

Durjan Singh Vs. the State and ors.

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Court : Rajasthan

Decided On : Apr-27-1954

Reported in : AIR1954Raj217

Judge : Wanchoo, C.J. and; Modi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145, 145(1) and 537

Appeal No. : Criminal Revn. No. 214 of 1952

Appellant : Durjan Singh

Respondent : The State and ors.

Advocate for Def. : Ratanlal, Adv. for Non-Petitioner No. 2 and; L.N. Changani, Govt. Adv.

Advocate for Pet/Ap. : Chandmal, Adv.

Judgement :

Modi, J.

1. This is a reference by a learned Single Judge of this Court and relates to the interpretation of Section 145, Cr. P. C. The question referred to this Bench is in the following terms:

'Whether the omission on the part of a Magistrate to pass a preliminary order under Section 145(1), Cr. P. C. stating the grounds of his being satisfied about the existence of dispute and the likelihood of the breach of peace is an illegality which would vitiate all the subsequent proceedings or is a mere irregularity curable under Section 537, Cr. P. C?'

2. The facts out of which the reference has arisen are these. On 6-11-1951, a report was presented on behalf of the police station Begu, in the court of the Sub-Divisional Magistrate, Begu, that there was a serious dispute between Durjansingh and others, who are petitioners in this Court, and Moda and others who are opposite parties, relating to a well called Rawla and the agricultural land attached thereto, situate in village Brijraj-pura, and that there was an imminent danger of breach of the peace, and it was prayed that action be taken under Section 107, Cr. P. C.

On 15-11-1951, the learned Magistrate directed notices to be issued to the parties complained against under Section 107, Cr. P. C. On the 23rd November the Sub-Divisional Magistrate directed separate notices to be issued against the same parties under Section 145, Cr. P. C. In these notices, a reference to the report of the Begu police was made and it was stated that there was an apprehension of a breach of the peace, and the Magistrate further called upon both parties to file written statements as regards their respective claims to possession of the land in dispute. There was a further report on 9-2-1952, by one Hukma, who appears to be an actual tenant in cultivator possession of the land in dispute, wherein he prayed for the attachment of the standing crop in view of the bad blood existing between the parties above named, and the learned Magistrate ordered attachment thereof.

Eventually, as a result of the inquiry made into the matter, the Sub-Divisional Magistrate declared that Moda and his party were in possession of the well and the land appurtenant thereto at the relevant time and directed that they be put in possession and enjoined Durjansingh and others to refrain from disturbing such possession until the eviction of Moda and others by a competent court. Durjansingh and others went in revision from the above order to the learned

Sessions Judge, Pratapgarh, who upheld it. This led to a revision to this Court.

3. It was contended on behalf of the petitioners before the learned single Judge that the Magistrate had failed to pass a preliminary order in accordance with the terms of Section 145 (1), Cr. P. C. and that he had not stated anywhere that he was satisfied that a dispute likely to cause a breach of the peace existed between the parties, much less that he had given his reasons relating thereto and, therefore, all the subsequent proceedings taken in the court of the Magistrate were illegal and were fit to be quashed. The learned Single Judge was faced with a conflict of decisions of this Court on the point raised before him. He has referred to -- 'Ramchandra v. Bhairon Buksh', AIR 1954 Raj 51 (A) and -- 'Mohansingh v. Kishan-lal', 1952 RLW 236 (B), and also to -- 'Narotam v. Kamlabai', 1951 R LW 55 (C) and -- 'Udami v. State', 1952 R LW 286 CD), and the latter two cases, according to the learned Judge, are distinguishable on their peculiar facts. The view taken in -- 'Ramchandra's case (A)', is in effect that the omission to record a preliminary order under Section 145 (1) is fatal 'and stands in conflict with the decision taken in 'Mohansingh's case (B)' where such an omission has been held, in the absence of prejudice, to be curable under Section 537, Cr. P. C. It is this conflict which has led to the present reference.

