
(1969) 10 CAL CK 0016

Calcutta High Court

Case No: Criminal Revision No. 238 of 1969

Shanti Bose

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Oct. 10, 1969

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 156, 203, 252(2), 253(2), 256
- Evidence Act, 1872 - Section 165
- Imports and Exports (Control) Act, 1947 - Section 5
- Penal Code, 1860 (IPC) - Section 120, 120B, 409

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

Bench: Single Bench

Advocate: J.P. Mitter, Prasun Chandra Ghosh, Manotosh Mukherjee and Promod Ranjan Roy, for the Appellant; Priti Bhusan Barman and Sudhir Gopal Poddar, for Opposite Party No. 2, for the Respondent

Judgement

N.C. Talukdar, J.

These three Rules being Criminal Revision Cases Nos. 238 of 1969, 289 of 1969 and 290 of 1969 are interconnected and are, for the sake of convenience, taken up together for disposal as they arise out of the same order dated September 7, 1968, passed by Sri S.R. Bhowmick, Presidency Magistrate, Seventh Court, Calcutta, framing a charge u/s 120 read with Section 409 of the Indian Penal Code against all the four accused Petitioners and u/s 409 of the Indian Penal Code against the accused Petitioners Paramananda Agarwalla, Madan Mohan Gour and Jhumermal Agarwalla and are for quashing the charges as also the proceedings based thereupon pending before the learned Presidency Magistrate in Case No. C/3443 of 1967-

2. The facts leading on to the present Rules can be put in a short compass. The complainant, Amar Chand Agarwalla, who is a partner of M/s Kalinga Bakery Biscuit Confectionery and Mineral Water Company, having its office and factory at Uditnagar,

Rourkela in Orissa, was granted an actual users" import licence dated November 18, 1966, by the Joint Chief Controller of Imports and Exports, Calcutta, for import of skimmed milk powder and other commodities upto the value of Rs. 60,000 for using the same in the licensee"s factory. A petition of complaint was filed by the complainant on August 26, 1967, before the learned Chief Presidency Magistrate, Calcutta, against one N.N. Bose of M/s N.N. Bose and Nephew, clearing agents, Custom House, Calcutta, u/s 409 of the Indian Penal Code alleging that the accused had committed criminal breach of trust in respect of 525 bags of skimmed milk powder imported from New Zealand on the strength of the complainant"s licence without any consent, verbal or written, from the complainant and converting the same to his own use. A part of the goods was seized later on by the C.B.I., Calcutta Branch. The complainant prayed that the D.C., D.D., may be directed to take cognizance u/s 156 of the Code of Criminal Procedure against the accused, N.N. Bose, of the offence u/s 409, Indian Penal Code and the petition of complaint has been marked as Ex. H in the present case. The learned Chief Presidency Magistrate, after examining the complainant, directed on the same date a judicial enquiry by Sri K.D. Banerjee, Presidency Magistrate, Ninth Court, Calcutta and for his report by September 28, 1967 and fixed September 29, 1967, as the next date. The judicial enquiry thereafter started and was adjourned on one ground or other at the instance of the complainant. On November 15, 1967, the complainant filed an application before the learned Presidency Magistrate, Ninth Court, Calcutta, to send back the file to the learned Chief Presidency Magistrate, Calcutta, on the ground that the complainant was misdirected to file the complaint against the accused, so that a fresh complaint may be filed against the "guilty persons who actually misappropriated the goods". On November 21, 1967, another application was filed by the complainant before the learned Chief Presidency Magistrate, Calcutta, that he did not want to proceed with the case and sought leave of the Court to file a fresh petition. The learned Chief Presidency Magistrate, Calcutta, thereupon passed the following order:

The complainant filed a petition stating that he does not want to proceed in this case on the ground mentioned in the petition. Accordingly the petition of complaint is dismissed u/s 203, Code of Criminal Procedure.

