

Smt. Chen Devi and anr. Vs. State of Rajasthan and anr.

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Court : Rajasthan

Decided On : Nov-10-1997

Reported in : 1998(2)WLC337; 1997(2)WLN620

Judge : Amaresh Ku. Singh, J.

Appeal No. : S.B. Criminal Misc. Petition No. 923 of 1996

Appellant : Smt. Chen Devi and anr.

Respondent : State of Rajasthan and anr.

Judgement :

Amaresh Ku. Singh, J.

1. Heard the learned Counsel for the petitioner, the Public Prosecutor and the learned Counsel for non-petitioner No. 2.
2. This petition under Section 482 Cr. P.C. is directed against the order dated 28th October, 1996 passed by the Special Judge, SC/ST (Prevention of Atrocities Act) Cases, Merta in criminal revision No. 38/96 whereby the learned Sessions Judge affirmed the order passed by the Assistant Collector-cum- Executive Magistrate, Degana on 30th July, 1996 in criminal case No. 4/96 Raja Ram v. Chen Devi.
3. By his order dated 30th July, 1996 passed in criminal case No. 4/96 Raja Ram v. Chen Devi, the learned Assistant Collector-cum-Executive Magistrate, Degana

passed a conditional order under Section 133 Cr. P.C. and also passed an order under Section 142 Cr. P.C. directing the closure of the factory, which was alleged to have been run by Smt. Chen Devi and Damodar petitioners. The aforesaid order was passed on a complaint filed by Raja Ram (non-petitioner No. 2). In his complaint Raja Ram alleged that Smt. Chen Devi and Damodar owned and possessed a residential house situated on plot No. 40 in village Goreedi Chacha Mohalla, Tankipura and that in their residential house they had set up a factory against the provisions of law for the manufacturing of polythene packs and 'Dana' and had installed an electric motor of 40 hrs. power to run that factory. It was alleged in the complaint that poisonous gases emanate from the factory run by Smt. Chen Devi and her son and because of this, lives of ordinary persons have become endangered; that the factory is being operated all the 24 hours and the noise created by the operation of the factory has caused nuisance and people living in the vicinity of the factory cannot live and sleep and the students cannot study and the operation of the factory is injurious for the health of the persons living the neighbourhood of the factory. A prayer was made by Raja Ram in his complaint that the factory set up by Smt. Chen Devi and her son be got removed immediately. On perusal of the complaint filed by Raja Ram and the so called affidavit, the learned Magistrate passed the impugned order dated 30th July, 1996. This order consist of two parts. By the first part of the order the Assistant Collector cum Executive Magistrate directed the issue of notice to Smt. Chen Devi and her son Damodar requiring them to show cause why an order for the removal of the nuisance. By the second part of the order, the learned Assistant Collector-cum-Executive Magistrate directed that the factory belonging to Smt. Chen Devi and her son be stopped immediately and further directed to issue of notice to them.

4. The record of the lower court shows that on 13th August, 1996, the non-applicant (petitioner Smt. Chen Devi and Damodar) filed their reply of the complaint filed Under Section 133 Cr. P.C. and also filed the reply to the application filed Under Section 142 Cr. PC. The case was then adjourned for arguments. Arguments regarding application Under Section 142 Cr. PC were heard on 27th August, 1996 and the case was adjourned to 31st August, 96. Meanwhile, it appears that an application for transfer of case had been filed, and therefore, the learned Assistant Collector-cum-Executive Magistrate could not

pass the order. The case was ultimately transferred to the court of sub-divisional Magistrate Merta.

5. The petitioner Smt. Chen Devi and her son preferred a revision petition against the order passed by the learned Assistant Collector-cum-Executive Magistrate. The revision petition No. 38/96 was disposed of by the learned Special Judge, SC/ST (Prevention of Atrocities Act) Cases, Merta. The learned Special Judge after considering the arguments advanced by both the parties held that the order passed by the Assistant Collector-cum-Executive Magistrate under Section 142 Cr. P.C. was an interlocutory order and therefore, a revision against that order was not maintainable. He, therefore, dismissed the revision petition.

