
(1968) 09 CAL CK 0010
In the Calcutta High Court
Case No : Criminal Revision No. 773 of 1968

Shamimal Hoda	Vs	APPELLANT
The State of West Bengal		RESPONDENT

Date of Decision : 06-09-1968

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 341, 380, 448, 457

Citation : 74 CWN 701

Hon'ble Judges : N.C. Talukdar, J

Bench : Single Bench

Advocate : Ajit Kumar Dutt and Dilip Kumar Dutt and Mrs. Maya Roy with N.K. Mitra for the Defacto-Complainants, for the Appellant; Balai Chandra Roy for the State, for the Respondent

Final Decision : Allowed

Judgement

N.C. Talukdar, J.—This Rule is against three orders passed by Shri K.J. Sen Gupta, Chief Presidency Magistrate, Calcutta in Section H.C. Case No. 379 dated 5.6.68 under sections 148 / 341 / 448 / 457 / 380 of the Indian Penal Code, namely, the order dated 6.6.68 enlarging the accused-petitioner on a bail of Rs. 750/- on condition that he will not go to the disputed room in question and would report to the Investigating Officer; the order dated 19.6.68 whereby the Chief Presidency Magistrate, Calcutta, did not find any reason to revise his previous order and rejected the application filed on 13.6.68 together with the certified copy of the order of interim injunction passed by the Judge, 7th Bench, City Civil Court, praying that the key of the disputed room may be made over to him for giving effect to the order of the City Civil Court; and the order dated 11.7.68 whereby the Chief Presidency Magistrate refused to revise his order passed previously on 6.6.68 and to direct the police to make over the key of the disputed room to the accused-petitioner rejecting thereby the petitioner's prayer as contained in his application dated 8.7.68 for the delivery of the key of the disputed room so that he may enter into the same and remain in occupation

thereof till the disposal of the case. The background of the facts leading on to the present Rule is a chequered one. The case of the accused-petitioner Shamimul Hoda inter alia is that he and his elder brother one Ilmul Hoda are the two partners of M/s. Savan Plastic, a firm carrying on the business of manufacturing plastic goods since June, 1966 with the help of power on the ground-floor of 3, Kshetradas Road, Calcutta, upon payment of a monthly rent to the de facto complainant and others, the joint owners of the said premises. Rent receipts were issued by the landlords in favour of the petitioner from May, 1966 upto June, 1967 when according to the petitioner, the landlords having put off granting such rent receipts upon various pretexts, the petitioner apprehended troubles and started depositing rents with the Rent Controller, Calcutta to the credit of the said landlords from July, 1967. The petitioner's case further is that there are some costly machineries in the said ground-floor room at premises No. 3, Kshetradas Road, Calcutta, as also other pieces of furniture and fixtures belonging to the petitioner and his brother for the purpose of carrying on their trade. There has been a regular payment of the licence fee to the Corporation of Calcutta on account of the above-mentioned business and a separate electric meter also stands in the name of the petitioner and his brother.

2. The long-standing dispute between the landlord and the tenant unfortunately came to a head on 4.6.68 when the petitioner had left the said factory room after keeping the same under lock and key. On coming back at about 7 p.m. he was surprised to find that during his absence the room was broken open and movables were thrown away in the courtyard while some other machineries of the petitioner were kept inside the room. The petitioner's case is that thereupon he put back his belongings inside the room and occupied the same. Upon enquiry he came to know that the landlords had filed a suit in the High Court being O.S. Suit No. 2346 of 1967 against Rahamatulla said to be a former tenant and/or occupier of the aforesaid room and obtained an ex-parte decree for recovery of possession against him on 15.3.68. In execution of the said decree, the de facto complainant had taken possession of the room through the Sheriff of Calcutta and others during his absence on 4.6.68. The moveables were thrown out but the fixtures remained intact. The petitioner was surprised because he was not a party to the said suit and the person against whom the decree is said to have been obtained is, according to the petitioner, neither a tenant nor an occupier, at least since after May, 1966, and therefore the tenancy or possession of the petitioner was not affected in any way whatsoever. After the petitioner had so taken back possession, one of the landlords, Md. Israil, lodged an information with the Bowbazar Police Station against the petitioner and his brother averring inter alia that in execution of the decree of the High Court he had obtained possession of the disputed room and thereafter had kept some articles inside it, but the petitioner and his brother along with other rowdy persons had forcibly broken open the lock, removed some of his articles and had taken forcible possession of the disputed room. The police thereupon arrived and arrested the petitioner on 5.6.68. They also seized the belongings of the petitioner found

