

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

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Court : Rajasthan

Decided On : May-03-2002

Reported in : 2002(3)WLN712

Judge : Harbans Lal, J.

Appeal No. : S.B. Cr. Misc. Petition No. 135 of 2002

Appellant : Smt. Chen Devi and anr.

Respondent : State of Rajasthan and anr.

Disposition : Petition allowed

Judgement :

Harbans Lal, J.

1. This petition Under Section 482 Cr.P.C. is directed against the order dated 28.1.2002 passed by the learned Sessions Judge, Merta in criminal revision No. 30/2001 whereby the revision has been dismissed and the order dated 7.8.2001 passed by the learned Addl. Collector-cum-Executive Magistrate, Degana in Criminal case No. 5/97 has been affirmed.

2. Briefly stated, the relevant facts giving rise to this petition are that a complaint was filed by one Raja Ram- non-petitioner No. 2 before the learned Assistant Collector-cum-Executive Magistrate, Degana with the allegation that Smt. Chen

Devi and Damodar own and possess a residential plot No. 40 in village Goredi Chachan Mohalla Tankipura and that in their Goredi Chachan Mohalla Tankipura and that in their residential house they have set-up a factory against the provisions of law for manufacturing plastic bags and granules and had installed an electric motor of the capacity of 40 HP to run that factory. It was alleged that poisonous gases emitting from the said factory is injurious to the health of the persons of the locality and since the factory is being run all the 24 hours the noise created by the factory is hazardous and also causing nuisance to the people of the vicinity, who cannot sleep during nights and the studies of the students are also being adversely affected. It was prayed that the said factory be got removed immediately. On perusal of the complaint filed by non-petitioner No. 2 Raja Ram and the enclosed affidavits, the learned Magistrate passed an order dated 30.7.1996 directing the petitioners to show cause as to why the order of removal of the alleged public nuisance may not be passed against them and it was also directed that the factory in question be stopped immediately.

3. The petitioners filed their reply on 13.8.1996, wherein they denied the allegations levelled in the complainant and pleaded that the factory is being run since 1994 under valid licence and after obtaining necessary NOC's from the Pollution Board and the Panchayat and that the complainant being personally annoyed with the petitioners has made, this complaint to harm, humiliate and harass him. They also preferred a revision petition against the order passed by the learned Executive Magistrate before the learned Sessions Judge, Merta, who dismissed the revision holding that the impugned order was an interlocutory order against which no revision was maintainable. Then the petitioners approached this Court Under Section 482 Cr.P.C. and this Court by well considered and detailed order dated 10.11.1997 upheld the order pertaining to issuance of show cause notice Under Section 133 Cr.P.C. but, found the order of closing the factory passed Under Section 142 Cr.P.C. illegal and unsustainable in the eye of law and the same was quashed and the parties were directed to appear in the learned court below on 10.12.1997. The Assistant Collector and Executive Magistrate, Degana again passed the final order dated 7.8.2001 on the basis of already filed affidavits and without recording any evidence and collecting any other materials in pursuance to the observations made by this court in the order dated 10.11.1997.

The petitioner again filed revision petition before the learned Sessions Judge, Merta who vide impugned order dated 28.1.2002 again rejected the revision and affirmed the order dated 7.8.2001. Hence, this petition.

4. Learned Counsel for the petitioners has vehemently contended that the learned courts below have totally disregarded the observations of this Court given in the order dated 10.11.1997 as also the provisions of Section 138 of the Cr.P.C. He submitted that this tantamounts to abuse of the process of the Court and rejection of criminal, revision filed by them does not come in the way of exercise of inherent powers by this Court in quashing the aforesaid illegal orders which have been passed in disregard to the order of this Court dated 10.11.1997. In this regard, he has placed reliance on : 1997 CriLJ1519 (Krishnan and Anr. v. Krishnaveni and Anr.), 1999 S.C.C. (Cri.) 77 (Jitendra Kumar Jain v. State of Delhi and others), 1974 Cr.L.J. (Mysore) 220 (Balakrishna Rao v. State of Mysore and Others), 1976 Cr.L.J. 1448 (Banta Singh v. Sohawa Singh and others), 1982 R.L.W. 538 (Kailash Chandra Jain v. S.M. Poddar) and the order dated 10.11.1997 passed by this Court in S.B. Cr.Misc. Petition No. 923/96 (Smt Chen Devi and Anr. v. State of Raj. and Anr.).