6. In the instant case, after going through the record as well as hearing the argument of both the parties, I am of the opinion that the first part of the impugned order dated 30th July, 1996 does not call for any interference by this Court under Section 482 Cr. P.C. The latter part of the order purporting to have been passed Under Section 142 Cr. P.C. directing the closure of the factory belonging to the petitioner Smt. Chen Devi and Damodar, requires serious consideration of the consequences ensuing from that order. The direct consequence of that order was the total closure of the factory and consequently deprivation of the means of livelihood to the petitioners. Any order, which directly affects the lives, limbs or the personal liberties of any citizen in a serious manner so as to endanger the fundamental rights guaranteed under Article 21 of the Constitution, must be passed with due care and caution for the simple reason that the guarantee under Article 21 of the Constitution is that no person shall be deprived of his personal liberty except according to procedure established by law. In other words, any order, which at this stage affects the life or personal liberty of any citizen calls for serious consideration before it is passed. It would be proper to recall the words of the Hon'ble Apex Court in *Ramnarayan v. State of Delhi* : 1953 CriLJ1113 :

Those who feel called upon to deprive other persons of their life or personal liberty in discharge of what they have complete to duty must strictly and scrupulously observe the forms and rules of law.

7. Right to livelihood has been included in the fundamental right contained in Article 21 of the Constitution of India, and therefore, once it is established that a person has acquired the right to continue to obtain the fruits of certain means of a livelihood, then unless, it is fully justified by the procedure established by law, that right to livelihood must not be denied to him or her, irrespective of the fact whether the concerned citizen is a poor person or he is a man of means. In the instant case, the factory, which was ordered to be closed was not merely an instrumentality for producing a nuisance, it was also a means of livelihood for the petitioners. Hence, the necessity of scrutinizing properly whether the learned Assistant Collector-cum-Executive Magistrate has or has not exceeded the jurisdiction Under Section 142 Cr. P.C., which reads as under:

142. Injunction pending inquiry--(1) If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

8. A bare perusal of Section 142 Cr. P.C. shows that this section empowers a Magistrate making an order Under Section 133 Cr. P.C. to take immediate measures by issue of such an injunction that is required to obviate or prevent the danger or injury referred to in the first part of section, pending the determination of the matter. The kind of danger or injury, which is referred to in Section 142 is not every danger, nor every injury. It is an 'imminent danger' or 'injury of a serious kind to the public'. These words clearly indicate that before the Magistrate pass an order Under Section 142 Cr. P.C., he must be satisfied on consideration of relevant material placed before him that there is either imminent danger or injury of a serious kind to the public is most likely to occur, if the nuisance of which he has

taken cognizance Under Section 133 Cr. P.C. is to be immediately prevented. Needless to say that the satisfaction of the Magistrate acting Under Section 142 Cr. P.C. must be objective and should be based on some record, which may justify such a satisfaction. In view of Section 142 Cr. P.C. the first question arises for the consideration is whether in the instant case, the learned Executive Magistrate had sufficient grounds before him to pass an order Under Section 142 Cr. P.C. Section 142 Cr. P.C. further makes it clear that the power of this section confers on the Executive Magistrate is restricted to issue of injunction necessary for preventing imminent danger or injury of a serious kind to the public. Therefore, the extent to which a prohibitory direction may be given Under Section 142 Cr. P.C. must be restricted to the object of preventing imminent danger or injury of a serious kind to the public. Nothing contained in Section 142 Cr. P.C. empowers the Executive Magistrate to pass a blanket order for closing the factory. The order prohibiting the performance of some acts, even if justified in the facts and circumstances of the case, must be reasonable. In view of this position of law, in the instant case, it is to be seen whether the order passed by the learned Executive Magistrate is or is not to be called reasonable within the meaning of Section 142 Cr. P.C.

9. A perusal of the record of the court of Assistant Collector-cum-Executive Magistrate shows that he had no personal knowledge about the alleged nuisance. Whatever information he had, at the time of passing the impugned order or the information communicated by the non-petitioner No. 2 by way of filing a complaint and the affidavits, which were annexed to the complaint. He did not examine any person in his court, nor he directed any expert to make any site inspection, nor he had before him any expert report to support or controvert the allegations made by the non-petitioner No. 2.

10. I have carefully perused the complaint as well as the affidavits which were filed by Raja Ram before the learned Executive Magistrate. Before the affidavits of Raja Ram and other persons are taken into consideration, it would be proper to point out that the affidavits are produced as a substitute of oral examination in Court if the law permits the evidence to be filed by means of affidavits. In the case of oral examination, the provisions of Section 60 of the Evidence Act apply. Section 60 requires that if a fact could be seen, the witness must say that he sight. If a fact

could be heard, the witness must say that he heard it. If a fact could be perceived by any other sense or in any other manner, it must be the evidence of a person, who must say that he perceived it by the sense or in that manner and if the evidence in the nature of opinion, the person must state that ground for such opinion. Hearsay evidence is generally prohibited. Because of the requirements of Section 60 of the Evidence Act, it is necessary that the deponent must indicate clearly which fact or facts are based on his personal knowledge and which fact or facts are based on the knowledge or information derived from others and in the case of opinion, what are the grounds of his opinion. Unless, the affidavits disclose these facts, they are worthless and they do not constitute evidence.

