Kadiri Kunhahammad vs The State Of Madras on 27 January, 1959

Equivalent citations: AIR1960SC661, 1960CRILJ1013, AIR 1960 SUPREME COURT 661

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Bench: P.B. Gajendragadkar, A.K. Sarkar, K. Subba Rao

JUDGMENT

P.B. Gajendragadkar, J.

1. This appeal by special leave is directed against the order passed by the High Court of Madras confirming the conviction of the appellant under Section 409 of the I. P. C. and the order of sentence directing him to suffer rigorous imprisonment for four and a half years. The prosecution case was that the appellant who was accused 1 and eight other persons who were charged along with him were parties to a criminal conspiracy, the common object of which was to dishonestly misappropriate the property of the Meenangadi Producers-cum-consumers Cooperative Society, Ltd., and otherwise to dispose of the said property dishonestly in violation of law. The said Society had been started for procurement and distribution of food-grains in the two amsams of Purakkadi and Muttil in Wynad Taluk and it had been granted the necessary licence under the food-grains control orders. The appellant was the President of the said Society and the eight other perons tried along with him were its directors. The Secretary of the Society, who was also a party to the said conspiracy and had been shown as a co-accused person in the charge-sheet, was granted pardon and he gave evidence at the trial (P. W. 3). The learned Assistant Sessions Judge, South Malabar, before whom the case was tried framed fourteen charges against the nine accused persons. The pricipal charge was one of conspiracy under Section 120B read with Section 409 of the I. P. C. The other charges were based on, and had reference to, the several illegal acts committed by one or more of the conspirators in pursuance of the conspiracy. The sixth charge was framed against the appellant in respect of acts alleged to have been committed by him in pursuance of the said conspiracy. It consisted of three counts. Under the first count, the appellant was charged under Section 409 with having committed criminal breach of trust in the sum of Rs. 26,000 between April 1949 and October 1951. The second count charged the appellant under Section 471 with having fraudulently or dishonestly used as genuine a voucher alleged to have been issued by one Kadiri Assoo which the appellant knew or had reason to believe to be a forged document; while the third count was under Section 477A and it was based on the allegation that about the same time and place and in pursuance of the said conspiracy the appellant, being a director and President of the said Society and with intent to defraud, falsified the day-book of the Society which belonged to the Society. The

learned trial Judge held that the main charge of conspiracy had not been proved. He also found that the charges other than charge six which had been framed against the other accused persons had also not been established. That is why he acquitted all the accused of the said offences. In regard to charge six, however, he held that the first and the third counts of the said charge had been proved against the appellant beyond a reasonable doubt but not count two. Accordingly he acquitted the appellant o count two and convicted him on counts one and three. For the offence under Section 409 the appellant was sentenced to suffer rigorous imprisonment for four years and six months and also to pay a fine of Rs. 1,000 or in default to suffer rigorous imprisonment for a further period of six months. For the offence under Section 477A he was sentenced to undergo rigorous imprisonment for one year. The learned Judge directed that both the sentences should run concurrently.

2. This order of conviction and sentence was challenged by the appellant by his appeal to the High Court of Madras. The High Court accepted his appeal in regard to his conviction under Section 477A and set aside his conviction on that count and acquitted him of the said charge. The conviction of the appellant under Section 409 was confirmed by the High Court and so was the sentence of four years and six months. It, however, took the view that having regard to the said sentence of rigorous imprisonment it was unnecessary to impose a fine on the appellant and so the order of fine passed by the trial Court was set aside. It is this order of conviction and sentence which is challenged by the appellant before us in the present appeal.

3. In his appeal, it is not open to the appellant to challenge the correctness or the propriety of the finding of the High Court that the charge under Section 409 had been proved against him beyond a reasonable doubt. It is a finding on a question of fact and incidentally in reaching its conclusion on this point the High Court has agreed with the view taken by the learned trial Judge. Thus both the Courts have come to the conclusion that the evidence adduced by the prosecution proved its case against the appellant in respect of the offence under Section 409. The trial Judge had taken the view that, out of the amount of Rs. 26,000, the subject-matter of the charge under Section 409, breach of trust had been proved in respect of amount of Rs. 5,800, The High Court thought that there was some doubt with regard to the alleged breach of trust of Rs. 200 and so it has held that there was no doubt that the appellant had committed breach of trust in respect of Rs. 5,600. That, however, is a minor matter. Broadly stated the finding against the appellant is based not merely on the evidence of the approver (Ex. P. W. 3) but on certain material admissions made by the appellant in Exhibits P. 64-A and P. 86. The relevant evidence on this point has been considered by the High Court, the pleas made by the appellant and the evidence led by him in that behalf have been examined, and it has been found that on the evidence there is no doubt that the charge against the appellant has been proved beyond a reasonable doubt. This finding cannot be challenged before us in the present appeal.

4. Mr. Purshottam, for the appellant, however, contends that the main charge of conspiracy should not have been framed against the appellant and the trial should not have been unduly complicated by the introduction of several other charges on the ground that they had been committed in pursuance of the main conspiracy. He strongly relied on the fact that the trial Court has made a definite finding that the conspiracy had not been proved; and he argues that it was necessary that

the act of breach of trust of which the appellant has been convicted should have been tried by itself without a joinder of other parties and other charges. In our opinion this argument cannot be accepted. Section 239 (d) authorises a joint trial of persons accused of different offences committed in the course of the same transaction; and there can be no doubt that in deciding the question whether or not more persons than one can be tried together under the said section, the criminal Court has to consider the nature of the accusation made by the prosecution. It would be unreasonable to suggest that though the accusation made by the prosecution would justify a joint trial of more persons than one, the validity of such a trial could be effectively challenged if the said accusation is not established according to law. It is true that, in framing the charge against more persons than one and directing their joint trial, Courts should carefully examine the nature of the accusation; but if they are satisfied that prima facie the accusation made shows that several persons are charged of different offences and that the said offences prima facie appear to have been committed in the course of the same transaction, their joint trial can and should be ordered. This question was fully considered by the Privy Council in the case of Babulal Choukhani v. Emperor, and it has been held that the point of time in the proceedings at which it is to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled or not is at the time when the accusation is made and not when the trial is concluded and the result known. Therefore, we cannot accept Mr. Purshottam's argument that the framing of the charge of conspiracy was not justified and that the trial of the appellant jointly along with the other persons was either improper or illegal.

