
(1981) 11 RAJ CK 0010
In the Rajasthan High Court

Mst. Narbada and Others

APPELLANT

Vs

Mohammad Hanif and Another

RESPONDENT

Date of Decision : 16-11-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 395, 397, 451, 452
Penal Code, 1860 (IPC) — Section 323, 336, 456

Citation : (1982) CriLJ 2330 : (1982) RLW 411

Hon'ble Judges : K.S. Sidhu, J

Bench : Single Bench

Judgement

K.S. Sidhu, J.—This order will deal with a reference made by the Additional Sessions Judge, Dausa, purporting to have done so, u/s 395(2) of the Criminal P.C. 1973.

2. The facts material for disposal of this reference may be shortly stated here. On December 25, 1980, one Mohamad Hanif gave information to the officer in charge of the police station, Dausa, alleging that he was in occupation of a shop as a tenant of accused Nar Singh Prasad, that he had locked the shop on December 24, evening, after the day's business was over, and that when he returned to it on December 25, morning, he found that his wares were lying outside the shop and it had been bolted from inside. Nar Singh Prasad, Ganga Sahai, father of Narsingh Prasad and Narbada Devi, wife of Narsingh Prasad, the three accused persons, began to throw stones from upstairs. One Shiv Kumar, a shopkeeper in the neighbourhood, sustained an injury with one of the stones hitting him. Mohd. Hanif further alleged that the accused had effected entry into his shop by making a hole through its rear wall which divides it from the shop of the accused.

3. The police registered a case (F.I.R. No. 272 of 1980) under Sections 323, 336 and 456 I.P.C. On investigation, the police filed a charge-sheet against all the three accused. The Judicial Magistrate first class, Dausa took cognizance of the offences punishable under Sections 323, 336 and 456 I.P.C. against all the three

accused. The case is still pending trial in his court.

4. It may also be mentioned in this context that the police had seized the goods lying outside the shop in dispute. The shop was also locked and sealed by the police.

5. Mohd. Hanif made an application, dated, January 27, 1981, for an order directing the return of the seized goods and restoration of the possession of the shop to him.

6. Narbada Devi, one of the accused persons in this case, contested the aforesaid application claiming that the shop in dispute along with the adjoining room had been in her possession since their purchase by her in 1977 and that the police had illegally sealed this shop and the room on December 25, 1980. She made a rival claim for delivery of possession of the shop to her. Curiously enough, she also pleaded that the court had no jurisdiction u/s 451 Cr. P.C. to deal with immovable property and make any order regarding its custody pending trial in the case against her and the other accused.

7. By his order dated February 6, 1981, the trial Magistrate repelled the objection that u/s 451 Cr. P.C. he had no jurisdiction to make an order regarding custody pendente lite of immovable property seized or attached by the police. He further held, prima facie, that the shop in dispute was in possession of Mohd. Hanif as a tenant of Narbada Devi on the day when it was locked and sealed by the police. As for the adjoining room, he held that it had been in possession of Narbada Devi at that time. Consequently, the learned Magistrate made an order, directing delivery of possession of the shop to Mohd. Hanif and of the room to Narbada Devi pending the conclusion of the trial.

8. Narbada Devi and other two accused persons in the case made an application for revision before the Additional Sessions Judge, Dausa, challenging the order of the Magistrate directing delivery of possession of the shop in dispute to Mohd. Hanif during the pendency of the trial.

9. In his judgment dated March 18, 1981, learned Additional Sessions Judge has recorded his findings as under:

(1) No valid order can be made by a Magistrate u/s 451 Cr. P.C. during enquiry or trial for custody of immovable property,

(2) The Order dated February 6, 1981, made by the Magistrate directing restoration of possession of the shop in dispute to Mohd. Hanif is illegal and without jurisdiction, it deserves to be set aside on that score.

Learned Additional Sessions Judge has, however, refrained from setting aside the said order because, as he says, Mohd. Hanif had already taken possession of the shop in dispute pursuant to that order and the learned Judge felt that he had no jurisdiction, as a revisional court, to recover possession from Mohd. Hanif and thus restore the status quo ante as it existed prior to February 6, 1981. He has

therefore made this reference with a recommendation that the order dated February 6, 1981, passed by the Magistrate be set aside and the shop in question, as he says, "be placed on the same position as it existed prior to February 6, 1981, or any appropriate order or direction as the Hon"ble High Court thinks fit in the circumstances of the present case may be given to this Court for further guidance.

