

In Re: Amar Chand Baid

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Court : Kolkata

Decided On : Sep-07-1995

Reported in : (1996)1CALLT314(HC),1997CriLJ867

Judge : Shyamal Kumar Sen, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 144, 144(1) and 401

Appellant : In Re: Amar Chand Baid

Advocate for Def. : Jaymalya Bagchi, Adv. for Preivate Opposit Party No. 2

Advocate for Pet/Ap. : Balai Chandra Roy, Sr. Adv., Praphulla Kumar Kundu and ;Ketaki Ganguly, Adv.

Judgement :

Shyamal Kumar Sen, J.

1. This is an application under Section 401 of the Code of Criminal Procedure for setting aside of the order dated 18.8.95 passed by the Learned Executive Magistrate, Sealdah in M.P. Case No. 2217 of 1995 (Rajendra Prahladka v. Amar Chand Baid and Ors.) being annexure-'C' to the petition.

2. Mr. Balai Chandra Roy, Learned Senior Advocate on behalf of the petitioner has submitted that the learned Executive Magistrate acted in excess of his jurisdiction in passing the said order under Section 144 of the Criminal Procedure Code. It is

the contention of Mr. Roy that while passing an order under Section 144 of the Criminal Procedure Code, the Magistrate must record his satisfaction on the basis of material on record about the breach of peace and about the necessity of maintaining peace when there is apprehension of nuisance and danger and that such order is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. Mr. Roy, learned Advocate has referred to Section 144 of the Code of Criminal Procedure and also relied upon the judgment and decisions in the case of (1) Dayamay Bhattacharya v. Surya kanta Sur and Ors. reported in 1989 Criminal Law Journal 1651 and in the case of (2) Raj Kumar Rawle v. Madan Gopal Rawla and Ors. reported in 1991 C Cr LR (Cal) 233.

3. Mr. Jaymalya Bagchi, Learned Advocate appearing on behalf of private opposite party No. 2 on the other hand has submitted that there cannot be any dispute about the breach of peace since the petitioner also complained of the same by filing an application and as such the learned Executive Magistrate did not consider it necessary to record his satisfaction. He has further submitted that since it is recorded in the order of Learned Magistrate that he has seen papers and the documents filed by both the parties, the Magistrate is satisfied about the breach of peace. According to him the decisions cited by the learned Advocate for the petitioner cannot have any application in the circumstances of the instant case since the petitioner has also filed an objection apprehending breach of peace.

4. To appreciate the proper scope, of Section 144 of the Criminal procedure Code the said Section is quoted below:

'144. Power to issue order in urgent cases of nuisance or apprehended danger:

(1) In cases where, in the opinion of District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or

to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.'

5. From perusal of the said Section 144, in my view, it is necessary that the Magistrate should be satisfied on the basis of the materials on record and should pass an order directing any person to abstain from doing certain act, if the Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray, learned Magistrate should record his satisfaction in his order to that effect. In the instant case, order passed by the Learned Executive Magistrate is totally silent on the question of his satisfaction and the materials for arriving at his satisfaction, has not also been recorded in his said order.

6. In the case of *Dayamay Bhattacharya v. Surya Kanta Sur and Others*, this Court *inter alia* held that where the Magistrate did not record any satisfaction that there was any breach of the peace which necessitated initiating a proceeding under Section 144 Cr. P. C. so as to empower him to issue directions in accordance therewith but on the contrary, he called for a report from police obviously with the purpose of ascertaining whether there was any apprehension of the breach of peace or not as alleged in the application, the order of Magistrate issuing directions to the opposite party was without jurisdiction and therefore the writ petition for enforcing compliance of those directions would not be maintainable.

