The State Of Bombay vs Rusy Mistry And Anr. on 24 September, 1959

Equivalent citations: AIR1960SC391, AIR 1960 SUPREME COURT 391

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

JUDGMENT

K. Subba Rao, J.

1. This appeal by special leave filed by the State of Bombay is directed against the judgment of the High Court of Judicature at Bombay setting aside the convictions of the respondents and the sentences passed on them by the Sessions Court for Greater Bombay, and acquitting them of the offences with which they were charged.

2. A private limited company called the Industrial Commercial Trust Limited was formed on April 1, 1943. The principal shareholders in that company were the first accused and one Sir Chinubhai Madhavlal. During the course of that year i.e., 1943, a firm called the Asian Air Associates (hereinafter called "the Company") was established as a subsidiary concern of the Industrial Commercial Trust Limited. Accused No. 1 and Sir Chinubhai Madhavlal were partners of the Company, and accused No. 2 was its General Secretary. The factory and the head office of the Company were at different places. The main work of the Company was the manufacture and repair of Royal Air Force equipment. In or about October 1943 the Company entered into a contract with Messrs. Ramdas and Sons for the purchase of certain machinery and tools at an agreed price of Rs. 3,05,001 and obtained possession of the same. On January 8, 1944, Ramdas and Sons wrote a letter (Ex. C), with an enclosure (Ex. D) giving a description of the machinery sold, to the Company acknowledging the receipt of the full price. In or about January 1944, Ex. D, the list of machinery, was detached from the letter and the price of the machinery was inserted therein as Rs. 4,'05,001, with the result that the list of machinery (Ex. D) was converted into a voucher. On the basis of that voucher, necessary entries were posted in the accounts of the Company debiting the "Plant and Machinery Account" with Rs. 4,05,001, and crediting Ramdas and Sons with an equal amount. An amount of Rs. 3,05,001, was shown as having been paid to Ramdas and Sons, and the balance of Rs. 1,00,000 remained credited to their account. This balance was carried forward from year to year till March 30, 1946. About the end of 1944, accused No. 1 paid Sir Chinubhai Madhavlal a sum of about Rs. 17,00,000 and took over both the Industrial Commercial Trust Limited and the Company, and, thereafter, accused No. 1 and his wife became the partners of the Company. On March 30, 1946, the said balance of Rs. 1,00,000 standing to the credit of Ramdas and Sons was transferred to the personal account of accused No. 1 and a corresponding debit was made in the account of Ramdas

and Sons.

3. On March 2, 1944, the Company entered into a contract with the Director of Munitions Production representing the Government of India for the manufacture, overhauling, repair and modification of Royal Air Force equipment. The said contract was to come into force retrospectively from November 11, 1943. Under one of the clauses of the contract, the Company would be entitled to the actual cost plus 7 1/2 per cent -- later on enhanced to 10 per cent -- profit on the actual cost of the work done by it. Depreciation was one of the items to be taken into consideration in determining the actual cost. The prosecution case is that the accused dishonestly inflated the cost of the machinery purchased from Ramdas and Sons by forging Ex. D, and attempted to cheat the Government by submitting bills on that basis. The prosecution also relied upon another item, namely, the commission of Rs. 3,338 alleged to have been received by the Company from the Electric Cable and Machinery Co. Ltd., but not included in the accounts with the same object of inflating the cost of the electrical goods purchased from them. It is not necessary to trace the facts in regard to this item as the learned Additional Solicitor General, appearing for the State, does not press the appeal of the prosecution in regard to this item, and, therefore, nothing further need be said about this.

4. The two accused were committed to the Sessions, and they were tried by the Additional Sessions Judge for Greater Bombay with the aid of special jury. It would be convenient to read the charges framed against the accused, as ultimately the result of the appeal turns upon them.

> "Charge framed by the Additional Sessions Judge, Greater Bombay :
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> FIRST : That you, Rusy Mistry, Accused No. 1, and P. N. S. Ayyar, Accused No. 2, being the principal partner and the General Secretary respectively in the Asian Air Associates entered into a criminal conspiracy at Bombay in or about the month of January 1944 and continued to be parties to it up to the 7th day of September 1948 to do illegal acts to wit to cheat the Government of India by submitting inflated bills based upon depreciation of 10 per cent allowed by the contract entered into between the Asian Air Associates and the Government of India, calculated upon the value of the machinery bought from Ramdas and Sons shown at a higher figure than what was actually paid to them, and by not disclosing and deducting the commission earned from the Electric Cable and Machinery Co. Ltd. for the electric goods purchased from them and that you both thereby committed an offence punishable under Section 120B of the Indian Penal Code and within the cognizance of the Court of Session for Greater Bombay.
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> SECONDLY : That in the aforesaid respective capacity and during the aforesaid period and at the same place in order to achieve the object of the aforesaid conspiracy and in furtherance of the common intention of you Accused Nos. 1 and 2 both, forgery of a valuable security, to wit, acknowledgment receipt (Ex. C) together with the list of machinery (Ex. D), was made by detaching the acknowledgment receipt dated 8-1-1944 page (Ex. C) from the list of machinery (Ex. D) and by making

