
(1979) 02 BOM CK 0046
In the Bombay High Court

Shamrao Sampatrao Khanderao

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 22-02-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 369, 451

Citation : (1979) CriLJ 1457 : (1979) MhLj 551

Hon'ble Judges : Jamdar, J;Gadgil, J

Bench : Division Bench

Judgement

Gadgil, J.—The applicant has filed this application u/s 482 Cr. P.C. challenging the order of the Judicial Magistrate First Class, Akot, in Criminal case No. 247 of 1977 whereunder the Magistrate has directed that the custody of the she-buffalo in question should be given to the complainant (Lilabai) in that case on her executing the requisite bond that the complainant would produce the she-buffalo whenever directed by the Court.

2. In order to understand the alleged grievance of the applicant, it will be necessary to state a few facts. On 13-12-1976 Baburao, acting on behalf of his mother Lilabai (present respondent No. 2), filed a report with the police alleging that Ramrao Sampatrao Gawande has committed theft of the she-buffalo belonging to Lilabai. On the basis of that complaint the police started investigations. The she-buffalo in question was seized from the possession of the present applicant Shamrao. The question arose before the Magistrate as to whom the custody of the she-buffalo should be given. Shamrao filed an application on 18-12-1976 praying that the custody of the she-buffalo be given to him. He contended in that application that he had purchased the she-buffalo from Ramrao Gawande. On that application the Magistrate passed an order dated 22-12-1976 that the she-buffalo should be entrusted to Shamrao on the condition that he would produce it whenever directed or would pay a penalty of Rs. 1500/-. Thereafter respondent No. 2 Lilabai filed an application requesting the Court that the custody of the she-buffalo should be made over to her. She

contended that Shamrao had alleged that he had purchased the she-buffalo for Rs. 1500/-when its price was Rs. 2500/-. She also contended that the transaction thus is not of a bona fide nature at all. The learned Judicial Magistrate, after hearing Lilabai as well as Shamrao, passed an order on 5-12-1977 that the she-buffalo should be given in the custody of Lilabai on her executing the necessary surety bond.

3. The above order was challenged by Shamrao in the Sessions Court, Akola, in Criminal Revision No. 68 of 1977. The said revision was dismissed on 19-5-1978 and hence this application.

4. It was contended on behalf of applicant Shamrao that the Magistrate, after having passed the order dated 22-12-1976 in favour of the applicant, has no jurisdiction to modify the order by directing that the custody of the she-buffalo should be with Lilabai. It was urged that the Magistrate has no power to review his own order and that the only remedy of an aggrieved party is to go in revision against that order. Reliance is placed on the decision of the Calcutta High Court in the case of *The State Vs. Sova Rani Debi*, In that case, certain rice was attached from one Chakrabarty on the ground that it was concerned in an offence of smuggling. Before the case proceeded till its conclusion Chakrabarty died. The Magistrate, therefore, passed an order dated 31-3-1969 that the rice be confiscated to the State. On 5-1-1970 the widow of Chakrabarty made an application to that Court that the rice should be returned to her. The Magistrate granted the application. The State took the matter in revision to the Sessions Court. That Court made a reference to the High Court. The proceedings had finally come to an end as the case against Chakrabarty abated on account of his death. The Calcutta High Court, therefore, held that the order of disposal dated 31-3-1969 was a final order and as such the Magistrate had no jurisdiction to review such a final order. We do not think that this case can be of any use to the applicant. The Calcutta High Court has made a distinction between an interlocutory order and a final order. This is what is observed in the judgment:

The question is, can a Court set aside or review its own order which does not amount to a judgment? In this case a distinction has to be made between an interlocutory order and a final order. In respect of a final order which does not amount to a judgment in a trial Section 369 Cr. P.C. would not in terms apply, but the general principles on which the section is based would be applicable and such final order cannot be altered or reviewed by the Court which passed it or by any other Court of co-ordinate jurisdiction....

The order before the Calcutta High Court was a final order and it is this order that was modified by the same Magistrate. Such modification was held to be not permissible.

5. In the present case, the order is not a final one. It is passed u/s 451 Cr. P.C. That section deals with the custody and the disposal of property pending trial. It says that when a property is produced before any Criminal Court during an

enquiry 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. Mr. Mohta submitted that though the order is passed about the custody pending trial, still that order would be final and the same Magistrate cannot modify it. We are not able to accept this contention. On the face of it, the purpose of Section 451 is to direct the custody of the property till the case is decided, Such an order would obviously be an interlocutory order. Secondly, the position would be somewhat anomalous if the order is treated to be a final order as alleged by Mr. Mohta. Let us take an instance where the Magistrate, as soon as the police produce a she-buffalo or a cow or a goat before the Magistrate, passes an order that such animal should be kept in the custody of the police Patil. After this order is passed, the complainant as well as the accused appear before the Court with an allegation that it would be in the interest of justice that the custody should be not with the police-Patil but that it should be either with the complainant or the accused. A prayer to that effect is made. Would it be correct to say that the Magistrate has no jurisdiction to pass an order directing that the animal which was kept in the custody of the police-Patil should be given to the custody either of the complainant or of the accused? We do not think that this can be the position.

