
(1893) 12 CAL CK 0006
In the Calcutta High Court

Bechu Sheikh

APPELLANT

Vs

Deb Kumari Dasi and Another

RESPONDENT

Date of Decision : 11-12-1893

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 537

Citation : (1894) ILR (Cal) 404

Hon'ble Judges : W. Comer Petheram, C.J;Trevelyan, J;Rampini, J

Bench : Full Bench

Judgement

Trevelyan, J.—On the 26th of April 1893 the Magistrate of Faridpur recorded a proceeding u/s 145, Criminal Procedure Code, regarding certain lands situate in his district.

2. This proceeding was as follows : Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate u/s 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute:

First party.--Abinash Chandra Sikdar of Kanaipur, station Faridpur.

Second party.--Badaruddin of Kafura, station Faridpur.

3. Notices were issued in accordance with this proceeding.

4. On the 17th of May, Badaruddin filed a written statement claiming the property in dispute.
5. On the 24th of May, Badaruddin died.
6. On the 31st May, Abinash Chandra Sikdar filed a written statement disclaiming any interest in the land in dispute, and asserting that his mother, Deb Kumari Dasi, was the owner and in possession thereof.
7. On the same day Deb Kumari put in a written statement claiming the property and disputing the right of the second party.
8. On the 1st of June, Sheikh Bechu, the son of Badaruddin, presented a petition asking to be substituted in the proceeding in the place of his father. An order was made accordingly, but no fresh proceeding was recorded. Evidence was taken, and on the 17th of July 1893, the Deputy Magistrate who tried the case made an order in favour of the first party, who is described in his order as "Deb Kumari Dasi, mother of Abinash Chandra Sikdar." The second party was described in such order as "Badaruddin Sheikh, deceased, and his son, Bechu Sheikh."
9. Bechu Sheikh has applied to us to set aside this order on two grounds. The first ground is, that the boundaries given in the order do not accord with those given in the order initiating proceedings. As to this it is agreed that, if the order is in other respects good, it may be amended by altering the boundaries to those mentioned in the order initiating proceedings.
10. The second ground is, that as Bechu Sheikh was not mentioned in the order initiating proceedings, and, his father being then alive, could not have then been concerned in the dispute, no order could be made against him without a fresh order initiating proceedings being drawn up.
11. It is contended that his application to be made a party cannot give jurisdiction, and that he is competent to take this objection.
12. It is also objected that the substitution of Deb Kumari for her son vitiates the final order. As Deb Kumari was concerned in the dispute which led to the original proceeding, and was actually mentioned in the proceeding, this objection is not, in my opinion, a valid one. I think, however, that it is clear that no order can be made against Bechu Sheikh. The cases beginning so far back as *In the matter of the petition of Pirthiram Chowdhry* 20 W. C. Cr. 51 under the old Code and ending with *Ambler v. Pushong* ILR Cal. 365, and the cases which have followed it under the new Code, show that the possession to be inquired into is the possession at the time of the initiation, of the proceeding. As far as I know, the Court has always taken this view of the section, and in a very recent case Mr. Justice Prinsep and I, when invited to do so by the Advocate-General, declined to refer the question to a Full Bench. These cases, I think, show clearly that the Magistrate's inquiry must be devoted only to the state of affairs in existence at the time of the initiation of the proceedings. The reasoning which led to these decisions would equally show that the words "parties concerned in such dispute"

must mean parties concerned at the time of the initiation of the proceedings.

13. There is no power to substitute father for son, or in any way to introduce parties who were not concerned in the original dispute. In civil cases the Courts have no power, apart from statutory provisions, to revive suits on the death of parties. Much less would they have the power in cases conducted under a criminal procedure. If the power to substitute be held to apply, there seems to be no reason why all the provisions of the CPC should not equally apply, and if these powers of Civil Courts are to be here introduced, they might equally apply to the cases of offences.

14. Authority is not wanting for the conclusion at which I have arrived. In In the matter of the petition of Kunund Narain Bhoop ILR Cal. 650, Mr. Justice Ainslie says: "There is no provision in the Criminal Procedure Code for allowing an intervenor to come in in the middle of proceedings held by a Magistrate u/s 530, As to such third party, the Magistrate has no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an inquiry as to the possession of such third party at the date of the commencement of the pending proceedings, is wanting. As to anything of later date he may take such steps in a separate proceeding as circumstances call for and the law allows."