additions or causing additions to be made in the list of machinery (Ex. D) by one or the other of you by putting the date '31-12-1943' in ink and the figures 'Rs. 4,05,001' in pencil and the words and figures "Total price : Rs. 4,05,001" and ("Rs. four lakhs, five thousand and one only") in type over the signature of Ramdas and Sons purporting to have been made by the said Ramdas and Sons, with intent to commit fraud, and that you both thereby committed an offence punishable under Section 467 read with Section 84 of the Indian Penal Code and within the cognizance of the Court of Session for Greater Bombay.

THIRDLY : That in the aforesaid respective capacity and during the aforesaid period and at the same place in order to achieve the object of the aforesaid conspiracy and in furtherance of the common intention of you, Accused Nos. 1 and 2 both, the aforesaid forged document, viz., the list of machinery (Ex. D) being part of Exs. G and D was fraudulently or dishonestly used as genuine by one or the other of you both, knowing or having reason to believe that it was a forged document and that you both thereby committed an offence punishable under Section 471-467 read with Section 34 of the Indian Penal Code and within the cognizance of the Court of Session for Greater Bombay.

FOURTHLY : That in the aforesaid respective capacity and during the aforesaid period and at the same place pursuant to the aforesaid conspiracy and/or in furtherance of the common intention of you accused Nos. 1 and 2 both, the Government of India represented by the Controller of Supply, Accounts, Bombay, and the Controller o Army Factory Accounts, Calcutta, was cheated by one or other of you by dishonestly inducing the said Controller of Supply, Accounts, Bombay and the said Controller of Army Factory Accounts, Calcutta, being officers of the Government of India, to part with a sum of Rs. 21,025, being the amount of depreciation on the inflated amount in the bills submitted for the machinery bought from Ramdas and Sons, and Rs. 483 being the amount of depreciation on Rs. 3,338 being the commission received by one or other of you both from the Electric Cable and Machinery Co. Ltd., on purchases made from them, by making payments to either of you, and which sums were the property of the said Government of India and that you both thereby committed an offence punishable under Section 420 read with Section 120B and/or Section 34 of the Indian Penal Code and within the cognizance of the Court of Session for Greater Bombay."

The charge to the jury is an elaborate document covering about 117 printed pages. We will have occasion to revert to it in the course of our judgment. The learned Sessions Judge accepted the verdict of the jury and convicted the accused as follows : The accused No. 1 was convicted of the offence punishable under Section 417, read with Sections 511 and 34, Indian Penal Code, and sentenced to suffer rigorous imprisonment for six months; he was also convicted under Section 471-467, read with Section 34, Indian Penal Code, and sentenced to suffer rigorous imprisonment for three years. The accused No. 2 was convicted of the offence under Section 417, read with Sections 511 and 34, Indian Penal Code, and sentenced to suffer rigorous imprisonment for six months; he

was also convicted of the offence under Section 467, read with Section 109, Indian Penal Code, and sentenced to suffer rigorous imprisonment for three years; and he was further convicted under Section 471-467, read with Section 34, Indian Penal Code, and sentenced to three years' rigorous imprisonment. The substantive sentences passed on both the accused were to run concurrently. The result is that both the accused were convicted for using as genuine the forged document (Ex. D) and also for attempting to cheat the Government of India. In addition, accused No. 2 was also convicted for abetting the forgery of Ex. D. The accused filed two appeals in the High Court of Judicature at Bombay against the said convictions and sentences.

5. In the High Court, the appeals were heard by Bavdekar and Chainani JJ. Chainani J., as he then was, delivered the leading judgment and Bavdekar J. agreed with him on all the points except one, namely, whether there was an attempt made by the Company to cheat the Government of India. The findings of Chainani I. are as follows : (i) there were mis-directions in the address to the jury; (ii) there were several irregularities in the course of the investigation; (iii) the Company, must be held to have attempted to cheat the Government; and (iv) it has not been established that both or any of the accused attempted to cheat the Government. The learned Judge concluded his discussion thus :

> "While, therefore, we have no doubt that a fraud was attempted to be practised upon Government and that, in all probability, both the accused knew and were aware of that fraud, on the evidence led by the prosecution it is not possible for us to say with certainty that the accused were responsible for that fraud or that they were even aware of it. In our opinion, the prosecution have failed to establish their case beyond reasonable doubt."

