

Emperor Vs. Rameshwar Narayan Agarwal

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Court : Mumbai

Decided On : Nov-02-1938

Reported in : AIR1939Bom92; (1939)41BOMLR84

Judge : Broomfield and ;Macklin, JJ.

Appeal No. : Criminal Application for Revision No. 266 of 1938

Appellant : Emperor

Respondent : Rameshwar Narayan Agarwal

Judgement :

Broomfield, J.

1. This is an application to revise an order made under Section 137 of the Criminal Procedure Code making absolute an order previously made under Section 133 by which the applicant was directed to close a flour mill erected by him on his premises in Malegaon Camp. In this revision application two points have been taken, first, that there is no legal evidence of the existence of a public nuisance, or to cite the relevant language of Section 133, no legal evidence that the conduct of the applicant's trade, that is to say this flour mill, is injurious to the health or physical comfort of the community. The second point is that even assuming that a public nuisance within the meaning of Section 133 be held to Be proved, it is not a case for prohibiting the use of the flour mill but for regulating it, and Section 133

permits an order regulating the conduct of any trade held to be offensive in such manner as the Court may direct.

2. The proceedings were started by two complaints made on April 15 and 16, 1937, by Uttamchand and Balkishan, the owners of the premises immediately adjoining the flour mill on the west and the south. The Magistrate sent these complaints to the police for inquiry and the police reported that the working of the engine caused the walls of the complainants' houses to shake and that there was a likelihood of danger. After this the preliminary order was issued under Section 133. Rameshwar, who is the owner of the flour mill and the applicant before us, asked for time in order that he might obtain legal advice and in the meantime undertook to see that the working of the mill did not endanger the surrounding walls or buildings in the vicinity. On May 21, 1937, he put in a written statement in which he said that the complaints were untrue and that the cracks in the walls of Uttamchand and Balkishan's houses were due to other causes than the vibrations caused by his engine. On May 24, 1937, Tarachand, a brother of Uttamchand who made the original complaint, put in a further application complaining of the discomfort due to the working of the engine, and on June 30, 1937, the Magistrate after making a local inspection ordered that the engine should be stopped. Rameshwar then applied to this Court for revision of this order but his application was dismissed as premature. On November 1, 1937, summonses were issued to the parties and the formal inquiry began on November 13, 1937. After recording evidence, the successor of the Magistrate who had made the original order, made the order for the closing of the mill absolute on April 4, 1938. It is this order which is sought to be revised. The Sessions Judge of Nasik was first approached, but he declined to interfere.

3. The first point to be borne in mind is that we are only concerned with the evidence which was given at the inquiry. Any information or ex parte statements on which the conditional orders were passed are not relevant for the purpose of determining whether the final order was a legal and proper one : see Raimohan Karmakar v. Emperor I.L.R. (1906) Cal. 61, Nor can a final order under Section 137 be legally based on the result of a local inspection by the Magistrate.

4. One of the witnesses examined was the Assistant Engineer, Malegaon. He was asked to submit a report at the suggestion of Rameshwar and he was called to prove his report and to give further evidence. It appears from his report that he examined one of the adjoining houses which he calls the house of Agarwal. That is merely the surname but we are informed that it was Uttamchand's house which was examined. The Engineer referred to cracks in the copings of the parapet walls on the terrace of this house and also in the plaster of the walls on the ground floor. According to his opinion all these cracks were due to natural causes, namely to 'temperature', settlement and shrinkage, but this opinion was to some extent qualified by a further statement that the cracks were 'apparently due to natural causes and not solely to the vibrations of the engine:' In the concluding paragraph it was pointed out that the main pulley was not running in one vertical plane owing to the fact that the pin on the main axle was slightly loose ; and if this defect was remedied, in the Engineer's opinion, the slight vibration which he observed in the adjoining house would be still further reduced. When called as a witness the Engineer stated that the result of his inspection was embodied in his report. He also referred to the fact that the engine would not start properly at first and until it started there was dense smoke in the engine room. When it started there was no smoke. He stated that in his opinion the working of the engine' would not go to enhance the danger to the walls of the neighbouring houses. Not a single question was put to this witness by way of cross-examination.

