

Banshi and anr. Vs. the State of Rajasthan and ors.

Banshi and anr. Vs. the State of Rajasthan and ors.

SooperKanoon Citation : sooperkanoon.com/751163

Court : Rajasthan

Decided On : Aug-26-1969

Reported in : AIR1971Raj50; 1971CriLJ405

Judge : L.S. Mehta, J.

Acts : High Court Rules; High Court Orders; Rajasthan High Court Rules, 1952 - Rule 325; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145, 439(2) and 440

Appeal No. : Criminal Misc. Application No. 864 of 1968 in Criminal Reference No. 279 of 1967

Appellant : Banshi and anr.

Respondent : The State of Rajasthan and ors.

Advocate for Def. : Renu Chatterji and; C.K. Garg, Advs.

Advocate for Pet/Ap. : V.S. Dave, Adv.

Disposition : Application dismissed

Judgement :

ORDER

L.S. Mehta, J.

1. A reference was submitted by learned Sessions Judge, Jaipur District, Jaipur, recommending that the order of the Sub-Divisional Magistrate, Amber, dated January 13, 1966, declaring party No. 1's possession over the disputed property, i.e., the temple, situate in village Shakarpura, in proceedings under Section 145, Criminal P. C., be set aside, The brief facts pertaining to the reference are as follows:--

2. Party No. 1, Badri Prasad submitted an application to the Superintendent of Police, Jaipur, on May 20, 1965, to the effect that he was the Pujari (priest) of the temple of Shri Sitaramji of the village Shakarpura. Party No. 2, comprising Banshi and Jagdish, wanted to unlawfully dispossess him from the said temple and that on that account there was every apprehension of breach of the peace. Party No. 1, therefore prayed that proceedings under Section 145, Criminal P. C. be initiated to prevent breach of the peace. That application was forwarded by the Superintendent of Police to the Station House Officer, Jamwa Ramgarh. The police proved into the matter, made necessary inquiry and then submitted a report to the Sub-Divisional Magistrate, Amber stating that party No. 1 and party No. 2 were at loggerheads and were bent upon committing breach of the peace necessitating initiation of proceedings under Section 145, Criminal P. C. On receipt of the above report learned Sub-Divisional Magistrate, Amber, passed a preliminary order, on July 22, 1965, attaching the property i.e., the temple, and appointed the Tehsildar Jamwa Ramgarh, as its receiver. The parties were further directed to file their written statements, affidavits and relevant documents in support of their respective claims. The parties did so. Eventually the Sub-Divisional Magistrate gave his finding that party No. 1 was in the actual possession of the temple property, within two months next before the date of the passing of the preliminary order and declared its possession.

3. Party No. 2, Banshi and Jagdish feeling aggrieved against the above order, filed a revision application in the Court of learned Sessions Judge, Jaipur District. The said Judge perused the record, heard the arguments of both the parties and expressed his view that the Sub-Divisional Magistrate, Amber went wrong in holding that party No. 1 was in actual possession of the temple property within two months next prior to the passing of the preliminary order, dated July 22, 1965, and

therefore, his order required interference. He accordingly submitted a reference to this Court, with the recommendation that the order of the Sub Divisional Magistrate, Amber dated January 13, 1966, be quashed. The reference was put up in chambers for orders on March 20, 1968; for some reasons or other it could not be disposed of that day. It was again put up in chambers for orders on April 1, 1968. This Court perused the entire record and rejected the reference.

4. An application was moved on behalf of Banshi stating that in the interest of justice it was necessary for the Court to have issued prior notices to the parties before the decision of the reference, so that they could assert their respective claims before the Court. But that was not done. The petitioner, therefore, prayed that the case should be recalled and the reference be decided afresh after hearing the arguments of both the parties. On receipt of the application, notices to both the parties were issued on December 15, 1968.

5. The only point that necessitates consideration for the disposal of this application is whether it was incumbent upon this Court to issue notices to both the parties before the reference was actually decided.

6. Rule 325 of the Rules of the High Court of Judicature for Rajasthan, 1952, framed in exercise of the powers, conferred by Section 46 of the Rajasthan High Court Ordinance, 1949 read with Article 225 of the Constitution, reads as follows:--

'(1) On receipt of a reference from a Sessions Judge or a District Magistrate under Section 438 of the Code of Criminal Procedure, 1898, the office shall examine it and see if it is in order and ascertain whether it is accompanied by the explanation of the presiding officer of the Court whose proceedings were under examination by the referring Court as required by Rule 80 of General Rules (Criminal), and if not whether the Court making the reference has given reasons for not submitting such explanation along with the reference. The defects, if any, shall immediately be brought to notice of the Registrar.

(2) If within two weeks of the receipt of such reference no appearance is put on behalf by any party, the papers shall be submitted to a Judge in Chambers for orders. Where appearance is put in on behalf of any party before the case is laid

before a Judge in Chambers, the case shall be listed in Court for Orders.'

From a perusal of the above rule, it is clear that if any party desires to put in appearance in connection with a reference, it can do so within two weeks of the receipt of the reference and if no appearance is put in, the case can be submitted to the Judge in chambers for orders. If appearance is put in on behalf of any party, the case has to be listed in Court for orders.

