

# Baboo Lal vs State Through Mahesh Prasad on 8 December, 1952

**Equivalent citations: AIR1953ALL409, AIR 1953 ALLAHABAD 409**

ORDER

P.L. Bhargava, J.

1. There is a house in mohalla Newaz-ganj, police station Saadatganj, in the city of Lucknow. The house in longed to one Brij Lal, who died leaving six sons. One of his sons is Babu Lal, who has filed this revision. Mahesh Prasad, who filed the complaint, which has given rise to this revision, is the grandson of Brij Lal Kailash Nath and Nand Kishore, who were named among the accused persons in the complaint filed by Mahesh Prasad, are also the grandsons of Brij Lal. Brij Lal's sons and grandsons now own and occupy the house, which has not yet been partitioned. In the house there is a room occupied by Babu Lal applicant and adjacent to that room on the other side is the dalan occupied by Mahesh Prasad. complainant. There is a common wall between Babu Barn's room and Mahesh Prasad's dalan. On the upper storey over the common wall, there is a parda wall. The partial demolition of the parda wall has led to the present dispute.

2. On 17-6-1950, at 10.30 a. m., Mahesh Prasad lodged a report at police station Saadatganj against Babu Lal, applicant, Kailash Nath and Nand Kishore. In this report Mahesh Prasad had alleged that there was an old enmity between him and the accused persons on account of the disputed about property and that on 17-6-1950, at about 8 a. m. while he was away from his house the accused Babu Lal had gone on the roof of his house and with the help of KailaghNath and Nand Kishore had demolished the parda' wall in order to cause loss and damage to him.

3. A couple of days later, on 19-6-1950, Mahesh Prasad filed a complaint against Babu Lal, applicant, Kailash Nath and Nand Kishoro in the Court of the Judicial Magistrate n of Lucknow. In this complaint it was alleged that the accused persons bore a grudge against the complainant "on account of assumed disputes regarding property," and that on 17-6-1950, at about 8 a.m while the complainant had gone to Chaupattia, Babu Lala, applicant, with the help of Kailash Nath and Nand Kishore had gone to the roof of the house and demolished the parda wall, which was his exclusive property, over which he was in exclusive possession and that the accused persons had done so with intent to cause wrongful loss to the complainant.

4. The case was transferred by the Judicial Magistrate to the Lucknow City Bench. The complainant produced evidence in support of the complaint in the Court of the Bench Magistrate, who, on a consideration of the evidence produced before them, discharged Kailash Nath and Nand Kishore and framed a charge under Section 426, Penal Code against the applicant, Babu Lal.

4a. in his statement before the Court, Mahesh Prasad stated that his house adjoined the house of the accused persons, that formerly his relations with the accused were quite cordial but subsequently they had deteriorated, that he had constructed a parda wall on the roof of his house and it was demolished by the accused persons and that he had protested but without any result.

5. The Bench Magistrates held that the parda wall in question did not belong exclusively to Mahesh Prasad or to Babu Lal, that the said parda wall was the common property of both Mahesh Prasad and Babu Lal and that the demolition of the parda wall had caused damage to the extent of Rs. 30. Accordingly, they found Babu Lal, applicant, guilty of an offence punishable under s. 426, Penal Code, and convicted him. They sentenced him to pay a fine of Rs 30 or in default of payment of fine to undergo simple imprisonment for fifteen days.

6. Against his conviction and sentence, the applicant preferred an appeal, which came up for hearing before the Assistant Sessions Judge of Lucknow. The learned Assistant Sessions Judge upheld the findings of fact recorded by the Bench Magistrates and also the conviction and the sentence imposed upon the applicant. In the result, he dismissed the appeal. The applicant has now come up to this Court in revision.

