

Mt. Mithan And Anr. vs The Municipal Board Of Orai And Anr. on 17 August, 1955

Equivalent citations: AIR1956ALL719, 1956CRILJ671, AIR 1956 ALLAHABAD 719

ORDER

James, J.

1. This Revision touches a fundamental question, namely, the foundation of the revisional powers of the High Court under the Code of Criminal Procedure.

The facts of the case are simple. The two applicants are alleged to be prostitutes or dancing girls of the town of Oral. The Municipal Board of Orai made a complaint to a first class Magistrate alleging that their house was being used for the purpose of habitual prostitution to the annoyance of respectable inhabitants of the locality, and requesting for action against them under Section 247 (1), U. P. Municipal Act (Act 2 of 1916).

The learned Magistrate summoned the applicants, took the evidence of the witnesses for the parties on oath, found the Board's complaint justifi-fied and passed an order under Section 247 (1) forbidding the applicants from using their house for habitual prostitution. They went up in revision to the Sessions Judge, but having failed there have now come up to this Court seeking a reversal of the Magistrate's order.

3. A preliminary objection raised on behalf of the Municipal Board is that no revision lies.

4. The revisional powers of the High Court are defined in Section 439, Criminal P. C. This provision of the law empowers the High Court to pass such orders as it may deem fit in the case of a proceeding the record of which it has called for under Section 435, or which has been reported to it under Section 438 after an examination under Section 435.

A reference to Section 435, Criminal P. C. is therefore necessary for the decision of the preliminary objection. Now, under this section the record of the proceeding has to be of any "inferior Criminal Court", from which it clearly follows that the revisional powers of the High Court are strictly limited to orders which are passed by any inferior "Criminal Court."

5. Unfortunately the term "Criminal Court" has not been defined in the Code, but the learned counsel for the Municipal Board relied on the decision of Seth J. of this High Court in -- "Madho Das v. Rex", AIR 1949 All 738 (A), in support of his contention that in a case like the present the Magistrate did not act as a Criminal Court.

Seth J. had before him an order under Section 310 (2), U. P. Municipalities Act passed by a Bench of Magistrates, and the question of maintainability of a revision against that order was specifically raised before him. In deciding whether or not the Bench had acted as a "Criminal Court" he laid down a test which appears from the following passage in his judgment :

"In the present case the Bench of Magistrates was neither trying the applicant for any offence nor was it holding any enquiry into the commission of an offence or crime. It Was not conducting any proceeding contemplated by the Code of Criminal Procedure & was not exercising any power of the Magistrate detailed in Schedule 3 of the Code. I am therefore of the opinion that the proceedings under Section 310 (2), Municipalities Act, were not criminal proceedings and therefore the record which has been called for by this Court is not the record of the proceedings of an inferior Criminal Court." An order under Section 310 (2) is analogous to one under Section 247 (1), and since there does not appear to be any other decision of this High Court, the ruling of Seth J. should be binding on me. But on behalf of the applicants doubt has been thrown on the correctness of his Lordship's ruling, and it is submitted on their behalf that his decision requires reconsideration.

6. They claim to fortify their contention with two earlier single Judge decisions of this Court --'Mt. Imaman v. Emperor', AIR 1920 All 176 (B) decided in 1920 by Banerji J., and -- 'Basanti v. Emperor, AIR 1.925 All 245 (C), decided in 1925 by Daniels J. Both were revisions against orders passed by a Magistrate under Section 247 (1), Municipalities Act. No doubt in neither case was the question of the competency of the revisions raised specifically, but the very fact that they were admitted and heard without any objection regarding their maintainability lends distinct support to the view that an order under Section 247 (1) should be deemed to have been passed by a "Criminal Court" and not by a Magistrate acting in his administrative or executive capacity or as, a persona designate.

In 'Basanti's case (C)', it should be noted in particular that his Lordship definitely held that Section 350, Criminal P. C. applied to the Magistrate's enquiry, a finding which immediately confers the status of a Criminal Court on the Magistrate who held it.

7. In deciding the point at issue it would be useful to examine the character of the official termed a "Magistrate" and the nature of the enquiry he holds under Section 247 (1) or Section 310 (2), Municipalities Act. Though the Code does not define the phrase "Criminal Court" Section 6 prescribes five classes of Criminal Courts" in India. Courts of Sessions, Presidency Magistrates and Magistrates of the first, second and third class comprise Criminal Courts. Various provisions of the Code have invested Magistrates with numerous powers. Magistrates also possess powers conferred on them by other statutes.

The term "judicial proceeding", is defined in Section 4 (1) (in) of the Code as including any proceeding in the course of which evidence is or may be legally taken on oath. Sections 247 and 310 of the Municipalities Act are divisible into two parts. The first part is an enquiry by a Magistrate into the fact whether a certain house is used as a brothel or to the annoyance of respectable inhabitants in the vicinity, or into the fact whether the occupier of any building or land refuses to allow its owner

to take a given action, and the enquiry concludes with a specific order by the Magistrate.

The second part is an independent proceeding ensuing on disobedience of the Magistrate's order made on the first part, and this second proceeding is penal. There is no offence unless and until an order has been made on the first part and has been disobeyed. In the enquiry under the first part a summons or notice has to be issued to the person concerned. Since a certain issue of fact has to be decided, evidence of both the parties has to be taken, and there is nothing in the Act to debar the Magistrate from taking the evidence of the parties on oath, and indeed it is of interest to note that in the case before me the Magistrate did administer the oath to the various witnesses produced before him.

The enquiry on the first part of both the sections is in fact in the nature of an enquiry into a nuisance, and as such resembles proceedings under Section 133, Criminal P. C. It is highly significant that, the Municipalities Act has made no provision for appeal or revision against an order passed under the first parts of Sections 247 and 310 nor does it specifically forbid a revision.

