

(1963) 10 BOM CK 0006

In the Bombay High Court

Case No : Criminal R. Application No. 432 of 1963

Pheroze Jehangir Dastoor

APPELLANT

Vs

Mrs. Roshan Jal Nanavaty

RESPONDENT

Date of Decision : 14-10-1963

Acts Referred:

Constitution of India, 1950 — Article 210, 240

Penal Code, 1860 (IPC) — Section 114, 120B, 143, 3, 341

Citation : (1964) MhLj 339

Hon'ble Judges : V.A. Naik, J

Bench : Single Bench

Advocate : H.G. Advani and G.A. Merchant, for the Appellant; T.N. Jungalwala and Rustom S. Daruwala for Accused Nos. 1 and 2, A.N. Banatwala for Accused No. 3 and Y.S. Chitale, Hon. Asstt. Govt. Pleader for State, for the Respondent

Final Decision : Allowed

Judgement

V.A. Naik, J.—This is an application in revision from the order of the Presidency Magistrate, 17th Court, Mazgaon, Bombay, dismissing the complaint on the ground that he had no jurisdiction to entertain the same. The material facts may be briefly stated as follows: The complainant lodged a complaint in the Court of the Presidency Magistrate, 16th Court, Esplanade, Bombay, on November 5, 1962, alleging that the three accused had committed offences under Sections 120B, 403, 143, 341, 454 and 114, Indian Penal Code. According to the complainant, these offences were committed in the year 1953 within the territorial limits of Daman, which was then a foreign territory, so far as India is concerned, and was governed by the Portuguese Government.

2. After the complaint was lodged, process was issued and the accused appeared before the Court on March 14, 1903. They raised the question about the jurisdiction of the Presidency Magistrate, Bombay, to entertain the complaint. Thereafter the case was adjourned to May 9, 1963, for recording evidence. It was then transferred to the 17th Court, Mazgaon, Bombay. It was contended

before the trial Magistrate that since Daman has been included in the Union Territories with effect from December 20, 1981, and since the complaint was lodged after that date, the offences could be tried at the place they were committed. The trial Magistrate held that the offences, which were alleged to have been committed at Daman, could not be inquired into at Bombay, after the merger of Daman with India. He, therefore, dismissed the complaint and discharged the accused. It is against that order that the complainant has come up in revision.

3. Mr. Advani, learned Counsel for the complainant, pointed out that the Indian Penal Code and the Code of Criminal Procedure were originally intended to be extended to Goa, Daman and Diu with effect from October 1, 1963, but they were actually extended on November], 1963. According to him, so long as these provisions are not extended to these territories, the matter would continue to be governed by the provisions of Section 4, Indian Penal Code and Section 188, Criminal Procedure Code.

4. In order to appreciate this line of reasoning, it is necessary to refer to a few more facts and the relevant provisions of the Constitution of India. The territories of Goa, Daman and Diu came to be occupied with effect from December 20, 1961. On March 5, 1962, an Ordinance (No. 2 of 1962) was proclaimed. Section 4 of the Ordinance declared that all laws in force before the appointed day, which is the same as the date of occupation, shall remain in force. Thereafter, on March 28, 1962 an Act (No. 1 of 1962) was passed, which was to be deemed to have come into force with effect from March 5, 1962. Section 5 of the Act declared that the laws existing since before the appointed day would continue to remain in force. It is not necessary to refer to the other provisions of the Act. The 12th Amendment of the Constitution received the assent of the President on March 27, 1962. Section 3 amended Article 240 of the Constitution and Section 2 amended the First Schedule of the Constitution by adding an eighth entry thereto. That takes me to the provisions of Article 240 of the Constitution, which enables the President to make regulations for the peace, progress and good government of the Union Territory. Goa, Daman and Diu were declared to be Union territories. The First Schedule under the heading "The Union Territories" mentioned seven territories as being included in that list. Goa, Daman and Diu came to be included as the eighth entry. Under Article 210, the President has got the power of making regulations for the peace, progress and good government of these territories. The President, in pursuance of Article 210. made a Regulation (No. 12 of 1962) governing these territories, which was published in the Gazette of India dated November 22 1962. Section 3 (1) of the Regulation provides:

The Acts, as they are generally in force in the territories to which they extend shall extend to Goa, Daman and Diu, subject to the modifications, if any, specified in the Schedule".

Section 3 (2) provides:

Notwithstanding anything contained in Sub-section (1) or in the relevant provision if any, of each such Act for the commencement thereof", the provisions of each such Act shall come into force in Goa, Daman and Diu on such date as the Lieutenant-Governor may, by notification in the Goa, Daman and Diu Gazette, appoint.