7. The learned counsel for the applicant has, in the first place, argued that there was a bona fide dispute about the ownership of the parda wall consequently the applicant's act of demolition of the wall did not amount to any offence, much less an offence of mischief as defined in Section 425, Penal Code. There can be little doubt that both the parties claimed to be the exclusive owner of the common wall which the complainant alleged had been constructed by him at his own costs. Evidently, this dispute had continued for sometime and it was there even on the date of the incident, which led to the initiation of these proceedings. According to the findings recorded by the Courts below, however, the wall was the common property of Mahesh Prasad and Babu Lal, applicant. The dispute about the ownership of the parda wall would not have entitled the applicant to demolish the wall or justify his action in actually demolishing the same or any portion thereof. Obviously, the applicant, instead of having recourse to legal action in a Court of law to establish the right which he claimed in the wall, started demolishing the same. No doubt, the demolition of the wall meant a loss to the applicant also but he obviously intended to cause loss to the rival claimant, Mahesh Prasad, complainant. On the facts found by the Courts below, I have no doubt in my mind that the applicant had demolished the parda wall with intent to cause loss or damage to Mahesh Prasad complainant. Explanation 2 appended to s. 426, Penal Code, provides that "Mischief may be committed by an act affecting property belonging to the person who commits the act or to that person and others jointly."

In my opinion, therefore, the Courts below were perfectly justified in recording a finding that the act of demolition in this case amounted to mischief as defined in s. 425, Penal Code.

8. In the next place, it has been argued by the learned counsel for the applicant that the trial in the Court of the Bench Magistrates was vitiated on account of all the Bench Magistrates not taking part in the proceedings throughout and delivering judgment. When the trial of the case against the applicant began in the Court of the Bench Magistrates on 25-8-1950, Sarv Sri Lakshmi Chand, Lalta Prasad Vaish and Mehdi Hasan Khan, Magistrates, were present. All the three Magistrates were also

present on some of the subsequent dates of hearing but thereafter Mehdi Hasan Khan dropped out and further evidence was recorded by Sarv Sri Lakshmi Chand and Lalita Prasad Vaish who also examined the applicant and framed a charge against him. The trial then proceeded and concluded before these two Bench Magistrates, who delivered judgment in the case.

9. The contention put forward on behalf of the applicant is that as the three Bench Magistrates who took cognizance of the offence, were not present throughout the trial, the trial was illegal and vitiated on account of that illegality. It was, therefore, contended that the judgment delivered by two of the Bench Magistrates, who had taken cognizance of the offence, was also invalid. In support of his contention learned counsel for the applicant has relied upon a Division Bench ruling of this Court in *Dasrath Rai v. Emperor*, A. I. R. 1934 ALL. 147 (A). The facts of the case relied upon by the learned counsel were, however, different. In that case three Honorary Magistrates constituted a Bench, which had power to try the case. On most of the hearings all the three Honorary Magistrates were present but on one of the dates of hearing, one of them was absent. The case was not taken up on that day and was adjourned. On the next date of hearing one of the Honorary Magistrates happened to be absent. He rejoined on the next day and then continued to be present all along and ultimately took part in delivering and signing the judgment. On the day on which one of the Honorary Magistrates was absent, some witnesses were examined and cross-examined. All the three Honorary Magistrates unanimously came to the conclusion that the accused were guilty and convicted them. Their appeal was dismissed by a Magistrate of the first class.

On revision a point was raised that inasmuch as one of the Honorary Magistrates was absent on one day, the whole trial was vitiated and the conviction could not stand. With reference to the above mentioned facts the learned Judges observed at page 147 :

But where an Honorary Magistrate who had not heard the whole evidence and has not been present throughout the proceedings takes part in the deliberations and joins with the others in arriving at the final decision, there is every likelihood of his influencing his colleagues. By virtue of his absence on some of the material dates, he became incompetent to form a true opinion on the merits of the case and if he joins in the deliberations, there is a likelihood of a failure of justice."

In the case before us, the Magistrate who had dropped out never joined the Bench again nor did he take part in the delivery of the judgment.

10. In the Division Bench case relied upon by the learned counsel for the applicant, the Division Bench had discussed three earlier decisions of this Court. While dealing with the case of *Chiteshwar Dube v. Emperor*, A.I.R. 1932 ALL. 127 (B), the learned Judges observed :

"We are not sure whether the learned Judge intended to lay down that if a member of Honorary Magistrates constitute a Bench and if only a few of them sufficient to form a quorum are present and try the case, the trial is altogether illegal. Apparently his intention was not drawn to the notification fixing a quorum which would obviate the necessity of the presence of all the Honorary Magistrates at the trial. If the learned

Judge meant to lay down that all the Honorary Magistrates irrespective of the quorum must be present at all the hearings then we would certainly not agree with that view. Furthermore if it was intended to lay down that a newly appointed member can replace an outgoing member on the Bench trying the case without necessitating a fresh trial even where his presence is necessary for the purpose of a quorum, we would not agree with that view" (p. 146).