11. In view of Section 60, the direct evidence is confined to only those facts, which can be perceived with the help of sense organs. Those facts, which cannot be perceived with the help of sense organs, do not fall within the definition of direct evidence, and therefore, those facts necessarily depend on circumstantial evidence for their proof and the opinion evidence has to develop upon the circumstances to justify itself.

12. In the instant case, various affidavits that have been filed certainly contain allegation to the effect that poisonous gases are emanated by the factory; they enter into the bodies of people; they are dangerous for the lives; and that the sound of running factory is creating the noise, amounting to nuisance. What particular gases are coming out and how the deponents have come to know about them; what kind of danger they have created or what injuries they have caused or likely to cause and what are the grounds for that apprehension, has not been stated. What is the degree of loudness or the noise created by the factory and how that noise is injurious and what are the means by which this apprehension has been acquired by the deponents, has not been stated in the affidavits. This shows that the affidavits contain two kinds of fact. The facts based on personal knowledge as well as the facts based on the opinion only. To the extent the deponents have said that the petitioners own a residential house on plot No. 40 and that they are running a factory in that house, it may be conceded that the contents of the affidavit are based on personal knowledge. But, on the other contents appears to be more in the nature of opinions than facts derived with the

help of sense organs within the meaning of Section 60 of the Evidence Act. The allegations, which amount to opinions unless supported by sufficient data or by themselves, not sufficient for the Courts to base their judgments on them.

13. Viewed in the light, the Assistant Collector-cum-Executive Magistrate could not in view of Section 60 of the Evidence Act legitimately arrive at the decision that imminent danger or injury to the public was likely to be caused for the purpose of invoking the jurisdiction under Section 142 Cr. P.C. In other words, the conditions laid down in Section 142 Cr. P.C. for invoking the jurisdiction thereunder were not fulfilled, and therefore, the latter portion of the impugned order purporting to have been passed Under Section 142 Cr. P.C. did amount to abuse of the process of the Court and must be quashed Under Section 142 Cr. P.C.

14. The learned Counsel for the non-petitioner No. 2 has submitted that it was open to the petitioners to appear before the learned Sub-Divisional Magistrate (to whose Court the file stands transferred) and to make a prayer for revocation of the order passed Under Section 142 Cr. P.C. if in the opinion of the petitioners, the circumstances necessitate it. No doubt that course is always open to anyone against whom an order has been passed Under Section 142 Cr. P.C. by the Magistrate. But, the fact that the non-applicant against whom an order Under Section 142 Cr. P.C. is passed by a Magistrate has a right to approach the concerned Magistrate with a request that he should revoke his order or modify the same, does not mean that this Court is precluded from exercising its jurisdiction Under Section 482 Cr. P.C. if it is found that the Magistrate exercising jurisdiction Under Section 482 Cr. P.C. have mis-directed himself as to the conditions necessary under that Section or the extent to which he can prohibit the activities which are challenged before him. In the instant case, the learned Executive Magistrate has not applied his judicial mind in accordance with law to the allegations made before him, for the purpose of finding out whether imminent danger or injury to the public was in fact existing. He has also not applied his mind whether the injunction, which he was authorised to make, is required by law to be tailored to the needs of the case or he can without any rhyme or reason direct the full and complete stop of the factory. In short, it is a fit case in which the latter part of the impugned order dated 30th July, 1996 passed by the learned Assistant

Collector should be quashed and set aside and is hereby quashed and set-aside Under Section 482 Cr. P.C. However, it is made clear that nothing in this order shall prevent the non-petitioner No. 2, who is the complainant in the case from producing legal evidence to show that the factory run by the petitioner Smt. Chen Devi and Damodar is creating a nuisance within the meaning of Section 133 Cr. P.C. Nothing contained in this order shall preclude the learned Sub-Divisional Magistrate (in whose Court the file is pending) from deciding the application filed by the non-petitioner No. 2 in accordance with law without being influenced by the fact that the latter part of the order dated 30th July, 1996 has been quashed by this Court for the reasons mentioned above.

15. For the reasons mentioned above, this petition is partly allowed. The first part of the order purporting to be passed Under Section 133 Cr. P.C. is maintained. The latter part of the order purporting to be passed Under Section 142 Cr. P.C. directing the closure of the factory of the petitioners is hereby quashed and set aside. The learned Sub-Divisional Magistrate shall now proceed to hear the case and dispose of the case as early as possible. The parties are directed to appear in the Court, of learned Sub-Divisional Magistrate on 10th December, 1997. The Registry is directed to send a copy of this order alongwith the record of the case to the Sub-Divisional Magistrate within a period of 15 days.