

Kalipada Das Vs. the State

Kalipada Das Vs. the State

SooperKanoon Citation : sooperkanoon.com/875822

Court : Kolkata

Decided On : Jul-28-1950

Reported in : AIR1951Cal207

Judge : Harries, C.J. and ;Bose, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 134, 144 and 144(2);
;[Indian Penal Code 1860](#) - Sections 378 and 379

Appeal No. : Cri. Revn. Nos. 425 and 493 of 1950

Appellant : Kalipada Das

Respondent : The State

Advocate for Def. : Bansorilal Sarkar, Adv.

Advocate for Pet/Ap. : Debabrata Mookerjee and ;Ajay Kumar Basu, Adv.

Disposition : Petition allowed

Judgement :

Harries, C.J.

1. These are two connected revisions which can be disposed of by this judgment.

2. Criminal Revision No. 425 of 1950 is a petition for revision of an order directing the prosecution of the petitioner under Section 188, Penal Code, for breach of an order made by the Sub-Divisional Officer of Uluberia under Section 144 Criminal P. C.

3. Criminal Revision 493 of 1950 is a petition for revision of an order directing the prosecution of the petitioner and three others on a charge of theft.

4. It appears that in the year 1940, the petitioner and his brothers leased from the Burdwan Raj the right to remove sand from sand banks in the Rupnarayan River. This lease gave them a right to remove sand at three points within the area of Police Station Daspur in the district of Midnapore. The lease was originally for three years, but has been renewed from time to time.

5. It seems that one Nalini Mohan Biswas leased the right to take sand from the Rupnarayan River (from?) the Collector of Howrah and in June of 1949, the petitioner applied to a Magistrate in the Midnapore district for an order under Section 144, Criminal P. C., restraining Biswas from taking sand from these areas in the Rupnarayan River. The learned Magistrate apparently made an order restraining Biswas. Thereupon, on August 13 Biswas applied to the Magistrate at Uluberia for an order against the petitioner under Section 144, Criminal P. C. These proceedings were not pressed as appellate proceedings were pending from the order of the Magistrate restraining Biswas under Section 144, Criminal P. C. On 6-12-1949, the Sessions Judge of Midnapore affirmed the order made by the Magistrate against Biswas under Section 144,.

6. On 12-1-1950, an application was made by Biswas to the Sub-Divisional Officer of Uluberia for an order under Section 144, Criminal P. C. No notice was served on the petitioner Kalipadadas Karmakar and an immediate order under Section 144, was made and it is said that this order was served.

7. A complaint was made that the petitioner in Criminal Revision No. 425 of 1950 in breach of this order took sand from the Rupnarayan River and therefore committed an offence under Section 188 of the Indian Penal Code. His prosecution was accordingly directed.

8. A complaint was also made that the petitioner and three others were taking sand from the char in the Rupnarayan River and therefore had committed theft and the charge sheet was received and it is urged that these proceedings should be quashed. It appears to me beyond all question that the dispute in this case is really a dispute between the Burdwan Raj and the Collector of Howrah and that attempts are being made to establish the title of the Collector of Howrah by means of criminal proceedings. The criminal Courts were never intended to decide nice questions as to the ownership of chars in a river which frequently change their position. The questions involved in this case are probably extremely difficult questions to decide and are questions which could only be decided satisfactorily in a civil Court. Nevertheless, the Sub-Divisional Officer of Uluberia having, as his order shows, received a memorandum from the Collector of Howrah, who of course is Biswas's lessee (lessor?) found no difficulty in coming to the conclusion that this char was within the district of Howrah and therefore could be leased to Biswas. It seems to me that a criminal Court in the district of Howrah is hardly an appropriate tribunal to decide whether the Collector and District Magistrate of Howrah who is the immediate superior of all Magistrates in the district is or is not entitled to lease property to others. In any event, I should have imagined before arriving at any conclusion that the learned Sub-Divisional Officer would have proceeded with great care. What he did, however, was to make an ex parte order when there was no urgency in the matter at all. He simply made it because a police officer thought that Kalipadadas Karmakar should be restrained from collecting sums in respect of this sand.

9. An order under Section 144, Criminal P. C., may be made where it is necessary to prevent a breach of the peace or something of that kind. Sub-section (2) of Section 144, Criminal P. C. however provides that only in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed an order can be made ex parte. As the narration of the facts has shown this dispute had been dragging on for months and months and there was no desperate urgency in the matter at all. There was no suggestion that heads were likely to be broken. The most that was being suggested was that the lessee of the Collector of Howrah was being deprived of his just dues. It seems to me that this was not a case which came

within Sub-section (2) of Section 144, and therefore the Sub-Divisional Magistrate had no right whatsoever to make an ex parte order. The ex parte order was made by the learned Magistrate after having seen a report of the Officer in Charge of the Amta Police Station and the Collector's memorandum. How the Collector's memorandum could be placed before a judicial officer to help him to decide the case when the Collector himself was the person really involved, I find it difficult to understand.

10. It seems to me quite clear that this order under Section 144, was illegally made and if, it had been challenged I should have had no hesitation whatsoever in setting it aside.

11. Further, it is clear that this order under Section 144, was never served on the petitioner Kalipadadas Karmakar as required by law. The service must be in accordance with the provisions of Section 144, Criminal P. C. Section 144, provides :

'(1) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons.