On the same date after dismissal of the first complaint, another petition of complaint was filed by the complainant against the four accused persons, viz., Paramananda Agarwalla, Madan Mohan Gour, Jhumermal Agarwalla and Santi Bose, instead of N.N. Bose on this occasion, under Sections 120B/409 and 409, Indian Penal Code. The learned Chief Presidency Magistrate, Calcutta, thereupon examined the complainant and sent the case for judicial enquiry by Sri K.D. Banerjee, Presidency Magistrate, Ninth Court, Calcutta and for his report by December 26, 1967. The judicial enquiry was held and two witnesses were examined. On December 19, 1967, the learned enquiring Magistrate recommended processes to be issued against the accused persons under Sections 120B/409 and 409, Indian Penal Code. The learned Chief Presidency Magistrate, Calcutta, by his order dated December 26, 1967, thereafter summoned all the accused persons u/s 120B read with

Section 409 and Section 409, Indian Penal Code. The case was subsequently transferred to the file of Sri S.R. Bhowmick, Presidency Magistrate, Seventh Court, Calcutta and the trial proceeded before the learned Magistrate. Ten witnesses on behalf of the prosecution were examined and several documents proved for the prosecution and also on behalf of the defence. Ultimately on September 7, 1968, the learned trying Magistrate framed a charge u/s 120B read with Section 409, Indian Penal Code, against all the four accused persons and also u/s 409, Indian Penal Code, against the first three accused persons only, viz., Paramananda Agarwalla, Madan Mohan Gour and Jhumermal Agarwalla. The accused pleaded not guilty to the same. Thereafter, the trial proceeded on several dates and some prosecution witnesses were cross-examined. The order ultimately passed by the learned trying Magistrate framing the charges as also the proceedings based thereupon have been impugned by the accused persons and the present three Rules were issued for quashing the same.

3. Mr. J.P. Mitter, counsel (with M/s Prasun Chandra Ghosh, Advocate, Manotosh Mukherjee, counsel and Promode Ranjan Roy, Advocate) appearing on behalf of the accused Petitioners, in all the three Rules made a five-fold submission. The first ground raised by Mr. Mitter is a broad one relating to the maintainability of the present proceedings initiated by an interested complainant, who himself was made one of the accused in a case over the same subject-matter u/s 5 of the Imports and Exports (Control) Act, 1947, started at the instance of the C.B.I., E.O.W, Calcutta, being R.C. Case No. 23/E/67. The investigation therein as stated in the remand petition was also completed but the accused were discharged by the learned Chief Presidency Magistrate, Calcutta, by his order dated January 2, 1969, on an application filed before him by D.S.P., C.B.I, E.O.W., Calcutta, on the same date, praying for another four months" time to take a final decision therein as the allegations were the same in both the cases and the head office at New Delhi wanted to await the result of the present proceedings, being case No. C/3443/67, started at the instance of the accused No. 2, Amar Chand Agarwalla, u/s 409/120B of the Indian Penal Code. Mr. Mitter contended in this context that the procedure, as adopted above, has been grossly prejudicial lending assurance to the designs of a complainant, by way of a counter-blast and prejudicing the accused Petitioners in the present case and that for just and fair determination of the offences involved, the aforesaid case u/s 5 of the Imports and Exports (Control) Act, 1947, should be proceeded with. The second contention of Mr. Mitter is procedural and relates to the effect of the order of dismissal of the first complaint by the learned Chief Presidency Magistrate, Calcutta, on November 21, 1967, upon the maintainability of the second complaint filed on the same date over the same subject-matter and the proceedings based thereupon. In this context Mr. Mitter referred to the application dated November 15, 1967, filed by the complainant, Amar Chand Agarwalla, praying that the records may be sent back to the learned Chief Presidency Magistrate so that necessary permission may be prayed for to withdraw the said case on the ground that the complainant was misdirected to institute the said complaint and he submitted that the second complaint did not disclose any such new material which was not known to the complainant on the first