7. In the case of *Jatindra Nath Sikdar v. State* reported in 1967 Cri LJ 1716 (Cal) it was held by this Court as follows :--

'the foundation of the Magistrate's order for a proceeding under Section 144 or 145 of the Code is his satisfaction on materials before him that there is an apprehension of breach of the public peace. Unless he is satisfied in that regard, he would have no jurisdiction to draw a proceeding under either of those two Sections. In order to give the Magistrate the jurisdiction to draw up the proceeding

concerned, there will have to be his satisfaction in the above matter, and if the learned Magistrate does not mention about this satisfaction, his Jurisdiction is lost.'

8. In the case of *Amulya Ratan Halder v. Bidya Bhusan Naskar*, reported in (1979) 2 Cal HC Notes 127 the aforesaid observation in the case of *Jatindra Nath Sikdar v. The State* (supra) was quoted with approval.

9. In the case of *Raj Kumar Rawal v. Madan Gopal Rawla and Ors.* (supra), the same question relating to jurisdiction of the Magistrate in passing an order under Section 144 Cr. P.C., again came up for consideration. The Learned Single Judge of this court in paragraph-4 of the said judgment observed that the first thing which a Magistrate has to be satisfied about is that there is sufficient ground for proceeding under this Section and an immediate prevention or speedy remedy is desirable, and the second element which has to be established is that the magistrate should consider that the direction which he is about to give, is one which is likely to prevent or tends to prevent obstruction annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray. The Magistrate must decide as a matter of fact whether the dispute is likely to lead to a breach of the peace or a disturbance of public tranquillity. The Magistrate must state in the order, the material facts by reason of which he was making the order thereunder.

10. The Supreme Court in the case of *Babulal Parate v. State of Maharashtra*, reported in : 1961 CriLJ16 held and observed as follows :

'... that to act under Sub-section (1) of Section 144, the Magistrate himself had to form an opinion that there was sufficient ground for proceeding under that Section and immediate prevention or speedy remedy was desirable. The Court further pointed out that the Sub-section also required the magistrate to make an order in writing and state therein the material facts by reason of which he was making the order thereunder. The Supreme Court further pointed out that the latter part of Sub-section (1) of Section 144 specifically mentioned that the order of the Magistrate should set out the material facts of the case. The record of the Magistrate should disclose the existence of an emergency which called for an *ex parte* order under Sub-section (2) of Section 144 or that there was no sufficient

time to serve notice on the party affected thereby. The urgency of a case of nuisance or apprehended danger is essential to its treatment under Section 144 and the orders to be passed under the Section must be of a temporary nature as is shown clearly by sub- section (4) of the Section. Such orders are passed in the general interest of the society and may validly interfere, within the limitation laid down, with private rights of enjoyment or property.

11. It therefore appears that under Sub-section 1 of Section 144 is required to make an order in writing and state therein facts on the basis of which he was making the order thereunder. The order on the fact of it, in the instant case, does not show that the magistrate has been satisfied on the basis of the metetrial on record about the imminent danger and emergency as required under the relevant Section 144 of Cr. P.C. Moreover, in my view, the Magistrate under this Section, can only direct any person to abstain from doing certain act or to take certain order with respect to certain property in his possession or under his management, if the Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to an person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

12. It does not appear from the order of the learned Executive Magistrate in the instant case that the Magistrate was satisfied that there is any apprehension to that effect, and the said order is intended to prevent any of the injuries referred to in the Section 144 Cr. P.C. In my view, the Magistrate has acted without jurisdiction in passing the said order and the order passed was clearly contrary to the statute.

13. In that view of the matter, the instant Criminal Revisional application is allowed and the said order of the Learned Educative Magistrate dated 18.8.95 in M.P. Case No. 2217 of 1995 is set aside.

14. Special Officer in the matter has completed inventory and submitted his report which may be kept on record. He is directed to return the key and documents which he has received from the concerned parties and will thereafter stand discharged.

Learned Advocates for the parties are given liberty to take down extracts of this order.

Xerox certified copy, If applied by the learned Advocates for the parties, be supplied expeditiously.

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