

(1978) 04 KAR CK 0035
In the Karnataka High Court
Case No : CrIP. 437 of 1977

Charlingappa Sharanappa and Others

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 12-04-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 451

Citation : (1978) 2 KarLJ 208

Hon'ble Judges : Nesargi, J

Judgement

1. This petition under Sec. 482 of the CrIPC is directed against the order dt. 24-9-1977 passed by the Judicial Magistrate First Class, Chincholi, in CC. 287/3/1977.

2. The pertinent facts may be narrated as follows: The three petitioners were accused in CC. 287/3/1977 of an offence under Sec. 379 of the IPC. They filed an application under Sec. 451 CrIPC before the said Magistrate requesting that the property seized i.e., electric motor and the accessories, and produced before the Court in the said case, be handed over to their custody. Their request was granted by an order dt. 13-7-77. By 24-9-77 respondent-2 Saranappa claiming to be the owner of the said property and entitled to possession thereof, filed an application under Sec. 451 CrIPC before the Magistrate, claiming that the possession of the said property be handed over to him as the same had been stolen from his possession. The learned Magistrate by his order now impugned has directed that arguments may be advanced on behalf of the petitioners and respondent-2 afresh "touching the right to have interim custody of the property seized", in view of the claim made by respondent-2.

3. Sri B.V. Deshpande, learned advocate appearing on behalf of the petitioners urged that by hearing afresh on the application made by respondent-2, the Magistrate would be exercising powers of review in regard to his earlier order passed on 13-7-1977 and such a power is not vested in the Magistrate and as such the direction made by the Magistrate should be quashed.

4. Respondent-2 has remained ex-parte though served with notice of this petition.
5. Sri A.B. Patil learned High Court Government Pleader urged that the direction of the Magistrate and any order that the Magistrate will pass subsequent to hearing arguments, would not amount to review of the order passed by him on 13-7-1977.
6. The learned Magistrate has based his order on the decision in Basappa Durgappa Kurubar v. State of Karnataka, 1977 (1) KarLJ. 432(Para 3), wherein it has been field as follows:
- "There may be compelling circumstances to make an order under Sec. 451 Cr. PC. 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."
- This view is based on the principle laid down by the Bombay High Court in Ramchetsing Arjunsing v. Deoji Kalyanji, AIR. 1942 Bom. 42. It has been further held in Basappa's case, 1977 (1) KarLJ. 432(Para 3), as follows:
- "Though Sec. 451 Cr. PC. 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." This view is based on the principle laid down by the Supreme Court in State Bank of India v. Rajendra Kumar Sing, AIR. 1969 SC. 401.
7. There can be no doubt in the case on hand that as against, the petitioners, who were the accused, trial for an offence under Sec. 379 IPC. was pending when the order dated 13-7-1977 was passed and when the direction now impugned was passed on 24-9-1977 and also that the property had been produced before Court when the order dated 13-7-1977 was passed and the property was given to the custody of petitioner-2. It is hence clear that the order dated 13-7-1977 was passed in exercise of the powers conferred on the Court by Sec. 451 Cr.PC. and in fact, it is seen that the petitioners had filed an application under Sec. 451 Cr.PC. praying that the custody of the property should be given to their possession.
8. By the order dated 13-7-1977 the Magistrate directed the custody of the property in favour of petitioner-2 on his executing a bond for a sum of Rs. 2,000 and undertaking to produce the same property before Court as and when required during trial.
9. The facts in Basappa's case, 1977 (1) KarLJ. 432(Para 3), were that an order under Sec. 451 Cr.PC. had been passed by the Judicial Magistrate First Class, Laxmeshwar in regard to 4 she-buffaloes, which were the subject matter of theft and in regard to which offence investigation was going on and that the she-buffaloes seized were given to the custody of the police Patil pending investigation. The charge-sheet was filed on 20-10-1976 in CC. No. 297 of 1966 against Basappa and others. Then on 21-10-1976 the complainant filed an

application under Sec. 451 Cr.PC. praying that custody of the four she buffaloes should be given to him. The Magistrate passed an order on the same day without notice to Basappa and the co-accused directing that the four she-buffaloes were to be given to the custody of the complainant who was respondent-2 before this Court in the said case. Of course, a condition that a bond for Rs. 3,000 was to be executed by the complainant was imposed. As the complainant did not execute the bond till 25-10-1976, Basappa and the co-accused filed an application under Sec. 451 Cr.PC. before the Magistrate for vacating the order dated 21-10-1976. But that application was dismissed by an order dated 18-11-1976 and that order was challenged before this Court.