5. Mr. Purshottam then argues that even if the joint trial may be justified it was not open to the prosecution to charge the appellant at such a joint trial with the commission of a specific act of breach of trust as alleged in charge six. This argument is wholly untenable. Under Section 235(1), if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence. Whereas Section 239 (d) allows a joinder of persons at a criminal trial, Section 235(1) allows joinder of charges subject to the conditions mentioned respectively in the said two provisions. In other words, these provisions constitute an exception to the provisions of Section 233 as well as those under Section 234(2). There is, therefore, no doubt that, in a case of conspiracy, if specific offences are committed in pursuance of the said conspiracy, all persons who are parties to that conspiracy and are also concerned in the specific offences thus committed can be lawfully tried jointly at the same trial. (Vide: Rash Behari Shaw v. Emperor,

6. The last argument urged by Mr. Purshottam is that the charge in question contravenes the mandatory provisions of the proviso to Section 222 (2) of the Code, and according to him this contravention vitiates the whole trial and renders void the order of conviction and sentence passed against the appellant. Section 222 occurs in Ch. XIX which deals with the form of charges. Sub-section (1) of Section 222 mentions the particulars as to time and place of the alleged offence which should be included in the charge. The object of this provision is to give the accused person a reasonably sufficient notice of the matter with which he is charged. Sub-section (2) provides that, when an accused person is charged with criminal breach of trust, it is sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the said offence had been committed. The proviso adds that it is unnecessary to specify particular

items or exact dates provided that the time included between the first and the last of such dates shall not exceed one year. It is common ground that the breach of trust which gives rise to count one in the sixth charge covers a period between April 1949 and October 1951 which is more than one year and that is the basis of Mr. Purshottam's argument. We have already dealt with the effect of Section 235 (1). Under the said provision more offences than one committed by the conspirators can be tried together at a trial where all the conspirators are jointly tried; and to that extent Section 234 (2) cannot be invoked in such a case. That being so, Mr. Purshottam's argument means nothing more than this that the form of the charge is inconsistent with the proviso to Section 222 (2). If the first count in the sixth charge had been split up into two sub-counts, each one specifying the amount in respect of which breach of trust had been committed during the period of one year that would have met the requirement of the proviso to Section 222 (2).

7. The failure of the prosecution to split up the first count into two Sub-counts cannot obviously be regarded as introducing a fatal infirmity in the validity of the trial. It would be noticed that this argument is not one of misjoinder. It is based on the formal requirement prescribed by the proviso to Section 222 (2) as to how charges of breach of trust should be framed. There is no difficulty in holding that such an irregularity can be cured both under Section 225 and Section 537 of the Code, provided of course no prejudice has been thereby caused to the appellant's case.

8. It would be relevant to state that the breach of every provision of the Code does not necessarily make the trial invalid. In this connection we may incidentally point out that the question about the effect of the breach of statutory provisions contained in the Code has often been raised for judicial decision. In Pulukuri Kottayya v. Emperor, 74 Ind App 65: (AIR 1947 PC 67), the Privy Council has held that if the criminal trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. In that case the irregularity held proved consisted in the breach of the provisions of Section 162 of the Code. Having considered the relevant circumstances and facts proved in the case, the Privy Council held that the breach of Section 162 had caused no prejudice to the accused and could not sustain the argument that his trial was bad.

9. Similarly in Abdul Rahman v. King Emperor, while dealing with a breach of the provisions of Section 360 of the Code, the Privy Council applied the test of the actual or possible failure of justice and held that the breach in question did not vitiate the trial. Even in cases of misjoinder where the contravention of the provisions of Section 234 of the Code is involved, it is not denied by Mr. Purshottam that, even prior to the amendment of Section 537 of the Code, misjoinder by itself would not have vitiated the trial unless prejudice to the accused had been proved. As we have already pointed out, in the present case there is no case of a misjoinder; and so, having regard to the nature of the principal charge framed against the appellant and the other accused persons, the argument that the breach of the proviso to Section 222 (2) necessarily vitiates the trial must be rejected.

10. That naturally leaves the question of prejudice or failure of justice to be considered. This question has been considered by the High Court and it has recorded the finding that no prejudice has been caused to the appellant so as to lead to the failure of justice by reason of the fact that the amount in respect of which breach of trust had been committed has been lumped together in one charge though it covers a period in excess of 1 year prescribed by the proviso to Section 222(2). The High Court has observed that in fact the appellant has been acquitted of the main charge of conspiracy and the other subsidiary charges framed at the trial; and it has also pointed out that the charge of which the appellant has ultimately been convicted is a straight and simple charge. The appellant knew fully well the case which he had to meet under the said charge, and in fact the appellant led evidence in support of his defence to the said charge. We do not think that the finding of the High Court that there has been no prejudice to the appellant can be successfully challenged by Mr. Purshottam in the present appeal.

11. In the result the order of conviction and sentence passed by the High Court is confirmed and the appeal is dismissed.