occasion. In support of his contention, he referred to a decision of the Supreme Court in [Pramatha Nath Talugdar Vs. Saroj Ranjan Sarkar](#), and the same will be considered in its proper context. The third contention raised on behalf of the accused Petitioner is that the factum and entrustment having not been established by clear and cogent evidence, there cannot be any breach of trust as alleged, far less any dishonest conversion leading on to the offence of conspiracy to commit the same. The fourth contention of Mr. Mitter is that both the first and the second petitions of complaint suppressed material facts vitiating the present proceedings which should accordingly be quashed. The fifth and the last contention of Mr. Mitter, which relates to the merits, is that the evidence on record does not establish the offence charged and a continuance of the present proceedings would be an abuse of the process of the Court. In this context Mr. Mitter relied on Exs. 2, 3, 6, 12, 20, 21, AA, Z and Z/1 and the oral evidence of P.Ws. 2, 5, 7 and 9. Mr. Priti Bhushan Barman, Advocate, appearing on behalf of the State in all the three Rules, joined issue. Mr. Burman made a broad submission that the prayer for quashing the present proceedings at this stage was premature when as yet two remaining witnesses and a Court witness remain to be examined. As to the first point raised by Mr. Mitter, Mr. Burman submitted that there was no legal bar to the institution of the present proceedings by the complainant opposite party No. 2 and that the cause of action involved in the two cases was not the same. Mr. Burman further submitted that the case registered at the instance of the State u/s 5 of the Imports and Exports (Control) Act, 1947, has only ended in a discharge because the Court had refused to adjourn the case further and therefore, there may not be any legal bar to revive the same, but on the said ground the present proceedings cannot be quashed. Mr. Burman next contended that the point of law raised by Mr. Mitter relating to the effect of the order of dismissal of the first complaint by the learned Chief Presidency Magistrate, Calcutta, on the maintainability of the second complaint, was not tenable and was based upon a misinterpretation of the principles laid down by the Supreme Court reported in AIR. 1962 S.C. 876 . The learned Chief Presidency Magistrate, Calcutta, by his order dated November 21, 1967, merely dismissed the first complaint because of the prayer of the complainant that he did not want to proceed with the same and had not applied his mind to the merits of the case. As to the fifth and last contention of Mr. Mitter relating to the merits of the case, Mr. Burman submitted that the contention raised was unwarranted and untenable at this stage and should be determined in a full-fledged trial. Mr. Sudhir Gopal Poddar, Advocate, appearing on behalf of the complainant opposite party No. 2 in all the three Rules, opposed the Rules. He supported the broad submission of Mr. Burman and contended that the question of quashing the proceeding at this stage was premature and the points at issue should be allowed to be determined in the trial which is well-nigh completed. Mr. Poddar joined issue with the first contention of Mr. Mitter that because previously case u/s 5 of the Imports and Exports (Control) Act, 1947, was registered at the instance of the C.B.I., E.O.W., Calcutta, resulting ultimately in the discharge of the present complainant, who was accused No. 2 therein, the latter had no right to file the present complaint under Sections 120B/409, Indian Penal Code, against the accused persons, considered by him to be really guilty in connection with the transactions and that in any event on that ground

alone the present proceedings should not be quashed. Mr. Poddar next submitted that in view of the nature of the order or dismissal of the first complaint by the learned Chief Presidency Magistrate, Calcutta, on November 21, 1967, upon the prayer of the complainant himself that he did not want to proceed with the said case, without any application of his mind to the merits of the case, the filing of the second complaint and the proceedings based thereupon are not barred in any way as alleged or at all. As to the third contention raised by Mr. Mitter that the evidence on record rules out any entrustment of the articles to the accused and therefore, there is no question of any dishonest conversion leading on to the offence of breach of trust as alleged, far less any conspiracy to commit the same offence. Mr. Poddar contended that it was unwarranted and untenable and that there is sufficient evidence to establish the factum of entrustment. As to the fourth contention raised by Mr. Mitter relating to a purported suppression of material facts in the two petitions of complaint Mr. Poddar submitted that the same was unwarranted and untenable and that as when the materials came to the knowledge of the complainant, those were duly disclosed in the petition of complaint. Mr. Poddar joined issue with the fifth and the last contention of Mr. Mitter that on merits the present proceedings are not maintainable and as such, should be quashed. Mr. Poddar submitted that the evidence on record warranted the charges framed and in any view of the matter the proceedings should not be quashed at this stage but should be allowed to be determined in the Court below by completing the evidence, more so when two remaining witnesses and a Court witness have yet to be examined.

4. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the evidence on record, both oral and documentary, I will now proceed to determine the points raised on behalf of the respective parties. As to the first ground raised by Mr. Mitter relating to the maintainability of the present proceedings because of the order of discharge of the present complainant who was an accused in the earlier case, started at the instance of the C.B.I., E.O.W., Calcutta, u/s 5 of the Imports and Exports (Control) Act, 1947 and registered as R.C. Case No. 23/E/67, I find that it is unfortunate that the said case was not proceeded with, when the investigation therein was completed and as mentioned in the remand petition itself filed on January 2 1969, the allegations in the said case are the same as in the instant case, being Case No. C/3443/67. There was no point in awaiting the result of the present case started at the instance of a private complaint and in making repeated prayers for time for the said purpose, resulting in the ultimate Order of discharge of the accused in the case started by the C.B.I., E.O.W. For a proper determination of the allegations involved, the earlier case started by the State and registered as R.C. Case No. 23/E/67 was the more comprehensive one but that by itself cannot constitute the ground for quashing the present proceedings unless the same is otherwise warranted or called for by the merits of the said case. The first contention of Mr. Mitter accordingly fails.

5. The second contention of Mr. Mitter is one of law, relating to the effect of the, order of dismissal of the first complaint, upon the second complaint and the proceedings based

thereupon. Upon ultimate analysis, however, it has not much force behind it and the nature of the order and the circumstances wherein it was passed, would bear eloquent testimony to the same. A reference to the record would bring to light that on November 15, 1967, the complainant opposite party No. 2 filed an application before the learned Presidency Magistrate, Ninth Court, Calcutta, praying that the records of the case may be sent back to the learned Chief Presidency Magistrate, Calcutta, for passing necessary orders on the ground mentioned therein, viz., that subsequent to the filing of the complaint the complainant felt that

he was misdirected to institute the case against the accused persons mentioned therein, by a set of really guilty persons, bent upon saving themselves by diverting the complainant to a wrong person.

On November 21, 1967, the complainant filed another petition before the learned Chief Presidency Magistrate, Calcutta, averring that he did not like to proceed with the first case and prayed for leave of the Court to file a fresh petition and the learned Chief Presidency Magistrate, Calcutta, ordered thereupon as follows:

Complainant filed a petition stating that he does not want to proceed with this case on the grounds mentioned in the petition. Accordingly the petition of complaint is dismissed u/s 203, Code of Criminal Procedure.

The present complaint was filed thereafter u/s 120B/409 and 409, Indian Penal Code. It is abundantly clear, therefore, that the learned Chief Presidency Magistrate, Calcutta, did not apply his mind to the merits of the case and consider the same in any way whatsoever before dismissing the first complaint u/s 203 of the Code of Criminal Procedure. There is, accordingly, no bar in limine or otherwise to the institution of the second complaint. In this context it is pertinent to refer to the case that has been cited. In the case of (i) Pramatha Nath Talukdar (In Cr. A. No. 75 of 1961) and (ii) Surendra Mohan Basu (In Cr. A. No. 77 of 1961) v. Saroj Ranjan Sarkar (in both appeals) Supra p. 899, the majority decision of J.K. Kapur J. and M. Hidayatullah J. (as his Lordship then was) is that

under Section 203, Code of Criminal Procedure, the judgment which the Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding.

Mr. Mitter relied on the observation of the majority decision that

An order of dismissal u/s 203, Code of Criminal Procedure, is however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g. where the previous order was passed on an incomplete record or a misunderstanding of the nature of the complaint or it was manifestly absurd unjust or foolish or where new facts which could not, with reasonable diligence have been

brought on the record in the previous proceedings, have been adduced,

and submitted that as the new facts disclosed in the second complaint were either within the knowledge of the complainant or could have been with reasonable diligence, brought on the record, the filing of the second complaint is bad over the same subject-matter and the proceedings based thereupon should be quashed. Mr. Mitter's contention obviously overlooks the first part of the observations of their Lordships of the Supreme Court whereby emphasis has been laid on the material fact that the Court concerned must apply its mind to the materials to form the judgment as to whether or not there are sufficient grounds for proceeding. In the instant case, however, it is apparent that there was no such application of the mind because the learned Chief Presidency Magistrate, Calcutta, by his order dated November 21, 1967, merely allowed the prayer of the complainant by dismissing the first complaint u/s 203 of the Code of Criminal Procedure on the submission that was made that the complainant did not like to proceed with the same. I, accordingly, hold that the present proceedings are not unwarranted and untenable on the ground of the first order of discharge, in the circumstances referred to above and the second contention raised by Mr. Mitter accordingly fails.

