REVISIONAL CRIMINAL.

1919
November, 25.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MAHADEI v. BENI PRASAD AND OTHERS.*

Criminal Procedure Code, sections 145, 435, 439—*Revision—Powers of High Court—Order giving possession of immovable property modified in effect by independent order as to part of such property.*

There being a dispute between two parties concerning the possession of a house, a magistrate of the first class took proceedings under section 145 of the Code of Criminal Procedure and ordered that possession of the house should be made over to one of the parties.

Inasmuch, however, as certain movable property concerning which the parties were disputing had been locked up in two rooms of the house in question by the orders of the police, the Magistrate passed a second and independent order that the two rooms in question were to remain locked until the rights of the parties to the movable property therein were determined by a Civil Court.

Held that, whatever might be the case with the order as to the house as a whole, the order as to the two rooms was a separate order, not passed under section 145 of the Code of Criminal Procedure, and was open to revision.

THE facts of the case are fully set out in the following order of RYVES, J. :—

This is an application in Criminal Revision in a proceeding under section 145 of the Code of Criminal Procedure. It was admitted by a very senior Judge of this Court, who sent for the record and issued notice to the parties concerned. The record is now on my table. On the case being called on, I was told that I must not look at the record, by way of a preliminary objection. I have, however, allowed my curiosity to prevail and I have examined the record. I find the facts to be as follows :—

One Makhdum Bakkal was the sole owner of a house. He had separated from the other members of his family. He died recently leaving him surviving a widow Musammat Mehdia. Disputes at once arose between the widow and the collaterals of Makhdum about the house. They asserted that Musammat Mehdia had not been legally married to Makhdum and that in any case they were entitled to the house and were in actual possession of it. The magistrate ordered a police inquiry. The police found that there was a dispute about the house between

*Criminal Revision No. 457 of 1919, from an order of Muhammad Fazalrab, Magistrate, First class, of Allahabad, dated the 10th of June, 1919.

the parties which was likely to cause a breach of the peace and indeed that it was so acute that the Sub-Inspector directed that some of the rooms in which movable property belonging to the deceased Makhdum had been stored should be locked up with the locks both of widow and of the collaterals. Thereupon the Magistrate instituted proceedings under section 145, and it is conceded that he was perfectly justified in what he did. He made Musammat Mehdia the first party and the collaterals the second party. He heard all the evidence tendered by the parties and came to the finding that Musammat Mehdia had been lawfully married to the deceased Makhdum, that Makhdum had separated from his family long before his death and that the house belonged exclusively to him, and that on his death his widow Musammat Mehdia was in possession of it. That being so he passed a perfectly proper order to the effect that she was entitled to retain possession of the house in dispute unless and until duly ejected by the order of a competent court. Up to this point there is no doubt that the proceedings of the Magistrate were properly begun, continued and concluded, and if he had stopped there undoubtedly this Court could not have interfered in revision. But the Magistrate did not stop there. He went on to consider what orders he should pass regarding the movable property which had been locked up by the police in some of the rooms of the house. He begins by stating :—

" I am of opinion that the movable property can have nothing to do with this case under section 145 of the Code of Criminal Procedure because section 145 relates only to immovables." So far it seems to me the learned District Magistrate was quite right; but he went on to say :—

" It is further ordered that the *kothris* locked up by the police with the locks of each party remain locked up as heretofore unless the rights of the parties are determined by the Civil Court."

It is this part of the order which is impugned by this application in revision, on the ground that is was beyond the jurisdiction of the magistrate to pass it. On the other side, it is not argued that the order was one which the magistrate had jurisdiction to pass under section 145, but it is contended that under the

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provisions of section 435, clause (3), this Court cannot even call for the record of this case, much less examine it and interfere with any of the orders passed, because it is a proceeding under Chapter XII of the Code of Criminal Procedure and is therefore exempted from the provisions of section 435. The case has been argued out before me at length on both sides and a very large number of authorities have been cited, but I do not propose to refer to more than a few of the reported cases, and I also do not refer to any cases decided by any of the High Courts except our own. I find that the cases in this Court may be divided into three classes:—

(1) Where this Court has interfered on the ground that the proceedings were not in fact and law proceedings under Chapter XII, although they purported to be, and are therefore not within the scope of section 435, clause (3), of the Code of Criminal Procedure. In this connection I cannot do better than quote the words of BANERJI, J., in *Mahadeo Kunwar* v. *Bisu* (1):—"In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the court has exceeded its jurisdiction in making the order, it is null and void, and this Court in the exercise of its revisional powers is competent to interfere with it."

