

(1980) 08 AHC CK 0035
In the Allahabad High Court
Case No : Criminal Case No. 1626 of 1980

Lalman and Another

APPELLANT

Vs

Shiv Naresh and Another

RESPONDENT

Date of Decision : 29-08-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(5), 147, 147(2)

Citation : (1980) AWC 493

Hon'ble Judges : P.N. Bakshi, J

Bench : Single Bench

Advocate : G.P. Dixit, for the Appellant;

Final Decision : Allowed

Judgement

P.N. Bakshi, J.—Proceedings u/s 147 Code of Criminal Procedure were initiated with respect to the right of user of a Nali between two contesting parties-Shiva Naresh on the one hand and Lalman and another on the other. The Sub-Divisional Magistrate, Auraiya called for a report from the Station Officer which was submitted on 28th July 1978. It indicated that there was no apprehension of the breach of Peace. It appears that a further report was called by the Magistrate and on 5th August 1978 the Station Officer reported that in future there may be an apprehension of breach of peace. The case proceeded. Parties were directed to file their written statements. A date was also fixed for evidence, but no evidence was led by the parties. Instead the Applicant Layman and another filed an application on 29th November 1979 alleging that there was no apprehension of the breach of peace and consequently the proceedings be dropped. It was prayed in this application that this question be decided first. The Sub-Divisional Magistrate Aquaria rejected that application on 25-2-1980. Aggrieved thereby the instant application has been filed u/s 482 Code of Criminal Procedure.

2. I have heard counsel for the parties and have also perused the impugned order. The Magistrate appears to be of the opinion that once the question of apprehension of the breach of peace had been decided, it is not open to a party

to raise that question again during the continuance of the proceedings u/s 147 Code of Criminal Procedure A bare reading of Section 147(2) Code of Criminal Procedure indicates that while the Magistrate is proceeding under that Section to record the statements of the parties or their further evidence, the provisions of Section 145 Code of Criminal Procedure shall, so far as may be, apply in the case of such enquiry. This expression has been interpreted by me earlier, while I was considering the case of emergency attachment in *Irshad Ahmad Vs. State and Others*, . In that decision I have held that so far as the provisions of Section 145 Code of Criminal Procedure are not repugnant to Section 147 Code of Criminal Procedure, the same would be available to the Magistrate in deciding proceedings u/s 147 Code of Criminal Procedure In the aforesaid decision which also arose out of a case u/s 147 Code of Criminal Procedure I had observed that even though the power to pass an order for attachment in case of emergency was not provided u/s 147 Code of Criminal Procedure, yet such a provision which existed u/s 145 Code of Criminal Procedure, could also be pressed into service while dealing with the case u/s 147 Code of Criminal Procedure The principle involved in the present case is the same. Section 145(5) runs as follows:

Nothing in this section preclude any party so required to attend, or any other person interested from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereupon shall be stayed, but, subject to such cancellation, the order of the Magistrate under Sub-section (1) shall be final.

3. Under the sub-section a party has a right to raise the question of nonexistence of apprehension of the breach of peace, at any time after the commencement of such proceedings till their final determination. The same provision must be applied to proceedings u/s 147 Code of Criminal Procedure and as such whenever in such I proceedings u/s 147 Code of Criminal Procedure this question is raised it becomes a mandatory duty of the Magistrate to decide it prior to proceeding with the rest of the case. The question of existence or otherwise of apprehension of breach of peace is a jurisdictional question and must be determined by the court before proceeding further. In my opinion, therefore, the Sub Divisional Magistrate committed an illegality in the exercise of his discretion in refusing to decide the question, when it was specifically raised by the Applicant vide their application dated 29th November 1979.

4. This application u/s 482 Code of Criminal Procedure is hereby allowed and the impugned order passed by the Sub Divisional Magistrate Auraiya, district Etawah dated 25-2-1980 is hereby quashed and he is directed to decide the question of apprehension of breach of peace first and then proceed in accordance with law.