6. The third contention of Mr. Mitter that the evidence on record does not establish the factum of entrustment and as such, the offence of criminal breach of trust as alleged, far less any conspiracy to commit the same, is ruled out, does not also stand on a strong ground. It is difficult for me to hold at this stage on the evidence adduced that there has not been any entrustment at all and the whole case will depend ultimately on the determination of the point as to whether there has been any dishonest conversion, resulting in the offence of criminal breach of trust or a criminal conspiracy to commit the said offence.

7. The fourth contention of Mr. Mitter, however, stands on a strong footing. The first petition of complaint filed on August 26, 1967 (Ex. H), suppressed material facts which were within the knowledge of the complainant and the grounds for not proceeding with the same and filing a second complaint are also not convincing. On a reference to the first petition of complaint it appears that the complainant Amar Chand Agarwalla suppressed any reference whatsoever to M/s Bharat Dyeing and Manufacturing Company, a partnership firm carrying on business at P. 28, India Exchange Place, Calcutta and the loan of Rs. 25,000 taken from the said firm against the security of the 525 bags of imported skimmed milk powder to be stored at the latter's godown by the complainant's clearing agents. The said petition of complaint further suppressed the delivery of the bags of skimmed milk powder to the godown of M/s Bharat Dyeing and Manufacturing Company by the clearing agents on the basis of an agreement dated August 8, 1967 (Ex. 20), entered into between the complainant, as the partner of the Kalinga Bakery Biscuit Confectionery and Mineral Water Company and M/s Bharat Dyeing and Manufacturing Company and as borne out by the several challans from time to time delivering the same, viz., Exs. 3 (collectively), 12 (collectively), Z and AA. There is no reference also to the suit, being Suit No. 2283 of 1967 instituted in the Original Side of this Court by the Bharat

Dyeing and Manufacturing Company as the Plaintiff against the Kalinga Bakery Biscuit Confectionery and Mineral Water Company as the Defendant for a declaration that the Plaintiff is the pledgee of the bags of skimmed milk powder imported by the Defendant and for a decree on account of the loan advanced and the interest. The said plaint with the concise statements of the liquidated claim has been proved in this case and marked as Ex. 31. The complainant curiously enough only proceeded against N.N. Bose of M/s N.N. Bose and Nephew, the clearing agents, whereof one Santi Bose, mentioned in the second petition of complaint as the accused No. 4, is stated to be the proprietor. The said petition of complaint however, was allowed to be dismissed on the ground that the complainant

feels that he has been misdirected to institute or to file this complaint against the accused above-mentioned by a set of really guilty persons who thereby planned to save themselves from prosecution by diverting the complainant to a wrong person.

The second petition of complaint was filed on November 21, 1967, not only against the above-mentioned Shanti Bose, the proprietor of the clearing agent's firm but also against three others, viz., Paramananda Agarwalla, Madan Mohan Gour and Jhumermal Agarwalla. The date of the institution of the suit in the Original Side, however, is September 25, 1967 and the complainant appeared thereon on November 6, 1967, in connection with the interim injunction obtained therein for directions and even affidavit was filed. In the second complaint again the purported new materials disclosed therein in paras. 9 and 12 thereof, appear to be within the knowledge of the complainant and the reasons for filing the second complaint appear also to be by way of a counterblast to the suit filed against the complainant's firm in the Original Side of the High Court as also the case started against him as R.C. Case No. 23/E/67 at the instance of the C.B.I., E.O.W., Calcutta, u/s 5 of the Imports and Exports (Control) Act, 1947. In any event the suppression of the material facts in the petitions of complaint referred to above, leading on to the present proceedings, has been bad and repugnant affecting ultimately the maintainability thereof. In this context a reference may be made to the case of [Sundar Das Loghani Vs. Fardun Rustom Irani](#), decided by Bartley J. and Henderson J. In that case the Magistrate after examining the complainant upon his petition of complaint directed that a warrant should be issued for the arrest of the accused and on the date fixed for hearing, the Magistrate heard both the sides and examined some documents but did not take the evidence of the complainant or his witnesses as he was of the opinion that the complainant had deliberately suppressed several facts and that the complaint was a thoroughly dishonest one and in that view he discharged the accused u/s 253(2) of the Code of Criminal Procedure. It was held by their Lordships in the case that the order of discharge passed by the Magistrate was legal and within the Magistrate's jurisdiction. I, accordingly, find that the present proceedings are bad and improper being based upon a suppression of material facts and it is just and fair that the same should be quashed. The fourth contention of Mr. Mitter accordingly succeeds.