An appeal is of course a creation of the statute, but on general principles it seems difficult to accept the view that the legislature intended to clothe the Magistrate's order in a mantle of finality, from which it would follow that a Revision should not be incompetent. It has been suggested in the course of arguments that if the person concerned disobeys the Magistrate's order and is thereupon convicted under the second part of the two sections an appeal would be his right and in exercise of that right he could challenge the correctness of the Magistrate's order before the Court of appeal. This however does not appear to be the scheme of the Code.

For instance, in proceedings under Section 476, Criminal P. C. not only does the accused person have a right of appeal after his conviction, but even before his trial starts he can go in appeal against the order filing a complaint against him. This fortifies the view that the Legislature could not have intended to deprive the person concerned of a remedy against an order under the first parts of Sections 247 and 310, Municipalities Act.

Lest it be said that that order is passed in a civil or quasi civil proceeding I should like to observe that it does not even appear to have been the purpose of the legislature to confine magisterial enquiries to offences : Section 488, Criminal P. C., an enquiry by a Magistrate into a purely civil matter, is a case in point.

8. It would follow from these considerations that Seth J. -- and I say so with the greatest respect -- has in 'Madho Das' case (A)', taken too narrow a view of the functions of a Criminal Court. In my opinion, the true test of a "Criminal Court" is that the order should be passed by one of the classes of Courts enumerated in Section 6, Criminal P. C., and should be passed in a judicial proceeding, i.e., a proceeding in the course of which evidence is or may be legally taken on oath (vide Section 4 (1) (m), Criminal P. C.), but the presiding officer of the Court must not be a *persona designata*. Every such order would be open to revision by the High Court under Section 439, Criminal P. C.

9. This appears to me to be the ratio of the many decisions cited by B.B. Mitra in his "Code of Criminal Procedure" 1954 Edn., at pages 1688 to 1693. I should like to refer to two Division Bench decisions of other High Courts, -- 'Rajani Khemtavali v. Emperor', 37 Cal 287 (D), decided by the Calcutta High Court in 1910, and -- 'Emperor v. Devappa Ramappa', 43 Bom 607: (AIR 1919 Born 158) (E), decided by the Bombay High Court in 1918. The Calcutta case was under the Eastern Bengal and Assam Disorderly Houses Act of 1907, and it is interesting to note that that Act contained provisions similar to those in Section 247, U. P. Municipalities Act. There a Magistrate after an enquiry passed an order similar to that in the instant case, and in revision it was specifically objected that the High Court had no jurisdiction to deal with the matter under Section 435, Criminal P. C. Their Lordships in overruling the contention pointed out that the information which lies at the root of the proceedings is to be received by a first class Magistrate, i.e., an official whose character is determined by the Code, and that the Court which convicts under the second part of the provisions need not be the same as that which makes the order under the first part; accordingly they held that the Magistrate in passing the impugned order had acted as a Criminal Court. The Bombay case is highly instructive. Though it was under a certain section of the Workmen's Breach of Contract Act of 1859, which has since been repealed, the principles laid down by their Lordships are of general application.

The appropriate section of that Act was in two parts. The first part prescribed an enquiry into the fact whether a breach of contract had occurred, and in the event of the breach being proved that enquiry concluded with an order directing either return of the advance or specific performance of the contract. The second was an independent proceeding penal in nature. A Magistrate had made an order under the first part, and their Lordships had before them a revision of that order under Sections 435 and 439, Criminal P. C. A preliminary objection taken was that the revision was incompetent, and it was argued that the Magistrate's enquiry was in the nature of a civil proceeding. Holding the contention to be untenable their Lordships emphasised that the test is not the nature of the proceeding held by the Court but the nature of the Court in which that proceeding is held. They ruled the Magistrate's order to be subject to revision under the Code.

10. It therefore becomes doubtful "if the decision of Seth J. in -- 'Madho Das v. Rex', AIR 1949 All 738 (A), is correct, and it is necessary for that decision to be re-considered by a larger Bench. Accordingly I refer the following two questions to a Division Bench :

1. What is a "Criminal Court"?
2. Whether a Magistrate who passes an order under Section 247 (1) or Section 310 (2), Municipalities Act does so as a "Criminal Court"?

Note : After the receipt of answers to the questions referred to the Division Bench James, J. dismissed the revision application in accordance with that opinion by his order dated 1-12-1955 but granted a certificate of fitness for leave to appeal to the Supreme Court.

ORDER

11. The Division Bench to which my two questions had been referred has returned its answers. It apparently thought it unnecessary to answer my first question, but to my second question its answer is that a Magistrate passing an order under Section 247(1) of the Municipalities Act does not do so as an inferior Criminal Court within the meaning of Section 435, Criminal P. C. In view of this finding the High Court has no jurisdiction to revise the order of the Sub-Divisional Magistrate from which the applicants feel aggrieved. Their application must therefore be dismissed.

12. On their behalf Mr. B. N. Katju has made a written application praying for the grant of a certificate of fitness for leave to appeal to the Supreme Court. In my opinion this case raises important questions of law of general importance, and with great respect to the Division Bench I am of opinion that in particular the first of the two questions which I had referred to the Bench requires to be "answered."

Besides, consideration is also deserved by ray view of the true test of a "Criminal Court" expressed in my referring order of 17-8-1955, namely, that the order should be passed by one of the classes of Courts enumerated in Section 6, Criminal P. C., and should be passed in a judicial proceeding, i.e., a proceeding in the course of which evidence is or may be legally taken on oath (vide Section 4 (1) (m), Criminal P. C.) but the presiding officer of the Court must not be a persona designata. Accordingly I certify this as a fit case for appeal to the Supreme Court and grant Mr. Katju's prayer.