

(1970) 07 CAL CK 0003

Calcutta High Court

Case No: Criminal Revision No. 975 of 1969

Lakshmi Kanta Sen

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: July 10, 1970

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 439
- Penal Code, 1860 (IPC) - Section 405, 406

Citation: 75 CWN 601 : (1970) 2 ILR (Cal) 193

Hon'ble Judges: N.C. Talukdar, J

Bench: Single Bench

Advocate: Malay Kumar Basu and Partha Butt, for the Appellant; Jaharlal Roy, for State and J.M. Banerjea, as Amicus Curice, for the Respondent

Judgement

N.C. Talukdar, J.

This Rule is at the instance of the accused-Petitioner Lakshmi Kanta Sen against an order dated November 5, 1969, passed by Sri S.S. Sarkar, Sub-divisional Magistrate, Bongaon, district 24 Parganas, issuing warrant of arrest u/s 406 of the Indian Penal Code in case No. C/300 of 1969 and for quashing the said proceedings.

2. The facts leading on to the Rule are short and simple. A complaint was filed on October 15, 1969, before the learned Sub-divisional Magistrate, Bongaon, by S. Mitra, S.C. Fands, Bongaon, against the accused Lakshmi Kanta Sen of Bhandargola, P.S. Bongaon, that in course of an inspection on June 14, 1969, of the M.R. shop belonging to him by B. Bagchi, Sub-Inspector (F. & S.) the M.R. accounts were checked and on a physical verification a shortage of M.R. rice to the extent of 2 quintals 11 kgs. 800 gms. was detected. The verification was conducted in the presence of the Anchal Prophan, Palla anchal, and the dealer who appended their respective signatures on the body of the report submitted by the enquiring officer. The learned Sub-divisional Magistrate on going through the said complaint took

cognizance and by his order of the same date issued warrant of arrest against the accused fixing November 25, 1969, as the next date. The defence case, as it appears from the petition filed in this Court, inter alia, is that the accused was appointed a modified ration dealer getting supply of food grains of allotted quantity every week for the purpose of distribution of food grains amongst card-holders registered by the proper authority in connection with the accuser's modified ration shop. On June 13, 1969, one Dinabandhu Biswas, a Food Sub-Inspector, with others came to the accuser's shop for the purpose of inspection. The accused was not present then and the Sub-Inspector made a record of his inspection wherein he did not complain about any shortage of food grains. On June 14, 1969, another Sub-Inspector accompanied by the Anchal Prodhan, Palla, belonging to a political party antagonistic to the party whereto the accused belonged and a large number of persons came to the accuser's shop when he was away there from and at the instigation of the said Anchal Prodhan the Sub-Inspector F. & S, Bhabesh Bagchi, inspected the stock and recorded a shortage of two gunny bags containing rice weighing approximately 2 quintals 11 kgs. and 800 gms. On receiving the show-cause notice dated June 25, 1969, issued by the Sub-divisional Controller (F. & S.), Bongaon, the accused Petitioner submitted a representation on July 7, 1969, by way of showing cause, denying all allegations and stating bona fide reasons for the purported shortage. On or about August 5, 1969, the accused Petitioner received another show-cause notice dated August 1, 1969, stating that the accuser's explanation was not convincing and he thereupon showed further cause denying the allegations. The Petitioner submits that he came to learn later on that the present criminal proceedings, being case No. G/300 of 1969, were started u/s 406, I.P.C., and was pending. Being aggrieved by the institution of the said criminal proceedings which are not maintainable either in law or on merits the Petitioner moved this Court and obtained the present Rule.

3. Mr. Malay Kumar Basu, Advocate (with Mr. Partha Dutt, Advocate), appearing on behalf of the accused Petitioner, raised a short point of law relating to the maintainability of the present proceedings u/s 406 of the I.P.C. inasmuch as there had been no entrustment within the bounds of Section 405 of the I.P.C. In this context Mr. Basu referred to a recent Full Bench decision in the case of [Ghasiram Agarwalla Vs. The State](#), wherein the majority decided that the retailer by virtue of the agreement could not be regarded as an agent of the Government in respect of the wheat received by him under the agreement. Mr. Jaharlal Roy, Advocate, appearing on behalf of the State, took a preliminary objection that the present Rule was not maintainable because the accused had not submitted to the process of the Court below and this Court, therefore, could not enter into the merits. Mr. Roy cited several decisions in this connection, both reported and unreported. Mr. Basu in his reply submitted that there is no such inexorable rule of law or practice and a Rule issued by the High Court need not be discharged on that ground alone, more so when on merits the application is clearly maintainable. In support of his contention

Mr. Basu also referred to several unreported decisions of this Court. The point raised being of some importance this Court requested Mr. J. M. Banerjea, a senior Advocate of the Bar, to appear as amicus curia to assist this Court in coming to a proper decision and Mr. Banerjea was good enough to agree to do so. Submissions thereafter were heard on the preliminary objection.

4. Mr. Jaharlal Roy, Advocate appearing on behalf of the State, referred to a Division Bench decision of this Court in the case of [Sultan Hasan Mirza Vs. Srimati Nanki Bibi](#), wherein Suhrawardy J. and Pantan J. held that the Petitioner having not appeared before the trial Court before filing the petition of motion had not acted properly and ultimately observed that as they are in contempt we are not prepared to hear this Rule. The Rule is, accordingly, discharged. Mr. Basu, however, contended that there is no provision in law that the accused must surrender before moving the High Court in Revision and there being no inexorable rule of law the preliminary point should not be entertained. In this context he referred to a case decided by this Court, viz. the case of [Sunilakhya Chowdhury Vs. H.M. Jadwet and Another](#). In that case also a preliminary point was taken as to the maintainability of the Revisional application because the accused had not submitted to the process issued by the Court below before invoking the Revisional jurisdiction of the Hon"ble High Court. It was held ultimately that apart from the fact that the accused Petitioner in this case has really submitted to the jurisdiction of the Court of Port Blair by sending telegrams and praying for adjournments the present case stands on a different footing because of a complete lack of jurisdiction of the Court of Port Blair with regard to the case against the present accused-Petitioner.