15. We were referred to a decision of Mr. Justice Markby and Mr. Justice Prinsep, in Annondo Moyee Debee v. Luchmun Pershad Gogo 2 C.L.R. 264, as enunciating a contrary proposition, That case is not in the least opposed to the case of Kunund Narain Bhoop. No person was there substituted for a deceased person. There is merely an obiter dictum that it would have been probably more regular to have postponed the case so as to have enabled some representative of the deceased to appear : at the most this is an obiter dictum in a case which was not argued and in which no one appeared.

16. I am equally clear with regard to the other question argued. I do not think Bechu Sheikh's action in any way justified the order made against him. It has been frequently held in this Court that a Magistrate has no jurisdiction u/s 145 unless there be in existence an initiatory proceeding in compliance with the law showing that there are grounds for supposing that a dispute exists, and that such dispute is likely to cause a breach of the peace.

17. As Mr. Justice Ainslie points out in the case of Kunund Narain Bhoop, at page 652 of the report: "In many cases it has been held that a proceeding such as is required by Section 530 (of the old Code) is a necessary preliminary." In the case of Kasi Kishor Roy v. Tarini, Kant Lahiri 3 B.L.R. A. Cr., 76, at p. 78, in dealing with the Act of 1861, Mr. Justice Norman says: "Now it has been pointed out in many cases before this Court, more particularly in the case of Dewan Elahi Newaz Khan v. Suburunnissa 5 W.R. Cr. 14, that it is a condition precedent to the powers of a Magistrate to take up and decide a case u/s 318, that he should decide judicially that he is satisfied that a dispute likely to induce a breach of the

peace exists, and that he should record a proceeding stating the grounds of his being so satisfied. Unless, and until, he shall have decided that preliminary matter, he has no jurisdiction to take up the case and decide the question of possession u/s 318" :see also In the matter of the petition of Kishore Mohun Roy 19 W.R. Cr. 10. There is no practical difference on this question between the Criminal Procedure Code of 1861 and the present one. As far as I am aware, this has been always held to be a question of jurisdiction. That being so, jurisdiction cannot be given by consent, waiver, or application.

18. It might be equally argued that a person who had not committed an offence could ask to be tried in the place of one who was charged but had died; where the dispute is as to property it might suit a person to be so tried.

19. I do not think that the Magistrate had any power to decide any question with regard to a person who was not concerned in the dispute at the time of the initiation of the proceeding, and I would make this rule absolute.

20. As my learned colleague differs from me, the case must be referred to a third Judge.

Rampini, J.

21. The rule in this case was obtained by the petitioner Sheikh Bechu on two grounds : (1) that the land dealt with in the final order was not the land in respect of which the initiatory proceeding was drawn up; (2) that the parties with regard so whom the final order was made were not the parties mentioned in the Magistrate's preliminary proceeding.

22. My learned colleague and I agreed that the first of these objections may be met by altering the order of the Magistrate declaring possession and by restricting it to the land described in his preliminary proceeding.

23. The circumstances under which Deb Kumari and the petitioner became parties to the proceeding are detailed in my learned colleague's judgment, and I need not recapitulate them. I would only add that there was a third party, named Bolaki, made a party to the proceedings, and that the evidence was recorded by the Magistrate on the 27th June and 7th July, and his final order was passed on the 17th July.

24. Now, it has been said that no order u/s 145, Criminal Procedure Code, can be made in favour of, or against, any person not named in the initiatory proceeding drawn up by the Magistrate I am unable to agree to this. No grounds for such a contention are to be found in the provisions of Section 145. The section is worded in very general terms. All that would seem to be necessary to give the Magistrate jurisdiction is that he should be satisfied that a dispute likely to cause a breach of the peace exists regarding certain tangible immove-able property or the boundaries thereof; and his duty is then to make an order in writing, stating the grounds of his being so satisfied, and calling on the parties concerned to put in written statements of their respective claims as to actual possession. The

section does not say that the Magistrate must in his proceeding name or describe the parties concerned in the dispute in any way, and it seems to me that it would be unreasonable to expect a Magistrate to do so. In most cases he does not know who the parties concerned in the dispute are until they appear before him. He has no means of knowing this. All he knows, and all I think he need concern himself with, is the fact of the dispute and the likelihood of a breach of the peace; and it is for the parties who claim possession to come forward and represent to the Magistrate their claims to the land. In short, I am of opinion that the preliminary proceeding referred to in Section 145 may, and in many cases must necessarily, partake of the character of a general citation to the parties concerned in the dispute to appear before him; and that it is not necessary for the Magistrate to confine his final order to the parties whom by way of supererogation he may have named in his preliminary proceeding.

