

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.11.2015

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Crl.R.C.Nos.1122 & 1133 of 2015
and
M.P.Nos.1 & 1 of 2015

M.Bala Gurusamy
Managing Director,
M/s.Prime Sristi Housing Private Limited,
B-2, Vijay Veena Housing Private Limited,
Balaji Nagar, Radha Krishnan Salai,
Valasaravakkam, Chennai - 600 087. .. Petitioner in both
Crl.R.Cs.

vs.

The District Magistrate & The District Collector,
Collector's Office,
Kancheepuram. .. Respondent in both
Crl.R.Cs.

Criminal Revisions filed under section 397 and 401 Cr.P.C.
praying to call for the records and set aside the order passed
by respondent in Rc.No.13030/2014/M1 under section 138 of
Cr.P.C. dated 12.10.2015 and 19.10.2015.

For Petitioner : Mr.Abudukumar Rajratnam
for Mr.S.Ashok Kumar

For Respondent : Mr.S.Shanmugavelayutham
Public Prosecutor

COMMON ORDER

Petitioner is the Managing Director of M/s.Prime Sristi Housing Private Limited. The Company had taken up construction of a twin eleven storied building earmarked as Block-A and Block-B at survey Nos.17/7A, 17/7B, 17/7C, 17/8B3 and 17/8B4B,

Moulivakkam, Sriperumbudur Taluk, Kancheepuram District. Block-B suddenly collapsed on 28.06.2014 resulting in loss of life of 61 persons and injuries to 27 persons. Crime No.751 of 2014 on the file of P.14 Mangadu Police Station, Mangadu, Chennai, for offences u/s.304(ii), 336, 337 and 338 IPC has been registered. Though a final report has been filed earlier, further investigation presently is on. Petitioner is one of the accused therein. Respondent initiated proceedings u/s.133 Cr.P.C. under R.C.No.13030/2014 M1 dated 14.11.2014, informing that the still standing structure, Block-A was in a precarious condition, was likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by and therefore removal thereof was necessary.

2. An order u/s.138 Cr.P.C. came to be passed by respondent on 24.11.2014. Such order was challenged in Crl.R.C.No.1239 of 2014. A further order u/s.141(2) Cr.P.C. passed by respondent on 02.12.2014 was challenged in Crl.R.C.No.5 of 2015. Under common order dated 08.01.2015, the Honourable First Bench was pleased to allow the same. This Court noted that u/s.138 Cr.P.C., the Magistrate was required to take evidence as in a summons case and as the respondent had furnished the petitioner only the Government Order and not the connected records. It was necessary that the petitioner be provided the same towards facilitating his defence. Taking note of the urgency expressed over the possibility of collapse of the building, this Court issued further directions towards expeditious decision of the respondent on the matter. After further proceedings, an order came to be passed by respondent on 14.03.2015. Contending that all material documents had not been furnished to them, petitioner preferred Crl.R.C.No.235 of 2015. Under orders dated 15.09.2015, this Court noted that the grievance of the petitioner was that the Mr.Justice R.Regupathy Commission of Inquiry Report had not been forwarded to him but the same stood supplied to the petitioner in the capacity of respondent in other writ proceedings and observed that the petitioner's grievance did not survive "except to the extent a fresh order would have to be passed now". Setting aside the order of respondent dated 14.03.2015, the respondent was required to make every endeavour to conclude the proceedings not later than three months. Petitioner was also required to co-operate. Pursuant to such order, the respondent issued a fresh show cause notice to the petitioner on 03.10.2015. Petitioner had caused a reply on 08.10.2015, which according to petitioner was received by respondent on 10.10.2015 whereas learned Public Prosecutor would contend that the same was received only on 13.10.2015. An order

u/s.138 Cr.P.C. came to be passed by respondent on 12.10.2015. Thereafter, respondent passed a further order u/s.141 Cr.P.C. on 19.10.2015 informing that the order u/s.133 Cr.P.C. had been made absolute u/s.138(2) Cr.P.C. under order dated 12.10.2015 and that unless Block-A was demolished within a period of five days of the receipt thereof, the same would be treated as notice u/s.141(2) Cr.P.C and the petitioner would be liable to bear the cost and consequences.