The last ruling on this point is a decision of KNOX, J., in *Brahma Nath* v. *Sundar Nath* (2), in which almost all the authorities are noted.

(2) Where this Court has declined to interfere, holding that section 435, clause (3), ousted its jurisdiction. The leading case is *Maharaj Tewari* v. *Har Charan Rai* (3). See also *Matukdhari Singh* v. *Jaisri* (4).

(3) Cases in which attempts have been made to invoke the interference of this Court under the Charter or the Government of India Act. The last reported decision on this point is *Emperor* v. *Salchawat Ali* (5). I am not concerned, however, with this last class.

(1) (1903) I. L. R., 25 All., 537.
(2) (1919) 17 A. L. J., 434.
(3) (1904) I. L. R., 26 All., 144.
(4) (1917) I. L. R., 39 All., 612.
(5) (1918) I. L. R., 41 All., 302.

This case seems to me to fall somewhere between the first and second class mentioned above. In the case of *Matukdhari Singh* v. *Jaisri* (1), it is reported, at the bottom of page 614 :

"The court refused, in the two cases quoted immediately before, to go into the question where, after being properly seised of the case the learned magistrate went out of his way and passed an order which he had no jurisdiction to pass."

Nevertheless in all the cases under class 2 in which this Court declined to interfere, I find that it was not found in any one of them that the magistrate had exceeded his jurisdiction. In some of them as in *Maharaj Tewari* v. *Har Charan Rai* (2) the complaint was that if the magistrate had examined and paid due regard to a recent judgment of a Civil Court between the parties he would not have, and should not have, proceeded under section 145. On the other hand, I find that wherever this Court has found that the magistrate has exceeded his jurisdiction, after examining the record it has interfered and set aside so much of the order as was passed without jurisdiction. The only exception to this, so far as I know, is the case of *Jhengar* v. *Baijnath* (3), in which Mr. JUSTICE RAFIQ held that, although the order complained of before him was illegal, nevertheless he declined to exercise his discretion to interfere with it for the reasons which he gave. But that judgment really supports the view that this Court could interfere.

I would refer specially to the case *Sheo Rani* v. *Baijnath* (4). That case seems to me to be practically on all fours with this one. Up to a certain point in both cases the proceedings of the magistrate were proper and in both cases the magistrate went on to pass an ancillary or supplementary order that was without jurisdiction (that is, assuming that I am right in thinking the order as to the locks not being removed in this case is such an order). In that case this Court interfered, and I would be prepared to interfere myself in this case. There are, however, some passages in some of the judgments of this Court which suggest some difficulties which I think, if possible, should be removed. For instance in this very case of *Sheo Rani* v. *Baijnath* (4)

(1) (1917) I. L. R., 39 All., 612.
(2) (1904) I. L. R., 26 All., 144.
(3) (1913) 11 A. L. J., 586.
(4) (1916) 14 A.L.J., 1

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(to which I have referred) in which a Sessions Judge sent up the record of the proceedings under section 145 with the recommendation that a particular order should be set aside. KNOX, J., after holding that the order was a bad order (which shows that he examined the record) goes on to say "I am reduced to this difficulty that I have to exercise a jurisdiction which is not vested in this Court in order to find out whether the magistrate has exercised jurisdiction which, it is said, is not vested in him."

Eventually, as stated above, he set aside the order. Similarly, in the very recent case of *Brahma Nath* v. *Sundar Nath* (1), the same learned Judge set aside proceedings which would seem on the face of them to be covered by the rulings in *Maharaj Tewari* v. *Har Charan Rai* (2) and *Sayeda Khatun* v. *Lal Singh* (3).