25. To hold otherwise would seem to me to lead to this, that any mistake made by the Magistrate in the preliminary proceeding about matters of which he can know nothing until informed by the parties, cannot be corrected by him, and must vitiate the entire proceedings.

26. No doubt the view that the preliminary proceeding is of the nature of a general citation is opposed to that expressed by Mr. Justice Ainslie in the case of *In the matter of the petition of Kunund Narain Bhoop* ILR Cal. 650, but it will be observed that Mr. Justice Ainslie's judgment refers to the provisions of Section 530 of Act X of 1872, the provisions of which are different from those of Section 145 of Act X of 1882. In fact, Mr. Justice Ainslie's judgment may be regarded as an authority in support of the view above expressed by me; for Mr. Justice Ainslie's contention that the Magistrate's order must be confined to the persons named in the preliminary proceeding is to some extent based on the language of Section 531 of the old Code, which was to the effect that "if the Magistrate decides that neither of the parties is in possession, etc." "Mr. Justice Ainslie says: "Had it been intended that the declaration should operate as universally binding, the words would have been that no party is in possession." But the terms of the section referred to by Ainslie, J., have now been altered, perhaps to obviate this objection of Mr. Justice Ainslie's, and to show that the declaration or citation is intended to be a general one. At all events, the words "neither party is in possession, etc", have now disappeared. The words of Section 146 are, "if the Magistrate decides that none of the Parties is therein such possession." In other words, the terms of this section are now just such as, according to Mr. Justice Ainslie, would have led him to the conclusion that an order u/s 530 or 145 need not be confined to the parties named in the preliminary proceeding.

27. It follows that in this case, on the view of the provisions of Section 145 which I take, neither Deb Kumari nor Sheikh Bechu can be regarded as an "intervenor." They are, in my opinion, to be regarded as parties concerned in the dispute who appeared before the Magistrate as soon as they learned that their interests were affected, and before any evidence had been recorded by him. Bechu, the

petitioner, appeared on the 1st June, his father having died on the 24th May.

28. Now, it has been said that there is no provision for the substitution of Bechu's name in the place of his father. But (i) no procedure of any kind is prescribed in Section 145, or in any section of Chapter XII of the Criminal Procedure Code; if a Magistrate is bound to confine himself to the procedure prescribed by Section 145 or Chapter XII, it follows that he can dispose of no case under that section or chapter, there being no procedure at all prescribed, e.g., for the issue of notices, the recording of evidence, the summoning of witnesses, or for any step the Magistrate may take in such cases; (ii) though the provisions of the CPC may not be applicable to proceedings u/s 145, the subject of such a proceeding is one of a quasi-civil nature. On the other hand, a proceeding u/s 145 is not a criminal trial. There is no "accused." No "offence" has been committed. Therefore, the provisions of the Criminal Procedure Code in their entirety cannot be applicable to such a proceeding. In such a proceeding, it seems to me, much must necessarily be left to the discretion of the Magistrate. The Legislature appears to have intentionally left it unfettered, and it is our duty to give effect to the intentions of the Legislature; (iii) the cases of *Anondo Moyee Debee v. Luchmun Pershad Gogo* 2 C.L.R. 264 and *Jitbahan v. Bansrup Dhobi* 6 C.L.R. 193 show that on the death of a party to a Section 145 proceeding, his heir may be substituted in his stead, and that it is not necessary to commence the proceedings de novo.

