John Vs. Joseph

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Court : Kerala

Decided On : Apr-11-1961

Reported in : 1962CriLJ439

Judge : P. Govinda Menon, J.

Appellant : John

Respondent : Joseph

Judgement :
ORDER

P. Govinda Menon, J.

1. Counter-petitioner No. 1 in M. U ,16 of 1960 on the file of the First Class Magistrate, Changanacherry has filed this revision petition against the order passed by the learned Magistrate under Sub-section 6 of Section 145 Cri. P. Code, declaring the respondents herein to be entitled to possession and restoring possession to them under the second proviso to Sub-section 4.

2. The subject matter of dispute is a portion of survey No. 841/6 of Madapallypakuthy. The respondents herein presented a petition ' the Magistrate on 31-5-50 alleging that they were in possession of the property in dispute and that on 30-4-50 the counter-petitioner forcibly trespassed and occupied the property. The petition was forwarded to the police and the police submitted a

report on 17-1-51. Why it was so delayed and why the respondents did not take any further steps is not known. On being satisfied that a dispute likely to cause a breach of the peace existed concerning %e land, the learned Magistrate passed 1 preliminary order Under Section 145(1) Cr IPC on 27-1-51 and called upon the parlies to put in written statements of their respective claims as respects he fact of actual possession of the subject of dispute.

3. Though the parties are not agreed about the delivery through court of the possession of the property in dispute lo the respondent Kihero is no dispute that from 30-4-50 the revision petitioner was actually in possession 01 the properity. The dispossession of thatroperty even according t0 the respondents have taken place more than two months prior to the commencement of the proceedings Under Section 145 Cr IPC and it is urged by the revision petitioner that he should be held to have been in possession by virtue of the second proviso to sub-section W of Section 145 Cr IPC

4. The learned Magistrate relying on certain rulings held that in as much as the respondents had applied to the Magistrate for preventive action as early as 31-5-50 the delay on the part of the police to report or of the Magistrate lo initiate the proceedings Under Section 145 Cr IPC till 27-1-51 should not adversely affect their rights and that 'the date of the order' nor the purpose of computing the period of two months under (She aforesaid proviso to Sub-section (4) of Section 145 should be the date On which They approached the Magistrate and not the actual date on which the proceedings were initiated and passed orders restoring possession to the respondents.

5. There is a clear cleavage of judicial opinion regarding the construction of the second proviso to Sub-section 4 of Section 145 Cr IPC One is in favour of accepting the plain meaning of the words used in the Section and the other that the period of two months should be liberally construed and where the party had approached the court as soon as he was forcibly and wrongfully dispossessed and the court either by directing local: enquiry or otherwise has delayed in passing a preliminary order Under Section 145(1) Criminal Procedure Code, that party should not lose the benefit of the proviso.

6. Section 145 Criminal P. C. authorises the Magistrate to pass appropriate Orders to prevent a breach of peace. The relevant provisions Under Section 145 are as follows:

Section 145(1): Whenever a District Magistrate, Sub-Pivisional Magistrate' or a Magistrate of the First Class is satisfied from a police report or aiher information that a dispute likely to cause a breach of the peace exists concerning any land or water or '-'he boundaries thereof, within the local limits of his jurisdiction, he-shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned: in such dispute to attend his court in person or by pleader with a time to be fixed by such Magistrate and to put in written statements of 'their respective claims as respects fee fact of actual possession of the subject of dispute.

* * *4. The Magistrate shall then without reference to the merits of 'the claims of any such parities to a right to possess the subject of the dispute, peruse the statements so' put in, hear the parties, receive all such evidence as may be-produced by them respectively, consider the effect of each evidence, take such further evidence, if any, as he thinks necessary, and if possible decide whether any and which of the parties was at the date of the order before mentioned, in such possession of "-'he said subject:

Provided, that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

* * * *6. If the Magistrate decides that one Of the parties was or should under the second proviso 4o Sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbances of Such possession until such evidence, and when he proceeds under the first proviso to Sub-section (4) he may restore to possession the party forcibly and wrongfully dispossessed.