inside the room on a seizure list, and further put a lock on the door, preventing the petitioner thereby to enter therein and carry on his trade. According to the petitioner, the cheque books, the ration cards of the petitioner and others which were not included in the said seizure list, were nonetheless lying in the disputed room. The petitioner was thereafter produced before the Chief Presidency Magistrate, Calcutta, who by his order dated 6.6.68 enlarged him on a bail of Rs. 750/- on condition that he will not go to the room in question and report to the investigating Officer.

3. On 10.6.68 a suit being T.S. No. 354 of 1968 was filed before the Judge, 7th Bench, City Civil Court, Calcutta, by the petitioner as the plaintiff against the landlords Md. Israil and Sk. Serajul Haque praying for a declaration that the plaintiff is the lawful tenant in respect of the aforesaid room at a rental of Rs. 45/- per month having, therefore, the right to use and occupy the same and for a permanent injunction restraining the defendants, their agents and servants from dispossessing the petitioner from the said room and/or in any way interfering with the peaceful possession thereof. By an order of the same date, Shri D.P. De, Judge, 7th Bench, City Civil Court, Calcutta, passed an ad interim injunction on the defendants "restraining them, their agents and servants from ousting and dispossessing the plaintiff from the suit room and/or interfering with the peaceful enjoyment of the said room till the disposal of the Rule". A copy of the said order of interim injunction has been attached to the petition upon which the present Rule was issued and is marked as annexure "B.", On 13.6.68 a material application was filed before the Chief Presidency Magistrate, Calcutta by the petitioner along with the certified copy of the above-mentioned order of interim injunction passed by the Judge, 7th Bench, City Civil Court praying that the key of the disputed room may be made over to him for giving effect to the said order of the City Civil Court. But the Chief Presidency Magistrate of Calcutta by his order dated 19.6.68 did not find any reason to revise his previous order and rejected the said application. On 8.7.68 the petitioner again filed an application before the Chief Presidency Magistrate praying inter alia that the Officer-in-charge of the Bowbazar Police Station may be directed to make over possession of the key of the disputed room to the petitioner and that he may be allowed to enter the room and occupy the same till the disposal of the case pending before the said Magistrate. But the Chief Presidency Magistrate, Calcutta, by his order dated 11.7.68 refused to revise his order dated 6.6.68 and to direct the police to make over the key to the accused-petitioner so that he may be allowed to enter the room and occupy the same till the disposal of the case. These orders have been impugned and form the subject-matter of the present Rule.

4. Mr. Ajit Kumar Dutt, Advocate (with Mr. Dilip Kumar Dutt, Advocate) appearing on behalf of the petitioner has made a four-fold submission. The first contention of Mr. Dutt is that the order dated 6.6.68 passed by the Chief Presidency Magistrate, Calcutta, is not a proper order in law inasmuch as, amongst others, as has been held by this Court in several decisions, a conditional bail is not

warranted by law. The second contention raised by Mr. Dutta is that the procedure adopted by the police during the investigation is unknown to law and de hors chapter XIV of the Code of Criminal Procedure and the same has vitiated the investigation and prejudiced the petitioner. Mr. Dutt submits in this context that there is no provision in law under chapter XIV of the Code or elsewhere whereby the police can put a lock on the room searched, tinkering thereby with the right of the citizen to enter into the room in his possession and carry on his trade or other occupations, without obtaining any previous permission of the court in that behalf. Mr. Dutta further contended that in this case where the police was investigating a case of trespass and theft and some similar offences, even the court could not pass such orders and neither the provisions of section 516A nor even of section 523 of the Code, would warrant the same at this stage. The third submission of Mr. Dutt is that the failure on the part of the Chief Presidency Magistrate, Calcutta, to take into consideration properly the effect of the interim order of injunction passed by the civil court has resulted in a failure of justice; that it was just and fair that the Criminal Court should have given effect to the said order of interim injunction passed by the civil court; and that the reasons given by the Chief Presidency Magistrate for not doing so in his order dated 11.7.68 are reasons which are neither sustainable in law nor on merits. Mr. Dutt further contended in this context that in such a case even the civil court would have appointed a Receiver, because machines have to be worked and workers are to be paid and the question ultimately is one of management of a factory. The failure to notice the same has resulted in a failure to prevent an undue interference with the fundamental rights of the citizen to carry on his trade, as guaranteed under the Constitution of India. The fourth and the last submission of Mr. Dutt is that in any event, on a balance of convenience and in the interests of justice, the possession of the key and consequently of the room in dispute should be made over to the petitioner's custody on a proper and sufficient bond, pending the completion of the investigation going on or the disposal of the case, if any, started thereafter, so that he may not be prejudiced in carrying on his trade and earn his livelihood.