I should like to put by way of illustration of my point of difficulty an extreme case. Suppose in the present case the magistrate had found on evidence not only that there was a likelihood of a breach of the peace, but that in fact one Ram Bakhsh let us say, had actually committed an assault on some one of the other party, and convicted him of an offence under section 323 of the Indian Penal Code and sentenced him to a month's rigorous imprisonment, could not this Court interfere? I think there can be no answer but that it could. It might be said that the want of legality in the order would be obvious on the face of the judgment, but the judgment in the section 145 proceedings might be quite silent on the point and the decision given on a separate piece of paper, or even on one of the same pieces of papers that formed the file of the proceedings under section 145 which were bound up together: could not this Court call for that file? It seems to me that it is difficult to reconcile the decisions of this Court satisfactorily, and I therefore think it desirable to refer the case to a Bench of two Judges.

Babu *Piari Lal Banerji*, for the applicant.

Munshi *Baleshwar Prasad*, for the opposite parties.

PIGGOTT, J.:—This is an application in revision which has been referred to a Bench of two Judges for orders. As I am

(1) (1919) 17 A.L.J., 434. (2) (1904) I.L.R., 26 All., 144.

(3) (1914) I.L.R., 36 All., 233

particularly anxious that I should not be quoted as having decided anything beyond what I think it necessary to decide in order to dispose of this matter, I would state what seem to me to be the essential facts now before us. A magistrate received information that a dispute likely to cause a breach of the peace existed concerning certain immovable property, namely, a house, within his jurisdiction. He took proceedings in due form under section 145 of the Code of Criminal Procedure and came to the decision that possession over the entire house was with the present applicant Musammat Mahadei and that she was entitled to be maintained in that possession unless and until a competent court otherwise decided. In so far as he passed an order to the above effect, the case is altogether outside the revisional jurisdiction of this Court. It appears, however, that when he was preparing to pass final orders in the case the attention of the magistrate was drawn to the fact that, over and above the dispute about the house, there was a dispute between the parties with regard to certain movables contained in the house itself. During the inquiries which had preceded the magistrate's decision, some police officer, presumably acting under section 149 of the Code of Criminal Procedure, had ordered that the two rooms which contained this movable property should be fastened on the outside with two locks, the keys of which were to be in the possession, one of one party and one of the other. The magistrate was asked to pass some order or issue some direction about this matter. It is I think worth while to quote in detail from the record before us the order which he did pass.

"Now remains the question of the movable property locked up in *kothris* with two locks, one of each party, by the police, i. e., to whom they should be given. As regards this I am of opinion that the movable property can have nothing to do with this case under section 145 of the Code of Criminal Procedure, because section 145 relates only to immovables. In this case the question for determination was only possession of the house in question. As regards movable properties, the parties are at liberty to have their rights adjudicated by the Civil Court and until the decision of the Civil Court the *kothri* should as heretofore remain locked up."

Following upon these words comes the formal order of the court embodying its decision in the proceedings under section 145 of the Code of Criminal Procedure. The magistrate adds :—

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"It is further ordered that the *kothris* locked up by the police with the locks of both parties do remain locked up as heretofore unless the rights of the parties are determined by the Civil Court. The parties are at liberty to have their rights regarding the movables locked up in the *kothris* adjudicated by the Civil Court as to which person is entitled to get and how much."

Musammat Mahadei applies to this Court on the ground, *firstly*, that the orders above quoted are without jurisdiction and, *secondly*, that they were inconsistent with the decision in the proceedings under section 145 of the Code of Criminal Procedure, according to which she was entitled to receive, and was ordered to receive, possession over the entire house and not over the entire house less two rooms in it. If it were merely a matter of inconsistency in the magistrate's order, or if it were possible to regard the magistrate as having, however irregularly, kept these two rooms under attachment by an order under section 146 of the Code of Criminal Procedure, while awarding the rest of the house to the applicant, I should have thought that it was outside the jurisdiction of this Court to interfere. As the case stands the magistrate himself has expressly said that the orders which he proceeds to pass about the movables are no part of his proceedings under section 145 of the Code of Criminal Procedure and have nothing to do with the case under that section. Nor has it been sought before us to defend the order upon the merits. If the magistrate had jurisdiction to pass this order at all it could only be under section 517 of the Code of Criminal Procedure. It has not been supported before us as a good order under that section. It is either a bad order under that section, or it is an order which the magistrate in his judicial capacity had no jurisdiction to pass. The difficulty raised before us on behalf of the party opposing the application is based upon section 435, clause (3), of the Code of Criminal Procedure. The contention is that the order in question is part of a proceeding under Chapter XII of the Code of Criminal Procedure, and therefore is embodied in a record which this Court has no jurisdiction to call for. If it were necessary to determine the case upon this ground alone I should be content to say that the record has, whether rightly or wrongly, been called for by the order of a learned Judge of this Court, who was competent to decide the question of his