Bavdekar J., while accepting the findings given by Chainani J., went further and held that the case had not gone beyond the stage of preparation and that it could not be held that the Company made an attempt to cheat the Government.

6. The learned Additional Solicitor General, appearing for the State, raised before us two points : (1) the High Court was wrong in holding that there were misdirections in the charge to the jury; and (2) on the admitted facts and evidence, it was not possible for any Court to come to a reasonable conclusion that the accused Nos. 1 and 2 were not guilty of the offences with which they were charged.

7. Re. (1) : The learned Judges of the High Court found two misdirections and several irregularities. We are satisfied that there was at least one clear misdirection in the charge to the jury which really vitiated the entire charge. One Mrs. Bapasola filed a complaint before Superintendent Sen, and it is marked as Ex. Z. 26. It is a lengthy document giving the alleged antecedents of the first accused ranging over a period from 1936 to 1949. Therein the first accused was represented to be a notorious swindler and as one who had amassed a large fortune by fraud and black-marketing. Most of the statements contained therein were entirely irrelevant to the charges made against the accused. Any jury would be prejudiced if the document was read to them. The learned Sessions Judge in his charge has read to the jury portions of the said exhibit, which he described as "relevant portions" of the document. What he read to the jury contained allegations to the effect that accused No. 1 had

obtained contracts from the Royal Air Force and the Royal Navy by improper means and the huge amounts swindled were utilised by him in opening several new concerns. "Relevant portions" also consisted of allegations that the said accused committed fraud on the Government of India through his various firms, which were 19 in number, and the fraud committed by him was in respect of several lakhs of rupees. After reading the so-called "relevant portions", the learned Sessions Judge concluded thus :

> "Thus ends the first information report which Mrs. Bapasola lodged with Superintendent Sen on 27th January, 1949. I should repeat. Members of the Jury, that it would be obligatory on your part to wipe out from your memory all other allegations Mrs. Bapasola made against accused No. 1 or his concerns in respect of affairs which do not relate to the charges involved in this case, because, as I told you, you cannot start with any prejudice against accused No. 1. Similarly, how accused No. 1 began his life, how he rose to eminence are questions not relevant for the purposes of this case. What property he amassed may be a factor to be taken into account to decide whether the charge of cheating etc. can be said to be properly proved; it may be a circumstance, but it will not be conclusive and therefore I gave you the details of the several concerns floated by him, the extensive properties he acquired according to Mrs. Bapasola. But barring that aspect the affluence, or poverty of the accused has very little to do with the proof of the guilt for the offences with which e is charged."

It will be seen from the said observations that the learned Sessions Judge, though he gave a caution to the jury not to be prejudiced by the antecedents of the first accused, told them that some of the allegations relating to the properties amassed by him were relevant to the charge framed against the accused. However enlightened the members of the jury might be, they are not persons trained to sift irrelevant evidence from the relevant and come to an objective decision. The graphic picture of the alleged past misdeeds and the fraudulent acts of the accused must have unconsciously prejudiced the jury against the accused. The usual refrain or a warning would not, and could not, undo the mischief done by reading the document to the jury. Two questions arise in connection with this document, viz., (1) whether it is a first information report; and (ii) if it be a first information report, was the learned Sessions Judge justified in reading to the jury those portions of it which were not connected with the subject-matter of the charge? The first information report is the information recorded under Section 154 of the Cr. P. C. It is an information given to a police officer relating to the commission of an offence. It is also an information given by an informant on which the investigation is commenced. It must be distinguished from information received after the commencement of the investigation which is covered by Sections 161 and 162 of the Cr. P. C. It is well-settled that the first information report is not substantive evidence, but can only be used to corroborate or contradict the evidence of the informant given in court or to impeach his credit. It follows that a Judge cannot place such a report before the jury as substantive evidence, but can only refer to that portion of it which had been used for one or other of the aforesaid purposes.

8. In this case, the learned Sessions Judge found that Ex. Z. 26 was not a first information report, as it was not the first complaint Mrs. Bapasola made to the police. If it was not the first information report, it was hit by Sections 161 and 162 of the Cr. P. C. and the learned Judge should not have

relied upon it except to the extent permitted by the proviso to Section 162 of the Cr. P. C., i.e., to contradict Mrs. Bapasola with reference to any particular statement therein. The learned Sessions Judge had, therefore, clearly misdirected himself in reading the so-called "relevant portions" of the said document to the jury.