4. It may be pointed out at once that the question that has been referred to us has been considered by the various High Courts, and before we express our independent' opinion upon it and examine the cases of our own court, we think it desirable to make a broad survey of the views of the other High Courts in this connection.

5. In the Allahabad High Court, the leading case on the subject is the Full Bench decision in -- 'Kapoor Chand v. Suraj Prasad', AIR 1933 All 264 (E), and therefore, we do not consider it necessary to examine the earlier cases where varying views were taken. It was held by the Full Bench that the jurisdiction of a Magistrate to take action under Section 145, Cr. P. C. arises from the fact that he has received certain information as to the existence of a dispute relating to land or water or the boundaries thereof and that there is an apprehension of a breach of the peace relating thereto, and he is satisfied as to the truth of that information. The

jurisdiction of the Magistrate does not depend upon how he proceeds. There are two things: one is the authority conferred upon him to act, and the other is how he has to act. If he has jurisdiction, he is not deprived of that merely because his procedure is erroneous or defective. Hence, the omission on the part of the Magistrate to follow certain directions contained in the section, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction.

It was further held that the sole criterion given by Section 537 is whether the accused person has been prejudiced or not, and as the object of procedure was to enable the court to do justice, and if in spite of disregard of the rules of procedure, justice had been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong. It may be pointed out that in this case, the learned Magistrate had failed to comply with the provisions of Section 145(1), Cr. P. C., inasmuch as he had omitted to state that he was satisfied that there was a likelihood of a breach of the peace; nor did he mention specifically the grounds upon which he was so satisfied, and all that he stated was that he had perused the record and that notices be issued in accordance with law which, in the particular context, could only mean Section 145(1), Cr. P. C. The above view has been consistently taken in later decisions of the Allahabad High Court. (See -- 'Mrs. V. E. Argles v. Chhail Behari' AIR 1949 All 230 (F); -- 'Shankar v. Rex', AIR 1950 All 274 (G); -- 'Narain Singh v. Mt. Suraj Kishore Devi', AIR 1951 All 326 (H) and -- 'Farmatma v. State', AIR 1954 All 24 (I).

6. Taking up the cases of the Calcutta High Court next, reference may be made to -- 'Banwari Lal v. Hriday Chakravarti', 32 Cal 552 (J). There it was held by a Division Bench that

'the drawing up of a formal order under Sub-section (1) of Section 145 was absolutely necessary to the initiation of proceedings under Section 145, and the omission to do so rendered them bad for want of jurisdiction.'

The learned Judges observed that the question was one of jurisdiction and held that in a number of cases the view had been taken that the making of a formal order under Sub-section (1) was absolutely necessary although they did not cite

any of those cases in their judgment and no reasons have been given as to how it was a question of jurisdiction. There are, however, earlier cases of that court -- 'Queen Empress v. Gobind Chandra Das', 20 Cal 520 (K) and -- 'Mohesh Sowar v. Narain Bag', 27 Cal 981 (L) both of which were relied on in -- 'Nittyanand Roy v. Paresh Nath Sen', 32 Cal 771 (M). With great respect, it may be pointed out that none of these cases differentiates between jurisdiction and the mode of its exercise or procedure.

The next case which requires to be noticed is --'Sukhlal Sheikh v. Tara Chandta', 33 Cal 68 (N), which was a Pull Bench decision. The precise question for determination there was whether the omission to publish a notice under Section 145 (3) Cr. P. C. was a mere irregularity which could not vitiate the proceedings in the absence of prejudice. It was held that the provision as to the publication of notice under Section 145 (3) was directory and related to a matter of procedure only and not of jurisdiction, although earlier cases of that Court had taken a contrary view. What is of significance about this case for our present purposes is certain observations which were made by the learned Judges, who referred the question to the Full Bench in the referring order.