5. Mr. Balai Chandra Roy, Advocate, appearing on behalf of the State has submitted in the first instance that upon a proper interpretation of the interim order of injunction passed by the Judge, City Civil Court, Calcutta, it is limited in its application to the defendants thereunder as also their agents and servants and not the Chief Presidency Magistrate of Calcutta or the police. With regard to the objection raised by Mr. Ajit Kumar Dutt relating to the procedure adopted by the police during the investigation under chapter XIV of the Code of Criminal Procedure being wholly bad and repugnant, Mr. Roy has submitted that there is undoubtedly no clear or specific provision in law for locking up a disputed room in the facts and circumstances like this, excepting perhaps in aid of investigation under chapter XIV of the said Code. Mr. Roy, in his fairness, however conceded that he could not ultimately support the order passed by the Chief Presidency Magistrate of Calcutta, in disregard of the order of injunction as passed by the

Judge, 7th Bench, City Civil Court, Calcutta which should prevail, whether it was final or temporary. Mr. Roy finally consented to the prayer as made by Mr. Dutt on behalf of the accused-petitioner that in any event, without any prejudice to the ultimate rights of the respective parties, the accused-petitioner may be allowed to get back the possession of the key and thereby of the room in dispute upon a proper bond so that he may carry on his trade without let or hindrance till the completion of the investigation or the disposal of the case, if any, based thereupon.

6. I will now proceed to determine the points raised in the light of the submissions made by the learned counsel appearing on behalf of the respective parties and also the materials on the record. So far as the first contention made by Mr. Dutt relating to the order dated the 6th June, 1968 is concerned, it relates to the legality and propriety of the terms and conditions of bail and as such this Single Bench cannot determine the same. There is considerable force, however, behind the second submission of Mr. Dutt relating to the legality and propriety of the procedure adopted by the police during the investigation under Chapter XIV of the Code of Criminal Procedure. Mr. Dutt has pinpointed in particular that the police have transgressed very much the bounds of section 165 of the Code of Criminal Procedure, a section meant to be strictly construed. In this context Mr. Dutt has referred to several cases. The first one being the case of (1) Thakur Tanti Vs. The State, wherein Mr. Justice N.L. Untwalia has observed that when a police officer wants to make a search, in exercise of his powers u/s 165 of the Code of Criminal Procedure, he must satisfy by legal and reliable evidence that he had gone there to exercise his power after fulfilment of all the requirements of the section. If the procedure adopted by the officer for the search of the house is not strictly legal as when he fails to comply with the requirements of section 165 of the Code of Criminal Procedure in the matter of making a record and sending a copy of it to the Magistrate as required by sub-section (5), the accused cannot be held to be guilty of the offence charged. The next case that has been referred to by Mr. Dutt is the case of (2) The State of Rajasthan Vs. Rehman, . Mr. Justice Subba Rao (as His Lordship then was), delivering the judgment of the court, observed that section 165 of the Code lays down various steps to be followed in making a search. The recording of reasons is an important step in the matter of search and to ignore it is to ignore the material part of the provisions governing searches. If that can be ignored, it cannot be said that the search is carried out in accordance with the provisions of the Code of Criminal Procedure; it would be a search made in contravention of the provisions of the Code. In a later decision by the Supreme Court in the case of (3) The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., , Chief Justice Wanchoo, who delivered the judgment of the court, observed at page 66 of the said decision: "These safeguards are-(i) the empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction, (ii) he must be of the opinion that such thing cannot be otherwise got without undue delay (iii)

he must record in writing the grounds of his belief, and (iv) he must specify in such writing so far as possible the thing for which search is to be made. After he has done these things, he can make the search. These safeguards, which in our opinion apply to searches under subsection (2) of section 41 of the Madras General Sales Tax Act 1 of 1959 also clearly show that the power to search under sub-section (2) is not arbitrary".