8. The fifth and the last submission of Mr. Mitter relates to the merits of the case and is based upon the evidence on record, both oral and documentary. Mr. Mitter has referred to the two seizure lists, Exs. 2 and 6, proved by P.W. 2, Tarapada Ghatak, Deputy Superintendent of Police attached to the C.B.I., Calcutta, showing the different articles seized from P-38 India Exchange Place, Calcutta, on August 21, 1967 and August 22, 1967. Exhibits 3 (collectively) and 12 (collectively) are the challans dated August 19, 1967 and August 22, 1967, by N.N. Bose and Nephew, clearing agents, showing the delivery of several bags of skimmed milk powder in the account of M/s Kalinga Bakery Biscuit Confectionery and Mineral Water Company to P-38 India Exchange Place, Calcutta. P.W. 5 Rabindranath Mukherjee, a supervisor in the employment of the firm of M/s N.N. Bose and Nephew proves the challans, Ex. 3 (collectively) and stated that--

Exhibit 3 (collectively) are the documents on the strength whereof we gave delivery of the goods.

He further stated that he produced Ex. 3 (collectively) before the Police and that these were the challans showing delivery to the complainant. The P.W. 7 Ratiram Sharma, the godown-keeper of Inodan admitted that Ex. 3/1 (collectively) are his signatures and endorsements. He further stated in cross-examination that he knew the complainant Kumar Chand Agarwalla who was found by him at P-38 India Exchange Place, Calcutta, when he came to take delivery of the articles on August 19, 1967. He further stated that the challans (Ex. 3 collectively) were made over to him and he signed the same. Exhibit 12 (collectively) has been proved by P.W. 2, T. P. Ghatak, D.S.P., C.B.I. and P.W. 5 Rabindranath Mukherjee, supervisor, M/s N.N. Bose and Nephew. Exhibit 20 is the agreement dated August 8, 1967, proving the advance of Rs. 25,000 against the skimmed milk powder to be stored at the godown of M/s Bharat Dyeing and Manufacturing Company at 16 Chottelal Misser Road, Howrah and P.W. 9, the complainant, proves the same in his evidence. P.W. 2 Tarapada Ghatak proved Ex. B, the remand application, whereby he prayed for four months' time from the learned Chief Presidency Magistrate, Calcutta, to await the outcome of the present proceedings and that the investigation in the R.C. Cases Nos. 22 and 23 of 1967 u/s 5 of the Imports and Exports (Control) Act, 1947, was completed before the prayer. Exhibit Z and its copy Ex. AA dated August 11, 1967, proved the receipt of the milk powder by one Durga Dutt Chowdhury on behalf of the Kalinga Bakery Biscuit Confectionery and Mineral Water Company As it was argued on behalf of the complainant, that for proving the genuineness of Exs. Z and AA, Durga Dutt Chowdhury should be allowed to be examined as a Court-witness as directed, I will leave these two documents out of my consideration. The other documents referred to above, however, as also the oral evidence establish that as agreed upon by Ex. 20 dated August 8, 1967, the bags of skimmed milk powder were delivered at the godown of M/s Bharat Dyeing and Manufacturing Company of P-38 India Exchange Place because of the advance of the loan of Rs. 25,000 and that the clearing agents had acted in conformance to the instructions given to them by their principal, viz, the complainant Respondent. These facts also were originally suppressed in the first

petition of complaint and a cloud was sought to be raised in the shape of the purported new materials as incorporated in the second petition of complaint that was filed on November 21, 1967. The evidence on record rules out any offence of breach of trust or a conspiracy to commit the same by the accused persons. The first and the last submission of Mr. Mitter, accordingly, succeeds and as a result I hold that the present proceedings are not maintainable and should be quashed.