With regard to the contention that failure to publish a notice under Section 145 (3), Cr, P. C. was a breach of the mandatory provisions and affected the Jurisdiction of the court below, the learned Judges pointed out that any such contention did not sufficiently distinguish between the notion of the jurisdiction of a court and the mode in which such jurisdiction is to be exercised, and they went on to say that the extent to which the restraints attaching to the mode of the exercise of the jurisdiction of a court should be included in the conception of the jurisdiction itself was a question of some nicety, upon which there had been considerable difference of judicial opinion. Then the learned Judges expressed the view that they were not prepared to accept the proposition that

'a non-compliance with every rule of procedure destroys the jurisdiction of the court. Such non-compliance may, in some cases, amount to nothing more than an irregularity and consequently be insufficient to invalidate the proceedings, until it is shown that any party has been prejudiced by reason thereof. In other cases such

non-compliance may amount to an illegality and thus destroy the validity of the whole proceedings.'

Those remarks, in our humble judgment, apply with full force to many of the Calcutta decisions to which we have referred above as taking the contrary view on the point before us.

The case to which reference may next be made in this connection is -- 'Khudiram Mandal v. Jitendra Nath', AIR 1952 Cal 713 (O), which was decided by a Division Bench. The learned Judges held that where a Magistrate does not state the grounds of his satisfaction in his initiatory order and merely states that it appeared to him that a dispute likely to cause a breach of the peace existed between the parties, such an order was undoubtedly a defective order and if challenged in proper time, it would be corrected or set aside; but that the omission to state grounds is only an irregularity in the proceedings and does not affect the Magistrate's jurisdiction and, therefore, when it is complained of at the end of the proceeding validity of the final order must be judged by the test of prejudice. The Allahabad Full Bench decision in 'AIR 1933 All 264 (E)' was referred to and followed. It seems to us, therefore, that the latest trend of decisions even of the Calcutta High Court is in favour of treating such errors as mere matters of procedure not having the effect of vitiating further proceedings in the absence of prejudice or failure of justice.

7. As regards the Bombay High Court, the only case which has been brought to our notice is 'In re Pandurang Govind', 24 Bom 527 (P). It was held there by a Division Bench that a Magistrate acting under Section 145, Cr. P. C. must in his preliminary order set forth the grounds on which he is satisfied that there is a dispute likely to cause a breach of the peace. The learned Judges were apparently of the opinion that the Magistrate had jurisdiction to deal with the case but that he did not follow the proper procedure. Reliance was placed on '20 Cal 520 (K)', and it was held that it was obligatory for the Magistrate to inform the parties of the grounds of the report before making an order under Section 145. We have already pointed out above that the recent trend of opinion in the Calcutta High Court is that such an omission is a mere irregularity in the absence of prejudice. Besides, such

a point would, in our opinion, have no force when the parties are fully alive to the contentions raised in the case, and we may with deference point out that the effect of Section 537, Cr. P. C. was not at all considered in this case.

8. Turning next to the Madras decisions, it appears to us that the opinion there has been very much divided. As early as 1912 in -- 'Kamal Kutty v. Udayavarma Raja Valia Raja of Chirak-kal', 36 Mad 275 (Q), a Division Bench in a considered judgment came to the conclusion (while earlier opinion was divided) that an omission to set forth, in a preliminary order, the grounds which satisfied the Magistrate that there was a likelihood of a breach of the peace does not affect his jurisdiction, and once the Magistrate was properly seized of jurisdiction, subsequent action must be considered in relation to procedure and not jurisdiction.

In -- 'Mariasusai Udayan v. Mahamud Azzeezu-deen Sahib', AIR 1936 Mad 824 (R), however,, a learned single Judge held that unless there was a preliminary order in terms of Section 145 (1) the Magistrate would have no jurisdiction to pass an order under Section 145 (6), and the learned Judge further observed that the decisions of that court 'so far' tend to support him. It is remarkable, however, that there was no reference to '36 Mad 275 (Q)' to which we have referred above or to any other case whatever and that no effort was made to meet the reasoning contained in that case or the cases of other courts which had meanwhile taken a considered view on the other side such as -- 'Kapoor Chand v. Saraj Prasad', (FB) CE).