5. The Police Sub-Inspector to whom the original complaints of Uttamchand and Balkishan had been sent for report was also examined as a witness. He also stated that the engine would not start at once and emitted a lot of smoke, in consequence of which he was not able to sit in the engine room and had to go out. But he stated that he was unable to say that the smoke was troublesome to the inhabitants of the neighbourhood. He inspected the houses of Uttamchand and Balkishan and found that the walls were shaking owing to the vibrations of the engine and there were cracks in the upper masonry walls of these two houses, and that was why he reported to the Magistrate that there was likelihood of danger occurring to the neighbouring houses of Uttamchand and Balkishan. He stated in cross-examination that the cracks in the building 'might have been due to vibrations or shocks.' The panchnama which was drawn up by this witness at the

time of his inspection has been put on record. It refers only to the two houses of the immediate neighbours Uttamchand and Balkishan and gives details of the cracks found in them, which were in the ground floor walls and the parapet coping of the roof terrace. The panchnama further refers to the fact that when the mill was set working the southerly wall, which it appears is a party wall between the house of Uttamchand and the premises in which the mill is situated, was found to be shaking and gunny bags kept close to the wall were also shaking. One of the panchas, who signed this panchanama, was examined as a witness, Rasoolbeg Lalbeg. In his evidence he refers only to Uttamchand's house and states that 'every thing inside the house was shaking due to the shocks from the engine working' and that there were cracks in the wall.

6. One of the complainants, Balkishan, was also examined. The house belonging to him which adjoins the flour mill is used as a store. It is an old building. Balkishan says that the walls are cracked owing to the vibrations caused by the engine; and that Uttamchand's house has also suffered from cracks ; and he also makes this statement : 'It (i.e. the flour mill) is a nuisance because of the sound and smoke from the engine.' That is all he says on that point. He gives no details at all. He does not say to whom the noise and smoke are a nuisance, whether to himself only or to other persons. There is nothing about noise and smoke in the original complaints. Balkishan is the only one of the complainants who has been examined as a witness. No other people from the locality have been called except one or two who were examined as witnesses for the owner of the flour mill and who depose that no nuisance is caused by it.

7. The Magistrate who made the final order inspected the place on April 1, 1938, and in the course of his notes of inspection he has stated: 'The vibrations are felt in the house of Tarachand (i.e. the same as the house of Uttamchand) though rather mildly. Went up-stairs also in company of the pleaders and found cracks in the masonry work of the terraces.' He has also stated that one of the complainants complained that the engine was deliberately worked slowly, so a fitter who was present was asked to work the engine. After which the Magistrate noted that 'the shocks are felt now more vividly.' The last point noted is 'The noise from the chimney another nuisance.' Except for the fact that the learned Counsel for the

opponents relied on these inspection notes it would have been hardly necessary to say that they are not evidence in the case. I have already referred to one case bearing on that point *Raimohan Karmakar v. Emperor. Bhura v. Tara Singh* I.L.R. (1926) All. 270 is another case.

8. At the conclusion of his judgment the Magistrate says:

I know and the opponent rightly says that in a number of cities many a flour mill works in populated areas and yet nobody complains of any injury to any one. But here the trouble is peculiarly nasty. The vibrations however indistinct they are felt at different times by different persons who visit the premises are enough to destroy one's peace of mind and are surely a constant source of discomfort to the neighbouring house owners and their families.

9. Further on he says:

One is sure to lose one's head by the constant thumping of the ground and the ceaseless dinning into ears of the rattling noise the engine makes while at work. The annoyance therefore not for any limited period but all day long as the mill works is real and simply unbearable. The noise the chimney makes and the smoke the engine emits, due to some defect in the pulley, the flour dust can as well be added to the list of mental worries of the neighbours. To my mind it is a veritable nuisance in this part of the locality.