10. From the facts narrated above, it is plain that the original order passed by the Magistrate though it purported to be under Sec. 451 Cr.PC. could not have been made under Sec. 451 Cr.PC. as there was no enquiry or trial before the Magistrate, Laxmeshwar and the four she-buffaloes had not been produced before the Magistrate. The order dated 18-11-1976 passed by the said Magistrate might have been under Sec. 451 Cr.PC.

11. Whatever it is, the principle of law upheld in the above decision is that an order under Sec. 451 Cr.PC. without notice to or hearing of the parties adversely affected can only be an interim order and such an order is subject to vacation or variation or confirmation after hearing the parties concerned and that the parties adversely affected must be given an opportunity to be heard. These principles are based on the ratios laid down in Ramchetsing's case, AIR. 1942 Bom. 42 and State Bank of India's case, AIR. 1969 SC. 401.

12. The ratio in State Bank of India's case, AIR. 1969 SC. 401 was in regard to disposal of property after the conclusion of the trial under Sec. 517 Cr.PC. 1898, which is equivalent to Sec. 452 Cr.PC., 1973.

13. The Code of Criminal Procedure, 1898 will be referred to as the Old Code and the Code of Criminal Procedure, 1973 will be referred to as the New Code in the course of this order.

14. The ratio of the decision in Ramchetsingh's case, AIR. 1942 Bom. 42, was not laid down on considering the provisions in Sec. 516A of the old Code equivalent to Sec. 451 of the new Code. Their Lordships of the Bombay High Court have on page-43 of the said decision made it absolutely clear that the facts before them disclosed that neither an enquiry nor trial within the meaning of Sec. 516A of the old Code was pending before the Magistrate and the objection on that score was not acceptable. What principle their Lordships would have laid down if the facts before them had disclosed that an enquiry or trial within the meaning of Sec. 516A of the Old Code was pending before the Magistrate concerned, cannot be stated.

15. Section 516A of the Old Code reads as follows:

"Order for custody and disposal of property pending trial in certain cases.-When

any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, or if it is otherwise expedient so to do, the Court, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

Section 523 of the Old Code reads as follows:

"Procedure by police upon seizure of property taken under Section 51 or stolen-

(1) The seizure by any police officer of property taken under Sec. 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

(2) Procedure where owner of property seized unknown.-If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall in such case, issue a proclamation specifying the articles of which such property consists and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

Section 451 of the New Code reads as follows:

"When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

Section 457 of the New Code reads as follows: "(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on Such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case,

issue a proclamation specifying the articles of which such property consists and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

16. A plain reading of the aforesaid provisions discloses that the words "the person entitled to the possession thereof" occurring in S. 4 of the New Code and Sec. 523 of the Old Code do not occur in Sec. 451 of the New Code and S. 516A of the Old Code. Therefore, while considering the question of custody of the property under Sec. 451 of the New Code, the Magistrate is to be guided by as to what would amount to proper custody of the property for the purposes of the trial. It is not required nor is it feasible for the Court to enter into the question as to who is the person entitled to the custody of the property or possession of the property produced before it during an inquiry or trial. While acting under Sec. 523 of the Old Code equivalent to Sec. 457 of the New Code, the Magistrate is required to consider as to who is the person entitled to the possession of the property reported to have been seized by the police, but not produced before a Criminal Court during an enquiry or trial. Therefore, during an enquiry or trial, the Magistrate is mainly concerned with the proper custody of the property so that the property will be always available to the Court for the purposes of the enquiry or trial that it has to proceed with. That is the object behind Sec. 451 of the New Code. That object was not for consideration before the Bombay High Court in Ramchetsing's case, AIR. 1942 Bom. 42 as Sec. 516A of the Old Code was not being considered by then Lordships.

