

(1990) 03 OHC CK 0046

In the Orissa High Court

Case No : Criminal Revision No. 565 of 1989

Niranjan Behera and Another

APPELLANT

Vs

Laxmidhar Rana and Others

RESPONDENT

Date of Decision : 14-03-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 141, 145, 145(3), 147

Citation : (1990) 2 OLR 440

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : B.H. Mohanty, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—This revision is directed against the order passed by the learned Additional Sessions Judge, Cuttack setting aside an interlocutory order passed by the Executive Magistrate, Cuttack, in a proceeding u/s 147 of the Code of Criminal Procedure ("Code" for short).

2. The parties belong to Cuttack town. The Petitioners have their house on Plot No. 1439. The opposite parties have their house on adjoining plot No. 1438. There is a passage on parts of plot No. 1438 and another adjoining plot No. 1441 in order to approach the Petitioner's house from the public lane and this seems to be the only passage. The opposite parties obstructed the passage as a result of which the Petitioners were deprived of using the same. This gave rise to a dispute between the parties leading to apprehension of breach of peace. The Petitioners. Therefore, moved the Executive Magistrate by filing an application which was forwarded to the police for enquiry and report. After receipt of the report of enquiry from the police the Executive Magistrate promulgated a preliminary order u/s 141 of the Code and at the same time passed an interlocutory order which reads as follows:

...Heard the learned Counsel for the F.P.I feel that there is emergency to interfere

in the matter. To prevent breach of peace between the parties status quo of the case land as on today be maintained by both the parties.

3. This order was challenged before the learned Additional Sessions Judge who after referring to Bhanwar Singh and Others Vs. Rama and Others, ; AIR 1953 Tra-Co. 202 Erazil Mathai Jacob and Ors. v. K. Ravivarman Thirupad and Anr.; AIR 1955 Raj 75 Rudi and Ors. v. Ram Kumar; Rameshwar Rai and Others Vs. Raghu Kahar and Another, ; Vol. Uchab Chandra Das Vs. Khirrod Ch. Das and Others, and Gajraj and Others Vs. Collector Singh, held:

...the Executive Magistrate while in season of the proceeding u/s 147, Code of Criminal Procedure has no jurisdiction to pass an interim order, much less the impugned order of status quo....

4. Accordingly, he vacated the interim status quo order of the Executive Magistrate. This order has been challenged in this Court.

5. Section 147 of the Code deals with apprehension of breach of peace when dispute is raised concerning rights of use of land or water. If the Executive Magistrate is satisfied from the report of a police officer or upon other information that a dispute is likely to cause a breach of peace regarding any alleged right of user of any land or water, he shall make an order in writing stating the grounds of his satisfaction and shall direct the parties concerned in such dispute to attend his Court and put in written statements of their respective claims. After appearance and filing of written statements by the parties, the Executive Magistrate shall peruse the same, receive all such evidence as maybe produced and then decide whether such right exists. In making such enquiry, the provisions of Section 145 of the Code as far as possible may be applied. If he would find that any such right exists, he may make all order prohibiting any interference with the exercise of such right including, in a proper case, an order for the removal of any obstruction in the exercise of any such right. To be more specific, the ultimate order that can be passed is under Sub-section (3) which is quoted below:

(3) If it appears to such. Magistrate that such right exists he may make an order prohibiting any interference with the exercise of such right, including, in a proper case, an order for the removal of any obstruction in the exercise of any such right.

6. A plain reading of Section 147 shows that the Executive Magistrate has no power to pass an interlocutory order in the same lines as provided in Sub-section (3) quoted above. He has jurisdiction to pass a final order in terms there of There is also no provision in Section 145 of the Code vesting powers on an Executive Magistrate to pass a status quo order as in this case so as to enable a party to use the disputed passage and restrain the other party to interfere with such, right during pendency of the proceeding u/s 147. Does this, therefore, mean that a party who claims a right of passage should be prevented to exercise such right of user during the pendency of a proceeding u/s 147 and the

Executive Magistrate has absolutely no power so as to prevent the wrong and embolden the wrong doer before a final decision is taken at the dose of the proceeding "I If the answer to this question shall be in the affirmative, there shall be untold suffering to persons having only one right of passage which if obstructed by somebody else will prevent them from coming out or going into the house. For instance in this case, as records-reveal the Petitioners have only one passage to their house from the public lane and if as a result of the order of the learned Additional Sessions Judge the status quo order is withdrawn, practically the Petitioners and members of their family shall be isolated in their house disabling them from coming out or going into it. So, the focal point for consideration in this case is whether the Executive Magistrate exercising powers u/s 147 of the Code has the ancillary and the natural power of passing an interlocutory order in terms of it in order to prevent hardship to a party in a particular case. It is true that in all the decisions cited by the learned Additional Sessions Judge a view has been taken to the effect that the Executive Magistrate during the pendency of a proceeding u/s 147 of the Code has no power to pass an interlocutory because the section itself does not provide for it. More particularly in the case of Uchab Chandra Das v. Khirrod Ch. Das and Ors. supra a learned Judge of this Court took the view that a Magistrate has no jurisdiction to pass an interim order of attachment in a proceeding u/s 147 of the Code. The case was decided on the basis of the law then existing, namely, the old Criminal Procedure Code. While this ruling is a precedent for this Court, Mr. B.H. Mohanty, learned Counsel appearing for the Petitioners, forcefully raised the contention that if the Executive Magistrate can pass a final order in a particular way, there is no prohibition for him to pass an interlocutory order analogous to the final order in order to prevent hardship to a party in a particular case. In support of his contention, he relied upon the principles of law with regard to interpretation of statutes and cited several decisions which are referred to below.

