

(1977) 04 KAR CK 0014
In the Karnataka High Court

Basappa Durgappa Kurubar and Others

APPELLANT

Vs

The State of Karnataka and Another

RESPONDENT

Date of Decision : 18-04-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 451, 516 A
Penal Code, 1860 (IPC) — Section 34, 379, 411

Citation : (1977) CriLJ 1541

Hon'ble Judges : S.R. Range Gowda, J

Bench : Single Bench

Judgement

S.R. Range Gowda, J.—This petition raises a short but important question namely whether an order made u/s 451 Cr. P.C. 1973, by a criminal Court without notice to or hearing the party adversely affected can be reviewed, and it arises in the following circumstances : On the complaint of the 2nd respondent Hanumantha Gowda a charge-sheet for the offences Under Sections 379 and 411 r/w Section 34 of the I. P.C. was ultimately filed against the petitioners on 20-10-1976 in C.C. No. 297/76 in the Court of the judicial Magistrate, First Class, Laxmeswar, inter alia, alleging that on 21-9-1976 the petitioners committed theft of 4 she-buffaloes belonging to the 2nd respondent Haunmantha Gowda. It appears that the 4 she-buffaloes were seized and given to the custody of the policepatil during investigation. Then on 21-10-1976, the 2nd respondent's Advocate filed an application u/s 451 Cr. P. C. in the said Court for the custody of the 4 she-buffaloes. The learned Magistrate on the same day without notice to or hearing any of the petitioners made an order directing the 4 she-buffaloes to be given to the custody of the 2nd respondent till the conclusion of the trial on his executing a bond in a sum of Rs. 3000/-. It appears, till 25-10-1976, the 2nd respondent did not execute a bond as ordered and on that day the 2nd petitioner too filed an application u/s 451 Cr. P. C. stating that the 4 she-buffaloes belonged to him and they were seized from his possession and they should be given to his custody. The learned Magistrate taking the view that in view of the order already made on 21-10-1976 u/s 451 Cr. P. C. in favour of the 2nd respondent the application filed

by the 2nd petitioner u/s 451 Cr. P. C. is not tenable, dismissed the same by his order dated 18-11-1976, and it is that order that is assailed in this petition.

2. It is obvious from the above that the learned Magistrate appears to think that u/s 451 Cr. P.C. it was open to him to make an ex parte order such as the one made on 21-10-1976 and that order must be regarded as final pending conclusion of the inquiry or trial. But in my opinion, there is no warrant at all for such a view. There may be compelling circumstances to make an order u/s 451 Cr. P. C. without notice to or hearing the party adversely affected, but an order passed in that way can only be an interim order subject to vacation or variation or confirmation after hearing the parties concerned. In this connection, I may refer to the following observations in *Ramchetsing Arjunsing Vs. Deoji Kalyanji*,

It may be that circumstances of urgency may necessitate the passing of ex parte orders, but orders passed in that way can only be interim orders subject to vacation or variation or confirmation after hearing the parties concerned.

In that case their Lordships were considering an order made u/s 516-A Cr. P. C. (Old) which corresponds to Section 451 Cr. P. C. (new) and while repelling the contention advanced at the Bar that even an ex parte order must be regarded as a final order pending conclusion of the inquiry or trial, observed as above. The view I have taken also finds support in the decision in *Mohammad Yousuf Vs. Abdul Ahad Shah*, In that case, while considering the question whether an ex parte order made u/s 516-A Cr. P. C. (old) is open to review, their Lordships said thus :

Once an order is made under this section the court becomes functus officio in the matter and cannot entertain a fresh prayer for the same relief unless and until the order has been set aside. In other words the court has no power to review an order made under this section, for there is none given by the Code of Criminal Procedure nor can one be found in the absence of a direct statutory provision. On the other hand the principle of law inferable from Section 369 of the Code of Criminal Procedure is to the contrary. That section provides that the judgment of a criminal court is final so far as that court is concerned and cannot be reviewed or altered except where it is otherwise provided by the Code or any other law for the time being in force or for purposes of correcting clerical errors. The word "judgment" may imply the decision in a trial terminating in the conviction or the acquittal of accused and as such the section may not in terms apply in respect of final orders like the one made u/s 516-A Cr. P. C. which do not amount to judgments in trials but the general principles on which the Section is based would apply and such orders cannot be reviewed or altered by the court which passed them. In that view the order passed by the trial magistrate in the instant case unqualified as it was could not be reviewed or reconsidered by it. The position would be somewhat different if the order were qualified in the sense that it was subject to the objections of "the party adversely affected thereby in which case the court could perhaps legitimately reconsider the matter after hearing such party for an order passed in that way can be considered to be an

interim order subject to confirmation or modification after hearing the parties and not one made finally under the section. It may be that the circumstances of urgency necessitate the passing of an ex parte order u/s 516-A Cr. P. C. but such an order should always be subjected to the objections of the party adversely affected thereby which, when considered a final order should be made by which the earlier provisional order may either be confirmed or else suitably varied.