7. I respectfully agree with the said observations of Their Lordships of the Supreme Court and of the High Court and I hold that in this case there has been a clear non-conformance to the said mandatory provisions, resulting in the consequent orders being vitiated and the accused-petitioner being prejudiced. There is no provision in Chapter XIV of the Code of Criminal Procedure, whereunder the police in this country can put on a lock on a room which is searched. Before the rights of the citizen to carry on his trade are tinkered with, it was the bounden duty of the police to follow the procedure as laid down in law and a non-conformance thereto would not only be a nonconformance to the safeguards as laid down by the legislature in this behalf but also a non-conformance to reason and to justice. There was no reason for an undue haste and the police could easily have taken recourse to the procedure for obtaining the necessary orders in this behalf from the court as provided for in the Code. One looks in vain for any such attempt and the impression is inescapable that everything was done in hot haste and in a cavalier manner.

8. The third submission of Mr. Dutt is also a relevant one. Mr. Dutt has contended in this context that the failure on the part of the Chief Presidency Magistrate, Calcutta to take into consideration properly the effect of the interim order of injunction passed by the civil court has resulted in a failure of justice; and that it was just and fair that the criminal court should have given effect to an order of interim injunction passed by the civil court, in the absence whereof the petitioner has been greatly prejudiced. The ultimate remedy as suggested by the Chief Presidency Magistrate Calcutta viz., to proceed under order 21 Rule 100 of the CPC has not been substantially departed from. The petitioner as the plaintiff filed a material suit being Title Suit No. 354 of 1968 on 10.6.68 before the Judge, 7th Bench, City Civil Court, Calcutta, against the landlords, the de facto-complainants in the case, praying for a declaration that the plaintiff is a lawful tenant in respect of the disputed room at a rental of Rs. 45/- per month having consequently the right to use and occupy the same and for a permanent injunction restraining the defendants, their agents and servants from dispossessing him from the said room and/or in any way interfering with the peaceful possession thereof. By an order of the same date Shri D.P. De, Judge, 7th Bench City Civil Court, Calcutta passed an order of ad interim injunction on the defendants "restraining them, their agents and servants from ousting and dispossessing the plaintiff from the suit room and/or interfering with the peaceful enjoyment of the said room till the disposal of the Rule". On 13.6.68 an application was filed by the present petitioner before the Chief Presidency Magistrate. Calcutta along with the certified copy of the abovementioned order of

injunction passed by the City Civil Court and praying that the key of the disputed room may be made over to him for giving effect to the order of the City Civil Court. The prayer was reiterated in another application dated 8.7.68 filed on behalf of the petitioner but the same was not allowed by the order dated 11.7.68 whereby the Chief Presidency Magistrate, Calcutta refused to revise his order dated 6.6.68 and to direct the police to make over the key of the disputed room to the accused-petitioner. Mr. Dutta has urged in this context that the Chief Presidency Magistrate of Calcutta appears to have been obviously displeased because the petitioner did not refer to the order passed by him on 6.6.68 before the Judge, 7th Bench, City Civil Court; and that his ultimate order, which is neither sustainable in law nor on merits, is a result thereof. According to Mr. Dutt this will merely tend to an undesirable conflict of decision. Mr. Dutt has further contended that in a case where a factory is involved, even the civil court would have appointed a Receiver because machines have to be worked and workers have to be paid and the crying need is to carry on the trade. I do not like to make any observations as the merits of the respective claims of the parties in this behalf, and such a determination will abide the ultimate decision of the competent court. It will be pertinent, however to hold that in a case where the civil court issues an interim order of injunction, the criminal court should give effect thereto and not disallow any prayer made on behalf of the party interested to give such effect merely on the ground that the applicant had kept back some facts from the knowledge of the civil court, although the same may not be material on the point, upon ultimate analysis. But I must observe in fairness to the Chief Presidency Magistrate, Calcutta, that he was quite right in expressing his displeasure as he did, because the petitioner did not bring to the notice of the judge, City Civil Court the order passed by the criminal court on 6.6.68. The question is indeed one of principle for the vindication whereof the Chief Presidency Magistrate rightly expressed his displeasure. I fully agree with him and hold that it is not fair on the part of the applicant who prays for relief from a court of law, which is a court of justice, to keep back certain facts even though the same may not be really material. Mr. Balai Chandra Roy, Advocate, appearing on behalf of the State, has fairly conceded that he cannot support the order passed by the Chief Presidency Magistrate, Calcutta, in disregard of the order of injunction passed by the civil court. I therefore uphold the contention raised by Mr. Dutt in this behalf and I find that in view of the order of interim injunction passed by the judge, 7th Bench, City Civil Court, Calcutta, it is just and fair that the accused-petitioner should be allowed to get back the possession of the key and consequently the possession of the room in dispute in order to give effect to the said order passed by the civil court and for carrying on his trade.