9. Even on the assumption that it was the first information report, the learned Sessions Judge has used chat document for a purpose not permitted by the statute. He read it as a piece of substantive evidence and most of the portions read to the jury were absolutely irrelevant and unconnected to the charge before them. What is more, the learned Sessions Judge told the jury that the portions read to them were relevant as they showed how the first accused, who was a poor man, amassed immense fortune. The accused was charged with the offence of cheating the Government in a sum of Rupees 20,000, and we do not see how the alleged previous acts of fraud committed by the accused whereby he amassed large fortune, have any relevancy to the charge for which the accused was tried in the present case.

10. For the reasons mentioned it is evident that the learned Sessions' Judge should not have introduced this highly prejudicial document in his address to the jury, and we agree with the High Court that this was a misdirection and the accused must have been prejudiced. In this view, the learned Judges of the High Court were certainly within their rights in considering the case on merits.

11. Re. (2): The learned counsel for the accused, apart from attempting to sustain the conclusion arrived at by the learned Judges of the High Court on merits of the case, contended that this Court should not interfere in exercise of its discretionary jurisdiction under Article 136 of the Constitution and reopen the findings of fact arrived at by the High Court, particularly in a case where the accused were acquitted. Article 136 of the Constitution does not confer a right of appeal on any party from the decision of a Court; but it confers a discretionary power on the Supreme Court to interfere in suitable cases. It is implicit in the discretionary power that it cannot be exhaustively defined. It cannot obviously be so construed as to confer a right on a party where he has none under the law. The practice of the Privy Council and that followed by the Federal Court and the Supreme Court is not to interfere on questions of fact except in exceptional cases, when the finding is such that "it shocks the conscience of the Court" or "by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise substantial and grave injustice has been done". This self-imposed restriction is not lightened, but is only heightened by the fact that the High Court on the basis of the finding of facts acquitted the accused.

12. But as the findings in the present case are halting and, at some places, appear to be inconsistent, and as the admitted and proved circumstances are prima facie indicative of the guilt of the accused rather than their innocence, we have heard the learned counsel at some length on facts to ascertain whether it is one of those exceptional cases where we must deviate from the conventional rule of guidance laid down by this Court. The arguments of the learned counsel and a scrutiny of the records disclose that the conclusions of the learned Judges can be supported on a firmer ground. It is not necessary to apportion blame, but it appears to us that the argument advanced in the High Court and in this Court and the discussion in the address to the jury and also in the judgment of the

High Court travelled beyond the scope of the enquiry necessarily circumscribed by the charges framed.

13. The charges have already been set out in the earlier part of the judgment. The learned Sessions Judge found the accused not guilty on the first two charges. The third charge relates to the offence of forgery of Ex. D and the user thereof, and the fourth to the offence of cheating the Government of India. The gravamen of both the charges is that the accused cheated the Government of India by presenting bills to them and claiming amounts of depreciation on the aforesaid inflated amounts shown in the accounts on the basis of Ex. D. The learned Additional Solicitor General contends that the fourth charge, i.e., the charge relating to the offence of cheating, cannot be so construed as to limit its scope only to the presentation of the bills by the accused to the Government, but should be so interpreted as to enable the prosecution to establish the offence of cheating against the accused at a later stage, namely, when the accounts based upon Ex. D were shown to Sundaram, who was authorised by the Government to investigate the cost of production, and, who, on the basis of the costs of materials shown in the accounts, recommended payment by the Government. He further contends that both the prosecution and the accused, and also the Courts understood the said charge in that light, and, therefore, the accused were not prejudiced. We cannot agree with the learned counsel on the scope of the fourth charge. The crucial words used in the fourth charge are: "to part with a sum of Rs. 21,025/, being the amount of depreciation on the inflated amount in the bills submitted for the machinery bought from Ramdas and Sons". It is said that the bills referred to are the bills given by Ramdas and Sons to the Company and not the bills submitted by the Company to the Government of India. Ramdas and Sons did not submit bills for the machinery bought from them, and even if Ex. C is considered to be a bill, it did not show any inflated amount. That apart, in the context, the bills submitted for the machinery can only mean bills submitted by the accused for the machinery to the officers of the Government of India, and not the bills submitted by Ramdas & Sons to the accused. Even if there is any ambiguity, that is dispelled by the phraseology used in the first charge which is incorporated by reference in the fourth charge. The relevant words in the first charge are:

> "That you, Rusi Mistri, Accused No. 1, and P. N. S. Ayyar, Accused No. 2, ... to cheat the Government of India by submitting inflated bills based upon depreciation of 10 p.c. allowed by the contract entered into between the Asian Air Associates and the Government of India, calculated upon the value of the machinery bought from Ramdas and Sons shown at a higher figure than was actually paid to them ..... ".