9. Besides replying to the five grounds urged by Mr. J.P. Mitter, as mentioned above, Mr. Poddar, appearing on behalf of the complainant opposite party No. 2, also raised one, viz, that as two remaining witnesses and a Court witness yet remained to be examined in the case, the prayer for quashing the proceedings at this stage is premature. He was supported by Mr. Burman appearing on behalf of the State. It is pertinent, therefore, to refer to the records to find out the nature of the applications praying for the two remaining witnesses and the Court witness, their context and the relative merits. Mr. Mitter contended at one stage that the purported application dated September 7, 1968, praying for two remaining witnesses, was an afterthought and was not filed on that date at all as would be apparent from the absence of any reference thereto in the order of the same date. In the order dated September 7, 1968, the learned trying Magistrate recorded that--

P.W. 9 further examined, C.E. declined. Heard as regards charge and thereafter he proceeded to frame the charge which have since been impugned and fixed September 13, 1968, for the cross-examination of the P.Ws. There is no direction for any remaining witnesses to be examined nor is there even a reference to any application for permission to examine the remaining witnesses on behalf of the prosecution. I hold, however, that the allegation of fabrication is wholly unfounded as the application bears the seal of the Court, showing that it was filed on that date. It might have been filed late, after the order was passed by the learned Magistrate or it might have been overlooked due to inadvertence. The case thereafter proceeded and several prosecution witnesses were examined and on January 11, 1969, the order passed is inter alia as follows:

A petition is filed by the prosecution to examine two witnesses as remaining P.Ws. Considered the grounds and complainant's prayer is allowed to examine such witnesses in the interest of justice. 15.2.69 and 17.2.69 for remaining P.Ws. Petition is filed by the prosecution to expunge Exts. Z and AA. Petition is considered and rejected.

On February 17, 1969, an application was filed on behalf of the accused No. 1, Paramananda Agarwalla regarding the examination of remaining and Court witnesses and a reference may be made to para. 4 thereof. On February 24, 1969, the learned trying Magistrate referred to the application filed on behalf of the prosecution on September 7, 1968, for examining two remaining witnesses, viz Satyanarayan Agarwalla and an officer of the Directorate of Industries, Government of Orissa and also Sri Durga Dutt Chowdhury whose signatures on Exs. Z and AA the prosecution disputed. The learned trying Magistrate ultimately held that Durga Dutt Chowdhury could not be considered to be a remaining witness but a new witness and as such, should not be

allowed to be examined u/s 256, Code of Criminal Procedure, but allowed the prosecution to examine the other two witnesses as remaining witnesses. There was a second application filed by the prosecution on February 24, 1969, praying for permission to examine the above-mentioned Durga Dutt Chowdhury as a Court witness. An application was also filed on the same date on behalf of the accused No. 1 objecting to the examination of Durga Dutt Chowdhury as a Court witness as the same would prejudice the accused persons. Ultimately by his order dated March 7, 1969, Durga Dutt Chowdhury was allowed to be examined as a Court witness. A consideration of the applications filed from time to time as also the orders passed thereupon would make it abundantly clear that the; prosecution was caught between two minds and the ratio underlying the different orders passed by the Court are contradictory and that, in any event, such examination will prejudice the accused. It is pertinent in this context to consider also the position in law. The expression "remaining witnesses" as used in Section 256 of the Code of Criminal Procedure refers, on a literal construction of the statute, to witnesses whose names have been ascertained u/s 252(2) of the Code of Criminal Procedure but who have not been examined by the prosecution before charge. As was observed by this Court in the case of Haripada Banerjee v. Hem Kanta Sen AIR 1969 Cal. 121, the expression

"remaining witness" as used in Section 256, Code of Criminal Procedure, should not be given an unnecessarily wide interpretation.