7. It is manifest from the aforesaid provisions that their main object is to prevent breaches of peace pending a settlement of the rights of the parties in a civil court. The necessary condition under the section, which confers jurisdiction on a Magistrate to make an enquiry, is that he should be satisfied from a police report, or other information that a dispute likely t0 cause a breach of peace exists concerning land or water and his jurisdiction to make an enquiry is confined only to the fact of actual possession of the subject in dispute. But to meet the situation of a party, who was in possession immediately before the passing of the preliminary order being dispossessed forcibly and wrongfully before '-hat date, a proviso is added empowering a Magistrate to treat such a person dispossessed as if he had been in possession on the date of the preliminary order. For .the purpose of this proviso a specific period of two months next before the date of such order is fixed' for invoking the fiction embodied in the proviso. Whatever may be the intention of the Legislature, die statute specifically and in express terms fixes two months under the proviso and there is no provision either expressly or by necessary implication empowering a Magistrate 10 invoke the fiction to cover a period extending beyond the said two months.

8. Now I will come to the case Law on the subject1. It is not necessary to cover the entire field of judicial conflict, I shall refer only to a few of the cases representing the different views. In the Madras High Court Wallace, J., in Chinchilada Krishnan v. Chintalaswami Nai-du A.I.R. 1927 Mad 816; pevadoss J. in Srinivasa Reddi v. Dasaratharama Reddi ILR 52 Mad 66 : A.I.R. 1929 Mad 198; Lakshmana Rao, J., in Ammanna v. Sitaramayya 49 Mad LW 473 and Govinda Menon and Basheer Ahmed Sayeed, J[. in Chunchu Narayana v. Karrapatti Kesappa A.I.R. 195 Mad 500 have interpreted the deeming pro. vision, in the first proviso against the terms and tenor expressly embodied therein by holding that inasmuch as the party should not be made to suffer because of the delay of the Court in passing the preliminary order referred to in Sub-section (1) of Section 145, that order should be deemed to have been passed on the date when the petition bas been presented.

9. On the other hand Jackson J. in Kchai Moopan v. Narayanaswamy Moopan (1931) 4 Mad Cr C 168 and Happell, T., in Arunachala Goundan v. Chinnadurai

1945 Mad LJ 210 : AIM 1945 Mad 216 'took the opposite view and held that where the Legislature has fixed a definite period for interference in these quasi-judicial civil disputes, courts outlet ki be guided by 11 and the court should without reference to any other consideration, abide by that rule even if, for no mistake or fault of the party complaining, the preliminary order was not passed immediately after the presentation of the petition. His Lordship Jackson J-3 observed:

there must be some time limit for the Magistrate's interference in these quasi civil disputes and the Legislature has hit upon one which admits of no dispute. Quite possibly another period would have served equally well, but that is a matter for legislation. If the interpretation of limitation periods is to be reasonable not literal there can be no certainty for finality

10.Govinda Menon and Basheer Ahmed Sayeed JJ in : AIR1951 Mad500 applied the maxim actus curiae neminem gtavabit (the act of court shall prejudice no man) and the fiction of mme protunc (now for then) and declared that the decisions in .1931-4 Mad .Cr. C- 168 and A.I.R. 1945 Mad 216 not to be good law and held that where due t0 the fault of the court there has been delay in passing 'he preliminary order that order should be deemed to have been passed on an earlier date.

11. The main reason given in justification of thus construing the proviso t0 subsectin (4) against the plain meaning of the express words used by the Legislature is that the delay of the court in passing the preliminary order under Sub-section (1) after satisfying itself that the dispute about possession is likely to cause a breach of the peace, should not prejudice a party if in fact he had filed a petition within two months of his dispossession by the opposite party.

12. It proceeds on the assumption that the Magistrate is bound to pass the preliminary order contemplated by Sub-section (1) of Section 145 immeidiately on receipt of a complaint or police report or other information that a dispute exists, about possession of immovable properly and)hat such dispute is likely to cause a breach of the peace. Put if, has to be pointed out that the Section does not lend any support to such an assumption. Even though the Section is intended to meet an emergent situation and to avoid a breach of the peace occurring it is significant

to note that the Section does not confer any jurisdiction on the Magistrate to start proceedings merely on the strength of the complaint or the police report or other information about an apprehended breach of the peace.

On the other hand the Section makes it clear that the. Magistrate gets jurisdiction to commence proceedings only on being 'satisfied' 'hat there is a real dispute about possession of immovable property and that such dispute is likely to cause a breach of the peace. No doubt, ho may be So satisfied, from the complaint petition .or the police report, but it cannot be said that in every case such satisfaction must automatically follow from the complaint petition or the police report.

13. When the Magistrate is satisfied of the necessity to take action under Section 145 the preliminary order contemplated by .Sub-section (1) must immediately follow. The subsequent inquiry directed by subjection 4 is intended to find out which of the contending parties was in actual possession of the property on the date of the preliminary order so that an order under Sub-section (6) may be passed in favour of .such party.