7. In Bindra's Interpretation of Statues (7th Edition) 725, "implied powers" has been explained as under:

I Implied powers.-The doctrine of implied powers is embodied in the maxim "Duando lex aliquid alique concedit conceditur et id sine quo res ipsa esse non potest.

8. Its full and true import is set out in the judgment in the case of Fenton v. Hampton as follows:

Whenever anything is authorised and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else, will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties of interests of others, it be found that no such impossibility exists; that the power may be legally exercised without the doing that something else, or even going a step further, that it is only in some particular instances, as opposed to its general operation, that the law fails in its

intention unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the "maxim, and regard" the absence of the power which it would supply, by implication as a cases missus. "In other words" when any power or control is expressly granted there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective. Where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or "employ such means" as are essentially necessary to its execution. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten Constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of Government.

9. The Latin expression means:

When the law gives a man anything, it gives him that also without which the thing itself cannot exist.

10. The Law Lexicon, Reprint Edition, 1987-Page-1059. In Matajog Dobey Vs. H.C. Bhari, it was held:

Where a power is conferred or" a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably, necessary for such execution.

11. If in the exercise of the power or the performance of the official duty, improper unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance; This accords with commonsense and does not seem contrary to any principle of law.

12. The true, position is neatly stated thus in Broom's Legal Maxims; 10th Ed. at page 312: It is a rule that when the law commands a thing to be done, it authorizes the performance of whatever may be necessary for executing its command.

13. In Khambalia Municipality and Another Vs. State of Gujarat, . the question that arose for consideration was whether Section 9(1) of the Gujarat Panchayats Act did not enable the Government to delegate the function to the Development Commissioner to make an enquiry. The Court ruled:

...The power to make the declaration necessarily carries with it the power to make the inquiry preliminary to the declaration. There can be no declaration without any inquiry. The relevant notification sufficiently authorized the development commissioner to issue the declaration after making the prescribed inquiry.

14. In AIR 1969 S.C. 430 Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi it was held:

...an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.

15. In para 4 of the decision, a quotation from Domat's Civil Law Cushing's Edition, Vol. I at page 88, was made as under:

It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application or them may be made on which appear to be comprehended either within the consequences that may be gathered from it.

16. Reference was also made to Maxwell on Interpretation of Statutes, Eleventh Edition, at page 350, in which the following statement was made:

where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdiction data setae quote concise esse videntur, sine quibus jurisdiction explication non potent.

17. The Latin express means:

To whomsoever a jurisdiction is given, those things are also supposed to be granted, without which the jurisdiction cannot be exercised.

18. The Law Lexicon, Reprint Edition, 1987-at page 267. In The Sub-divisional Officer, Sadar, Faizabad Vs. Shambhoo Narain Singh, it was held as follows:

It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the Court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power.

19. In a Bench decision of this Court reported in Vol. State of Orissa Vs. Member, Sales Tax Tribunal and Another, . the selfsame principle was adopted. In a recent decision reported in Savitri Rawat Vs. Govind Singh Rawat, while examining the legality of award of interim maintenance u/s 125 of the Code, it was noticed that the section itself does not empower a Magistrate to grant interim maintenance. Nevertheless it was held:

In view of the foregoing it, is the duty of the Court to interpret the provisions in Chap. IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made u/s 125 of the Code to pay some reasonable sum by way

of maintenance to the Applicant pending final disposal of the application. It is quite common that applications made u/s 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings u/s 125, the Applicant should be alive till the date of the final order and that the Applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et sine quo res ipsa esse non potest (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist.) vide *Barl Jowitt's Dictionary of English Law* 1959 Edn, p.1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration.

20. The principle laid down in the decision is being consistently followed by this Court.

21. The principles laid down and referred to above are undoubtedly applicable to this case. Despite the fact that Section 147 of the Code does not contemplate an interim arrangement by way of an interlocutory order, yet, on account of hardship to a party, the Executive Magistrate must be deemed to have the power to pass an interlocutory order. In the case of *Uchab Chandra Das v. Khirrod Ch. Vas and Ors.* (supra) these principles were not noticed and so the ruling cannot be accepted as a precedent.

22. For the reasons stated above, the Criminal Revision is allowed, and the order of the learned Additional Sessions Judge is set aside. The order of the Executive Magistrate is restored.

23. Revision allowed.