

In Re: C.J.R.

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Court : Mumbai

Decided On : Sep-30-1919

Reported in : (1920)22BOMLR157

Judge : Shah and ;Hayward, JJ.

Appeal No. : Criminal Application for Revision No. 294 of 1919

Appellant : In Re: C.J.R.

Judgement :

Shah, J.

1. This is an application for the revision of an order made by the Chief Presidency Magistrate under Section 144 of the Criminal Procedure Code. The orders under Section 144 are not proceedings within the meaning of Section 435 of the Code as provided by Sub-section 3 of that section, and are excluded from the revisional powers of this Court. It is clear, however, that it is open to this Court to consider whether the order complained of is outside the scope of the section under which it purports to have been made. If it is within the scope of the section, the Court cannot revise the order on its merits; in other words we are not concerned with the propriety of the order if it is within the scope of Section 144. If it is outside the scope of the section, it is liable to be set aside on the ground that the lower Court had no jurisdiction to make it. On this point it is enough to refer to the observations in *In re Pandurang Govind* I.L.R(1900) . 25 Bom. 170: 2 Bom. L. R. 84 .

2. The question whether it is outside the scope of the section must be determined with reference to the facts, which are found by the lower Court or which are not in dispute, in each case. With a view to determine that question we have examined the broad facts of the case and heard arguments on both sides. I am not concerned with and express no opinion as to the respective rights of the two parties, who are neighbours in this case, as regards the nuisance complained of.

3. [His Lordship after setting out the facts of the case proceeded-] On these facts the question is whether the order is outside the scope of the section or not, and, as I have said, that is the only question which we are concerned with. In my opinion in form it is within the scope of the section, but in substance it is outside it. In form it directs the petitioner to abstain from certain acts for two months from the date of the order, and in terms it is in accordance with the verbal requirements of the section. But it seems to me that in substance the opponent's application to the lower Court was for the prevention of the nuisance not temporarily but permanently. In substance it seems to me that that is what he wants and not merely a temporary relief. Apart from the temporary development of the feelings between the parties soon after the termination of the proceedings on the charge of assault which is held by the Magistrate to create an emergency such as is contemplated by Section 144 the dispute between the parties to my mind is entirely of a civil nature and the question is whether the opponent who has a Nursing Home is entitled to prevent the nuisance which he complains of. The proper remedy for that is a suit in a civil Court which alone can finally determine the civil rights of the parties. If the opponent is found entitled to any relief in such a suit, he would get a permanent relief in the form of an appropriate injunction. The question of any temporary relief would be entirely a subordinate matter. As regards the tension between the parties and the development of the nuisance in the course of a few days just preceding the application to the lower Court it seems to me that the opponent helped, to no small extent, by the shooting of the goose, by writing improper letters, and by occasionally throwing stones, to create a situation which has been relied upon by the Magistrate as a ground for applying Section 144. We are not concerned in this case with the question as to whether any party who threatens to disturb the public tranquillity can be properly proceeded against under Section 107 of the Code of Criminal Procedure or not.

4. Section 144 occurs in Chapter XI of the Code. This Chapter relates to temporary orders in urgent cases of nuisance or apprehended danger and the section applies to cases where immediate prevention or speedy remedy is desirable. Any Magistrate mentioned in the section may by a written order direct any person to abstain from a certain act if the Magistrate considers that such direction is likely to prevent or tends to prevent danger to human health or a disturbance of the public tranquillity. Sub-section 5 shows that no order under the section shall remain in force for more than two months unless in certain cases the Local Government otherwise directs. I may mention here that I express no opinion whatever as to whether the Local Government can make any permanent order under this section. The section in terms relates to temporary orders, and as the question as to the extent of the powers of the Local Government under this clause has not been argued before us, and it is not necessary to express any opinion on the point, I refrain from doing so. But I am quite satisfied that so far as the Magistrates referred to in the section are concerned, the section merely provides for temporary orders in urgent cases of nuisance or apprehended danger and that it ought to be applied with due regard to its scheme and purpose. The scheme and the provisions of the section to my mind show that it is meant to provide for a temporary remedy to meet an emergency and that it applies to cases where the temporary orders in the nature of things would be appropriate and would afford a reasonably adequate relief under the circumstances of the case. Having regard to the circumstances of this case to which I have adverted and which have been found by the trial Magistrate, it seems to me that this case cannot be properly treated as an urgent case of nuisance or apprehended danger, when we have regard to the fact that the nuisance complained of has existed for a great length of time practically without any complaint. The inadequacy of remedy is established by the fact that the order which in terms purports to operate for two months will leave the parties practically in the same position with reference to their rights and remedies as to the alleged nuisance when the period expires.