(2) If such order cannot be served, it shall be notified by proclamation, published in such manner as the State Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.'

12. The proof of service was the peon's report which stated that he had placed the order on a bamboo pole and stuck the pole into the sand near the scene of the dispute. That clearly is no service at all of the order in question. Before that form of service can be resorted to it must be shown that personal service could not be effected. Even if personal service could not be effected, service should, if possible, be made on an adult member of the family of the person to be served. It is only when those forms of service are found impossible that service can be effected by affixing the notice at some place at which it is likely to be seen by the persons sought to be served. There was in this case no evidence at all that any attempt had been made to serve the petitioner personally and that such attempts had

failed. There was no evidence that any attempt had been made to serve any adult member of the petitioner's family and that such had failed. That being so, service by placing this notice on a bamboo pole near the scene of the dispute was no service at all. This point has been clearly decided by a Bench of this Court consisting of Sanderson C. J. and Rankin J. in the case of Beni Modhab v. Jadu Nath, 31 C. W. N. 148 : (A. I. R. (13) 1926 Cal. 1208 : 27 Cr. L. J. 715). The Bench had to deal with the service of a notice under Section 134, Criminal P. C., and it was held that where the serving peon's return showed that personal service could not be effected and therefore service was effected by affixing a copy to some conspicuous part of the house but it did not show that service by leaving a copy with an adult male member of the family was impossible, there was no proper service of the order.

13. The case before us is a very much worse case than the Bench decision to which I have referred. In that case there was some evidence that personal service could not be effected, but even so that was not sufficient to warrant service by affixing the order at some conspicuous place. In the case before us there is no evidence that personal service could not be effected and no evidence that service on an adult male member could not be effected. That being so, the service proved in the peon's report was no service at all and, therefore, this order under Section 134 which to my mind was invalidly made ex parte, was never served and therefore no proceedings could be commenced for breach of it. Though I am of opinion that no ex parte order should have been made in this case, I am not deciding the petition on that ground. I am deciding it on the ground that the order which was made was never served and therefore never brought to the notice of the petitioner.

14. Section 188, Penal Code, provides :

Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both ...'

15. Learned Advocate for the opposite party contended that eventually the petitioner appeared in Court and then he must have known of this order. Unfortunately, he is charged with a breach of the order before that time, and there is nothing to show, and indeed it could not be shown, that the order had been brought to his notice and therefore no proceedings under Section 188 could possibly lie against him. The Code of Criminal Procedure requires these orders to be served in a certain way and if they are not served in that way, then it appears to me that a prosecution under Section 188 becomes well nigh impossible if not altogether impossible. However, in this particular case, there is nothing whatsoever to suggest that the petitioner knew of this order at the time when he is alleged to have acted in contravention of it and for which he was being prosecuted.

16. It seems to me that these proceedings under Section 188, Penal Code, were wholly misconceived and the proceedings are quashed.

17. Criminal Revision No. 493 of 1960 is, as I have said, a petition for quashing certain proceedings by which the petitioners are being prosecuted under Section 379, Penal Code. It appears to me that the Collector of Howrah is seeking the aid of the criminal Courts to establish his title and a criminal Court is not a Court which is fit to decide or capable of deciding difficult questions of title. I can well imagine if this dispute was fought out in the civil Court evidence of experts involving very accurate measurements would be tendered to show that the char in question either fell within the Burdwan Raj territory or fell within the district of Howrah. Of course, the Sub-Divisional Magistrate says the matter is quite simple. But these cases usually are not simple and though a Sub-Divisional Officer may think they are simple other Judges with somewhat more experience of this class of cases than the Sub-Divisional Officer frequently find them most difficult. Whether the petitioners are guilty of theft or not would depend in the first place upon whether

the sand was taken from the area leased to the petitioner Kalipadadas Karmakar by the Burdwan Raj or whether it was taken from the area leased by the Collector of Howrah to Biswas. That may be an extremely difficult point to decide and the proper tribunal to decide that question is a civil Court and not the Court of a Magistrate in the Howrah District particularly when the person mainly concerned is the Collector of Howrah. There is of course a complete defence to a charge under Section 379, even if it transpired that the sand was taken from the area leased to Biswas. If the Court was satisfied that it was taken under a bona fide claim of right, then no prosecution for theft could possibly succeed. It seems to me in the present case that each party is asserting its right to take the sand from this particular area. One or other of them must be wrong. But it may well be that both of them are claiming bona fide a right to take sand. That being so, a case under Section 379, Penal Code, if instituted, would be bound to fail. It seems to me that instituting a case of theft in a matter of this kind practically amounts to an abuse of the process of the criminal Courts. The matter should be fought out either between the lessees or between the Burdwan Raj and the Collector of Howrah. The right to take sand from this particular area cannot and should not be decided by Courts of Magistrates wholly unfitted to deal with questions of this kind. In my view the proceedings under Section 379, Penal Code, should be quashed and I would quash them.

18. In the result, therefore, both these petitions are allowed. The proceedings under Section 188 and Section 379, Penal Code, now pending against the petitioners before the Courts at Uluberia are Quashed.

Bose, J.

19. I agree.