In an unreported decision of the Calcutta High Court in the case of Bhakta Malik v. The King Cr. Rev. No. 185 of 1947 disposed of on May 13, 1949, by Harris C.J. and J. Mitter, J. held as follows:

It is clear that the balance of authority is in favour of the view put forward by Mr. Dutt for the prosecution that the phrase "remaining witnesses for the prosecution" means any witness for the prosecution who had not been examined before the charge-sheet was framed, but whose names were on the list of witnesses submitted to the Magistrate u/s 252(2) of the Code and summoned by the latter before the charge was framed.

As was aptly observed by the third Judge, S.C. Lahiri J. (as his Lordship then was), to whom the case was referred on a difference of opinion between two Judges, in the unreported case of Vasudeb Parasram Samtani v. State Cr. Rev. No. 493; of 1957 decided on August 17, 1959 by S.C. Lahiri J that any other view

will give a dangerous weapon in the hands of the prosecution by which it can always undo the effect of cross-examination by adducing fresh evidence to contradict every statement elicited by cross-examination.

I respectfully agree with the said observations and I hold that the two remaining witnesses should not be allowed to be so examined, in the facts and circumstances of the case, more so, when the said two witnesses cannot possibly have any material effect upon the

merits of the case as to the maintainability of the present proceedings. As to the examination of the Court witness, the position in law and on merits is also against the prosecution. The first part of Section 540 of the Code of Criminal Procedure authorising the Court to summon any person as a witness at any stage of the enquiry or trial is undoubtedly discretionary, but the said discretion must be used judicially as otherwise the interests of the accused in a criminal trial will be prejudiced. The intention of the Legislature clearly is that such powers should be used "very sparingly and in emergent cases". It is pertinent in this context to refer to the observations of Tindal C.J. in the case of *Reg. v. Frosi* (1839) 9 Car. And p. 126 that

the practice should be limited to a case where a matter arises ex improvision which no human impunity can foresee, on the part of a prisoner otherwise injustice would ensue.

In the case of [In Re: N. Krishnaswamy and Others](#), Somasundaram J. observed:

But then the discretion given to the Court u/s 540, Code of Criminal Procedure, is a judicial discretion. In any event, even if all these witnesses are examined by the Court, their evidence cannot be used to fill up the gaps in the prosecution.

A further reference may be made to a recent decision of the Supreme Court in the case of [Jamatraj Kewalji Govani Vs. The State of Maharashtra](#), . M. Hidayatullah J. (as his Lordship then was) delivering the judgment of the Court observed that Section 540 of the Code of Criminal Procedure and Section 165 of the Indian Evidence Act "between them confer jurisdiction on the Judge to act in aid of justice". It was further observed:

There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly.--Page 181.

I agree with the said observations and I hold that Durga Dutt Chowdhury cannot be allowed to be examined as a Court witness at this stage when the learned Magistrate himself refused to examine him earlier as a remaining witness and that the examination of the said Court witness at this stage will only prejudice the accused and undo the effect of their cross-examination. It is also pertinent to note in this context that, in view of the nature of the points raised and discussed above, the present case can be disposed of, independently of Exs. Z and A and therefore, the examination of the Court witness, in any event, will not be necessary. I, accordingly, hold that the order for the examination of a Court witness as well as the two remaining witnesses will not in any way constitute a bar to the quashing of the present proceedings, if it be otherwise permissible to do so, on account of the intrinsic merits of the case, to prevent an abuse of the process of the Court and I have already held above that such grounds are present in this case. The ancillary, contention, therefore, raised by Mr. Poddar fails.

10. In the result, I make all the three Rules absolute, set aside the charge u/s 120B read with Section 409, Indian Penal Code, framed against all the accused Petitioners and the

charge u/s 409, Indian Penal Code," framed against the accused Petitioners Paramananda Agarwalla, Madan Mohan Gour and Jhumermal Agarwalla by the learned trying Magistrate; and I quash the proceedings based thereupon, pending before Sri S.R. Bhowmick, Presidency Magistrate, Seventh Court, Calcutta, being case No. C/3443 of 1967.