14. The Section as it originally stood did no;; empower the Magistrate to protect the possession of a party who was wrongfully dispossess ed by the opposite party sometime immediately prior to the date of the preliminary order. The hardship bound to follow from such a situation was specifically commented upon by the Calcutta High Court in Katras Kherriah Coal Co, v. Sibkrishta Daw and Co. ILR 22 Cal 297 where one of the parties to the dispute had been dispossessed by the other party only 14 days prior to the commencement of the proceedings by the Magistrate. The Legislature appears to have, felt that the matter should not be left in such a state of uncertainty as to the nature of the possession which required protection at the hands of the Magistrate and 'that it was necessary to empower the Magistrate to protect the possession of the party who is wrongfully dispossessed within a specific period prior to the date of the preliminary order.

15. The Legislature in its wisdom thought (that the period might be fixed at two months .prior to the date of the preliminary order and accordingly die 1st proviso to Sub-section 4 of Section 145 was added when the Criminal Procedure .Code was re-enacted in the year 1898. If it was the intention of She Legislature to treat the

date pf the complaint petition or of the police report as the material date for the purpose of determining possession under Sub-section (4) it would have been so stated when this proviso was added in the year 1898. But what we find is that in the proviso it is particularly emphasised that possession has to be determined as it was on the date of the preliminary order and that in doing so any wrongful dispossession occurring within two months prior to the date of that order may be ignored and the party thus dispossessed may be deemed to have been in actual possession of the property on the date of the preliminary order in spite of such dispossession.

16. Where the intention of the Legislature is so manifest and the same has been expressed in clear and unambiguous language, there is no scope or justification for the application of the legal fiction 'Munroe tune' and to enlarge the period fixed in the proviso by pushing back the date of the preliminary order and t0 treat that order as one passed on the date of the complaint petition or the police report' calling for action Under Section 145 For these reasons I have to respectfully dissent from the view taken in the Madras decision referred to above.

17. In Subbaraju v. Konetiraju : AIR 1955 AP99 , Subba Rao, C.J., (as he then was) considered the decision in : AIR1951 Mad500 and held that as the tiling of a petition is not a necessary condition for invoking the jurisdiction of the court to make a preliminary order, it is not permissible to hold that the preliminary order must be deemed to have been made on the date of the, filing of the petition.

18. It would be pertinent to refer to the observation of Subba Rao C.J., at page 118 (of Andh WR) (at pp. 102-103 of A.I.R.) which is as follows:

Nor can we agree with the learned Judges 'that the principle embodied in the legal maxim curies nominee gravamen can usefully and legitimately be invoked in the present case. That maxim recognizes the equitable principle that an act of the court shall not prejudice any man. It is founded upon justice and good sense and affords a safe and certain guide for the administration of law. The foundation for the application of the principle is that the court is under a duty to do a particular act and it has tailed to do so which caused prejudice to the other side. To apply that provision to She instant case, it must be established that the courts should make

the preliminary order on the date of the petition filed Under Section 145 Cr.PC The provisions of S- 145. as we have initiated, do not show that the proceedings under the Section should ha initiated only by a petition filed by the affected party. It may also be initiated suo motu by the Magistrate. Nor is the dale of the filing of the petition the basis for making a preliminary order under that Section ... The jurisdiction to make a final order docs not depend on the manner in which the proceedings are initiated but on the satisfaction of the Magistrate 'hat; a breach of 'the peace was imminent on a particular date when he makes the preliminary order. Further, to apply the equitable principle, it would be necessary to ascertain the acts of a court which prejudiced a party to apportion the blame between the court and the party and to of the period of delay attributable to the courts acts. In such an enquiry, it cannot be premised that, in every case, the delay caused by the court, if added, would synchronies with the date of the application. It would be a futile enquiry. The said principle was invoked and applied to a case where a party has done all he should do under a statute and by a mistake of court, he was precluded from completing the act, in which case it was held that the party must be deemed to have done the act on the date n which he had done his part. This is illustrated by the case where a party made a deposit, which is a condition for getting some order and he had done all he should do in the matter but he was prevented from doing so by 'the mistake of an officer of the court. See Gopalkrishna Pillai v. Kunjithapatarw 45 Mad LJ 849 : A.I.R. 1924 Mad 324, Buti Ram v. Sardar Singh A.I.R. 1934 Lan 875 and Muthia Chetty v. Suppan Servai ILTK 38 Mad 291: A.I.R. 1915 Mad/ 865. In those cases by mistake of the office the party could not complete the act within the time prescribed and the courts applied the maxim and he held that he must be 'deemed to have completed that act within the time. Those decisions have no bearing on the question to be decided.