10. The Sessions Judge in his judgment has repeated these remarks of the Magistrate and in discussing the objection that the original complaints only mention vibrations and said nothing about noise or smoke, observes that there was also a police report on which the Magistrate acted. The police report itself does not appear to be on record. But I have referred to the evidence of the police officer and the panchnama from which it is sufficiently clear that there was no report of a public nuisance at all, but merely of a nuisance, if any, to the two immediate neighbours Uttamchand and Balkishan. The Sessions Judge has also mentioned the fact that a number of other people in the neighbourhood had complained about the flour mill. This complaint] is not on the record, but is among the papers of the case. It purports to have been signed by fourteen people and

states in general terms that extreme annoyance is caused to them by this engine. Apparently this petition was sent to the Collector and forwarded by him to the Magistrate for inquiry. He received it while the preliminary proceedings under Chapter X were going on. It does not appear that the conditional orders under Section 133 were based upon it. But even if they had been, this petition or complaint, which has not been proved in any way, is no evidence against the present applicant and cannot be considered for the purpose of justifying the Magistrate's final order.

11. I have already referred to the material evidence in the case, and in my opinion it is perfectly clear that the legal evidence which has been produced does not justify the finding that the working of the flour mill engine amounts to a public nuisance. In view of the evidence given by the Assistant Engineer, who is a perfectly independent and impartial witness, it can hardly be said that there is a very strong case of a nuisance caused even to the immediate neighbours Uttamchand and Balkishan. But in any case any damage or inconvenience that may be caused to their premises by the working of the engine must be regarded as a private nuisance which may perhaps justify civil action on their part. If the applicant wishes to avoid the danger of civil proceedings, he would be well advised to remedy the defects which have been pointed out in the evidence of the Assistant Engineer and to do everything possible to minimise the vibration. But that is not a matter with which the Court is concerned in these proceedings. The nuisance if any caused to Uttamchand and Balkishan owing to the vibration of the engine could not possibly justify an order under Section 137 of the Criminal Procedure Code, since there is no evidence whatever to suggest that any similar nuisance or inconvenience is caused to anybody else.

12. As regards the alleged nuisance from the noise and smoke, there is merely the vague statement of the witness Balkishan to which I have already referred. That solitary piece of evidence which does not even purport to say that the nuisance in question is a public one obviously cannot justify the finding of the Magistrate in this connection.

13. It was argued that under Section 135 the person against whom the conditional order is made is required to show cause against the same, and it was suggested that the burden of proof is on him. This, however, is not a correct statement of the position. In the first place, he has only to show cause in respect of the matters complained of, and as I have pointed out, the original complaints mention nothing but that the vibration has affected the houses of Uttamchand and Balkishan, But, apart from that, Section 137 provides that the Magistrate has to take evidence as in a summons case. That means that the complainant has to make out a prima facie case, that is to say, he has to produce before the Court legal evidence which would justify a finding that what is complained of amounts to a public nuisance. We think therefore that on the evidence no order under Chapter X was justified.

14. That being so, the second point which has been taken in this revision application does not really arise. Had the evidence shown satisfactorily that persons other than the two immediate neighbours were injured in their health or physical comfort by this flour mill, we should still have been of the opinion that it was not a case for prohibiting the flour mill but for regulating it in some way. In *Emperor v. Raghunandan Prasad I.L.R. (1931) All. 706* the facts found on proper evidence were that the noise made by the factory engine was such as to be a serious nuisance to the neighbours, meaning thereby a considerable number of people living in the neighbourhood, preventing them from sleeping at night and concentrating on their work during the day. Nevertheless it was held that though it amounted to a public nuisance justifying the application of Section 133, the proper order to make was, not that the factory should be closed, but that the working of the engine should be forbidden between the hours 9 p.m. to 5 a.m. In the present case however there is no proof that the noise is so excessive as to amount to a public nuisance or that the hours of working are in any way unreasonable, and no action under the Criminal Procedure Code can be taken. These sections relate to the existing state of affairs and not to the possibility of future results. Assuming that a nuisance might be caused in future, as was suggested, that must be left to be dealt with if and when occasion arises.

15. For these reasons we hold that the Magistrate's orders of June 30, 1937, and April 4, 1938, which were confirmed by the Sessions Judge on June 4, 1938, must

be set aside.

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