The latest Madras case to which our attention has been drawn is -- 'Swaminatha Filial v. Ragh-vachariar', AIR 1947 Mad 161 (S). This case undoubtedly takes the recent view that the omission to make mention of the material relating to the existence of a dispute within the meaning of Section 145, Cr. P. C., in the order of the Magistrate was by itself a mere irregularity in procedure and would not be fatal to the proceedings. It is noticeable, however, that there is no reference even in this case to the earlier cases of that court or of the other courts, and it appears to us that the view of the Madras High Court on the point before us is characterized by great lack of uniformity.

9. Coming to the Lahore cases we again find the same state of affairs. In -- 'Jhanda Ram v. Topan Ram', AIR 1922 Lah 454 (T), learned single Judge held relying on '36 Mad 275 (Q)' referred to above that once a Magistrate was satisfied from information of some sort that a dispute existed likely to cause a breach of the peace concerning land or water or boundaries thereof in his jurisdiction, such jurisdiction was complete and his action thereafter was a matter of mere procedure. In -- 'Hakam v. Ralia Ram', AIR 1924 Lah 91 (U), however, the same learned Judge took a contrary view and held on the authority of some earlier decisions of that Court but without referring to his own decision in -- 'Thanda Ram v. Topan Ram.', (T) that the omission to pass an order under Section 145 (1) was not a mere technical defect and constituted a defect of jurisdiction. This case was followed in -- 'Emperor v. Sis Ram', AIR 1930 Lah 895 (V) by another learned Single Judge, which in its turn was followed in -- 'Chanan Singh v. Emperor', AIR 1938 Lah 345 (W) also by a Single Judge in a very short judgment which contained very little reasoning. Then came -- 'Ratan v. Tika,' AIR 1939 Lah 233 (X) before another learned Single Judge who noticed the cases referred to above but was not prepared to follow them, as he was inclined to the view taken in the Pull Bench case of the Allahabad High Court, and held want of an initial order as required by 145 (1), Cr. P. C., was curable under Section 537, Cr. P. C. The learned Judge referred to some earlier decisions of his own Court, viz., -- 'Mahomed Sharif v. Dhanpat Rai', AIR 1911 Lah 295 (Y) and -- 'Nur Baksh v. Emperor', AIR 1917 Lah 35 (1) (Z) and -- 'Sajad Hussain v. Nanak Chand', AIR 1917 Lah 35 (2) (ZI) in support of his view. The opinion in Lahore is thus more or less evenly divided, and it is difficult to say what is precisely the view of that Court although the latest trend there appears to be in favour of the Allahabad view.

10. As regards the Patna High Court, we propose to notice three cases. The first is -- 'S.M. Yaqub v. T. N. Basu', AIR 1949 Pat 146 (SB) (Z2), which was decided by a Special Bench. It was, held disagreeing with '32 Cal 771 (M)' referred to above that the failure of a Magistrate to state the grounds of his satisfaction as to the likelihood of the breach of the peace does not touch the question of jurisdiction. In a later case -- 'Dir-gopal Singh v. Rambrich Singh', AIR 1951 Pat 412 (23) Agarwala C. J. threw a doubt and was not sure whether an omission to record a preliminary order in terms of Section 145 (1), Cr. P. C. was a curable irregularity.

He proceeded to say, however, that assuming that to be so for the purposes, of the case before him, the question was whether the materials before the Magistrate were so coercive that it should be held that he must be satisfied that the dispute was likely to occasion a breach of the peace while he did not record that he was so satisfied; and on an examination of the materials on the record, the learned Chief Justice came to the conclusion that they were not sufficient and, therefore, the Magistrate had no jurisdiction to inquire into the complaint.