5. I do not desire to say anything, which can in any way restrict the wide powers given to the Magistrate under the section and reduce the corresponding responsibility laid upon him by the Legislature. But having regard to the exceptional nature of the powers, it is right that the scope and the purpose of the

section must be duly borne in mind in applying it to the facts of a particular case. The present case, it seems to me, cannot be fairly and properly treated as being within the special purpose of Section 144 of the Code. On that ground it is liable to be set aside.

6. In view of the fact that it is a temporary order which will expire on the 20th of the next month, and that during that time the opponent, if so advised, will have an opportunity to file a suit for the prevention of the nuisance complained of and to obtain any temporary relief in the suit, I have come to the conclusion that in spite of my opinion to the contrary I may with propriety acquiesce in the order proposed by my learned brother.

7. I accordingly agree that the rule may be discharged.

8. Having regard to the position of the parties and to the nature of the case it is not inappropriate to express a hope that both the parties will act hereafter in a spirit of forbearance and with due regard to the rights and conveniences of their neighbours, and that no further action in connection with the nuisance complained of may be necessary.

Hayward, J.

9. This is an application for revision of the order of the Chief Presidency Magistrate directing the applicant to abstain from certain acts and to take certain order with property in his possession for two months in order to prevent a disturbance of the public tranquillity under Section 144 of the Criminal Procedure Code.

10. We admittedly cannot sitting here decide the civil rights of the parties. They must go for that-and ought, in my opinion, to have gone long ago-to the civil Courts. But we have been requested by way of revision to set aside as improper and without jurisdiction the order passed for preserving the public tranquillity under Section 144 of the Criminal Procedure Code. It has been urged on behalf of the applicant that he was not the aggressor and that the proper procedure would have been to bind over the respondent to keep the peace. It has also been urged that it was improper to pass a temporary order of this nature for the settlement of a

dispute demanding a permanent injunction. It was urged on these grounds that the order was passed without the jurisdiction conferred by Section 144 of the Criminal Procedure Code.

11. [His Lordship referred to the facts and proceeded-] The circumstances appear to me undoubtedly such as to create an emergency requiring an immediate order so as to prevent a disturbance of the public tranquillity. Deliberate provocation would seem to me no less reprehensible than deliberate breach of the peace. It was to deal with that deliberate provocation and to prevent a probable breach of the peace resulting that these particular proceedings were taken before the Magistrate and it is difficult, in my opinion, to say that they were not within the wide terms of the section which are as follows:-

Where, in the opinion of...a Chief Presidency Magistrate...immediate prevention or speedy remedy is desirable, such Magistrate may, ... direct any person to abstain from a certain act or to take certain order with certain property in his possession ... if such Magistrate considers that such direction is likely to prevent... annoyance or injury ... to any person lawfully employed, or danger to ... health ... or a disturbance of public tranquillity or an affray.

12. It is difficult to say on the facts found that immediate prevention or speedy remedy was not desirable or that the direction to abstain from the particular acts mentioned, would not be likely to prevent annoyance to any person lawfully employed or prevent danger to health, or in view of what had actually happened that there was no likelihood of an affray or a disturbance of the public tranquillity. Nor in my opinion is it possible to hold that a temporary order ought not to be passed merely because the dispute demanded a permanent injunction for final settlement. There does not appear to be any such express limitation in the section. On the contrary it is provided in the last clause as follows:-

No order under this section shall remain in force for more than two months .. unless ... otherwise directed by the Local Government by notification in the official Gazette.

13. It would appear, therefore, by the last clause that even a permanent order would not be illegal under Section 144 of the Criminal Procedure Code if made in a particular manner by the Local Government.

14. We have, it must be remembered, to take the facts as they have been found. It is not open to us to enter into the merits of the quarrel sitting here in revision. We have to leave the matter entirely to the discretion of the Magistrate. The responsibility for preserving the public tranquillity has been laid wholly on the Chief Presidency Magistrate and the revisional powers of the High Court have been expressly excluded by the provisions of the 3rd clause of Section 435 of the Criminal Procedure Code. We have, therefore, merely to satisfy ourselves that the facts found fell within the section so as to give jurisdiction to the Magistrate as pointed out in the case of *In re Pandurang Govind* I.L.R.(1900) 25 Bom. 179: 2 Bom. L. R. 755 by Sir Lawrence Jenkins. It has already been observed that the facts here found did, strictly speaking, fall within the very wide scope of the section and it would therefore be impossible for us in my opinion to hold that the order was passed without jurisdiction by the learned Chief Presidency Magistrate under Section 144 of the Criminal Procedure Code. The order ought, therefore, in my opinion, to stand and the rule ought to be discharged, which has been issued by this Court.

15. I should like to add my entire concurrence with the last remark of my learned brother.