3. CrI.R.C.No.1122 of 2015 challenges the order of respondent dated 12.10.2015 while CrI.R.C.No.1133 of 2015 challenges the order of respondent dated 19.10.2015.

4. Heard learned counsel for petitioner and learned Public Prosecutor. Mr.P.Wilson, learned senior counsel for petitioners in W.P.Nos.20702 and 20703 of 2014, a public interest litigation, informs that he would be entitled to a hearing in the present criminal revisions given the observation of the Hon'ble First Bench in the above said writ petitions made on 07.11.2015 to the following effect:

"7. In the given scenario, we are of the view that it would be appropriate that the learned counsels for the parties, fully gear themselves, to assist the learned Single Judge on 23.11.2015 and all the counsels assure us that no adjournment would be sought to facilitate the learned Single Judge to take a final view of the matter in both the revision petitions."

This Court has informed learned senior counsel that given the nature of proceedings before this Bench viz., the propriety, legality or correctness of the orders of the District Magistrate and District Collector, Kancheepuram passed, pursuant to issue of notice under Section 133 culminating in an order under Section 141 Cr.P.C, a clarification may have to be sought from the Hon'ble First Bench, if by the portion of its order referred to, it was also meant the petitioner in the writ petitions be heard. Learned senior counsel has informed that he would reserve his submissions for the writ petitions pending before the Hon'ble First Bench.

5. Learned counsel for petitioner submitted that the orders under challenge came to be passed in a most mechanical manner and reflect non-application of mind. In passing the same, the respondent independently had not applied his mind and the orders came to be passed on the orders of others. In passing the order dated 12.10.2015, the respondent had misconstrued the order of

this Court passed in CrI.R.C.No.235 of 2015 dated 15.09.2015 and proceeded to pass an order u/s.138 Cr.P.C. without affording any opportunity to petitioner to rebut the allegations/version of respondent. In paragraph No.13 of its order, the respondent has stated thus:

"13.Whereas in view of the orders passed by the Hon'ble High Court order that "various documents have been supplied to you including the report of Justice R.Ragupathi Commission of enquiry and grievance of the petitioner does not survive except to the extent that a fresh order would have to be passed now", a fresh notice has been issued to you to show cause why the notice issued under section 133 Cr.P.C. should not be made absolute under section 138 of Cr.P.C. vide reference 15th read above. On receipt of above notice, so far no reply has been received from you as on date."

6. It is contended by learned counsel that the order of respondent dated 12.10.2015 violated the principles of natural justice and statutory provisions. When such order cannot be sustained, the consequential order dated 19.10.2015 would also fail. Learned counsel submitted that under G.O.Ms.No.997 Public (SC) Department dated 07.11.2014, it was informed that the findings of Mr.Justice R.Regghupathy, Commission of Inquiry, for the sudden collapse of building Block-B due to lack of structural stability, applied equally to Block-A and therefore, the same was liable to be demolished and the same should not be allowed to remain and that even as per law, Block-A is liable to be demolished since it is an illegal construction. In conclusion it was stated thus:

"7.Accordingly, in view of public safety and to avoid further recurrence of any mishap, the Government hereby order that the Collector, Kancheepuram District shall take necessary steps immediately to implement the recommendation of the Commission in accordance with law and as per its recommendation."

7. In passing orders in CrI.R.C.No.1239 of 2014 dated 08.01.2015, this Court, taking note of the position that upon service of notice u/s.133 Cr.P.C., the petitioner under reply dated 22.02.2014 had sought material to enable him to file a reply, observed that it is trite to say that the material relied upon against the petitioner ought to have been handed over to

