

Driver Vs. Queen-empress

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Court : Kolkata

Decided On : Jun-03-1898

Reported in : (1898)ILR25Cal798

Judge : Banerjee and;Stevens, JJ.

Appellant : Driver

Respondent : Queen-empress

Judgement :

Banerjee and Stevens, JJ.

1. This is a rule calling on the Magistrate of the District to show cause why the order of the Magistrate of Monghyr, dated the 15th February 1898, calling upon the petitioner to execute bonds with sureties, should not be set aside, on the following grounds, namely, first, that the order is not warranted by the finding arrived at by the Magistrate; second, that it is inconsistent with the notice which he was called upon to answer; and third, that it is not warranted by law, and is otherwise not a fit and proper order under the circumstances of the case.

2. The learned Magistrate has submitted a written explanation, and Mr. Jackson appeared to show cause on behalf of the Manjoul Factory between the proprietors of which and the petitioner the dispute that has given rise to these proceedings is said to exist.

3. As the rule is issued only upon the Magistrate to show cause, and as the order that is sought to be set aside is one that is only intended to secure the peace of the district by binding upon the petitioner, and does not and cannot determine any question of disputed possession between the petitioner and any other party with whom he may have disputes, the Magistrate in our opinion is the only party entitled to be heard in a case like this; and we have accordingly held that Mr. Jackson, who appears only for the Manjoul Factory, is not entitled to be heard in this rule.

4. It is true that the learned Magistrate in the last paragraph of the explanation submitted by him says that the first party should be given an opportunity of showing cause against the rule, as they are very considerably interested in the result, and the Magistrate requests that a postponement be granted to admit of their doing so. But we can only express our regret that the learned District Magistrate should have taken this view of the matter. He was called upon to show cause. He has submitted a written explanation which we have duly considered; and if he wished that cause should be shown on his behalf by any one appearing before us, it was quite competent to him to have instructed the Legal Remembrancer to appear and show cause before us. But he has gone a little out of the way in saying that the persons whom he calls the first party should have an opportunity given them of showing cause, because they have a very considerable interest in the result.

5. As we have said above, the party interested in the result is the Magistrate of the district. Proceedings under Section 107 of the Criminal Procedure Code are only intended for the security of the public peace, and not for the purpose of enabling one of two contending parties to help themselves in recovering or retaining possession of immoveable property, after having their adversary's hands tied down by an order under that section. If it was thought necessary that an order should be made relating to the possession of any immoveable property, which is the subject matter of dispute between contending parties, the proper course was to have instituted proceedings under Section 145 of the Criminal Procedure Code; and then the parties would have had due notice of the case they had to meet, and each party could have put forward evidence to prove his possession of the land in

dispute.

6. We were then referred to a permission granted by the Legal Remembrancer to Mr. MacNair, authorizing him to show cause in this case. We do not think that such permission is equivalent to instructing that gentleman to appear on behalf of the Magistrate; nor were we asked to allow the learned Counsel to appear on behalf of the Magistrate. We do not think that a mere permission of this sort by the Legal Remembrancer is equivalent to an authority to appear for the Magistrate or for the Crown.

7. That being so, now let us see how the case stands on the merits with reference to the first ground. We observe that what the learned Magistrate has found is that the petitioner before us is doing wrongful acts which may lead to a breach of the peace. To quote the learned Magistrate's own words, he says: 'I find therefore, on enquiry that J. C. M. Driver, Baiju Lal and Damri Lal, are doing, and are likely to do, wrongful acts, viz., the giving of leases of lands not in their possession and thereby instigating the lessees to commit criminal trespass on these lands, and otherwise wrongfully dispossess their rightful occupiers, and that these wrongful acts are in the highest degree likely to give rise to breaches of the peace in the village of Manjoul and neighbouring villages, and I therefore order under Section 118 of the Criminal Procedure Code that they give each a bond, with sureties, for the amounts noted below for their good behaviour for one year.'

8. Now this finding and the conclusion based thereon are, in our opinion, clearly wrong. In the first place the giving of leases to tenants by a party who is not in possession is not necessarily a wrongful act. If a party is rightfully entitled to immovable property and has been wrongfully kept out of possession thereof, there is nothing wrong in his giving a lease of such property to another party. If the party taking the lease goes to take possession peaceably, there is nothing wrong in that act. It is only where a party goes to take possession by force that any wrong is done.

9. The mere fact, therefore, of the petitioner before us having given leases to parties of land, not in the Possession of his employer, cannot in our opinion constitute a wrongful act such as Section 107 of the Code of Criminal Procedure

contemplates, and if that is not a wrongful act, the whole foundation for the proceeding is gone. It may be that ryots taking leases from, or executing kabuliats in favour of, a lessor who is not in possession may feel induced to commit a breach of the peace in their attempt to take possession. If they attempt to do so, they may be bound down; but that can be done only if it is found that they are going to take wrongful measures to recover possession.

10. We may observe that the taking of kabuliats from tenants by a landlord who may not be in actual possession is by no means such an uncommon thing as to give rise to any apprehension such as the Magistrate in his judgment refers to.

11. The learned Magistrate observes in his judgment that, as by law (Section 108 of the Transfer of Property Act) a lessor is bound on the lessee's request to put him in possession of the property, the fact of a lease being given by a party out of possession must be taken to amount to an instigation or an attempt on his part to take forcible measures for obtaining possession. We can only say that the reasoning is a far-fetched one, and that it does not follow that, because a lessee in such a case can ask the lessor to put him in possession, the lessor will necessarily go the length of resorting to force to put his lessee in possession.

12. The first ground, therefore, on which this rule has been issued, namely, that the facts found are not sufficient to warrant the order, ought, in our opinion, to succeed.

13. The second ground, namely, that the order made is inconsistent with the notice by which the petitioner was called upon to show cause, is also well founded; for whereas the notice directed him to show cause why he should not be bound down to keep the peace, the order is one directing him to execute bonds for his good behaviour under Section 118 of the Criminal Procedure Code.

14. The Magistrate says in his explanation that this must be a clerical error. Perhaps it is a clerical error as the terms of the bond subsequently taken would go to show.

15. We are also of opinion that the third ground, namely, that the order made in this case is not a fit and proper order, is well founded. The effect of the order, as we have already observed, is to bind down one of two contending parties whilst it leaves the other party free. That is hardly fair in any view of the case.

16. For all these reasons we are of opinion that this rule must be made absolute, and the order complained of set aside.

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