case. The decision in that case is based on an amplification of the principle that no man is allowed to be a judge in his own cause, and rests on the decisions in the cases of *The Queen v. Farrant*,⁽¹⁾ *Allinson v. General Council of Medical Education and Registration*⁽²⁾ and *Leeson v. General Council of Medical Education and Registration*.⁽³⁾

It was held in *Allinson's case*⁽²⁾ (p. 758) :

"Where a person who has taken part in the judicial proceedings, or, you might say, has sat in judgment on the case, has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biased or likely to be biased. The Court will say at once, It is against public policy that a person who has any monetary interest, however small, in the result of judicial proceedings should take part in them as a judge. The Court will inquire no further, but will say at once that he is disqualified."

In *Serjeant v. Dale*⁽⁴⁾ it was held (p. 567) :—

"The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The decision in the case of *Emperor v. Cholappa*,⁽⁵⁾ relied on on behalf of the opponents, has no application to the facts of the present case. It was held in that case that the mere fact that the inquiry was made by the Magistrate is not to be regarded as a disqualifying ground, and that the phrase "interested" does not imply mere intellectual interest but something of the nature of an expectation of advantage to be gained or of a loss, or of some disadvantage to be avoided, by the person who is said to be interested in the case. The decision in *In the matter of the petition of Ganeshi*,⁽⁶⁾

⁽¹⁾ (1887) 20 Q. B. D. 58 at p. 60

⁽²⁾ [1894] 1 Q. B. 750.

⁽³⁾ (1889) 43 Ch. D. 366.

⁽⁴⁾ (1877) 2 Q. B. D. 558.

⁽⁵⁾ (1906) 8 Bom. L. R. 947.

⁽⁶⁾ (1893) 15 All. 192.

also relied on on behalf of the opponents, does not apply to the present case as the Magistrate there in charge of the excise and opium administration of the District was held to be not personally interested merely by reason of its being his duty as an officer under Government to see that the law relating to the sale of opium is enforced and maintained. The present case falls under the class of cases of which the case of *In Re P. A. Rodrigues*,⁽¹⁾ is a type.

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In Halsbury's Laws of England, Vol. XIX, page 552, paragraph 1156, it is laid down :—

“ A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is, subject to any statutory authority to the contrary, a bar to the justice acting, but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter.

“ The interest, if pecuniary, need not be confined to the justice himself to preclude his acting. Membership of a company or association which is interested is a bar, as also is a bare liability to costs, where the decision itself would involve no pecuniary loss.”

As the accused in this case are the auditors of the company and, in their capacity as such signed the balance-sheet, the shareholder may not be considered to be personally interested in them or in their case. But it cannot be said that the success or failure of the prosecution would have no effect upon the value of the shares of a shareholder. According to the authorities pecuniary interest even to a small extent is a sufficient disqualification independently of the question whether the Magistrate is really biased or likely to be biased.

It is urged on behalf of the opponents that the petitioner has waived the objection as regards the disqualification of the Magistrate. It is urged that at the initial stage of the case the complainant raised the same objection and the learned Magistrate overruled it, and by consent the case was postponed to several dates and no objection was taken by the complainant to the trial

⁽¹⁾ (1895) 20 Bom. 502.

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of the case by the Magistrate, and the petitioner must be considered to have waived the objection. The decision in the case of *The Queen v. Justices of Antrim*⁽¹⁾ would to a certain extent support the contention raised on behalf of the opponents. It appears from the judgment of Sir P. O'Brien, C.J., at page 639 in that case, that not only was there mere consent but there was pressure on the eminent justice to continue when he manifested a desire to leave the Bench. The consent or acquiescence of any party would not, in my opinion, supply the defect or want of jurisdiction in a Magistrate. I agree with the view in *Emperor v. Bisheshar Bhattacharya*,⁽²⁾ where a Magistrate as the President of the octroi sub-committee of a Municipal Board ordered the prosecution of the accused and with the consent of the accused tried the case himself, it was held that the Magistrate must be deemed to have been personally interested within the meaning of section 556 of the Code of Criminal Procedure, and was not qualified to try the case of the applicant, whose consent could not confer jurisdiction upon him. I may refer to the case of *Queen v. Bholanath Sen*,⁽³⁾ where it was held that criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner. We think, therefore, that the disqualification of the Magistrate is not cured by any consent or acquiescence of the complainant in this case.

It is further urged on behalf of the opponents that the present application is not a *bona fide* one, and reference has been made to the report made by the learned Presidency Magistrate, Third Court, to the Chief Presidency Magistrate in an application for transfer of the

⁽¹⁾ [1895] 2 I. R. 608.

⁽²⁾ (1910) 32 All. 635.

⁽³⁾ (1876) 2 Cal. 23.

case. It appears from the report that the applicant interrupted the Magistrate in the course of his work, and refused to listen and went on talking in a loud tone, and though warned by the Magistrate he went on in a still louder tone, and when he was warned that if he did not cease to talk he would have to call a Police Sergeant to remove him from the Court room, the applicant, finding that the Magistrate's order would be carried out to his humiliation, remained silent and walked away, and on the next day presented an application for transfer to the Chief Presidency Magistrate. As suggested by the opponents the present application may not be a *bona fide* one. The absence of *bona fides*, however, on the applicant's part does not affect the question of the disqualification of the Magistrate in trying this case.