the petitioner to facilitate him to take his defence and the same had not been done. On being informed that various documents have been supplied to petitioner except the report of the Commission of Inquiry and finding that such report also had been supplied to petitioner in the capacity of respondent in other writ proceedings, this Court, under orders in CrI.R.C.No.235 of 2015 dated 15.09.2015, had observed that the effect of the aforesaid position is that the grievance of the petitioner does not survive except to the extent that a fresh order would have to be passed now. Thereafter, this Court while setting aside the order u/s.138 Cr.P.C. dated 14.03.2015 had remitted the matter to respondent authority to proceed in accordance with law. Under letter dated 08.10.2015, petitioner had sought to explain their proper conduct in construction activity. He submitted that though both Block-A and Block-B had been raised on a common platform, Block-A had not so much as suffered a crack despite the entire Block-B having collapsed. Petitioner wished to establish that Block-B had collapsed owing to lightening and towards that end examine experts, cross-examine experts relied upon by respondent towards establishing that such experts were wrong and thus establish their case. Learned counsel submitted that the respondent had acted in a predetermined manner and therefore, it would not be appropriate to allow him to further deal with the matter. In this regard, learned counsel relied on the decision of the Apex Court in Siemens Ltd. vs. State of Maharashtra and others [2006 (12) SCC 33].

8. Mr.S.Shanmugavelayutham, learned Public Prosecutor, submitted that pursuant to notice u/s.133 Cr.P.C., it was for the petitioner to appear before the respondent and show cause there against. Petitioner had failed to do so and merely had been resorting to sending communications seeking further materials and time. Though present in the city, the petitioner had not chosen to appear in person. Learned Public Prosecutor submitted that paragraph 14 of the order dated 12.10.2015 reflected the independent application of mind by the respondent. Such paragraph reads thus:

"14. Whereas on perusal of available records, it is contended that the existing 'A' Block building situated in Survey Nos.17/7A, 17/7B, 17/7C, 17/8B3 and 17/8B4B at Moulivakkam village, Sriperumbudur Taluk has been constructed similar to Block "B". Inadequate beams and columns were constructed deviating from approved plan with substandard quality materials and inadequate raft thickness and inadequacy of bracing system and

safety margins have resulted in structural failure and mal-designed structure that endanger the durability of the building. There is no single reason to believe that the Block "A" building situated in Survey Nos.17/7A, 17/7B, 17/7C, 17/8B3 and 17/8B4B at Moulivakkam village, Sriperumbudur Taluk is structurally stable. The stability and durability of the existing 'A' Block building is a big concern to public safety and so the above Block "A" is liable for demolition beyond any reasonable doubts."

9. In support of his contentions, learned Public Prosecutor, relied on the following observations in State of Maharashtra and others v. Jalgaon Municipal Council and others [2003 (9) SCC 731]:

"The caution of associating rules of natural justice with the flavour of flexibilities would not permit the courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision-maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are : (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) the need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate expectation, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, and (v) express legislation. There is also a situation which Prof. Wade and Forsyth term as "dubious doctrine" that right to a fair hearing may stand excluded where the court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exception into play."

10. Learned Public Prosecutor also relied on the following observation in Malik Ram v. State of Rajasthan and others [AIR 1961 SC 1575] (a case dealing with challenges to a draft scheme published under Chapter IV-A of the Motor Vehicles Act (4 of 1939). One of the considerations in such case was whether in hearing objections to a draft scheme under Chapter IV-A of the Motor Vehicles Act (4 of 1939), the officer concerned could take evidence oral or documentary or all that he had to do u/s.68-D of the Act was to hear arguments of either side):

"6. We may, however, point out that the production of evidence (documentary or oral) does not mean that the parties can produce any amount of evidence they like and prolong the proceedings inordinately and the State Government when giving the hearing would be powerless to check this. We need only point out that though evidence may have to be taken under Section 68-D(2) it does not follow that the evidence would be necessary in every case. It will, therefore, be for the State Government, or as in this case the officer concerned, to decide in case any party desires to lead evidence whether firstly the evidence is necessary and relevant to the inquiry before it. If it considers that evidence is necessary, it will give a reasonable opportunity to the party desiring to produce evidence to give evidence relevant to the enquiry and within reason and it would have all the powers of controlling the giving and the recording of evidence that any court has. Subject therefore to this overriding power of the State Government or the officer giving the hearing, the parties are entitled to give evidence either documentary or oral during a hearing under Section 68-D (2)."