11. Another decision considered by the Division Bench was the case of *Ham Khelawan v. Sheo Nandan*, A. I. R. 1932 ALL. 191 (c). In that case one of the three Magistrates was not present on some of the days of the hearing and the two Magistrates who had been present throughout actually differed in their conclusions. The third Magistrate who had been present on some days joined them and agreed with the Magistrate who was in favour of the acquittal. It was on account of his opinion that the accused were acquitted. It was held in revision at the instance of the complainant that the order of acquittal was invalid under Section 358, Criminal P. C., as the Magistrates constituting the Bench had not been present throughout the proceedings. On a reference made to the High Court, the acquittal was set aside and a retrial ordered. The order of acquittal was set aside as in that case the opinion of the Magistrate who had not been present throughout the proceedings actually turned the scales and it was on account of his opinion that the accused were acquitted.

12. The last case dealt with by the Division Bench was of *Mathura v. Emperor*, A, I. R. 1933 ALL. 355 (D). The facts of that case were very much similar to the facts of the present case. There when the case was started there were three Magistrates and throughout the conduct of the case, there was a quorum of two and the judgment was delivered by those two who were present throughout. It was held that the trial was not irregular as the presence of the third Magistrate was not necessary for the case and as he was not a party to the judgment, the Magistrates were not influenced by his opinion.

13. In the case relied upon by the applicant's learned counsel, it was further held that the failure of all the Magistrates to be present at the trial was a mere irregularity curable under Section 537, Criminal P. C., if the irregularity had not occasioned any failure of justice. The relevant observations on this occur at p. 147 of the report. They are as follows :

"But inasmuch as Section 350A in terms is a saving clause and does not directly prohibit or declare invalid the trial of a case where one of the Honorary Magistrates has not been present throughout the proceedings but only indirectly or by implication assumes that the trial would be irregular if all the Magistrates constituting the Bench have not been present throughout the proceedings, it seems difficult to hold that such a defect is illegal and vitiates the whole trial. When there is no specific provision in the Act requiring that all the Honorary Magistrates constituting the trial Bench must be present at all the hearings and if they are not present the trial shall be illegal, we can only infer that such defect would be irregular. The defect is not such as involves a direct infringement of any specific provisions of the Act, but is contrary to the spirit and the principle underlying Section 350A. We think that we cannot regard it as anything more than an irregularity in the judgment or proceeding within the meaning of Section 537 of the Act."

It would thus appear that the authority cited by the applicant's learned counsel does not support his contention. On the other hand, the case in A. I. R. 1933 ALL. 355 (D) which was cited with approval in that case supports the validity of the trial and the judgment delivered by the trial Court in this case.

14. It is true that the trial of the applicant had commenced before three Magistrates constituting a Bench and, for some time it had continued before them and that on a subsequent date of hearing one of the Magistrates had absented himself and the trial had proceeded and concluded before the remaining two Magistrates. But the absence of one of the Magistrates could not and did not invalidate the constitution of the Bench. There is no provision of law which requires the presence of all the Magistrates constituting a Bench and before whom the trial of a particular case begins, to be present on all the hearings. The trial of the case can proceed before the Bench, if the Magistrates present constitute the prescribed quorum. All that para. 814 of the Manual of Government Orders, which lays down the rules for the conduct of business by Benches of Honorary Magistrates, requires is that the Bench shall not consist of more than three members and two of those shall form a quorum. Therefore, so long as the prescribed quorum is there, the Bench will be duly constituted and will be able to exercise its jurisdiction. In this case it is admitted that the quorum was always there; consequently during the trial of the applicant the Bench was always duly constituted. I can therefore, find no illegality in the trial of the applicant.

15. The Magistrate who had absented himself after some hearings did not appear again and took no part in the rest of the trial or the delivery of judgment. Therefore, there was no illegality even in the delivery of the judgment in this case, and the judgment does not suffer from any defect or illegality.

16. In any case the failure of all the three Magistrates to take part in the trial throughout was at the most an irregularity but the applicant was not thereby prejudiced in any manner. I am, therefore, not prepared to accept the contention put forward on behalf of the applicant that the trial in the present case or the judgment delivered by the Bench Magistrates was vitiated on any ground.

17. I, therefore, see no force in any of the contentions put forward on behalf of the applicant in this revision and I, accordingly, reject it.