10. After hearing Mr. S. K. Jain, learned Counsel for the revision-petitioner, and giving the matter my careful consideration, I am of opinion that this reference is wholly misconceived and should therefore be declined. Now that Mohd. Hanif has been given possession of the shop in dispute, as an interim measure, until the conclusion of the trial against the revision-petitioners, there was hardly (any) justification for the learned Additional Sessions Judge to entertain an application for revision for setting aside the said interim order. One fails to understand as to what ends of justice are going to be served by the proposed recovery of possession of the shop in dispute from Mohd. Hanif and of the adjoining room from the revision-petitioners, and by their being put under the look and seal of the court once again. Moreover, the learned Judge does not seem to have realised that, acting in the exercise of his revisional jurisdiction, he could not have made a valid reference to this Court u/s 395(2) Cr. P.C. Sub-section (2) of Section 395 reads:

A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of Sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

It will be seen that, in order that a Sessions Judge may make a valid reference u/s 395(2) Cr. P.C. it must be shown that the question of law referred for decision of the High Court arises in a case pending before him. Now if a Sessions Judge acting u/s 397 Cr. P.C. calls for the record of any case pending before a Magistrate for the purpose of satisfying himself as to the correctness of any order passed by the Magistrate, the calling of such record by the Sessions Judge does not put an end to the pendency of the case in the court of the Magistrate and transfer such pendency to the court of session. In other words, the mere event that the Sessions Judge has entertained an application for revision u/s 397 Cr. P.C. and called for the record of any case pending in any inferior criminal court will not thereby transfer the pendency of the case to his court and clothe him with jurisdiction and power to make a reference on a question of law arising in the hearing of such revision.

11. Even on merits, it is difficult to accept the view of the learned Additional Sessions Judge to the effect that the word "property", as used in Section 451 Cr. P.C. is confined merely to movable property and that, therefore, it does not cover immovable property like a shop with which we are concerned in this case. I see no good reason for excluding, from the ambit of "property" immovable property like a shop or a building. It is argued that since shop or building is incapable of

being produced before the court, it cannot possibly be covered by Section 451 Cr. P.C. which speaks of production of property before the court as a condition precedent for the court making an order for its custody under that section. The fallacy of this argument is obvious on the face of it, for it proceeds on the erroneous assumption that production of property before the court, as envisaged by Section 451, means physical production of property in the court. Production of property before the court is certainly not the same thing as physical production of property in the court. Can a heavy ocean freighter, notwithstanding the fact that it is movable, be physically produced in a court? And, for that matter, can a heavy motor vehicle, be physically produced in a court located in a small room on the 10th floor of a multi-storeyed building? The answer is obviously "no", but even then it cannot be questioned for a moment that Section 451 Cr. P.C. does apply to this kind of property. It may be said about such property that its production before the court may be effected either by producing the requisite documents, before the court or by taking the presiding officer of the court to the spot where the property is, and thus enabling him to take it in the symbolical custody of the court. This is obviously a plausible argument, but then it equally applies to immovable property, strictly so called.

12. If there was any doubt about the meaning of the expression "property", as used in Section 451 the newly added explanation to this section ought to have removed it. The explanation reads as under:

Explanation. For the purposes of this section, "property" includes:

(a) property of any kind or document which is produced before the court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

Both the Clauses (a) and (b) of this explanation make it clear that "property" includes property of any kind regarding which an offence appears to have been committed. Clause (a) would show that such property, for being "property" within the purview of the section, may either be produced before the court or may be in custody of the court. An immovable property which is seized and sealed by the police during the investigation, as was the case in respect of the shop in dispute in the instant case, becomes custodia legis immediately on the Magistrate receiving the police report in that behalf and taking cognizance of the case on that basis.

13. Reference may now be briefly made to case law on the subject. In *Narasingha Rou Vs. Sricharan Panda and Others*, the Orissa High Court construed the word "property" in Section 517(1) of the Cr. P.C. 1898, corresponding to Section 452 of the present Code, as including both movable and immovable property. A similar view was taken by the Madhya Pradesh High Court in *Hajjiwakhani Vs. Gulabchand Harakchand and Another*, The Andhra Pradesh High Court, however, took a different view in *Ramamurthy v. State of Andhra Pradesh*

AIR 1962 AP : 1962 Cri LJ 24. The Orissa and Madhya Pradesh view is in accord with the view expressed in this judgment. The contrary view held by the Andhra Pradesh High Court in Ramamurthy's case (ibid) is. it is submitted with respect, not correct.

14. For all these reasons, this reference is declined. Learned Additional Sessions Judge may be informed accordingly. The record of the case which was sent by him along with his letter of reference may be returned directly to trial court for further proceedings in the trial which has so far been held up on account of this reference.