29. Then, as to the time which the Magistrate is to have regard to when deciding as to the actual possession of the land, the section says, the Magistrate is, if possible, "to decide which of the parties is then in possession" of the subject of dispute. In this respect the wording of the section is altered from that of Section 530, Act X of 1872. This, therefore, seems to imply that the Magistrate is to consider who is in possession at the time of recording the evidence. But even if the rulings which lay down that the possession which a Magistrate is to find and support is possession at the time of the institution of the proceedings, and not possession at the time of his passing final orders in the matter, be followed, I do not see how this affects this case. Nobody says that there has been any change of possession between the opposing parties, and the rulings cited all refer to such a change of, or such a dispute as to, possession. According to Sheikh Bechu, the petitioner, he and his father have all along been in possession. On the death of his father, he succeeded him as his heir, and according to the civil law he is entitled to regard his father's possession as his own. There has in the case of Bechu been no such change of possession as the rulings cited in my learned colleague's judgment refer to. However this may be, whether there has been a change of possession as regards Bechu, there has been none as regards Deb Kumari, whom the Magistrate has held to have been in possession all along. On the Magistrate's finding she was in possession at the time of the initiation of the proceedings, at the time of the recording of the evidence, and at the time of the Magistrate's final order. The proceedings are therefore quite regular as far as Deb Kumari is concerned. Whether or not the objection would have had any force

if the Magistrate's final order had been in favour of Bechu, it would seem to me to have none, when it is Deb Kumari whose possession of the land has been declared.

30. Then, the objection as to the change of parties is one of a highly technical character and one entirely devoid of merit. If it be said that Deb Kumari has wrongly been made a party to the proceedings, then Bechu, the petitioner, is in exactly the same position, or a worse one. If it be Bechu who, it is contended, should not have been made a party, then it is to be remembered he was made a party at his own request. He appeared voluntarily. When he appeared, he raised no objection to the proceedings. As already pointed out, both Deb Kumari and Bechu were made parties before any evidence was recorded, and Bechu adduced his evidence and fought the case against Deb Kumari to the best of his ability. It is only after the case has on the evidence been decided against him that he comes forward and impugns their regularity. He is, or at all events in my opinion ought to be, estopped from now raising the plea he does.

31. Finally, the provisions of Section 537, Criminal Procedure Code, are in my opinion applicable to the case. The objection as to the change of parties does not affect the merits of the case. It has not been contended before us that it does so. No failure of justice has been said, or appears to have taken place. I therefore think that the order of the Magistrate should be altered so as to restrict it to the land described in the preliminary proceeding, and that in other respects the rule should be discharged.

W. Comer Petheram, C.J.

32. I agree with Mr. Justice Trevelyan, and for the reasons given by him, that this rule should be made absolute. Mr. Justice RAMPINI thinks that an order of a Magistrate requiring the parties concerned in the dispute to attend his Court and to put in written statements is in the nature of a general citation to all parties concerned in the dispute to appear before him, and that when such an order has been made, the Magistrate may deal with the possession of any person who may appear before him, or indeed, as I think must be the case if this is the correct view of the decision, any person concerned in the dispute, whether such person does appear before him or not, and though no order has ever been made upon him to attend, and though he may never have heard of the order at all. In this view of the section I am unable to agree. As far as I can learn, such a construction has never been acted upon down to the present time, and I do not think it is justified by the words of the section itself.

33. It is, I think, clear that by "parties concerned in such dispute" in the 1st paragraph of the section, parties claiming to be in possession of the subject-matter of the dispute are intended, inasmuch as what they are required to do is to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and what the Magistrate is empowered to do is to find whether any, and which, of the parties is then in

possession of the land in dispute. Mr. Justice RAMPINI thinks that the word "parties" includes any person who up to the time of the commencement of the inquiry, that is, before any of the witnesses are called, sets up a claim to be in possession, and that it is not confined to the individuals to whom the order was addressed by name; but I cannot think that that is the case, as the last paragraph of the section provides that any party so required to attend shall have certain rights, and the language there used seems to me to indicate conclusively that the Legislature were dealing with individuals who had been required to attend by the order of the Magistrate, i.e., the persons or parties to whom it was addressed, and not to any member of the public whom it might concern.

34. Mr. Hill, in showing cause against the rule before me, contended that the order made upon the petition of Bechu, the present applicant, that he should be made a party to the proceedings in the place of his father, was in effect an order made upon him under the section to attend the Court and put in his written statement, and that if there was any irregularity, it was one which had caused no miscarriage of justice and was cured by Section 537 of the Code. As to this I think it enough to say that the order of the Magistrate calling on a party to attend and put in a written statement rests on his finding that there exists at the time a dispute likely to cause a breach of the peace, and that at the time to which both the Police report and the finding by the Magistrate upon it related, Bechu was not a person who claimed to be interested in the subject-matter of the dispute at all, and so was not a person who on the basis of that finding could be required to attend the Court of the Magistrate or to put in a written statement.