We think, therefore, that the Presidency Magistrate, Third Court, is disqualified under section 556 of the Criminal Procedure Code from trying the case. Under section 556 of the Criminal Procedure Code a Magistrate who is personally interested can try a case with the permission of the Court to which an appeal lies from his Court. In the present case if the learned Magistrate at the initial stage of the case when both the parties agreed to go on with the case before him, had made a report to this Court and requested permission of this Court to try the case, this Court would, no doubt, have given the required permission. Even at this stage if both the parties consented, we would have given the required permission. We think, therefore, that the case must be transferred from the Court of the Third Presidency Magistrate. We must, however, make it clear that we have come to the conclusion that the transfer is necessary on account of the disqualification under section 556. We have no doubt that the learned Magistrate would have dealt with the case impartially, and

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that there was not the slightest chance of his being biased one way or the other on account of the small personal interest alleged on behalf of the petitioner.

The next question is to which Court the case should be transferred. We think that Mr. Dastur, the Chief Presidency Magistrate, having tried similar cases would have been the proper Magistrate to deal with the present case. The learned counsel on behalf of the opponents has drawn our attention to two considerations against the transfer to the Court of the learned Chief Presidency Magistrate. The first circumstance to which he has referred is that if the case is transferred to the Court of the Chief Presidency Magistrate, the present case is not likely to be heard for a long time; and, secondly, the learned Chief Presidency Magistrate, Mr. Dastur, has expressed an opinion with regard to the balance-sheets in question. Under these circumstances we think that this case must be transferred to some Magistrate other than the Third Presidency Magistrate and the Chief Presidency Magistrate. We would, therefore, direct that the case should be transferred to the Court of some Presidency Magistrate other than the Third Presidency Magistrate whom the Chief Presidency Magistrate may appoint. We find that some evidence has already been gone into before the Presidency Magistrate, Third Court, and we order this transfer on condition agreed to by both the parties before us that the Magistrate whom the Chief Presidency Magistrate may appoint in this behalf should try this case from the stage at present reached in the Court of the Presidency Magistrate, Third Court.

We, therefore, make the rule absolute and order that the case should be transferred to the Court of some Presidency Magistrate whom the Chief Presidency Magistrate may appoint.

WILD, J. :—The petitioner Parashuram Dataram Shamdasani has applied for transfer of proceedings instituted by him in the Court of the Third Presidency Magistrate, Bombay, against the auditors of the Central Bank of India to the Court of the Chief Presidency Magistrate, Bombay. There are some allegations that the learned Magistrate has shown bias in favour of the accused but there appears to be no ground for thinking so in this case. The more important point, however, is that it is alleged that the learned Magistrate has a personal interest in the case and that therefore under section 556 of the Criminal Procedure Code he is not empowered to try it. The alleged interest is this. The prosecution is against the auditors of a certain Bank of which the learned Magistrate is a shareholder. As a shareholder he is a person who has in theory appointed the auditors and in that sense he is said to be interested. Moreover it is argued that if the prosecution is successful and it is shown that the auditors wrongfully passed the accounts then the credit of the Bank would be impaired and the value of the shares will go down. In this way it is said that the learned Magistrate has a monetary interest in the case.

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In view of the ruling in *In re P. A. Rodrigues*⁽¹⁾ it is impossible to say that the Magistrate is not personally interested. That was a case where the accused was a compounder in the employ of a company and was tried for criminal breach of trust as a servant in respect of certain goods belonging to that company. The Magistrate who tried the case was a shareholder in the company and it was held that he was personally interested in the prosecution. In *Emperor v. Cholappa*⁽²⁾ it was said that the phrase "interested," as used in section 556 of the Criminal Procedure Code means something of the nature of an expectation of advantage to be gained or

⁽¹⁾ (1895) 20 Bom. 502.

⁽²⁾ (1906) 8 Bom. L. R. 947.

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of a loss, or of some disadvantage to be avoided, by the person who is said to be interested in the case. That test would also apply in this case on the assumption that the shares would go down in value if the prosecution were successful.

It is true that this Court could give permission to the learned Magistrate to try the case. Properly speaking that permission should have been given before the proceedings were begun. But in view of the fact that the proceedings can go on without any inconvenience in the Court of another Presidency Magistrate and that all the parties agree that the case shall so go on from the point which it has now reached, I agree with my learned brother in the order of transfer.

Case transferred.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

1928
 July 5.

MANEKJI RUSTOMJI BHARUCHA v. NANARHAI CURSETJI
 BHARUCHA.*

Will—Construction—Legacy—Intention of testator—Creation of trust—Investment of trust funds—Payment of interest to life-tenant—Trust for the benefit of children of life-tenant—Beneficiaries entitled to the investments.

A testator by his will directed his executors "to stand possessed of investments to be selected by them of the market value on the day of my death of Rs. 17 lakhs upon trust to pay the income thereof, from time to time as the same accrues due to my sister D for her life." (Clause 14.) After the death of D, "my executors shall divide and pay the said sum of Rs. 17 lakhs" to the daughters of D and to the children of a pre-deceased daughter of D. The amounts payable to the said legatees were specified. (Clause 15.)

The executors accordingly invested a sum of Rs. 17 lakhs in the Bombay Development Loan Notes, and paid the interest to D during her lifetime. On the death of D, a question arose whether the daughters and the grandchildren of D were entitled only to the specific sums mentioned in the will or to the securities of the face value of the amounts mentioned therein :

Held, (1) that clauses 14 and 15 of the will were not independent clauses, but were connected by the expression of a common purpose; and that, so read, a fully constituted trust was created by those clauses;

*O. C. J. Suit No. 258 of 1928, O. S.