6. The nature of an order passed u/s 451 has been considered by this Court in the case of *Ramchetsing v. Deoji Kalyanji* reported in AIR 1942 Bom 42. It was a case u/s 516A of the old Cr. P.C. 1898. That section is equivalent to the new Section 451. A complaint was made about the breach of trust of the she-buffaloes. The police attached the she-buffaloes and the Magistrate passed an order that they be handed over to the complainant on his executing the requisite bond. The accused thereafter applied to the Court alleging that the said order should be modified and the custody should be given to him. The Magistrate did not grant that prayer. The matter came up to the High Court in revision. The nature of the order that is passed for the custody of the property pending trial was considered in that case in the following words:

The record, however, does not suggest that the parties had been heard on 28th April and the form of the Magistrate's order is not consistent with the view that he was merely confirming his previous order after hearing the parties. He said in so many words that it was not necessary to pass any orders at all on the application made by the accused on 18th April, and his view appears to have been that it was open to him to make an ex parte order, such as the order complained of on 16th April and that that order must be regarded as final pending the decision of the case. We think it necessary to point out emphatically that there is no warrant at all for any such view. 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.

The order in the present proceedings was passed by the Magistrate after hearing

the Police Prosecutor. It was, therefore, submitted by Mr. Mohta that the order would not be an ex parte order and the present respondent No. 2 would not have any right to ask for its modification. The fact that the Police Prosecutor was heard would not in every case mean that the order was passed after hearing all the concerned parties. In the present case, it is respondent No. 2 who is primarily concerned with the order about the custody of the she-buffalo pending enquiry. The fact that Police Prosecutor was heard cannot be a circumstance from which a presumption can be drawn that respondent No. 2 was heard. Thus, here is a case where the order dated 22-12-1976 was passed by the Magistrate without hearing respondent No. 2. The said order has been modified after respondent No. 2 made an application and placed her claim before the Court. We think that the modification of the order dated 22-12-1976 would not be a review of the order. It would (be) passing an appropriate order after hearing the concerned parties. Hence the principle that the Magistrate has no power to review his own order is not applicable when the Magistrate reconsiders his order previously passed u/s 451 Cr. P.C.

7. The question had arisen before the Karnataka High Court in the case of Basappa Durgappa Kurubar and Others Vs. The State of Karnataka and Another, wherein it is laid down that an ex parte order passed u/s 451 Cr. P.C. can be modified after hearing the party or parties adversely affected by the said ex parte order. The necessity of hearing the concerned parties is also considered by the Supreme Court in the case of State Bank of India Vs. Rajendra Kumar Singh and Others, There the order about the disposal of the property was challenged and the Supreme Court held as follows:

It is true that the statute does not expressly require a notice to be issued of 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 of return of the seized property.

Thus, in order to make an order final as far as a particular Court is concerned it would usually be necessary that the concerned parties are heard. Of course, we need not consider this aspect in detail, particularly when in the present case the impugned order is about the custody of the property pending trial, and as discussed above, such an order is liable to modification if the previous order is an ex parte order.

8. It was next urged that even on merits the applicant has a better claim for the custody of the she-buffalo. We have already observed that according to him he has purchased the she-buffalo from the owner Ramrao. Lilabai has challenged the transaction by saying that the said purchase does not appear to be a bona fide one. We may also note that immediately after the seizure of the she-buffalo by the police, the police had initially handed over the she-buffalo to Lilabai on her executing a bond. It is this order that was later on modified by the Magistrate without hearing Lilabai. The question as to what order is likely to be

passed after the termination of the trial would depend upon various factors. It will not be possible for Mr. Mohta to contend that at the close of the trial the she-buffalo will have to be returned to the applicant. We are not ready to go into this question as an appropriate order will be passed by the Magistrate after the trial is over.

9. The result, therefore, is that the learned Magistrate has passed an order about the custody of the she-buffalo in favour of respondent No. 2. It is this order that is being challenged by making an application u/s 482 of the Code of Criminal Procedure for the exercise of the inherent powers of this Court. Inherent powers would normally be exercised very sparingly. We do not think that the applicant has made out any case for such exercise. The application is, therefore, dismissed. The interim stay granted by this Court stands vacated. The learned Judicial Magistrate would, as far as possible, expedite the hearing of Criminal Case No. 247 of 1977.

10. The parties to appear before the Judicial Magistrate First Class, Akot, on 5-3-1979.