19. This view has been approved by the Pull Bench of the Andhra High Court in Kama-pathi Venkatramiah v. Sitharamiah (1960) 2 Andh WR 383 : A.I.R. 1981 Andh Pra 208 (FB) lf the head note of which reads as follows:

The crucial date under the second proviso to Sub-section (4) of Section 145, Cr IPC is the date of the preliminary order and there is no room for applying any

fiction relating the date of the preliminary order to the date of the petition under Sub-section (1) of Section 145, There is no warrant for the application of he equitable principle to engraft upon a statutory Motion, another fiction by deeming the order we have been passed at the date of the petition, when in tact it was not on he date.

20. To the same effect is the Full Bench Decision of the Allahabad' High Court in Change Bux Singh v. Sukhdin : AIR1959 All141 . Their Lordships dissenting from the view taken in : AIR1951 Mad500 and the decision of the former Hyderabad1 High Courts in Bhadramma v. Kotam Raj A.I.R. 1955 Hyd 140 held that.

The doctrine of 'mine pro tune and actus curiae nominee arravabit' cannot be applied to an order passed1 by a Magistrate Under Section 145(4) Criminal P. C.

21. Another decision to which reference may it made is the case in Ayyan Badmanabhan v. Padmnabhan Narm A.I.R. 1055 Tray-Co 262. There also '1'he Bench decision of the Madras High Court has been dissented from and it was held that the order referred to in Sub-section 4 is undoubtedly the preliminary order passed under Sub-section 1 and that the Magistrate has no jurisdiction to pass a protection order under Sub-section 6 in favour of a party who has been out of possession for a period of more than two months just before the date of the preliminary order.

22. In Lakshmi Narain Singh v. Jugeshwar Jha A.I.R. 1954 pat 169 Imam and Ahmad approved the decision in Emperor v. Parashram A.I.R. 1931 Nag 38 and Meharban Singh v. Bhola Singh ILR 57 All 488 : A.I.R 1935 All 35 and Imam, T. observed;

While I think, from the point of view of hardship and perhaps even a sense of equity, sentiment should lead a court to favour a party who has been forcibly and wrongfully dispossessed, I think it would be beyond: the function of a court to be misled by such sentiments and give a construction to the provisions of as a' tute, which entirely alters it and gives to it a meaning which is contrary to the plain words of the statute, I think the view taken in the Allahabad High Court and the Nagpur High Court is the correct view, and as Rachhpal Singh J. has observed,

the court cannot be affected by the hardships of a case. With great respect to the learned Judges of Madras and this Court who held otherwise, in my opinion, 'he plain words of the proviso compel the decision to be that two months must be calculated from (he date of the order passed Under Section 145 of the Code and no other date,

23. The other decisions which have dissented from the view expressed by the Madras High Court are ILR 5 Luck 440 : A.I.R. 129 Oudh 526; Tolan Kah'ta v. Bhuban Chandra A.I.R. 1951 Assam 161; Janama Bhoi v. Draupadi Bholani : AIR1952 Ori26 ; Mahmood Beg v. Ehsen Beg A.I.R. 1941 Oudh 515; Sri Ram v. The State and Kewaldas v. phusa 1957 Cri LJ 682 (Raj). All these decisions apply the sound and well accepted principle of interpretation that the plain words of the statute should be given full force and effect.

24. I may also refer to the observation of the Judicial Committee in Nagendranatha De v-Sures Chandra De A.I.R. 1932 PC 165 where it is stated:

The fixation of periods of limitation mus3 always be to some extent arbitrary, and may frequency result in hardship. But in construing such provisions, equitable considerations are out of place and the strict grammatical meaning 01 (the words is, their Lordships think, the only safe guide.

25. The fact that in some cases a strict construction of the clear provisions of a statute may cause hardship to one party or other cannot be a ground for puting construction on a Section doing violence to the language used. After all, Section 145, Cri. P. Code, prescribes a summary procedure for deciding the foam of actual possession to prevent breach of peace and to effectuate the purpose a reasonable time was fixed for dating back the order, f am therefore Clause (opinion that the second proviso to Sub-section (4) of Section 145, Cr IPC must be continued only to forcible and wrongful dispossession within two months next before the date of the preliminary order. In the view that I take no Other question arises.

26. In the result the order of the First. Class Magistrate is set aside and the revision1 petitioner is declared, to be entitled to possession until evicted therefrom in due course of law and forbidding all disturbances of such possession until such

eviction.