With great respect, we may point out that this, case is not helpful, as it does not deal with the question of principle but addresses itself to considerations which, in our opinion, were more of a subsidiary nature. The last Patna case to which we should like to refer in -- 'Wazir Mahton v. Badri Mahton', AIR 1950 Pat 372 (Z4). In that case Dass J. came to a different conclusion and laid down that where a Magistrate had materials before him, (1) his failure to state the reasons why he was satisfied that there was an apprehension of a breach of the peace was clearly an irregularity and nothing more, and (2) that an omission to draw up a formal preliminary order under Section 145 (1) was also an irregularity and would not vitiate subsequent proceedings where no prejudice was caused to the parties, and they know the nature and extent of the dispute. It appears to us, therefore, that the preponderance of opinion, in the Patna High Court is in favour of the Allahabad view.

11. We would now turn to a few Oudh. cases. The first case which calls for notice is -- 'Bibi Asghari Khanarn v. Emperor', AIR 1935 Oudh 316 (Z5). That case originally came before a Bench of two judges, and as there was a difference of opinion between them, it was placed before a third Judge King C. J. who, it may incidentally be mentioned, was a party to the Allahabad Pull Bench, case. On a careful analysis of the opinions delivered in this case, it appears to us that the difference between the Judges was not so such as-to the principle involved as to its applicability to the circumstances of a particular case. Nanavatty J .who apparently was of the contrary view did not question the rule of law laid down in the Allahabad case, and tried to distinguish it. To use his own words,

'the principle laid down in that (that is the Allahabad Full Bench) decision is also not challenged but its applicability to this case is challenged'

and on this reasoning, the learned Judge came to the conclusion that the Magistrate had no materials upon which he could come to a conclusion that there was a fear of a breach, of the peace. But this conclusion of the learned Judge was not shared by the other two Judges, and it was held that the Allahabad case fully applies to the circumstances of that case and that the mere omission to frame an order in accordance with Section 145(1) was cured by Section 537, Cr. P. C., as no failure of justice has occurred.

This case which went before three Judges had almost the effect of a Full Bench decision; 'but strangely enough, in -- 'Bisram v. Kamta Prasad', AIR 1945 Oudh 62 (Z6) and -- 'Abdul Aziz Khan v. Badri', AIR 1948 Oudh 184 (Z7) an attempt appears to have been made by learned Single Judges to distinguish the earlier case on points which do not, in our opinion, admit of any real distinction. With respect, we would point out that these Oudh cases are characterized by a confusion, if we may say so, between the enunciation of a principle and a desire to avoid its application for some reason or another, with the result that the principle itself appears to have got blurred in the process.

We may explain our point of view a little more fully. Many of these cases turn on the consideration that there was not sufficiency of material to enable the Magistrate to satisfy him that there was an apprehension of a breach of the peace within the meaning of Section 145 (1). But we would respectfully point out that that would not destroy the principle that the mere failure to draw up a formal order, or the omission to state the grounds by the Magistrate showing his satisfaction as to a likelihood of a breach of the peace would, by itself, not be fatal provided that there are materials on the record on the basis of which the Magistrate could come to such a conclusion. Granting that the Magistrate acts arbitrarily in initiating proceedings under Section 145, Cr. P. C. without any material on the record that there was a likelihood of a breach of the peace, such a proceeding would be bad because of a total want of such material rather than by reason of his failure to draw up a formal order in terms of Section 145 (1). Again, where there is no

foundation whatsoever for a Magistrate being satisfied that there was a dispute of the kind provided for under Section 145, Cr. P. C-, or that there was a likelihood of a breach of the peace relating to it, his mere drawing up of a formal order under Section 145 (1) would not cure the weakness of such a proceeding, and this brings us to the point we wish ourselves to make and it is this.