(underlining is mine)

It may however be asked that the provisions of Section 451 Cr. P. C. do not contemplate Issue of notice to or hearing of the parties adversely affected. But, all the same, an order made without hearing the parties adversely affected does not cease to be an ex parte order. Though Section 451 Cr. P. C. does not expressly require a notice to be issued or a hearing to be given to the parties adversely affected, as pointed out by the Supreme Court in *State Bank of India Vs. Rajendra Kumar Singh and Others*, , there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for the return of the seized property, and while dealing with this subject the Supreme Court said thus :

It is true that the statute does not expressly require a notice to be issued or a hearing to be given to the parties adversely affected. But though the statute is silent and does not expressly require issue of any notice there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order for return of the seized property.

The principle is clearly stated in the leading case of *Cooper v. Wandsworth Board of Works* (1863) 14 CB NS 180. In that case Section 76 of the Metropolis Local Amendment Act, 1855 authorised the District Board to demolish the building if it had been constructed by the owner without giving notice to the Board of his intention to build. The statute laid down no procedure for the exercise of the power of demolition, and therefore, the Board demolished the house in exercise of the above power without issuing a notice to the owner of the house. It was held by the Court of Common Pleas that the Board was liable in damages for not having given notice of their order before they proceeded to execute it. Erle C. J. held that "the power was subject to a qualification repeatedly recognised that no man is to be deprived of his property without his having an opportunity of being heard and that this had been applied to many exercises of power which in common understanding would not be at all a more judicial proceeding than would be the act of the district board in ordering a house to be pulled down". Wills J. said that "the rule was of universal application and founded upon the plainest principles of justice and Byles J. said that "though there are no positive words in a statute requiring that the party shall be heard yet the justice of the common law will supply the omission of the legislature. The same principle has been reaffirmed in recent case *Ridge v. Baldwin* (1963) 2 WLR 935. In that case, Section 191 of the Municipal Corporations Act 1881, provided that a watch committee may at any time suspend or dismiss any borough constable whom

they think negligent in the discharge of his duty or otherwise unfit for the same. The appellant who was the chief constable of a borough police force was dismissed by the watch committee on the ground that he was negligent in the discharge of his duties as chief constable. He brought an action against the members of the watch committee by stipulating that his dismissal was illegal and ultra vires the powers. It was held by the House of Lords that the decision of the watch committee was ultra vires because they dismissed the appellant on the ground of neglect of duty and as such they were bound to observe the principles of natural justice by informing him of the charges made against him and giving him an opportunity of being heard. The same principle was applied by this Court in Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others, It was held in that case that an examination committee of the Board of Secondary Education in Uttar Pradesh was acting quasi-judicially when exercising its power under Rule 1(1) of Chapter VI of the Regulations dealing with cases of examinees using unfair means in examination halls and the principles of natural justice which require that the examinee must be heard will apply to the proceedings before the Committee. Though there was nothing express one way or the other in the Act or the Regulations casting a duty on the committee to act judicially, where no opportunity whatever was given to the examinees to give an explanation and present their case before the Committee the Resolution of the committee cancelling their results and depriving them from appearing at the next examination was defective. Applying the principle to the present case, it is manifest that the High Court was bound to give notice to the appellant before reversing the order of the Sessions Judge directing the disposal of the property u/s 517 of the Code of Criminal Procedure. As no such notice was given to the appellant the order of the High Court dated 5th April 1963 is vitiated in law.

(underlining is mine)

The above enunciation makes it abundantly clear that though Section 451 Cr. P. C. does, not expressly require a notice to be issued or a hearing to be given to the parties adversely affected, the parties adversely affected must be heard. In the present case, the 2nd petitioner, it is obvious, was not heard at all before the order was made on 21-10-1976, The said order being an ex parte order, for the reasons stated above, can be reviewed by the Court which made it, of course, after hearing the party or parties adversely affected by the said ex parte order, The view taken to the contrary by the learned Magistrate, therefore, cannot be sustained.

3. In the result, this petition is allowed, the impugned order of the learned Magistrate dated 18-11-1976 is set aside, and he is directed to take the application of the 2nd petitioner on file and dispose of the same in accordance with law and in the light of the observations made above.