

(1954) 01 BOM CK 0006
In the Bombay High Court
Case No : Criminal Reference No. 148 of 1953

Shantilal Maganlal

APPELLANT

Vs

Dahyabhai Gordhanbhai

RESPONDENT

Date of Decision : 07-01-1954

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 133, 145(2), 147, 147(1), 147(2)
Judicature Act, 1873 — Section 89
Penal Code, 1860 (IPC) — Section 188

Citation : AIR 1954 Bom 368 : (1954) 56 BOMLR 269 : (1954) ILR (Bom) 733

Hon'ble Judges : Chainani, J;Bavdekar, J

Bench : Division Bench

Advocate : A.A. Mandgi, A.G.P., D.V. Patel, for the Appellant; I.C. Dalal, for the Respondent

Judgement

Chainani, J.—This is a reference made by the Sessions Judge, Broach, recommending that a portion of the order passed u/s 147, Criminal P. C., by the Resident Magistrate, First Class, Jambusar, should be set aside. This order was passed by the Magistrate on an application made to him by one Dahyabhai stating that he had a right of way to his field through the lands of the opponents and that the opponents had closed this way by putting up a hedge across it in one of their lands. After holding an inquiry, the learned Magistrate came to the conclusion that the applicant had proved the right claimed by him and that the dispute between the parties was likely to result in a breach of the peace.

Accordingly he passed an order prohibiting the opponents from interfering with the exercise of the said right, until the rights of parties were decided by a competent Court. He also ordered the opponents to "forthwith remove the hedge", put up by them and "make a way by which carts, bullocks etc. might pass safely." The Sessions Judge is of the opinion that this latter part of the order of the Magistrate is illegal and beyond his powers and has recommended that it should be set aside.

2. Sub-section (1) of Section 147, Criminal P. C., provides "inter alia" that whenever a Magistrate of the first class is satisfied that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in Section 145. Sub-section (2) of this section states" that

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

There is a proviso to this sub-section, but it is not necessary to refer to it, as it is not material for the decision of this case. This Sub-section, therefore, empowers a Magistrate to make an order prohibiting interference with the exercise of a right. He can, therefore, order a person not to do something, e.g., not to cause obstruction to, or not to interfere with, the use of a way.

There is a material difference between asking, a person not to do something and asking him to do some positive act, e.g. to remove an obstruction already erected. The section does not empower a Magistrate to direct any person to do any positive or particular act. The Magistrate cannot, therefore, issue any mandatory order under this section.

Section 147, as it stands today, was substituted for the original section in 1923. Under the old section, when the Magistrate found that a right existed, he could make an order "permitting such thing to be done, or directing that such thing shall not be done, as the case may be." These words were construed as enabling a Magistrate to pass an order directing a party to do a positive act such as the removal of a bund or fence erected by one party, but which interfered with the exercise of the right of the other party; see -- "Karuppana v. Kandaswami", AIR 1914 Mad 712 (A) and -- "Ambica Prasad Singh v. Gur Sahay Siagh", 39 Cal 560 (B).

The relevant words in the present section are, however, different. The section now empowers a Magistrate to make an order "prohibiting any interference with the exercise of" a right. It does not empower him to direct anything to be done. Reference may also be made in this connection to S. 133. That section gives power to a Magistrate to pass orders both for the prevention of the commission of nuisances and for the removal of nuisances. Under that section the Magistrate can pass not only prohibitory orders, but also mandatory orders.

It is, therefore, clear that whenever the Legislature intended that a Magistrate should have the power to pass both kinds of orders, it has used clear language to that effect. Form No. 24 in Schedule 5 to the Criminal P. C. also shows that an order u/s 147 must be in a negative form, prohibiting a person from doing something. (3) Mr. Patel has contended that the power to Issue a prohibitory order would include the power to issue a mandatory order under the doctrine of

implied powers. This doctrine has been enunciated as follows in Maxwell on the Interpretation of Statutes, 1953 Edn., at p. 361 :

"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."

At p. 362 it is observed :

"In the same way, when powers, privileges, or property are granted by statute, everything indispensable to their exercise or enjoyment is impliedly granted also."

We do not think that this doctrine can be applied in this case, because in order to enable a Magistrate to direct a person not to do anything, it is not necessary that he should also have the power to direct that person to do something. The power to prohibit interference with the enjoyment of a right can be exercised without issuing any mandatory order.