jurisdiction to do so; and that under section 439 of the same Code the jurisdiction of this Court is not limited to proceedings the record of which has been called for by its order, or which have been reported for orders, but extends also to cases which otherwise come to its knowledge. I should have been prepared to deal with this matter as a case which had "otherwise come to the knowledge" of this Bench. In the present case, however, I think there is no serious difficulty and I do not believe it to be covered by any of the rulings which have been cited to us. The magistrate himself expressly says that the order with which we are concerned has nothing to do with the case under section 145 of the Code of Criminal Procedure. It is, therefore, as much apart from it as if the magistrate, in the course of his inquiry under section 145 aforesaid, had found reason to believe from the evidence that one of the parties before him had committed an offence, such for instance as the offence of causing hurt, or of criminal intimidation, of which it behoved him at once to take cognizance, and had there and then recorded a proceeding convicting certain parties before him of such offence and sentenced them to a term of imprisonment. If he had in this irregular manner incorporated in the middle of his proceedings under section 145 of the Code of Criminal Procedure, a proceeding which he himself quite understood to be of a wholly different nature, I am clearly of opinion that nothing in section 435, clause (3), of the Code of Criminal Procedure would stand in the way of this Court calling for the entire record in which the irregular proceeding was embodied merely for the purpose of examining the said irregular proceeding and satisfying itself as to the correctness and legality of any sentence or order therein recorded or passed. I am quite satisfied that we have jurisdiction to deal with this matter under section 439 (1) of the Code of Criminal Procedure and, under that section read with section 423 (*c*) of the same Code, I would set aside so much of the order of the magistrate as is embodied in the passages above quoted.

WALSH, J.:—I entirely agree. I do not think that there is the inconsistency between the authorities of this Court on this question that is so frequently suggested. The principle in all cases, I think, has always been kept clearly in view. The trouble has

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arisen over the different methods of applying the practice to the varying circumstances in which the question has from time to time occurred and also to the unnecessary frequency with which particular cases of no general importance are reported as if they laid down some general principle. A little care at the Bar in studying the actual facts of the authorities would, I think, remove a great deal of superfluous difficulty which has been raised about this question. I have said all I have to say upon the point of practice in *Sundar Nath* v. *Barana Nath* (1). I would merely add to what I stated there my concurrence in what has been pointed out by my brother, that proceedings in revision in this case, quite apart from the authorities of this Court, are clearly authorized by the expression in section 439, sub-section (1) "proceeding which otherwise comes to its knowledge."

BY THE COURT.—We set aside the magistrate's order directing that the rooms or *kothris* locked up by the police with the locks of each parties do remain locked up as heretofore.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

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RAGHUNATH (PLAINTIFF) v. GANESH AND OTHERS (DEFENDANTS)*.

Civil and Revenue Courts—Jurisdiction—Suit for ejectment of defendants as trespassers—Defence set up that defendants were tenants of the plaintiff—Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 202.

In a suit filed in a Civil Court for ejectment of the defendants as trespassers, the defendants pleaded in effect that they were tenants of the plaintiff. With reference to this plea the civil court held that the suit was not cognizable by it; but, instead of returning the plaint for presentation in the proper court, passed a decree dismissing the suit. On the plaintiff's appeal the lower appellate court agreed with the first court that the suit was not cognizable by a civil court and made an order returning the plaint.

Held that an appeal lay to the High Court against this order.

Held also that, the suit being on the face of the plaint a suit cognizable by a civil court, the court of first instance should have entertained it, but, in

* First Appeal No. 35 of 1919, from an order of Kalka Singh, Subordinate Judge of Banda, dated the 19th of November, 1918.

(1) (1918) I.L.R., 40 All., 364.