This clearly shows that the bills referred to in charge 4 are the self-same bills referred to in the first charge i.e., bills presented by the accused to the Government of India. The learned Sessions Judge also understood the charge in the said sense. The learned Sessions Judge in his charge to the jury observed thus:

> "It is further contended for the prosecution that the Asian Air Associates used to prefer bills by calculating depreciation not on the actual price paid to Ramdas and Sons but on the inflated amount, namely, rupees 4,05,001. It is thus that the Asian Air Associates are alleged to have cheated the Government of India by making the

> Government of India pay them more depreciation than what was really due to the Asian Air Associates. The offence of cheating is alleged to have been committed by the Asian Air Associates by inflating the bills submitted to the Government of India by calculating depreciation on the higher amount than what was really paid to Ramdas and Co. ....."

This passage in clear and unambiguous terms explains the real scope of the charge in question. Ground 38 of the Memorandum of Criminal Appeal No. 1352 of 1953 filed by the accused No. 2 in the High Court made the grievance that the learned Sessions Judge did not tell the jury that it was in the evidence of Sundaram that depreciation has no direct bearing on bills submitted by Asian Air Associates to Government. The High Court considered the evidence and found that the accused did not make any claims in the bills on the basis of the depreciation calculated on the inflated costs of machinery purchased from Ramdas and Sons. It cannot, therefore, be said that the accused did not set up the case that the charge as framed was not established and that it is raised for the first time before us.

14. On the facts, it must be held that the attempt to cheat the Government of India in the manner stated in the charge has not been established. Exhibit D is the sheet-anchor of the prosecution case. But the interpolation of an inflated figure in the said Ex. D was made in January 1944, whereas the contract entered into with the Government of India was dated March 2, 1944. It is true that that contract was to come into effect retrospectively, i.e., from 11-11-1943. Whatever legal effect it may have on the civil rights of the parties under the document, it is impossible to invoke the said date to impute a criminal liability to the accused for an act done by them before the document was executed. Though it is suggested that Ex. D might have been forged in anticipation of the execution of the contract with the Government, there is nothing on record to prove that fact. The interpolation might have been made in Ex. D for many reasons. We are not justified to base a finding on a pure surmise that it might have been done only in anticipation of the Company entering into a contract with the Government.

15. The contract with the Government itself contemplates that the bills should be submitted to the Controller of Supply, Accounts, Bombay, prepared on the basis of the actual costs plus 10 p.c. Pursuant to the said term, the Company submitted in all 1265 bills. Only three out of them were filed in Court and marked as Exs. W, W1 and Z 29. Exhibit V, the entries in the first page of the Cost Ledger of the Asian Air Associates for the month of January, 1944, shows how the over-head charges were claimed in the bills. No claim was made on the basis of the cost of the materials purchased and shown in the accounts. A claim was made only on a hypothetical basis, namely, four times the labour charges. For instance, Ex. V shows in the column "labour" Rs. 152-7-0 and the figure corresponding to this in the column "over-head" is Rs. 609-12-0, which is four times Rs. 152-7-0. Harihar admits in his evidence that the over-head charges included an approximate percentage on the labour charges. He admits that the bills submitted to the Government of India had no direct bearing on actual capital account of depreciation charges. The learned Judges of the High Court on the evidence rightly came to the conclusion that in the bills submitted by the Company 'on-costs" charges were calculated at four times the labour charges and, therefore, no amounts were claimed on account of depreciation charges on the basis of the figures shown in the Company's account books. On this

clear evidence it is manifest that the fourth charge, namely, the attempt to cheat the Government of India by submitting bills on the basis of the inflated costs of the machinery purchased from Ramdas and Sons, has not been established. If this charge fails, the third charge also must fail. That charge relates to the offence of forgery of Ex. D and user of the said forged document. The charge refers by incorporation to the first charge indicating thereby that the intention to fabricate the document was only to cheat the Government in the manner stated in the first charge. As we have held that the accused did not make any claim in the bills on the basis of Ex. D or the accounts written on the foot of Ex. D, the necessary ingredient of the third charge was also not established.

16. In the result, we agree with the conclusion arrived at by the learned Judges of the High Court, though for different reasons. The appeal fails and is dismissed.