It was further observed:

In a case where there is an initial lack of jurisdiction coupled with the existence of abounding difficulties due to great distance or other reason standing in the way of the accused to physically appear in the Court below before moving the High Court, it shall constitute no valid ground for refusing to hear the said petition upon that preliminary ground.

It was ultimately held that in the facts of the said case there was neither any defiance in the majesty nor was any non-submission to the process of the Court. The facts in the above-mentioned case are distinguishable from those of the present one and the said decision does not" support the contentions of Mr. Basu made in this behalf.

5. I will now proceed to consider the submissions made by Mr. J. M. Banerjea, the learned amicus curia appointed in this case, and the various cases cited by him. Mr. Banerjea submitted in the first instance that the exercise of the jurisdiction u/s 439 of the Code of Criminal Procedure is a discretionary jurisdiction and should not be so exercised in cases where the applicant did not come with his hands clean. If and when a process is issued by the Court below, the accused must surrender to the

same and submit to the jurisdiction of the said Court before invoking the Revisional jurisdiction of the High Court and the same would be in contumacious disregard of the process issued by the Court below. In this context Mr. Banerjea referred to several unreported decisions of this Court. The first one cited is the case of Kalidas Ghosh v. Hezral Ali Pramanth Unreported Cr. Rev. No. 1091 of 1943, decided on March 24, 1944, by Henderson J Henderson J. observed as follows:

In showing cause against this Rule Mr. Lahiri pointed out to me that the Petitioner had not appeared before the Magistrate and is defying the process. I shall therefore not interfere. The Rule is discharged. The next unreported case is that of Muhuleswar Rahaman v. Badrinarayan Chowdhury Unreported Cr. Rev. No. 873 of 1962, decided on September 6, 1962, by Amaresh Roy J wherein Amaresh Roy J. considered this point of non-submission to the process of the Court below and as it ultimately transpired that there had been in fact a conformance to the said process observed that as the Petitioner has obeyed the order issuing summons before hearing of this Rule, I am inclined to overlook the breach of the wholesome and well-known practice of this Court which had undoubtedly occurred in this case.

The next case cited by the learned amicus curiae is the case of Debi Prosad Bhaduri v. Satyabrata Ghosh Unreported Cr. Rev. No. 164 of 1962, decided on November 30, 1962, by N. K. Sen, J wherein N. K. Sen J. upheld the preliminary objection taken therein and held that there is considerable force in this argument of Mr. Dutt and Mr. Kar who has appeared for the Petitioner in this case admits that his clients did not submit to the jurisdiction of the Court as was ordered on the 20th December, 1961. In these circumstances the Rule is discharged. His Lordship expressed no opinion on the merits of the case. The next case is the case of Mohan Lal Ganguly v. Joynarayan Chowdhury Unreported Cr. Rev. No. 754 of 1966, decided on September I, 1966, by A. K. Das. J wherein A. K. Das J. upheld the preliminary objection by observing that this application u/s 439 does not therefore lie at the instance of the Petitioner and also considered the merits and ultimately disposed of the Rule.

The last case cited by the learned amicus curia is also an unreported one, viz. the case of Smt. Binapani Basu v. State. Cr. Rev. No. 748 of 1968, decided on January 29, 1970, by Ajoy K. Basu, J which was disposed of along with Criminal Revision Case No. 749 of 1969 on January 29, 1970. Ajoy Kumar Basu J. delivering the judgment upheld the preliminary objection relating to non-submission to the process of the Court below and observed that the Petitioner deliberately avoided appearance in Court, and I cannot support such conduct. The Petitioners were directed to appear before the learned Magistrate before hearing the prayer relating to exemption Court be granted and there was a further direction that the Magistrate would thereafter dispose of the case according to law. On the basis of the principles laid down in the above-mentioned cases Mr. J. M. Banerjea, the learned amicus curiae, submitted that the rule of practice which had been approved of by this Court in a series of decisions was that the accused must surrender to the process issued by the Court

below before he could invoke the Revisional jurisdiction of this Court. I respectfully agree with the principles laid down in the aforesaid unreported decisions and the Division Bench decision reported in (Shaikh) Khairat Ali v. Wahed Ali (Supra) and I also agree with the submissions of Mr. Banerjea. The rule of practice approved of therein, viz. that the accused shall surrender to the process of the Court below before being entitled to invoke the Revisional jurisdiction of the High Court is a wholesome and well-known rule of practice which has assumed a sanctity imparted to it by an imprimatur of judicial decisions and I shall not be, justified in deviating there from. The principle underlying is quite clear that nobody who has contumaciously disregarded the process issued by the subordinate Court be allowed to invoke the High Court's Revisional jurisdiction, which is a discretionary one: I, therefore, uphold the preliminary objection raised on behalf of the State to the maintainability of the present Rule and in that view I do not proceed any further to decide the point of law raised by Mr. Basu as to whether there has been any entrustment in law on the footing of the Full Bench decision. I make it clear that I make no observations as to the merits of the case.

6. In the result the Rule is disposed of as follows:

The case shall go back to the Court below for being tried in accordance with law and expeditiously; and it will be open to the accused Petitioner to urge the "preliminary point of law taken here after submitting to the process of the Court.

7. The records are to go down as early as possible.

Rule disposed of in terms of the order.