The Schedule begins from page 365 of the Gazette and mentions both the Indian Penal Code and the Code of Criminal Procedure. Mr. Jungalwalla, for accused Nos. 1 and 2, contended that both those enactments must be deemed to have been extended to these territories with effect from the date of passing of this Regulation and for this again, he relied on Section 3(1) of the Regulation. All that Section 3(1) provides is that the Acts specified in the Schedule shall extend to these territories. Sub-section (1) must be read in conjunction with Sub-section (2), which begins with the non-obstante clause viz.,

Notwithstanding anything contained in Sub-section (1) or in the relevant provision, if any, of each such Act for the commencement thereof....

and proceeds to say that the provisions of each such Act shall come into force in Goa, Daman and Diu on such date as the Lieutenant-Governor may by notification in the Goa, Daman and Diu Gazette, appoint. It is thus clear that the extension of any of the Acts depends upon a notification promulgated by the Lieutenant-Governor, who will also fix the date from which each of these Acts comes into operation. It is not, therefore, correct to say that merely because the Indian Penal Code and the Code of Criminal Procedure have been mentioned in the Schedule, they must be deemed to have come into operation from the date of the Regulation. Mr. Jungalwalla has been unable to show any notification issued by the Lieutenant-Governor saying that any of these Acts was extended to these territories. We find from the Government Gazette dated July 20, 1963, that the Lieutenant-Governor issued a notification in exercise of the powers conferred by Section 3(2) of the Regulation, under which both the Indian Penal Code and the Code of Criminal Procedure came to be extended to these territories with effect from October 1, 1963. It is on this footing that we have to consider the legal position relating to the Court which will have jurisdiction to entertain the complaint lodged on November 5, 1962. It is clear that on the date of the complaint, neither the Indian Penal Code nor the Code of Criminal Procedure was extended to these territories. Section 3, Indian Penal Code, provides:

Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India". Section 4, Indian Penal Code, is still more relevant and it runs thus: "The provisions of this Code apply also to any offence committed by :

(1) any citizen of India in any place without and beyond India;

(2) ...

Then there is an explanation, which provides:

In this section the word "offence" includes every act committed outside India which if committed in India, would be punishable under this Code." There is one illustration, which is as follows:

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place- in India in which he may be found.

It will thus be seen that so far as an Indian citizen is concerned he should be deemed to have committed an offence in India, even if he has committed the offence outside the limits of Indian territory and even if the act complained of does not constitute an offence under the law prevailing in the place in which the offence was committed. The illustration relates to the place of trial and in effect says:

... He can be tried and convicted of murder in any place in India in which he may be found.

Since the offence had been committed beyond the limits of Indian territory, it is obvious that none of the provisions of the Code of Criminal Procedure relating to the place of trial would be attracted to such a case and, therefore, a rule had to be laid down as a matter of convenience providing that the offender would be tried in the place where he is found. This provision must be read in conjunction with the provisions of Section 188, Criminal Procedure Code, which runs thus:

When an offence is committed by:

(a) any citizen of India in any place without and beyond India; or (b) . . .

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

The provisions of Section 4, Indian Penal Code and Section 188, Code of Criminal Procedure are complementary to one another. What is stated in the form of illustration in Section 4, Indian Penal Code, has been provided for in the body of the statute in Section 188, Criminal Procedure Code.

5. Although it is true that Goa, Daman and Diu came to be merged in the Indian Union with effect from December 20, 1961, and although from that date, they became Union territories, still an offender could not be tried in Daman territory by Daman Courts for an offence committed by him in 1953, when the offender was an Indian citizen and the offence falls within the purview of Sections 3 and 4, Indian Penal Code. It is the date of the offence which would be determinative of the issue and on the date of the offence, the matter was governed by the provisions of Sections 3 and 4, Indian Penal Code, and Section 188, Criminal Procedure Code. That position would continue unchanged till the extension of the provisions of the Indian Penal Code and the Code of Criminal Procedure to Goa, Daman and Diu territories. The trial Magistrate seems to have assumed that the Daman Court will have jurisdiction to try the offences by reason of the fact that

these territories became Union territories with effect from December 20, 1961. It may be that under the law prevailing in Daman territory, the acts complained of also constituted offences. But that is neither here nor there. The acts complained of constituted offences within the meaning of Sections 3 and 4, Indian Penal Code and could be tried at any place where the accused is found as laid down in Section 188, Criminal Procedure Code. I will consider the meaning of the expression "at any place within India at which he may be found" presently. For the time being, I will content myself with holding that in so far as the matter is governed by the provisions of Sections 3 and 4, Indian Penal Code and Section 188, Code of Criminal Procedure the accused persons are liable to be tried in the Indian Court of competent jurisdiction, and for this purpose, the date of the complaint, viz , November 5 1962, is relevant. It is necessary to note that after the complaint was lodged process came to be issued which means that cognizance of the offences was taken by the Presidency Magistrate in Bombay.