17. Under Sec. 523 of the Old Code and Sec. 457 of the New Code, a Magistrate directs possession of property, reported to have been seized, to be given to a person entitled to possess the same. Thus, it is seen that such person secures possession of the property in his own right. Under Sec. 516A of the Old Code and Sec. 451 of the New Code, the Court gives custody of the property produced before it to a person as it would be proper custody. Such person does not get custody of the property in his own right. His custody is on behalf of the Court.

18. It is no doubt true that an order passed by a Magistrate under Sec. 451 of the New Code will be in force during the pendency of the trial and after the conclusion of the trial an order under Sec. 452 of the New Code will be passed by the Magistrate. It is the duty of the Magistrate in view of the wordings in Sec. 451 of the New Code, to bear in mind at every stage during enquiry or trial, that the property produced before him is in proper custody. It is further his duty to see in such circumstances that the property produced before him remains in proper custody till the trial of enquiry is concluded. Even if any party interested in having possession of the property so produced before a Magistrate in an enquiry or trial approaches the Magistrate for custody of the property, the Magistrate can lock into the facts and circumstances of the case only with the object of finding out whether an order already passed in regard to the custody of the property would, in the facts and circumstances of the case, properly serve the purpose of Sec. 451 of the New Code in regard to the proper custody of the

property during the enquiry or trial. He is not to be guided by the claims of parties that each one of them is entitled to the possession of the property by virtue of various facts and circumstances such as ownership etc. Hence, the order passed under Sec. 451 of the New Code, cannot at all be considered to be an order passed in the interests of a party or adverse to the interests of a party. It is simply an order for proper custody of the property to enable the enquiry on trial to go on smoothly before the concerned Magistrate.

19. Sec. 451 of the New Code further makes it abundantly clear that if a Court otherwise finds that it is expedient so to do, it may after recording such evidence as it thinks necessary, order the property produced before it during an enquiry or trial to be sold or otherwise disposed of. It also provides that if a property produced during an enquiry or trial before a Court is subject to speedy and natural decay, the Court may, after recording such evidence as it thinks necessary, order the property to be sold or otherwise disposed of. Taking for example a case of theft of bullocks it can be seen easily because of the provision in Sec. 451 of the New Code that if the Magistrate concerned who had earlier ordered custody of the bullocks to be with a police patil of the village and later on, during enquiry or trial, which might have prolonged for a number of years, finds that the bullocks had not been taken care of properly by the police patil and were likely to die in a short time, may on his own change his mind on the basis of the evidence recorded as deemed fit by him and direct disposal of the bullocks by sale and depositing of the sale proceeds in the said case in his Court. Nothing in law prevents the Magistrate acting in this manner though it might be against the interest of the complainant in the said case. Therefore, the object to be served by Sec. 451 of the New Code equivalent to Sec. 516A of the old Code is quite different from the one to be served by Sec. 457 of the New Code equivalent to Sec. 523 of the Old Code. There is good deal of distinction between the two objects. Interest of a party has by itself no relevance while considering Sec. 451 of the new Code.

20. In view of the foregoing reasons. I hold that the petitioners cannot be permitted to contend that the Magistrate has no power to enquire into the question in regard to the custody of the property. But the view of the Magistrate expressed in the light of the decision in Basappa's case, 1977 (1) KarLJ. 432(Para 3), that argument should be advanced afresh "touching the right" to have interim custody of the property seized, cannot be upheld. The Magistrate is at liberty to consider the question of custody of the property at any stage in the proceeding in the light of the observations made in the body of this order pertaining to the object to be served by Sec. 451 of the New Code.

21. This revision petition is dismissed subject to the aforementioned observations.