9. The fourth and the last submission of Mr. Dutt, as referred to above, is that it is expedient in the interests of justice and on a balance of convenience, that the possession of the key and consequently of the disputed room including the fixtures and the machineries therein should be made over to the petitioner's custody on a proper bond, pending the completion of the investigation going on

or the disposal of the case, if any, started thereafter. I have given my anxious consideration to the matter and I hold that there is much force behind the said submission of Mr. Dutt. There should be no clog on the wheels of trade and the fundamental right of the citizen, if based upon bona fide premises, to carry on his trade as guaranteed under the Constitution of India, should not be tinkered with. Mr. Balai Chandra Roy, Advocate, appearing on behalf of the State, has consented to the said prayer on condition of a proper bond being executed by the accused-petitioner and the preparation of an inventory in the presence of the accused-petitioner as well as the police, and on the further condition that such articles are to be produced when called upon to do so by the court, till the completion of the investigation or the disposal of the case, if any, based thereupon. Mr. Roy has also submitted that this order must be without any prejudice to the ultimate rights of the respective parties. I therefore uphold the fourth and the last submission of Mr. Dutt. I refrain however from making any observations as to the merits of the respective claims of the parties and make it clear that such a determination will abide the ultimate decision by the competent court.

10. Before I part with the case, I must observe in all fairness to the Chief Presidency Magistrate, Calcutta, that the consideration that appeared to have been uppermost in his mind, in passing the impugned orders, was to uphold the order passed by this court and to see that the same was given effect to and not observed in its breach. The other dominant consideration was that nothing should be kept back from the court of law by the party who seeks justice. I fully agree with the Chief Presidency Magistrate, Calcutta in this respect. As has however been observed by Lord Atkins in the case of (4) Rashbehari Lal and ors. applts. v. King Emperor, respondent, reported in 60 IA 354 at pp. 361 that "Finality is a good thing but justice is better". I respectfully agree with the said observations and determine the points at issue accordingly.

11. In the result, the Rule is made absolute; the impugned orders dated 19.6.68 and 11.7.68 passed by Shri K.J. Sengupta, Chief Presidency Magistrate, Calcutta in section H.C. Case No. 379 dated 5.6.68 under sections 148 / 341 / 448 / 457 / 380 of the Indian Penal Code are set aside; and the Chief Presidency Magistrate, Calcutta is directed to make over the key and the possession of the room wherein the fixtures and other articles of the petitioner are stated to have been kept, on a bond of Rs. 25,000/- (Rupees Twenty five thousand only) to the satisfaction of the Chief Presidency Magistrate, Calcutta, after the preparation of an inventory in the presence of the accused-petitioner as well as the police, and on condition that such articles are to be produced when called upon to do so by the court, till the completion of the investigation or the disposal of the case, if any, based thereupon. The order is to go down as soon as possible. After the abovementioned judgment was delivered in court, but before it was signed, Mrs. Maya Roy, Barrister-at-law (with Mr. Nirendra Krishna Mitra, Advocate) prayed for permission to appear on behalf of the de facto-complainants by filing the requisite power, and for an opportunity of being heard. In the interests of justice,

I allowed the said prayer and in presence of the respective parties I heard the submissions. I hold however that the said submissions are neither maintainable in law nor on merits and as such the judgment, passed by me on 29.8.68, but not signed, stands. I further direct that the ordering portion of the judgment be communicated to the court below by today.