12. From a review of the numerous authorities of the various High Courts, our view is that a Magistrate's jurisdiction or lack of it under Section 145, Cr. P. C-, arises not from the presence or absence of a formal order under Section 145 (1) or again from a statement of his grounds as to his satisfaction of a likelihood of a breach of the peace or his failure to record such grounds, but the Magistrate really acquires jurisdiction from certain basic conditions laid down in Section 145, viz., (1) that there exists a dispute concerning any land or water or boundaries thereof within, the local limits of his jurisdiction and (2) that he is satisfied from some information whether it be a police report or any other information, and the Code does not limit the kind of information upon which a Magistrate may act, that such dispute is likely to cause a breach of the peace. As soon as these conditions are fulfilled, the Magistrate is at once seized of the dispute, and acquires jurisdiction to act under Section 145. What he does thereafter, however, namely, that he makes 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 within a stated time and to put in, written statements of their respective claims as respects the fact of actual possession of the subject of dispute, is all a matter of procedure. And if a Magistrate commits any error with respect to any of the matters last-mentioned, his errors are merely procedural and cannot be considered to have the effect of depriving him of jurisdiction which he undoubtedly possessed at the commencement of the proceedings. This of course assumes that the basic conditions are satisfied; for if those conditions are not satisfied, the Magistrate cannot arrogate jurisdiction to himself by merely complying with the procedural formality. If we may say so, without any disrespect, it is the failure to appreciate this distinction between the part of Section 145 which gives jurisdiction and the remaining part thereof which merely lays down the procedure that has been responsible for a good deal of confusion in the decisions of some of the Courts. We are unable to accept the view that mere procedural errors can have the effect

of destroying jurisdiction duly acquired. It is true that errors of procedure as such are of varying degrees and they may sometimes have the effect of vitiating conclusions of law or fact. But whether they are susceptible to such an effect must depend on the facts and circumstances of each case. Thus where by reason of a failure to draw up a preliminary order under Sub-section (1) in a proceeding under Section 145, Cr. P. C., the parties remain under a misapprehension as to the subject-matter of dispute or as to its nature and extent, or are prevented from, leading relevant evidence, such an error may result in prejudice to one or both of the parties and may have the effect of vitiating the proceedings. But where the parties fully know their respective cases and have sought the dispute out without raising any objection at the appropriate opportunity and then seek to avoid the adverse final result on account of mere procedural irregularities, then such a proceeding will not for such reason be invalidated. In this connection we cannot do better than to quote the observations of their Lordships of the Privy Council in -- 'Pulu-kuri Kottaya v. Emperor', AIR 1947 PC 67 (Z8). Their Lordships in that case had to consider the effect of a failure to comply with the provisions of Section 162, Cr. P. C., and the following observations have a direct bearing on the question before us:

'There are, no doubt, authorities in India which, lend some support to Mr. Pritt's contention, and reference may be made to -- 'Tirkha v. Nanak', AIR 1927 All 350 (Z9), in which the Court expressed the view that Section 537, Criminal P. C., applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to -- 'Maruda Muthu Vannian v. Emperor', AIR 1922 Mad 512 (Z10) in which the view was expressed that any failure to examine the accused under Section 342, Criminal P. C., was fatal to the validity of the trial and could not be cured under Section 537. In their Lordships' opinion this argument is based on the narrow view of the operation of Section 537- When a trial is conducted in a manner different from that prescribed by the Code as in -- 'Subramania Iyer v. Emperor', 28 Ind App 257 (PC) (Z11) the trial is bad, and no question of curing an irregularity arises but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and none the less so because the irregularity involves,

as must merely always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in-- 'Abdul Rahman v. Emperor', AIR 1927 PC 44 (Z12) where failure to comply with Section 360, Criminal P. C. was held to be cured by Ss. 535 and 537.'

Their Lordships then came to the conclusion that the case before them fell under Section 537, and the trial was held to be valid notwithstanding the breach of Section 162, Cr. P. C.