6. The trial Magistrate has almost in a summary fashion held that the provisions of Section 188, Code of Criminal Procedure do not apply to the present case by reason of the fact that these territories became Union territories with effect from December 20, 1961. This view is wrong for the reasons mentioned above. In my view, the case is governed by the provisions of Section 188, Criminal Procedure Code. In this connection, we have to consider the effect of the first proviso to Section 188, Criminal Procedure Code, which in effect says:

...no charge as to any such offence shall be inquired into in India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in India; and where there is no Political Agent, the sanction of the State Government shall be required

7. It was contended by Mr. Jungalwalla that so long as no sanction, as laid down in the proviso has been obtained from the appropriate authorities, the case cannot be deemed to have been initiated. On this point, we have clear rulings of this Court in *In Re: Rambharthi Hirabharthi*, : 25 Bom. L R 772 : I L R 47 Bom. 907 and *Emperor Vs. Sakham Pandu*, . In *Rambharthi's* case (1) the Division Bench observed as follows (p. 775):

.. If the only difficulty in the way of the applicant was the absence of the certificate u/s 188, Criminal Procedure Code, at the date of the complaints we should allow these applications as the certificate has been obtained subsequently.

In *Emperor v. Sakham* (2), which is again a Division Bench decision, it has been held (p. 668):

Per Curium.--This Court does not find any illegality or irregularity in the proceedings of the trial Magistrate. All he has done is to take some evidence for the complainant. Having taken that, he found that the offence complained of appeared to have been committed within the limits of a Native State and, therefore, cognizable only under the conditions specified in the proviso to Section

188 of the Code of Criminal Procedure. That proviso requires that such an offence should not be inquired into without a certificate of the kind mentioned therein. There is nothing in the language of the proviso making illegal the obtaining of the certificate after the complaint has been filed and the inquiry has begun or been completed to the extent that has happened in this case. Section 532, on which the District Magistrate relies, applies only to a commitment to a Sessions Court. We must, therefore, decline to interfere and direct the trial Magistrate to deal with the case according to law.

A similar view has been taken by the Nagpur High Court in *Harnarayan v. Govindram* 1940 N L J 304 = A I R 1910 Nag. 245 = I L R 1942 Nag, 193. In that case, the learned Judge has considered the question as to what is meant by taking cognizance and he says that cognizance is taken "as soon as a Magistrate applies his mind to the suspected commission of an offence". According to him, it occurs as soon as he reads the complaint and even before he examines the complainant which he is bound to do. At page 247 the learned Judge, after referring to the case *In re Rambharthi* (1) observed:

.. it was also conceded that the absence of the certificate u/s 188 was not fatal if the certificate had been obtained subsequently...".

Mr. Advani argued that the proviso to Section 188, Criminal Procedure Code, is not applicable to the present case after the merger of Goa, Daman and Diu territories, because the proviso presupposes two classes of territories, one where there is a Political Agent and the other where there is no Political Agent. Mr. Advani contended that Goa, Daman and Diu territories would not answer either of these descriptions from the date of the merger from which date these territories became Union territories, Mr. Jungalwalla for accused Nos. 1 and 2 and Mr. Chitale for the State suggested that since this question was not argued in the trial Court, no final decision be recorded on that question. I have, therefore, left this question open for consideration by the trial Magistrate. But, my object in referring to the proviso to Section 188, Code of Criminal Procedure was to point out that the trial Magistrate's action in taking cognizance of the complaint would not be vitiated merely for the absence of sanction from the competent authority. If sanction is necessary, it could be taken at a later stage and in any case before the charge is inquired into. It would be open to the complainant to secure sanction of the State Government. It would be equally open to him to urge that no sanction is necessary under the proviso to Section 188, Criminal Procedure Code, and the trial Magistrate is free to decide the question on its own merits.

S. Turning to the question as to whether the accused could be said to have been found within the limits of the city of Bombay, it is sufficient to refer to the commentary of Ramnatha Iyer on the Code of Criminal Procedure, Vol. 1, 1956 Ed. relating to Section 188, Code of Criminal Procedure at page 642 wherein the learned author says:

The word "found" in the group of words "at which ho may be found" used in

Section 188, Criminal Procedure Code, means found by the Court at the time when the matter comes up for trial, that is to say, any Court which is otherwise competent to try the offence can take seisin the moment the accused appears in its presence. How he gets there is immaterial. It does not matter whether he comes voluntarily or in answer to a summons or under illegal arrest....

It is not disputed that the accused in the present case did appear before the trial Magistrate. Therefore, there is no difficulty for the Magistrate in inquiring into the charge levelled against the accused so far as the question as to whether the accused were found in Bombay is concerned.

9. Mr. Banatwala, for accused No. 3, contended that accused No. 3 was not an Indian citizen on the date of the offence. According to him, on the date of the offence, accused No. 3 was a foreigner i. e., a citizen of Portuguese Goa. He, therefore, requested that this question should also be left open for consideration by the Magistrate. I see no objection in doing so.

10. The result is that the application is allowed and the case is sent back to the Presidency Magistrate, 16th Court, Esplanade, Bombay, who had taken cognizance of this case, to proceed according to law and in the light of the above observations.