5. Learned Counsel for the non-petitioner No. 2, on the other hand, has contended that after availing of the remedy of revision, this petition Under Section 482 Cr.P.C. cannot be filed as it amounts to circumventing the provision of Section 397 (3) Cr.P.C. which is not permissible and in this regard he has placed reliance upon : 1997 CriLJ1519 (Krishnan and Anr. v. Krishnaveni and Anr.) : 1993 CriLJ1049 (Dharampal and others v. Ramshri (Smt.) and others). 1993 R.L.R. (Raj.) 103 (Kana Ram v. State of Raj. and Ors.), 1996 Cr.L.R. (Raj.) 676 (Jasa Ram and 34 Ors. v. State and Am.), 1996 Cr.L.R. (Raj.) 21 (Muni Lai v. State), 2000 W.L.C. (UC) 257 (Bhagwan Das v. State), 1996 Cr.L.R. (Raj.) 49 (Budh Singh and Ors v. Hapu Ram and Ors.) and 2000 W.L.C. (3) 136 (Mohd. Ahsan v. State).

6. I have given my anxious and thoughtful consideration to the rival submissions made at the Bar and have also perused the impugned orders, record and the authorities cited at the Bar. Before proceeding further, it would be pertinent to state that this Court in the order dated 10.11.1997 after extracting Section 142 Cr.P.C.

and discussing its scope and ambit, has observed as under:

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 of 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.

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 saw it. 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 is in the nature of opinion, the person must state the 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.

7. In spite of these observations and other observations in the aforesaid order of this Court, the learned Executive Magistrate has again passed the final order dated 7.8.2001 without collecting any materials, recording any evidence and obtaining any expert report in support of allegations levelled in the complaint and has thus not only disregarded the directions of this Court but has also fell into

grave illegal error in relying upon the same affidavits which this Court had held to be worthless, which attitude on the part of learned Executive Magistrate cannot be appreciated and the learned Sessions Judge has also in passing the impugned order not kept in view the observations of this Court and the provisions of Section 138 Cr.P.C. which renders the impugned order unsustainable. His observation that affidavits amount to evidence is not proper in the face of the clear provisions of Section 138 Cr.P.C. which is as under:

138. Procedure where he appears to show cause. --(1) If the person against whom an order Under Section 133 is made appears and show cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

8. In case of Balakrishna Rao (supra), Banta Singh's case (supra) and Kailash Chandra Jain's case (supra) it has been clearly held that the conditional order can be made absolute only after recording evidence and satisfaction of the Magistrate and the affidavits do not constitute evidence because the aforesaid Section 138 Cr.P.C. enjoins upon the Magistrate to take evidence in the matter as in a summons case.

9. Thus, from the foregoing discussion, it is plain that the learned Executive Magistrate has not followed the procedure prescribed by law and in utter disregard of the observations of this Court has committed grave illegality and the learned Sessions Judge has also passed the impugned order without considering the relevant provisions of Cr.P.C. and without keeping in view the observations of this Court which render the orders of the learned courts below unsustainable in the eye of law.

10. No doubt, the inherent powers vested in this Court Under Section 482 Cr.P.C. are to be used sparingly and in the rarest of rare cases and the same cannot be used where these are sought to be exercised to circumvent the specific provision of the Code provided Under Section 397(3) or any other provision of the Code, but in the authorities relied upon by the parties it has clearly been held that where there is abuse of the process of the Court or it is necessary for securing the ends of justice, the High Court can exercise its inherent powers Under Section 482 Cr.P.C. in appropriate cases and inherent powers Under Section 482 Cr.P.C. in such cases would not be subject to the bar provided Under Section 397(3) Cr.P.C.

11. In the instant case, as shown above, the learned courts below have clearly acted in violation of the provisions of the Code and in utter disregard to the observations of this Court in the order dated 10.11.1997 and have thus committed grave illegality and if the orders of the courts below are allowed to stand, it will lead to miscarriage of justice and the exercise of inherent powers Under Section 482 Cr.P.C. is justified and warranted in the facts and circumstances of the case for securing the ends of justice.

12. In the result, this petition is allowed and the order dated 28.1.2002 passed by learned Sessions Judge, Merta and order dated 7.8.2001 passed by learned Assistant Collector-cum-Executive Magistrate, Degana are hereby quashed and the matter is remitted back to the learned Magistrate with the direction to record evidence as per law and to pass appropriate orders keeping in view the observations of this Court in the order dated 10.11.1997 and hereinabove.