7. Here, the reference made by learned Sessions Judge, Jaipur District is dated May 30, 1967, and the reference was received here on November 27, 1967, after obtaining explanation from the Magistrate concerned- None of the parties put in appearance in accordance with the provisions of Rule 325 of the High Court Rules. Consequently the reference was put up in chambers for orders on March 20, 1968. If the petitioner was serious enough to put in appearance, he could have done so within two weeks of the receipt of the reference. The case was argued on behalf of the petitioner in the Court of the Sessions Judge and he was fully aware of the orders of the said Judge, dated May 30, 1967. Had he exercised some diligence, he could have put in appearance within the prescribed time. In para No. 5 of the affidavit filed by Banshi, it is mentioned that the petitioner inquired from the High Court about the arrival of the reference, but no reference was received in this Court within that period. The petitioner again tried to find out whether the case was received by the Court, but he was told that no reference was received. On which date attempts were made by the petitioner is not mentioned in the affidavit. The space meant for inserting the date has been left blank. It is also not given in the affidavit as to from which authority or person the inquiry was made. Thus, the assertion that an inquiry was made by the petitioner remains vague and uncertain.

8. Learned counsel for the petitioner drew the attention of the Court to a judgment of Hon'ble Kan Singh, J., in S. B. Criminal Misc. Case No. 170 of 1966, Raghunath Mal v. State, and urged that the party concerned has been prejudicially affected by not offering it an opportunity of being heard either personally or by its pleader. I have gone through the above judgment. In that case a reference was received from the Court of the Additional Sessions Judge, Jalore, recommending that the conviction of Baghunathmal and others, for offence under Section 7/3 of the

Essential Commodities Act, 1955, be set aside. That reference was rejected in chambers. The learned Judge held that in the case of passing an order which might prejudicially affect the accused persons, the requirements of subsection (2) of Section 439, Criminal P. C., have to be fulfilled. The learned Judge further held that Rule 325 of the High Court Rules deals with the parties to a reference generally. In the case in hand the reference does not affect any accused person. Therefore, the provisions of Sub-section (2) of Section 439, Criminal P. C., would not be applicable. Sub-section (2) of Section 439, lays down that no order under the section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either in person or by pleader in his own defence. This Sub-section does not apply to a reference not dealing with an accused person. The reason is that there can be no question of hearing the accused in his own defence in such a case. The Sub-section only shows that no order under the Sub-section shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his defence. No notice, therefore, needs be given to the party concerned where the High Court in revision or reference sets aside a particular order passed under Section 145, Criminal P. C. When the parties have already been informed of the reference to be submitted to this Court by the Court below, it cannot be said that the parties were taken unawares before the reference was decided.

9. Here, it will also be worthwhile to peruse Section 440, Criminal P. C. It reads as follows:--

'Optional with Court to hear parties : No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision: Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect Section 439, Subsection (2).'

According to Section 440, Criminal P. C., no obligation is cast upon the Court while exercising the revisional jurisdiction to hear the parties to such application. This section expressly lays down that no party has any right to be heard either personally or by pleader before any Court exercising its powers of revision. There

is, however, a proviso to Section 440, Criminal P. C., which lays down that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect the operation of Section 439 (2), Criminal P. C. Sub-section (2) of Section 439, Criminal P. C., provides that no order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence. The effect of these two provisions is that although party to an application in revision cannot claim any right to be heard, the discretion is given to the Court exercising revisional jurisdiction to call upon the parties to such application to attend the hearing of the application and hear them personally or by a pleader. Despite discretion under Sub-section (2) of Section 439, Criminal P. C. the Court cannot make any order on the application which would work to the prejudice of the accused, unless he has an opportunity of being heard. In proceedings under Section 145, Criminal P. C., there is no complainant and there is also no accused. Here, if there is at all a complainant it is the police and if at all there are any accused both the parties to the proceedings are the accused. The analogy of a complainant and an accused in an ordinary criminal case cannot aptly be applied to a case such as this as neither party to the dispute is alleged to have committed any offence and proceedings under Section 145, Criminal P. C., cannot amount to prosecution for such an offence. Therefore, the obligation imposed upon the Court under subsection (2) of Section 439, Criminal P. C., to give an opportunity to the accused to be heard cannot apply to the proceedings under Section 145, Criminal P. C. In support of this proposition reliance is put on *Ambu Kisan Vaditke v. Benubai Limba*, AIR 1961 Bom 261. In that case, Hon'ble Shah, J. (as he then was) observed that in a proceeding under Section 145, Criminal P. C. no accused is involved and, therefore, the obligation cast by Sub-section (2) of Section 439, Criminal P. C. is not applicable to revision against an order passed in proceedings under Section 145, Criminal P. C. The learned Judge further pointed out that an order dismissing an application under Section 145, Criminal P. C., cannot be challenged on the ground that the parties were not heard.

10. In the present case, the Sessions Judge in his order of reference wrote a complete order, setting forth his views. He also submitted a reply obtained by him

from the Magistrate concerned. The facts of the case were incorporated in the reference order beyond all doubt. Information had been given to the parties concerned that a reference was to be submitted to this Court and yet the parties did not put in appearance within the time allowed by Rule 325 of the High Court Rules. In these circumstances, the order of this Court dismissing the reference cannot be impugned on the ground that no hearing was given to the party concerned.

In the result, this application having no force is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com