4. Mr. Patel has also urged that the order of the Magistrate prohibiting interference with the right of way would be rendered nugatory, unless the obstruction caused by constructing the hedge is also directed to be removed. Assuming that this is correct, that "would be no ground for giving to the words used in Section 147 a meaning which they do not legitimately bear.

The primary object of proceedings under this section is to prevent a breach of the peace and not to determine or enforce the rights of parties. An order under this section remains in force for a temporary period and is subject to the decision of a civil Court. The Legislature might, therefore, have taken the view, when the section was revised in 1923, that it was not necessary to invest Magistrates with powers to undo things which had already been done, that it was sufficient to provide for prevention of further interference with the enjoyment of a right and that if a party wanted more relief, such as a mandatory order to remove an existing obstruction, he should seek it in a civil Court.

Mr. Patel has referred to "Ex parte Martin (1879) 4 QBD 212 (C) and -- "Martin v. Bannister (1879) 4 QBD 491 (D), in which it was held that a county Court, under the Judicature Act, 1873, S. 89, has in actions within its jurisdiction power to grant an injunction against a nuisance and to enforce obedience to it by committal. The principle laid down in this case is that where a Court has been given power to make an order, it also possesses the power to enforce it.

It is not necessary to resort to this principle In the present case, because disobedience of an order issued by a Magistrate u/s 147 is punishable u/s 188, Indian Penal Code. This case, however, is not an authority for the proposition that where the power conferred is to prohibit the doing of any act, it also includes the power to direct the doing of any positive act.

5. Mr. Patel has relied on two decisions of the Madras High Court in -- "Venkanna v. Venkata Surya Neeladri Rao AIR 1930 Mad 865 (E) and -- Thoongavadan and

Others Vs. Perumal Goundan and Others, , in which it was held that u/s 147 it is open to a Magistrate to direct the removal of an obstruction put up by a party. These are both decisions of single Judges. The contrary view has been taken by a Pull Bench of the Calcutta High Court in -- Hem Chandra Banerji Vs. Abdur Rahaman, in which it was held that u/s 147, Criminal Procedure Code, the Magistrate has no power to issue a mandatory injunction directing the removal of an existing obstruction. At p. 245 it was observed :

"It is one thing to make an order prohibiting the doing of an act; it is another to order the doing of an act. The Sub-section allows the former, but it does not allow the latter With regard to the cases that have taken the contrary view it is sufficient, in my opinion, to say that what the Sub-section allows, the Magistrate may do and nothing else. If the aggrieved party wishes any fuller or further relief from the Courts, the Civil Courts are open to him and the remedy is a mandatory injunction,"

With respect, we agree with these observations. The Nagpur High Court has taken, the same view; see -- "Usman Ali v. Emperor AIR 1938 Nag 297 (H). The Allahabad High Court had formerly taken the same view in -- "Ram Chand v. Emperor AIR 1947 All 302 (I) but the contrary view has been taken by a Full Bench of that Court in -- Abdul Wahab Khan Vs. Mohd. Hamid Ullah, .

6. With respect, we agree with the view taken by the Calcutta and Nagpur High Courts. We, therefore, accept the reference and set aside the last portion of the order passed by the Resident Magistrate, First Class, Jambusar, directing the opponents to remove the hedge at the northern end of survey No. 727 and make a way by which carts, bullocks, etc. might pass safely.

Bavdekar, J.

7. I would like to add a few words upon the English case which has been cited by Mr. Patel In that case it was held that where an inferior Court has been given a power to grant an injunction, the power also included, in case the injunction was disobeyed, a power to commit for contempt of Court.

It appears to me, however, that the principle of that case cannot be applied to the case before us, for the reason that that question can only arise after it is found that the order, which the Magistrate has passed, has been disobeyed. The only order which the section allows him to pass is to prohibit interference with the exercise of the right, which, he has found, exists, and at this stage the question of this power being rendered nugatory, if the hedge is not removed and the Magistrate's order is thus set at naught, does not really arise. Nor do I express any opinion on the question whether the refusal to remove the hedge would be tantamount to disobeying the order.

8. It has got to be remembered, besides, that the section is aimed at prevention of a breach of the peace; it is not aimed at giving a person, who comes to Court, such relief as he would be entitled to, if he were to go to a Court of law; and the

Legislature may well have thought that it would be sufficient for the purpose it bad in view if the Magistrate was empowered to prohibit the interference with the right, which he has found, without going to the length of ordering, by way of a mandatory injunction, the removal of something which may have been constructed and may be obstructing the right of one of the parties.

9. Reference Accepted.