13. Applying the principle laid down by their Lordships of the Privy Council in the above case, we have no hesitation in coming to the conclusion that where there are materials on the record vesting a Magistrate with jurisdiction under Section 145 (1), or in other words, where there is a dispute relating to land or water or boundaries thereof within the local limits of his jurisdiction, and where he is satisfied from a police report or other information that such a dispute is likely to cause a breach of the peace, a mere omission on the part of the Magistrate, to draw up a formal preliminary order or his failure to state the grounds of his being so satisfied are, by themselves, mere irregularities of procedure and cannot have the effect of vitiating the entire proceedings unless such failure has resulted in prejudice or failure of justice.

14. In view of the conclusion at which we have arrived above, we do not consider it necessary to deal at any great length with the cases of our own Court, and we propose to deal with them briefly. The following cases of our Court have been brought to our notice. -- 'Narotam v. Kamlabai (C)', -- 'Ramchandra v. Bhairon Buksh (A)',; -- 'Bhairon Bux v. Raj Mal', AIR 1952 Raj 100 (Z13); -- 'Mohansingh v. Kishanlal (B)'; -- 'Bhanwarlal v. Harisingh', 1952 Raj LW 282 (Z14) and -- 'Udami v. State', (D). Out of these, --'Ramchandra's case (A)' and 'Bheron Bux's case (Z13)', have laid down in effect that a preliminary order under Section 145, Cr. P. C. is indispensable, and in its absence, the proceedings are illegal. It follows as a corollary from what we have stated above that these cases were not correctly decided.

We are of opinion that 'Narotam's case (C)' is also not correctly decided in so far as it holds that it is mandatory under Section 145 (1) for the Magistrate to make an order in writing stating the grounds of his being satisfied that there is a dispute likely to cause a breach of the peace concerning the immovable property, or to comply with the provisions of Sub-section (3) of Section 145, Cr. P.C. directing the publication of a copy of the notice to some conspicuous place at or near the subject of dispute. All these are clearly matters of procedure and it would depend upon the circumstances of each case whether non-compliance in such matters of procedure has caused prejudice or led to failure of justice, and in that event, only such errors may have the effect of vitiating the proceedings.

As regards 'Udami's case (D)', it seems to us that the learned Single Judge was of the opinion that there must be something on the record to show that the Magistrate did apply his mind to the facts of the case and was so satisfied to justify an action under Section 145, and that counsel for his party concerned had in that case expressed his inability to show anything from the record from which it might be gathered that the Magistrate at stage had applied his mind to the point whether there was an apprehension of a breach of the peace. The case, therefore, depended for its decision not so much upon the principle involved but upon the applicability of the principle to the facts and circumstances of that case. We are of opinion that if there were materials before the learned Magistrate which would have enabled him to acquire jurisdiction under Section 145, the mere omission to record a formal order or to state there- ' in the grounds of his satisfaction as to the likelihood of a breach of the peace was, and, in our opinion, would be a mere matter of procedure, in so far as such material existed on the record, it should be presumed that the Magistrate must have applied his mind to it, and no other evidence of such application in the shape of a formal order would be necessary. The other two cases of our Court namely -- 'Mohansingh v. Kishanlal (B)', and -- 'Bhanwarlal v. Hari Singh (Z14)', took a correct legal view.

15. For the reasons explained above, our answer to the question referred to us is that a mere omission on the part of a Magistrate to pass a preliminary order under Section 145 (1), Cr. P. C-, or his failure to record the grounds for his being satisfied as to the existence of a dispute within the meaning of that section, and as

to the likelihood of a breach of the peace are irregularities of procedure and must be judged by the test of prejudice under Section 537, Cr. P. C.

16. We would take this opportunity of pointing out, however, that though our view on the legal aspect of the point referred to us is, as stated above, we consider it highly desirable that the magistracy should avoid slipshod or perfunctory procedure in dealing with cases under section 145, Cr. P. C., and should carefully comply with its provisions, and invariably record a preliminary order strictly complying with the directions contained therein, so that the object underlying this section is properly fulfilled and not defeated.

17. With our answer as above, the case will now go back to the learned Single Judge for disposal in the light of our opinion.

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