This Court finds both decisions relied on by learned Public Prosecutor inapplicable.

11. This Court, without hesitation, would inform that the reading placed by the respondent on the orders of this Court totally are misconstrued. Such reading in effect would mean that this Court has passed an order contrary to law. In proceedings u/s.138 Cr.P.C., the Magistrate is required to take evidence as in a summons case. Chapter XX of the Criminal Procedure Code deals with the procedure to be adopted for the trial of summons cases by the Magistrate. Chapter XX Cr.P.C., consists of

sections 251 to 259. Section 251 requires substance of accusation to be stated. Section 252 provides for conviction on plea of guilty and section 253 provides for conviction on plea of guilty in absence of accused in petty cases. Of particular relevance is Section 254 Cr.P.C. which reads thus:

"254. Procedure when not convicted -

(1) If the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) A Magistrate may, before summoning any witness on such application, require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court."

Where the respondent has failed to observe the letter of the law and conduct proceedings u/s.138 Cr.P.C. in keeping with the summons case procedure, CrI.R.C.No.1122 of 2015 is to be allowed. As a consequence, CrI.R.C.No.1133 of 2015 would also succeed.

12. The next question is whether the further proceedings can be entrusted to the same Executive Magistrate?

A reading of the order of respondent dated 12.10.2015 shows that though much reliance has been placed on the Mr. Justice R.Regupathy Commission of Inquiry Report and the conclusions arrived by it, the respondent also has relied on reports of an Expert Committee from Indian Institute of Technology, Chennai, Anna University and on the field inspection conducted by the earlier District Collector along with PWD Planning & Development, Chennai Metropolitan Development Authority and members of the Technical Expert Committee. As this Court is requiring proceedings to proceed afresh from the stage of 138 Cr.P.C., it, rather than address the issue of independent application of mind by the respondent, would consider the tendency towards bias in favour of one's own decision. In Siemens's case, it has been observed thus:

"9. Although ordinarily a writ court may not

exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P V. Brahm Datt Sharma, Special Director v. Mohd. Ghulam Ghouse and Union of India V. Kunisetty Satyanarayana, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India). It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.

10. The said principle has been followed by this Court in V.C., Banaras Hindu University v. Shrikant, stating

"48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post-decisional hearing given by the High Court was illusory in this case."

The application of the principle informed in the case above cited would lead us to require further proceedings to be entrusted to another Executive Magistrate.

13. In the result, these Criminal Revisions shall stand allowed. The order passed by respondent in Rc.No.13030/2014/M1 dated 12.10.2015 and 19.10.2015, shall stand set aside. Consequently, connected miscellaneous petitions are closed. The matter shall now stand remanded for fresh consideration to such other Executive Magistrate, as may be considered appropriate by Government, who shall proceed afresh from the stage of Section 138 Cr.P.C.

This Court is constrained to observe thus:

Block-B of the building came crashing down on 28.06.2014. Proceedings were commenced pursuant to notice u/s.133 Cr.P.C. dated 14.11.2014. The proceedings have, thus far, given rise to five Criminal Revisions before this Court. According to

G.O.Ms.No.997, Public (SC) Department, dated 07.11.2014, Government had accepted the Commission of Inquiry Report which informed of large scale violations in construction of building. Such Government Order specifically terms the building 'an illegal construction'. If indeed, the State is intent upon carrying out its avowed object would recourse not have been had to Section 56 of the Town and Country Planning Act, 1971, which provides for the local authority, in this case Chennai Metropolitan Development Authority

(CMDA), to do the needful towards demolition of unauthorised/illegal construction. Is this Court a witness to shadow boxing?

Sd/-

Assistant Registrar(CCC)

True Copy

Sub Assistant Registrar

To

- 1.The District Magistrate & The District Collector,
Collector's Office,
Kancheepuram.
- 2.The Public Prosecutor,
High Court, Madras.

+lcc to Mr.S.Ashok Kumar, Advocate SR.64358

+lcc to The Public Prosecutor, Sr.64718

Cr1.R.C.Nos.1122 & 1133 of 2015

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srg 30/11/2015

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