

(2006) 11 CAL CK 0040
In the Calcutta High Court
Case No : C.R.R. 3243 and 3244 of 2006

Susarma Mukherjee alias Adhikary and Another	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 134, 144, 144(1), 144(2), 144(4)

Citation : (2007) 1 CALLT 676 : (2007) 1 CLT 676 : (2007) 1 ILR (Cal) 183

Hon'ble Judges : Biswanath Somadder, J

Bench : Single Bench

Advocate : Satyajit Mondal and Sanjib Dutta, for the Appellant; Biswaroop Chowdhury and Hiranmay Paik for Opposite party No. 2, for the Respondent

Judgement

Biswanath Somadder, J.—Heard the learned advocates of the respective parties. By consent of both the parties, the matters being C.R.R. 3243 of 2006 and C.R.R. 3244 of 2006 are taken up for hearing together.

2. The two applications u/s 482 of the Code of Criminal Procedure, are directed against the proceeding u/s 144(2) Cr.P.C. being M.F. Case No. 1687 of 2006, pending before the learned Executive Magistrate, Diamond Harbour, District-South 24 Parganas and particularly, in respect of two orders being orders dated 30th August, 2006 and 1st September, 2006 respectively passed by the learned Magistrate in the said proceeding.

3. For the sake of convenience, the two orders being orders dated 30.8.06 and 01.09.06 and 01.09.06 are set out hereinbelow:

Order dated 30.8.06:

Heard petitioner.

To O/C M/Bazar P.S./B.L. & L.R.O. M/Bazar to cause enquiry and report by 29.11.06 O.Ps. to be informed by notice and S.R. of notice is to be submitted along with the report. O/C. to (1) peace in the meantime.

Heard and perused. It has come out from the submission of the petitioner that the said shop house is situated on the land of P.W.D. road and the record of the land is not in the name of the petitioner and not also of the O.P.men.

O.P. is restrained from disturbing in any manner as alleged. O/C/M/Bazar is directed to ensure peace and compliance of the order.

Asst. Engineer, P.W.D. Diamond Harbour is directed to enquire and report as to whether the shop is constructed in the land of P.W.D. or not and if so, what action has been taken from their end in this connection.

Prodhan, Dhanurhat G.P. under M/Bazar Block is directed to report as to on which basis trade licence (if issued) has been issued to the petitioner.

Asst. Engineer, Group Electric Supply, WBSEB, Lakshmikantapur is directed to report as to, on which basis electric connection has been provided to the petitioner.

Inform accordingly.

To 29.11.06.

Order dated 01.09.06:

C.R. is put up today. 2nd party appeared by Vakalatnama and files a petition.

Heard and perused the O.P. side against put up petition. Both parties are restrained from breaking the lock of the shop until further order.

The case will be heard on the next date in presence of both sides. Inform accordingly.

4. From the mere reading of the two orders passed by the learned Magistrate, it appears that the learned Magistrate is totally silent on the aspect of his satisfaction and no reasons have been recorded as to why the order, being order dated 30.08.06 was passed by him, in a proceeding u/s 144(2) of the Code of Criminal Procedure. So far as other order is concerned, being the order dated 01.09.06, the learned Magistrate, [in the same Cr. P.C. Section 144(2) proceeding], restrained the parties from breaking the lock of the shop until further order.

5. Before proceeding any further, there is a need to look into the scope of a Magistrate's power u/s 144 Cr. P.C, which can be found out from the said section itself.

Section 144. Power to issue order in urgent cases of nuisance or apprehended danger--(1) In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speed remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and

served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under this management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any persons aggrieved, rescind or alter any order made by it under the proviso to Sub-section (4).

(7) Where an application under Sub-section (5) or Sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

6. The scope of a Magistrate's power u/s 144 of the Code of Criminal Procedure has been considered by the Supreme Court in the case of Babulal Parate Vs. State of Maharashtra and Others, . while the Apex Court was, inter alia, considering the constitutional validity of the said section. The Supreme Court, in that case, inter alia, held and observed that to act under Sub-section (1) of Section 144, the Magistrate himself had to form an opinion that there was sufficient ground for proceeding under that section and immediate prevention or speedy remedy was desirable. The Apex Court further pointed out that the sub-section also required the Magistrate to make an order to writing and state therein

the material facts by reason of which he was making the order thereunder. The Supreme Court further pointed out that the latter part of Sub-section (1) of Section 144, specifically mentioned that the order of the Magistrate should set out the material facts of the case by reason of which he was making the order thereunder. The Supreme Court further observed that Sub-section (2) required the Magistrate ordinarily to serve a notice on the person against whom the order was directed circumstances did not admit of serving such a notice in due time.

7. The Apex Court further held as follows:

...Looking at the section as a whole it would be clear that broadly speaking, it is intended to be availed of for preventing disorders, obstructions and annoyances and is intended to secure the public weal. The powers are exercisable by responsible magistrates and these Magistrates have to act judicially. Moreover, the restraints permissible under the provisions are of a temporary nature and can only be imposed in an emergency....

8. In the said Judgment, the Supreme Court further observed as follows:

...It is true that there is no express mention anywhere in Section 144 that the order of the magistrate should be preceded by an enquiry. But we must construe the section as a whole. The latter part of Sub-section (1) of Section 144 specifically mentions that the order of magistrate should set out the material facts of the case. It would not be possible for the magistrate to set out the fact unless he makes an enquiry or unless he is satisfied about the facts from personal knowledge or on a report made to him which he prima facie accepts as correct....

9. In the present facts of the case, from the impugned orders, it does not appear as to how the learned Magistrate was satisfied that the case warrants passing of an order u/s 144 of the Code of Criminal Procedure, more specifically an ex parte order u/s 144(2) of the said Code. No reasons have been given by the learned Executive Magistrate in his order dated 30.08.06 as to how he arrived at his satisfaction for passing the said order. The material facts have not been set out, nor has he made any enquiry. He has not recorded his satisfaction about the facts from personal knowledge or based his order on a report made to him which he prima facie accepts as correct. Purely on the basis of submissions and allegation made by the petitioner the learned Magistrate went on to pass the ex parte order dated 30.08.06. So far as the subsequent order, being the order dated 01.09.06 is concerned, the learned Magistrate proceeded to give directions on the two private parties restraining them from breaking the lock of the shop until further order. This subsequent order also has been passed in the same proceeding u/s 144(2) Cr. PC. No reason or material facts of the case appear to be forthcoming as to why the subsequent order dated 01.09.06 was passed by the learned Magistrate.

10. I am of the opinion that the learned Magistrate ought to have stated the material facts and recorded his reasons based on such facts while passing the

two orders, being orders dated 30.08.06 and 01.09.06. The Judgment referred to above, passed by the Hon''ble Apex Court, makes it abundantly clear that the learned Magistrate while passing orders u/s 144(2) of the Code of Criminal Procedure ought to have recorded as to how he arrived at his satisfaction, based on material facts, about his apprehension of breach of peace, for the prevention of which he was exercising his power u/s 144 Cr. PC. This crucial aspect is missing from the said two orders.

11. In the circumstances, the orders dated 30.08.06 and 01.09.06 passed by the learned Executive Magistrate, Diamond Harbour, South 24 Parganas in a proceeding u/s 144(2) Cr. PC being M.F. Case No. 1687 of 2006, are hereby set aside.

12. However, it is left open to the learned Magistrate to consider the contention of both the parties in respect of the said proceeding pending before him and pass appropriate order in accordance with law and conclude the said proceeding as expeditiously as possible.

13. Criminal section is directed to supply urgent xerox certified copy of this order, if applied for, to the respective parties.